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George Washington International Law Review
(forthcoming 2018) (accepted for publication)
101–155

Heritage, Power, and Destiny: The Protection of Indigenous Heritage in International Investment Law and Arbitration

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“Won’t you help to sing
These songs of freedom? . . .
None but ourselves can free our minds.”¹

ABSTRACT

This Article explores the clash between investors’ rights and Indigenous peoples’ rights in international investment law and arbitration. It contributes to the existing literature by highlighting the power differentials among different state and non-state actors as well as the role of international investment law in maximizing or neutralizing such conflicts. The existing literature has shown that the protection of the rights of Indigenous peoples has increasingly intersected with the promotion of foreign investments in international investment law. However, due to the extraordinary boom of investor–state arbitrations in the past years, a comprehensive scrutiny of the relevant arbitrations and a

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1. Bob Marley, *Redemption Song*, UPRISING (Island Records 1980).

conceptual analysis of the same is still missing. This Article aims to fill this gap in the existing literature. Not only does this Article map the most recent awards dealing with Indigenous peoples' rights, but it also critically assesses the key importance of this jurisprudence for the development of international investment law, human rights law, and international law more generally.

INTRODUCTION

Although the protection of Indigenous rights has gained some momentum since the adoption of the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP or Declaration),² “many of the estimated 370 million [I]ndigenous peoples around the world have lost, or are under imminent threat of losing, their ancestral lands” because of the exploitation of natural resources.³ In fact, “a large proportion of the world’s remaining natural resources . . . are located on [I]ndigenous-occupied lands . . . [and] global demand for natural resources has skyrocketed in recent years.”⁴ Economic considerations risk perpetuating power asymmetries among investors, states, and Indigenous peoples.⁵

This Article explores the clash between investors’ rights and Indigenous peoples’ rights in international investment law and arbitration. It contributes to the existing literature by highlighting the power differentials among different state and non-state actors as well as the role of international

2. U.N. General Assembly, Declaration on the Rights of Indigenous Peoples, A/RES/61/295 (Sept. 13, 2007) [hereinafter Declaration on the Rights of Indigenous Peoples]. The Declaration on the Rights of Indigenous Peoples (UNDRIP) was approved by 143 nations. While the United States, Canada, New Zealand, and Australia initially opposed the Declaration, they all subsequently endorsed the Declaration.

3. Navi Pillay, Statement by the United Nations High Commissioner for Human Rights Navi Pillay for 9 August, the International Day of the World’s Indigenous People, http://www.un.org/esa/socdev/unpfii/documents/int_day_2011_message_UNHC_HR.pdf (last visited June 14, 2018).

4. *The Double Life of International Law: Indigenous Peoples and Extractive Industries*, 129 HARV. L. REV. 1755, 1756 (2016) [hereinafter *The Double Life of International Law*].

5. George K. Foster, *Investors, States, and Stakeholders: Power Asymmetries in International Investment and the Stabilizing Potential of Investment Treaties*, 17 LEWIS & CLARK L. REV. 361, 361–62 (2013) [hereinafter Foster, *Investors, States, and Stakeholders*].

investment law in maximizing or neutralizing such conflicts. The existing literature has shown that the protection of the rights of Indigenous peoples has increasingly intersected with the promotion of foreign investments in international investment law.⁶ However, due to the extraordinary boom of investor–state arbitrations in the past years, a comprehensive scrutiny of the relevant arbitrations and a conceptual analysis of the same is still missing. This Article aims to fill this gap in the existing literature. Not only does this Article map the most recent awards dealing with Indigenous peoples’ rights, but it also critically assesses the key importance of this jurisprudence for the development of international investment law, human rights law, and international law more generally.

There is tension between state obligations to investors arising under investment treaty provisions and state policies adopted to protect the rights of Indigenous peoples. Arbitral tribunals can deem regulations to be indirect expropriation for interfering with foreign investment; regulatory changes can be challenged as violations of the fair and equitable treatment that states owe to investors. Indigenous protests against certain investments have led to claims of violation of the full protection and security standard under applicable international investment agreements (IIAs).⁷ In fact, under most IIAs, investors can challenge state regulation alleged to infringe their rights before international arbitral tribunals.⁸

6. For a seminal study see Valentina Vadi, *When Cultures Collide: Foreign Direct Investment, Natural Resources and Indigenous Heritage in International Investment Law*, 42 COLUM. HUM. RTS. L. REV. 797–889 (2011) [hereinafter Vadi, *When Cultures Collide*]. See also VALENTINA VADI, *CULTURAL HERITAGE IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION* 204–36 (Cambridge Univ. Press 2014) [hereinafter VADI, *CULTURAL HERITAGE*]; George K. Foster, *Foreign Investment and Indigenous Peoples: Options for Promoting Equilibrium Between Economic Development and Indigenous Rights*, 33 MICH. J. INT’L L. 627 (2012).

7. *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, ¶¶ 26, 53 (June 2, 2010) (the claimant sought, inter alia, to hold Ecuador liable for failing to provide physical protection and security for the company’s hydrocarbon concession in blocks twenty-three and twenty-four of the Amazonian rain forests, arguing that the opposition of Indigenous communities to oil development had impeded its business and that Ecuador’s purported failure to provide physical security violated the standard of full protection and security under the U.S.–Ecuador BIT.).

8. August Reinisch, *The Scope of Investor-State Dispute Settlement in International Investment Agreements*, 21 ASIA PACIFIC L. REV. 3, 8 (2013) (noting that “IIA dispute settlement clauses typically contain a graduated procedure

This mechanism has sensibly altered “investor–state power dynamics” and brought the existing “power asymmetry” between Indigenous peoples, investors, and states to the forefront of legal debate.⁹

IAs aim to address “the inherent power asymmetry in favor of host states resulting from their sovereign status.”¹⁰ Historically, foreign investors have been amongst the vulnerable sectors of societies—easy objects of reprisal, without vote and voice in the local political affairs.¹¹ Fundamentally, “[i]nvestment treaties aim at establishing a level playing field for foreign investors and a sort of shield against their discrimination and mistreatment by the host state.”¹² Foreign investors no longer have to rely on the vagaries of diplomatic protection;¹³ rather, they can bring direct claims and make strategic choices in the conduct of the proceedings.¹⁴ In this regard, investor–state arbitration facilitates access to justice for foreign investors¹⁵, and provides a neutral international forum for the settlement of investment disputes.¹⁶ It is perceived to be necessary to render meaningful the more substantive investment treaty provisions.¹⁷

according to which the parties proceed from voluntary consultations/negotiations to binding arbitration.”).

9. Foster, *Investors, States, and Stakeholders*, *supra* note 5, at 367–68.

10. *Id.* at 371 (noting that “[f]oreign investors have long had various protections under international law designed to shield them from abusive treatment at the hands of the host state, but often had no effective means of enforcing host state obligations before the advent of investment treaties.”).

11. See Francesco Francioni, *Access to Justice, Denial of Justice and International Investment Law*, 20 *EUROPEAN J. INT’L L.* 729 (2009) [hereinafter Francioni, *Access to Justice*]; JAN PAULSSON, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* (Cambridge Univ. Press 2005).

12. VADI, *CULTURAL HERITAGE*, *supra* note 6, at 291.

13. Sergio Puig, *No Right Without a Remedy: Foundations of Investor–State Arbitration*, 35 *U. OF PA. J. INT’L L.* 829, 844 (2014) [hereinafter Puig, *No Right without a Remedy*].

14. Sergio Puig, *Recasting ICSID’s Legitimacy Debate: Towards a Goal-Based Empirical Agenda*, 36 *FORDHAM INT’L L. J.* 465, 485 (2013).

15. See generally Francioni, *Access to Justice*, *supra* note 11, at 729–47 (noting that investor–state arbitration facilitates access to justice for foreign investors

who have direct access to an international tribunal without having to rely on their home governments).

16. Puig, *No Right Without a Remedy*, *supra* note 13, at 845–46.

17. See Thomas Wälde, *The “Umbrella” (or Sanctity of Contract/Pacta sunt Servanda) Clause in Investment Arbitration*, 1 *TRANSNAT’L DISP. MGMT.* 4, 13 (2004).

Yet, with regard to investments taking place in areas traditionally inhabited by Indigenous peoples, investor–state arbitrations have determined other power asymmetries. One such asymmetry is between the foreign investors who have access to a binding, effective, and efficient dispute settlement mechanism and Indigenous peoples who do not have comparable access. Investor–state arbitrations have also perpetuated power asymmetries between Indigenous peoples and the host state. In fact, as noted by human rights bodies, “in many cases, States and their officials have favored corporate interests to the detriment of Indigenous peoples’ interests, stating that [the exploitation of natural resources] is in the national and public interest.”¹⁸

Has international investment law embraced an international economic culture—a culture focused on productivity and economic development—maximizing existing power imbalances between investors, states, and Indigenous peoples? Or is international investment law open to including human rights concerns in its operation?

The Article proceeds as follows: Part I examines the international norms protecting Indigenous cultural heritage with particular reference to the UNDRIP. Part II briefly sketches out the international investment law regime. Part III analyzes and critically assesses the relevant arbitrations. Part IV offers some legal options to better reconcile the different interests at stake. The last Part briefly concludes.

The Article argues that the UNDRIP contributes significantly to current discourse on Indigenous heritage and Indigenous peoples’ human rights. However, the collision between investors’ rights and Indigenous entitlements in investor–state arbitration makes the case for strengthening the current regime protecting the human rights of Indigenous peoples. In parallel, such interplay also requires further reflection on the role of international investment law as a vital field of international law and requires scrutiny of its congruence with, and contribution to, the development of international law.

The Article then proposes two principal mechanisms to

18. U.N. Econ. & Soc. Council, Permanent Forum on Indigenous Issues, Study on Indigenous Peoples and Corporations to Examine Existing Mechanisms and Policies Related to Corporations and Indigenous Peoples and to Identify Good Practices, UN Doc E/C.19/2011/12, ¶10 (Mar. 10, 2011).

address the existing power imbalances among Indigenous peoples, investors, and states: treaty drafting and treaty interpretation. While these techniques are more evolutionary than revolutionary, they offer sound, feasible, and concrete steps to prevent conflicts between different treaty regimes. While fostering a balance of power, they can contribute to the humanization of international investment law and the harmonious development of international law.

I. THE INTERNATIONAL PROTECTION OF INDIGENOUS HERITAGE

Historically, Indigenous peoples “must be viewed as part of the large number of overseas peoples with whom European powers entertained diplomatic, commercial and political relations during the era of their expansion abroad.”¹⁹ State governments concluded international treaties with Indigenous peoples.²⁰ As the U.S. Supreme Court stated, “[b]efore the coming of Europeans, the tribes were self-governing sovereign political communities.”²¹

Nonetheless, for centuries, Indigenous peoples were “trapped by history” within the mantle of state sovereignty.²² A “paradigm of domestication” gradually prevailed “through which states aimed to subvert the position of Indigenous peoples as peoples, often ignoring or unilaterally amending treaties” between Indigenous and state parties.²³ The concept that only states are subjects of international law deeply affected Indigenous peoples. Prior to the 1970s, international law did not view Indigenous peoples as legal

19. Isabelle Schulte-Tenckhoff, *Reassessing the Paradigm of Domestication: The Problematic of Indigenous Treaties*, REVUE D’ETUDES CONSTITUTIONNELLES (1998) 239, 243 [hereinafter Schulte-Tenckhoff, *Reassessing the Paradigm of Domestication*].

20. *Id.* (noting that “state governments took Indigenous peoples seriously enough to conclude international compacts with them.”)

21. *United States v. Wheeler*, 435 U.S. 313, 322–323 (1978).

22. See Darryl Cronin, *Trapped by History: Democracy, Human Rights and Justice for Indigenous People in Australia*, 23 AUSTL. J. HUM. RTS. 220, 220–41 (2017).

23. Schulte-Tenckhoff, *Reassessing the Paradigm of Domestication*, supra note 19, at 240.

subjects;²⁴ rather, it largely forgot them.²⁵ As a result, states tended to view and govern Indigenous peoples as units of domestic law.²⁶ As Daes puts it, “[i]nternational law knew no other legal subjects than the state . . . and had no room for Indigenous peoples.”²⁷

However, elements of Indigenous sovereignty have remained through centuries.²⁸ Despite the failures of national law to address Indigenous peoples’ rights adequately, elements of their sovereignty never went away. Nowadays, Indigenous peoples are seen “as entities actually owning the attributes of sovereignty pursuant to international law.”²⁹ There has been “a paradigm shift in international law”³⁰ and Indigenous peoples have been considered to be “legal subjects” under the same.³¹ Indigenous sovereignty means that indigenous peoples are entitled to “self-

24. See *Cayuga Indians (Great Britain) v. United States*, 6 REV. INT’L ARBITRAL AWARDS 173, 176 (1926) (stating that an Indian tribe “is not a legal unit of international law.”)

25. See *The Double Life of International Law*, *supra* note 4, at 1758 (referring to the fact that for centuries Indigenous peoples used to be “the forgotten people of international law”).

26. See Siegfried Wiessner, *Indigenous Self-Determination, Culture, and Land: A Reassessment in Light of the 2007 UN Declaration on the Rights of Indigenous Peoples*, in *INDIGENOUS RIGHTS IN THE AGE OF THE UN DECLARATION* (CUP 2012) 31–63, 38 (Elvira Pulitano ed.) [hereinafter *Wiessner, Indigenous Self-Determination*].

27. Erica-Irene Daes, *Indigenous Peoples’ Rights to their Natural Resources*, in *ARISTOTLE CONSTANTINIDES & NIKOS ZAIKOS, THE DIVERSITY OF INTERNATIONAL LAW* (2009).

28. *United States v. Wheeler*, 435 U.S. 313, 322323 (1978) (referring to “inherent powers of a limited sovereignty which has never been extinguished”).

29. Federico Lenzerini, *Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples*, 42 *TEX. INT’L L. REV.* 155, 165 (2007).

30. MATTIAS ÅHRÉN, *INDIGENOUS PEOPLES’ STATUS IN THE INTERNATIONAL LEGAL SYSTEM* 149 (OUP 2016) (arguing that the recognition of Indigenous peoples as “peoples” “for international legal purposes can be described as nothing less than a paradigm shift in international law.”).

31. For a seminal study see Russel Lawrence Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law*, 7 *HARV. HUM. RTS. J.* 33, 34 (1994) (noting that “Indigenous peoples are gaining recognition of their legal personality as distinct societies with special collective rights and a distinct role in national and international decisionmaking”). See also JÉRÉMIE GILBERT, *INDIGENOUS PEOPLES’ LAND RIGHTS UNDER INTERNATIONAL LAW: FROM VICTIMS TO ACTORS*, II revised edition (Brill 2016) XIII (arguing that “Indigenous peoples have been the victims of international legal theories supporting the colonization of their territories . . . and that they have become subjects of protection under the main human rights treaties . . . to finally become more active and direct actors to the development of their own rights.”).

government” and “internal self-determination,” “the extent of which varies in the different States.”³² International law has finally recognized that Indigenous peoples are bearers of rights under international law both as individuals and as peoples.³³ Not only has international law increasingly regulated Indigenous peoples’ matters in the past half century,³⁴ but Indigenous peoples are directly influencing and contributing to international law making.³⁵ Existing international law has been interpreted in a way favorable to Indigenous peoples.³⁶ New international instruments have specifically recognized the rights of Indigenous peoples.³⁷ Finally, an emerging jurisprudence of various human rights bodies has coalesced reaffirming their rights.³⁸

32. Lenzerini, *supra* note 29, at 165.

33. Declaration on the Rights of Indigenous Peoples, *supra* note 2.

34. Barsh, *supra* note 31, at 33 (pointing out that “[s]ince work began on the first United Nations study of discrimination against Indigenous ‘populations’ in 1971, the attention given to Indigenous peoples by international institutions and the participation of Indigenous peoples’ representatives in intergovernmental discussions have grown dramatically.”); *see also* José Paulo Kastrup, *The Internationalization of Indigenous Rights from the Environmental and Human Rights Perspective*, 32 TEX. INT’L L. J. 97, 98 (1997) (noting that “[i]n the past few decades, the international community has been presented with numerous agreements and new policies regarding the Indigenous rights.”); Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 BERKELEY L. REV. 173, 173 (2014) (highlighting that “[a]s [I]ndigenous peoples have become actively engaged in the human rights movement around the world, the sphere of international law, once deployed as a tool of imperial power and conquest, has begun to change shape. Increasingly, international human rights law serves as a basis for [I]ndigenous peoples’ claims against states . . .”).

35. Carpenter & Riley, *supra* note 34, at 177 (noting that “Indigenous peoples are influencing law around and outside of their communities, all the way up into state and international practice.”).

36. *The Double Life of International Law*, *supra* note 4, at 1758 (“Emerging [I]ndigenous rights norms have been promulgated through three main processes: (1) interpretation of existing international law in a way favorable to [I]ndigenous peoples’ aspirations; (2) promulgation of new international instruments specifically focused on Indigenous peoples’ rights; and (3) successful litigation before international [courts]”).

37. *Id.*

38. *Id.*

Among the human rights entitlements of Indigenous peoples, cultural entitlements are of particular importance.³⁹ If the “claims and aspirations” of Indigenous peoples “are diverse,” they present a common thread: the quest for safeguarding their heritage.⁴⁰ This does not exclude the relevance of other Indigenous rights. On the contrary, not only are cultural rights complementary to other Indigenous rights, but the safeguarding of Indigenous cultural heritage is indissolubly “tied to their ancestral land” and to self-determination.⁴¹

Indigenous heritage appears in a number of international law instruments,⁴² and plays a central role in the UNDRIP. The Declaration is the product of two decades of preparatory work and “a milestone of re-empowerment” of Indigenous peoples.⁴³ While this landmark instrument is currently not binding, this may change in the future to the extent that its provisions reflect customary international law and/or general principles of law.⁴⁴ The Declaration constitutes a significant

39. LAURA WESTRA, ENVIRONMENTAL JUSTICE AND THE RIGHTS OF INDIGENOUS PEOPLES 10 (2008) (discussing the “cultural integrity model” that “emphasizes the value of traditional cultures in themselves as well as for the rest of society”).

40. Siegfried Wiessner, *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*, 22 EUR. J. INT’L L. 121 (2011) [hereinafter Wiessner, *The Cultural Rights of Indigenous Peoples*].

41. *Id.* at 121–22 (noting that “[s]elf-determination was . . . redefined as the indispensable vehicle of preservation and flourishing of the culture of the group.”).

42. See ILO Convention 169, Indigenous and Tribal Peoples Convention, art. 13(1) (1989), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169 [hereinafter ILO Convention 169] (providing that: “[i]n applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship”). See also Marina Hadjoannou, *The International Human Right to Culture: Reclamation of the Cultural Identities of Indigenous Peoples under International Law* (2005) 8 CHAPMAN LAW REVIEW 201, 202 (describing how international organizations, including the United Nations and Organization of American States, have expressed the right to culture in their legal instruments).

43. Wiessner, *Indigenous Self-Determination*, *supra* note 26, at 31.

44. On the legal status of the Declaration, see Mauro Barelli, *The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples* 58 INT’L & COMP. L.Q. 957, 983 (2009) (arguing that “regardless of its non-binding nature, the Declaration has the potential effectively to promote and protect the rights of the world’s [I]ndigenous peoples” and that “the relevance of a soft law instrument cannot be aprioristically

achievement for Indigenous peoples worldwide as it brings Indigenous peoples' rights and cultural heritage to the forefront of international law.⁴⁵ Indigenous culture is a key theme of the Declaration.⁴⁶ Many articles are devoted to different aspects of Indigenous culture; the word "culture" appears no less than thirty times in its text.⁴⁷ Not only does the UNDRIP recognize the dignity and diversity of Indigenous peoples' culture but it also acknowledges its essential contribution to the "diversity and richness of civilization and cultures, which constitute the common heritage of mankind."⁴⁸

The Declaration recognizes the right of Indigenous peoples to practice their cultural traditions⁴⁹ and maintain their distinctive spiritual and material relationship with the land that they have traditionally owned, occupied, or otherwise used.⁵⁰ For most, if not all, Indigenous peoples, land is not only the basis of economic livelihood, but also the source of spiritual and cultural identity.⁵¹ They "see the land and the sea, all of the sites they contain and the knowledge and the laws associated with those sites as a single entity that must be protected as a whole."⁵² Because Indigenous peoples often have this holistic approach, a U.N. study acknowledges that "[a]ll elements of heritage should be

dismissed"); International Law Association, Comm. on the Rights of Indigenous Peoples, Res. No. 5/2012 (Aug. 2012) (noting that "UNDRIP as a whole cannot yet be considered a statement of existing customary international law. However, it includes several key provisions which correspond to existing state obligations under customary international law.").

45. ELVIRA PULITANO, *Indigenous Rights and International Law: An Introduction*, in *INDIGENOUS RIGHTS IN THE AGE OF THE UN DECLARATION* 25 (CUP 2012).

46. See generally Wiessner, *The Cultural Rights of Indigenous Peoples*, *supra* note 40, at 139 (describing international and governmental efforts to protect the rights and cultural heritage of Indigenous peoples).

47. See Yvonne Donders, *The UN Declaration on the Rights of Indigenous Peoples. A Victory for Cultural Autonomy?*, in *CHANGING PERCEPTIONS OF SOVEREIGNTY AND HUMAN RIGHTS* 99 (Ineke Boerefijn & Jenny Goldschmidt eds., 2008).

48. Declaration on the Rights of Indigenous Peoples, *supra* note 2, pmb1.

49. *Id.* art. 11.

50. *Id.* arts. 8, 11, 12.1, 13.1.

51. See Jérémie Gilbert, *Custodians of the Land – Indigenous Peoples, Human Rights and Cultural Integrity*, in *CULTURAL DIVERSITY, HERITAGE AND HUMAN RIGHTS* 31–44 (Michele Langfield et. al. eds. 2010).

52. Ciaran O'Faircheallaigh, *Negotiating Cultural Heritage? Aboriginal Mining Company Agreements in Australia*, 39 *DEV. & CHANGE* 25, 27 (2003).

managed and protected as a single, interrelated and integrated whole.”⁵³ For the same reason, [I]ndigenous culture “often cannot be preserved in locations outside traditionally [I]ndigenous territories.”⁵⁴

The linkage between culture and land does not merely have a normative character, but also a semantic one. The very word “culture” derives from the Latin term *cultura* meaning “cultivation, care; husbandry” and the Latin verb *colere* meaning “to cultivate, . . . inhabit; protect, nurture; honour, [and] worship.”⁵⁵ Therefore, the term culture indicates “activities that are closely connected to place and place attachment associated with rituals and spirituality.”⁵⁶ In parallel, “heritage” derives from the Latin word *hereditas* indicating “something [that] is left behind,” that is “filled with meanings” and “that convey[s] values for the next generation.”⁵⁷ For Indigenous peoples, cultural heritage has “a temporal dimension that moves simultaneously in two directions”: the past and the future.⁵⁸ For Indigenous peoples, cultural heritage transforms the past into a tool to address present needs and future challenges.⁵⁹

For Indigenous peoples, cultural heritage is a mix of tangible and intangible elements that contributes to personal identity, life-values, and resilience. For them, culture and nature are “deeply interconnected by their holistic view of land.”⁶⁰ They do not differentiate between cultural heritage on the one hand and natural heritage on the other.⁶¹ Rather,

53. Erica-Irene Daes, Special Rapporteur, Comm. On Human Rights, Subcomm. on Prevention of Discrimination and Protection of Minorities, *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, UN Doc. E/CN.4/Sub. 2/1993/28, at 9 (1993).

54. *The Double Life of International Law*, *supra* note 4, at 1759.

55. Johan Josefsson & Inga-Lill Aronsson, *Heritage as Life-Values: A Study of the Cultural Heritage Concept*, 110 CURRENT SCI. 2091, 2091–98 (2016).

56. *Id.* at 2091.

57. *Id.* at 2092.

58. Tumu te Heuheu, Merata Kawharu & R. Ariihau Tuheiava, *World Heritage and Indigeneity*, WORLD HERITAGE, Feb. 2012, at 17.

59. Josefsson & Aronsson, *supra* note 55, at 2093–95 (noting that “memories of past events . . . can be used in order to build or strengthen our identity.”).

60. *Interview with Myrna Cunningham, Chair of the United Nations Permanent Forum on Indigenous Issues*, WORLD HERITAGE, Feb. 2012, at 54–57 [hereinafter *Interview with Myrna Cunningham*].

61. Josefsson & Aronsson, *supra* note 55, at 2098 (noting that for Indigenous peoples, “the nature of cultural heritage and the culture of natural

their cultural traditions “are inseparable from their lands, territories and natural resources.”⁶² Tangible and intangible qualities of heritage “become blurred when viewed through an [I]ndigenous lens” and “fuse into one.”⁶³

Some scholars caution that emphasizing the cultural entitlements of Indigenous peoples can reduce their political rights and limit their claims to self-determination.⁶⁴ According to these authors, overemphasizing Indigenous culture risks undermining Indigenous self-determination.⁶⁵ On the contrary, this Article argues that without protection of Indigenous cultural identity, heritage, and rights, all of the other claims of Indigenous peoples lose strength.⁶⁶ Cultural claims do not replace other claims; rather, they complement and reinforce them. Human rights are indivisible.⁶⁷ The UNDRIP acknowledges the importance of Indigenous cultures and adopts this holistic understanding of Indigenous peoples’ rights. In fact, the protection of the cultural identity

heritage are in sublime harmony”).

62. *Interview with Myrna Cunningham, supra* note 60, at 54.

63. Heuheu, Kawharu & Tuheiava, *supra* note 58, at 17.

64. See A. Claire Cutler, *Indigenous Identity, International Law and the New Constitutionalism* 1, 12 (June 6, 2013) (unpublished manuscript) (on file with author) (noting that “Indigenous peoples’ claims to self-determination have generally proceeded through the legal forms provided for peoples and collectivities through the prism of cultural rights”); Kirsty Gover, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* by Karen Engle 12 MELBOURNE J. INT’L L. 419, 419 (2011) (noting that scholars “worry that limits may be imposed on the content of indigenous ‘culture’ in order to confine states’ human rights obligations”); KAREN ENGLE, *THE ELUSIVE PROMISE OF INDIGENOUS DEVELOPMENT—RIGHTS, CULTURE, STRATEGY* 1–2 (2010) (arguing that “cultural rights have provided the dominant framework for indigenous rights advocacy since at least the 1990s” and suggesting that “increased cultural rights sometimes lead to decreased opportunities for autonomy and development”).

65. Cutler, *supra* note 64, at 12 (cautioning that there is tendency “to treat cultural rights as less fundamental than other human rights.”), 20 (noting “the emergence of a different approach to culture that is having some impact on state practices. This approach treats culture, not as a noun or a good to be owned, bought, or sold, but as an activity to be enhanced, nurtured, and preserved, and is evident in recent international documents and interpretations addressing the cultural heritage of Indigenous peoples.”).

66. Cindy Holder, *Culture as an Activity and Human Right: An Important Advance for Indigenous Peoples and International Law*, 33 ALTERNATIVES 7, 7 (2008) (highlighting that “protecting the capacity of both peoples and persons to engage in culture is taken to be as basic a component of human dignity”).

67. Amund Sinding-Larsen, *Our Common Dignity: Rights-Based Approaches to Heritage Management*, 68 WORLD HERITAGE 58, 58 (2012).

of Indigenous peoples is at the heart of the UNDRIP,⁶⁸ and “one can find the cultural rights angle in each article of the Declaration.”⁶⁹ Therefore, recognizing the importance of Indigenous culture not only adds to, but is of vital importance to, recognizing, protecting, and fulfilling the human rights of Indigenous peoples.

A particularly significant limitation of the legal framework protecting Indigenous cultural heritage is the absence—aside from the classical human rights mechanisms—of an international court where Indigenous peoples can raise complaints regarding measures that affect them.⁷⁰ Human rights may be claimed before national courts and regional human rights courts, as well as through particular complaint mechanisms at the U.N. level.⁷¹ Several human rights treaties set up “international mechanisms for monitoring states’ compliance with human rights, and some even authorize individuals or groups to file complaints before a court or commission alleging state human rights violations.”⁷² However, none of these mechanisms has jurisdiction over private parties.⁷³ At best, communities impacted by foreign direct investment (FDI) can “obtain an award against the state in which violations [of human rights] occurred.”⁷⁴ Nonetheless, this “may be unsatisfactory . . . because states sometimes fail to comply with the determinations of human rights bodies, and options for enforcing those determinations are limited or non-existent.”⁷⁵ Finally, regional human rights courts have “a limited geographical scope” and are present only in several

68. Francesco Francioni, *The Human Dimension of International Cultural Heritage Law: An Introduction*, 22 EUR. J. INT’L L. 9, 15 (2011).

69. Elsa Stamatopoulou, *Taking Cultural Rights Seriously: The Vision of the UN Declaration on the Rights of Indigenous Peoples*, in REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 387, 392 (Stephen Allen and Alexandra Xanthaki eds., 2011).

70. Manfred Nowak, *The Need for a World Court of Human Rights*, 7 HUM. RTS. L. REV. 251, 252–54 (2007) (calling for the institution of a World Court of Human Rights).

71. Irene Watson & Sharon Venne, *Talking Up Indigenous Peoples’ Original Intent in a Space Dominated by State Interventions*, in INDIGENOUS RIGHTS IN THE AGE OF THE UN DECLARATION 87, 96, 106 (Elvira Pulitano ed. 2012).

72. Foster, *Investors, States, and Stakeholders*, *supra* note 5, at 390.

73. *Id.* at 390.

74. *Id.*

75. *Id.* at 391.

regions of the world.⁷⁶

The UNDRIP does not change this situation. Therefore, notwithstanding the major political merits of the Declaration, as one author puts it, “UNDRIP does not definitively resolve, but at best temporarily mediates, multiple tensions.”⁷⁷ The UNDRIP constitutes a milestone, achieved after decades of elaboration. However, it does not fully address the remaining power imbalances among investors, states, and Indigenous peoples, thus requiring further analysis and action.

II. INTERNATIONAL INVESTMENT GOVERNANCE AND THE DIASPORA OF INDIGENOUS CULTURE-RELATED DISPUTES BEFORE INTERNATIONAL INVESTMENT TREATY TRIBUNALS

International investment law is a well-developed field of study within the broader international law framework.⁷⁸ As there is no single comprehensive global investment treaty, investors’ rights are defined by an array of IIAs, customary international law, and general principles of law.⁷⁹ International investment law provides extensive protection to investors’ rights in order to encourage FDI and to foster economic development.⁸⁰ At the substantive level, IIAs provide, *inter alia*, for adequate compensation for expropriated property, protection against unlawful expropriation and discrimination, fair and equitable

76. *Id.*

77. See Karen Engle, *On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights*, 22 EUR. J. INT’L L. 141, 163 (2011) (contending that “[i]f we are willing to examine it critically, the UNDRIP may have the potential to become an important site for the ongoing struggle over the meaning of human rights”).

78. VADI, CULTURAL HERITAGE, *supra* note 6, at 240 (noting that “international investment law constitutes a well-developed part of public international law”).

79. M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 79, 87 (3rd ed. 2010) (enumerating the sources of international investment law: treaties, custom, general principles of law and considering judicial decisions as subsidiary sources of international (investment) law).

80. Genevieve Fox, *A Future for International Investment? Modifying BITS to Drive Economic Development*, 46 GEO. J. INT’L L. 229, 229 (2014) (highlighting that “[s]ince the conception of Bilateral Investment Treaties (BITs) in the late 1950s, developed (home) and developing (host) states have signed on to BITs with two distinct desires: home states seek to establish BITs in order to protect their investors and their investments from deleterious host state action, while host states sign BITs pursuant to the notion that such action brings increased inflows of foreign direct investment (FDI) and related economic development.”).

treatment, full protection and security, and assurances that the host country will honor its commitments regarding the investment.⁸¹

At the procedural level, international investment law is characterized by sophisticated dispute settlement mechanisms.⁸² While state-to-state arbitration has been rare,⁸³ investor–state arbitration has become the most successful mechanism for settling investment-related disputes.⁸⁴ Nowadays, most IIAs provide investors with direct access to an international arbitral tribunal.⁸⁵ Arbitral tribunals are typically composed of an uneven number of members, most frequently three.⁸⁶ All arbitrators are

81. VALENTINA VADI, PROPORTIONALITY, REASONABLENESS AND STANDARDS OF REVIEW IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 9 (2018) [hereinafter VADI, PROPORTIONALITY] (noting that “[typically, after defining foreign investors and their investments, IIAs include provisions on non-discrimination . . . , minimum standards, and fair and equitable treatment. Other common provisions in investment treaties concern the repatriation of profits . . . or . . . stabilization clauses”); 10 (“[p]rotection against unlawful expropriation and guarantees of compensation in the event of nationalization, expropriation or indirect expropriation constitute the core of investment treaties.”).

82. VADI, CULTURAL HERITAGE, *supra* note 6, at 240 (noting that international investment law “presents a sophisticated dispute settlement mechanism.”).

83. On state-to-state investment treaty arbitration, *see* Anthea Roberts, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority*, 55 HARV. INT’L L.J. 1, 1–70 (2014) (noting that “Most investment treaties contain two dispute resolution clauses: one permitting investor-state arbitration for investment disputes and the other permitting state-to-state arbitration for disputes concerning the treaty’s interpretation and/or application. Despite this duality, the potential role of state-to-state arbitration, and its proper relationship with investor-state arbitration, have largely been ignored.”); Michele Potestà, *Towards a Greater Role for State-to-State Arbitration in the Architecture of Investment Treaties?*, in THE ROLE OF THE STATE IN INVESTOR–STATE ARBITRATION 249, 250 (Shaheez Lalani & Rodrigo Polanco Lazo eds., 2015) (noting that “[d]espite being incorporated in almost every BIT, State-to-State dispute settlement clauses have attracted very little attention . . . due to [their] limited use in practice”).

84. *See* Susan Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT’L L.J. 435, 435–89 (2009).

85. VADI, PROPORTIONALITY, *supra* note 81, at 11 (noting that “[s]ince the 1980s, investor–state arbitration has become a standard feature in international investment treaties for the settlement of disputes that arise between the foreign investor and the host state.”).

86. Sergio Puig, *Social Capital in the Arbitration Market*, 25 EUR. J. INT’L L. 387, 397 (2014) (noting that “ICSID arbitration tribunals are typically composed of three members.”); Antonio R. Parra, *The Initiation of Proceedings and Constitution of Tribunals in Investment Treaty Arbitrations*, in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY

required to be independent and impartial.⁸⁷ The use of the arbitration model is aimed at depoliticizing disputes, avoiding potential national court bias, and ensuring the advantages of confidentiality and effectiveness.⁸⁸ Once proceedings are initiated by an investor, arbitral tribunals review state acts in light of their relative investment treaties.

Given the structural imbalance between the vague and non-binding dispute settlement mechanisms provided by human rights treaties and the highly effective and sophisticated dispute settlement mechanisms available under international investment law, cultural disputes involving the rights of investors and Indigenous peoples have been brought before investment treaty arbitral tribunals.⁸⁹

One may wonder whether the fact that cultural disputes tend to be adjudicated before international investment treaty tribunals results in institutional bias.⁹⁰ Investment treaty standards are vague⁹¹ and their language covers a potentially wide variety of state regulation that may interfere with

ISSUES 105, 113–115 (Katia Yannaca-Small ed., 2010) (discussing the appointment of arbitrators under different arbitral rules).

87. Parra, *supra* note 86, at 116 (discussing the requirements of impartiality and independence under different arbitral rules).

88. See Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID REV–FOREIGN INV. L.J. 1, 1–25 (1986).

89. Obviously, this does not mean that these are the only available fora for this kind of dispute. Other tribunals are available such as national courts, human rights courts, regional economic courts, and traditional state-to-state courts and tribunals such as the International Court of Justice or even inter-state arbitration. Some of these dispute settlement mechanisms may be more suitable than investor–state arbitration to address cultural concerns. However, given its scope, this study focuses on the jurisprudence of arbitral tribunals.

90. For a seminal investigation see Valentina Vadi, *Socio-Legal Perspectives on the Adjudication of Cultural Diversity Disputes in International Economic Law*, 1 OñATI SOCIO-LEGAL SERIES 1–24 (2011).

91. Geoffrey Gertz & Taylor St John, *State Interpretations of Investment Treaties: Feasible Strategies for Developing Countries*, Blavatnik Sch. of Gov't, Glob. Econ. Governance Programme, at 1, 2 (2015), http://geg-test.nsms.ox.ac.uk/sites/geg/files/GEG%20Gertz%20and%20St%20John%20June2015_A.pdf (noting that “Many investment treaties contain broad standards and vague language, leaving the arbitration tribunals that decide investment treaty cases with substantial discretion. This discretion means arbitration rulings can be unpredictable, as different groups of arbitrators may draw different conclusions from the same set of facts. And when arbitrators use their discretion to adopt expansive interpretations of state obligations, states may perceive that investment treaties are being used by investors in ways governments didn’t intend or foresee. With arbitration awards against states sometimes reaching hundreds of millions of dollars, the stakes over interpretation are high.”).

economic interests.⁹² Therefore, a tension exists when a state adopts regulatory measures interfering with foreign investments, as regulation may be considered as violating substantive standards of treatment under IIAs and the foreign investor may claim compensation before arbitral tribunals. The architecture of the arbitral process also raises significant concerns in the context of disputes involving Indigenous peoples. While arbitration structurally constitutes a private model of adjudication, substantively, arbitral awards ultimately shape the relationship between the state and private individuals.⁹³ Arbitrators determine matters such as the legality of governmental activity, the degree to which foreign investors should be protected from state action, and the appropriate role of the state.⁹⁴ Evidently, disputes determined within this dispute settlement mechanism can potentially affect the human rights of Indigenous peoples. Yet, arbitrators may not have specific expertise in human rights law.

Moreover, investor–state arbitration distinguishes between two types of non-state actors: (i) the investor engaged in FDI and (ii) the FDI-impacted non-state actors.⁹⁵ While foreign investors have direct access to investor–state arbitration, the FDI-impacted Indigenous peoples do not have immediate access to transnational courts. Rather, they have access to local courts and only after the exhaustion of local remedies can they eventually have access to regional human rights courts and relevant U.N. mechanisms.⁹⁶ Furthermore, foreign investors can challenge domestic court decisions (upholding complaints brought by locals against the same investors) before an arbitral tribunal on the grounds that they constitute wrongful interference with the

92. Anna T. Katselas, *Do Investment Treaties Prescribe a Deferential Standard of Review?*, 34 MICH. J. INT'L L. 87, 88 (2012) (noting that investment treaty arbitration “can tread on delicate issues typically within the *domaine réservé* of states.”).

93. GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* 70 (2007).

94. M. Sornarajah, *The Clash of Globalizations and the International Law on Foreign Investment*, 10 CAN. FOREIGN POL'Y 1, 1–18 (2003).

95. Noemi Gal-Or, *The Investor and Civil Society as Twin Global Citizens: Proposing a New Interpretation in the Legitimacy Debate*, 32 SUFFOLK TRANSNAT'L L. REV. 271, 271–301 (2009).

96. Francioni, *Access to Justice*, *supra* note 11, at 63–64, 72.

investment.⁹⁷ Therefore, investor–state arbitration “transfers power and authority from states to investors,”⁹⁸ “amplifies pre-existing power differentials”⁹⁹ and “maximiz[es] investor protection.”¹⁰⁰

The increasing impact of FDI on the social sphere of the host state “has raised the question on whether the principle of access to justice, as successfully developed to the benefit of investors through the provision of binding arbitration, ought to be matched by a corresponding right to a remedial process for individuals and communities adversely affected by the investment in the host state.”¹⁰¹ While the recognition of multinational corporations as “international corporate citizens” has progressed,¹⁰² by comparison, the procedural rights of Indigenous peoples have remained unchanged. At the same time, however, Indigenous peoples have clearly defined rights under international law. The following Part addresses the question as to whether the human rights of Indigenous peoples play any role in the context of international disputes before international investment treaty tribunals.

97. *Id.* at 738. See also *Chevron Corp. v. Ecuador*, PCA Case No. 2009-23 (Perm. Ct. Arb. 2009), <https://www.italaw.com/cases/257> (the inhabitants of the Ecuadorian Amazon allegedly experienced serious illnesses because of pollution from oil operations carried out by the company Texaco. The Ecuadorian court issued an \$18 billion judgment against Chevron, Texaco’s successor. However, Chevron initiated investor–state arbitration contending that domestic proceedings were in breach of investment treaty provisions.) For additional commentary, see Lise Johnson, *Case Note: How Chevron v. Ecuador is Pushing the Boundaries of Arbitral Authority*, INVESTMENT TREATY NEWS, 13 April 2012 (noting that “The tribunal’s awards have prompted backlash and questions regarding the scope of the arbitrators’ authority.”).

98. Tai-Heng Cheng, *Power, Authority and International Investment Law*, 20 AM. U. INT’L. REV. 465, 492 (2005).

99. Sergio Puig & Anton Strezhnev, *Discussion Paper No. 16-28: The David Effect and ISDS*, ARIZ. LEGAL STUD., at 10 (2017).

100. Thomas Schultz & Cédric Dupont, *Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study*, 25 EUR. J. INT’L. (2014) 1147, 1150.

101. Francioni, *Access to Justice*, *supra* note 11, at 71.

102. Peter Muchlinski, *Global Bukovina Examined: Viewing the Multinational Enterprise as a Transnational Law-Making Community*, in GUNTHER TEUBNER, *GLOBAL LAW WITHOUT A STATE* 97 (Dartmouth, 1997) (citation omitted).

III. WHEN CULTURES COLLIDE

The development of natural resources within and near to traditional Indigenous areas is ever increasing. While development analysts consider extractive projects as anti-poverty measures and advocate FDI as a major catalyst for development,¹⁰³ “for the most part, the peoples in the areas where the resources are located tend to bear a disproportionate share of the negative impacts of development through reduced access to resources and direct exposure to pollution and environmental degradation.”¹⁰⁴ In particular, rising investment in the extractive industries can have a devastating impact on the livelihood of Indigenous peoples.¹⁰⁵

The interplay between investors’ rights and Indigenous peoples’ rights has been discussed by domestic courts¹⁰⁶ and by human rights bodies at the regional and international levels.¹⁰⁷ While this jurisprudence and the relevant literature are extensive, the emerging jurisprudence of investment treaty arbitral tribunals dealing with elements of Indigenous cultural heritage remains understudied. This Article builds upon previous studies¹⁰⁸ and contributes to the state of the art

103. See OECD, FOREIGN DIRECT INVESTMENT FOR DEVELOPMENT, at 3 (2002).

104. Lila Barrera Hernández, *Indigenous Peoples, Human Rights and Natural Resource Development: Chile’s Mapuche People and the Right to Water*, ANNUAL SURVEY OF INTERNATIONAL AND COMPARATIVE LAW 6 (2005).

105. See generally Kyla Tienhaara, *What You Don’t Know Can Hurt You: Investor–State Disputes and The Protection of the Environment in Developing Countries*, 6 GLOBAL ENVIRONMENTAL POLITICS 73–100 (2006) (describing how the alteration of the natural landscape affects indigenous peoples’ relationship with land, their lifestyle, and worldview).

106. At the national level, see, e.g. *Hupacasath First Nation v. The Minister of Foreign Affairs Canada and The Attorney General of Canada*, Judgment of 9 January 2015, 2015 FCA 4 (CanLII) (the Canadian Federal Court dismissed an application by the Hupacasath First Nation, an aboriginal band in British Columbia, to stay the Canada–China investment treaty until First Nations have been consulted, holding that any potential adverse impacts are non-appreciable and speculative in nature).

107. For a discussion see Valentina Vadi, *Natural Resources and Indigenous Cultural Heritage in International Investment Law and Arbitration*, in KATE MILES, RESEARCH HANDBOOK ON ENVIRONMENT AND INTERNATIONAL INVESTMENT LAW (Cheltenham: Edward Elgar forthcoming 2018) [hereinafter Vadi, *Natural Resources*].

108. Earlier studies include VADI, CULTURAL HERITAGE, *supra* note 6, at 204–36; Vadi, *When Cultures Collide*, *supra* note 6, at 797–889; Vadi, *Natural Resources*, *supra* note 107 (all discussing an earlier set of arbitrations); Valentina Vadi, *Global v. Local: The Protection of Indigenous Heritage in International*

by examining and critically assessing a number of recent arbitrations and by proposing policy options to address the power imbalance between international investment law and the human rights system.

Given the impact that arbitral awards can have on Indigenous peoples' cultural heritage and rights, and the growing number of investment arbitrations, scrutiny and critical assessment of this jurisprudence is particularly timely and important. On the one hand, such scrutiny illuminates the way international investment law responds to human rights concerns in its operation, thus contributing to the ongoing investigation on the role of international investment law within its broader matrix of international law. On the other hand, this scrutiny calls for strengthening the human rights system to redress some institutional imbalance with international investment law.

With regard to the subject matter of these arbitrations, most relate to the extractive industries; cases that involve other types of business remain atypical. This Article adopts a broad notion of heritage inclusive of both cultural and natural heritage, given that Indigenous peoples do not separate these types of heritage. This approach is also well-known to international lawyers as one of the most important UNESCO instruments protecting world heritage similarly governs both natural and cultural heritage.¹⁰⁹

With regard to the actors involved, in general terms, investment disputes with Indigenous cultural elements are characterized by the host state's need to balance the protection of the human rights of Indigenous peoples with the rights of foreign investors. However, atypical cases arise in which Indigenous peoples file investment disputes qua investors. Moreover, Indigenous peoples can participate to the proceedings as *amici curiae*.

To date, the crossover of international investment law and the rights of Indigenous peoples has arisen in four ways.¹¹⁰

Economic Law, in S. SARGENT & JO SAMANTHA, *A NEW MILLENNIUM FOR INDIGENOUS RIGHTS* 7–36 (Buckingham Univ. Press 2017), (discussing an earlier investment arbitration and an analogous World Trade Organization case concerning indigenous cultural heritage).

109. Convention concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, in force Dec. 17, 1975, 1037 U.N.T.S. 151.

110. Here, I follow the useful analytical framework elaborated by Judith Levine. See Judith Levine, *The Interaction of International Investment Arbitration*

First, as investors, Indigenous peoples have filed claims before arbitral tribunals qua foreign investors, alleging that the host state failed to consider their human rights. Second, foreign investors have filed claims against the host state contending that regulatory measures protecting Indigenous cultural rights or their heritage were in breach of relevant investment treaty provisions. Third, foreign investors have filed claims against host states contending that the latter failed to protect the former or their investments against actions of Indigenous peoples. Finally, groups of Indigenous peoples, who are not party to a given arbitration but have an interest in the outcome of the same, have sought permission to intervene in the proceedings. This Article proceeds by examining each of these different types of intersections between investors' rights and the rights of Indigenous peoples.

A. *Indigenous Peoples Qua Investors*

In an atypical case, Indigenous peoples acting qua foreign investors have complained about measures adopted by the host states, alleging that the state failed to take their human rights into account. In *Grand River v. United States*,¹¹¹ a Canadian tobacco distribution company composed of Indigenous peoples contended that the Master Settlement Agreement—an agreement between tobacco companies and major tobacco producers in the United States—was being applied to their business without their input. For the company, this allegedly violated customary law requiring consultation, if not consent, of Indigenous peoples on regulatory matters potentially affecting them.¹¹² The Arbitral Tribunal, however, did not find any violation of fair and equitable treatment (the minimum standard due to investors under Article 1105 of NAFTA),¹¹³ albeit admitting,

and the Rights of Indigenous Peoples, in Freya Baetens (ed.) *INVESTMENT LAW WITHIN INTERNATIONAL LAW—INTEGRATIONIST PERSPECTIVES* (CUP 2013) 107–128. In earlier studies, I developed a different analytical framework based on the investment claims (expropriation, fair and equitable treatment, full protection and security, etc.) See VADI, *CULTURAL HERITAGE*, *supra* note 6, at 204–36; Vadi, *When Cultures Collide*, *supra* note 6, at 797–889.

111. *Grand River Enterprises Six Nations, Ltd. v. United States*, Award, NAFTA Trib. (Jan. 12, 2011).

112. *Id.* ¶ 182(3).

113. *Id.* ¶ 187 (holding that “whatever unfair treatment was rendered [to the claimant] or his business enterprise, it did not rise to the level of an infraction

in passing, that Indigenous peoples should be consulted on matters potentially affecting them.¹¹⁴

In the reasoning of the Tribunal, two holdings and one important gap in legal reasoning related to indigenous peoples' rights in investment treaty arbitration can be found. First, according to the Tribunal, fair and equitable treatment “does not incorporate other legal protections that may be provided to investors or classes of investors under other sources of law.”¹¹⁵ “To hold otherwise”—argues the *Grand River* Tribunal—“would make Article 1105 a vehicle for generally litigating claims based on alleged infractions of domestic and international law and thereby unduly circumvent the limited reach of Article 1105 as determined by the North American Free Trade Agreement (NAFTA) Free Trade Commission in its binding directive.”¹¹⁶ In reaching this outcome, the Tribunal was guided by the NAFTA Free Trade Commission's statement that “determination that there has been a breach . . . of a separate international agreement does not establish that there has been a breach of Article 1105.”¹¹⁷

Second, the Tribunal held that NAFTA Article 1105 required a uniform standard of treatment for all foreign investments, rather than admitting specialized procedural rights owing to some categories for investors (e.g., Indigenous persons).¹¹⁸

Third, the arbitrators did not discuss the role that Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT) can play in investor–state arbitration as a tool to

of the fair and equitable treatment standard of 1105, which is limited to the customary international law standard of treatment of aliens.”).

114. *Id.* ¶ 210 (noting that “It may well be, as the Claimants urged, that there does exist a principle of customary international law requiring governmental authorities to consult Indigenous peoples on governmental policies or actions significantly affecting them.”).

115. *Id.* ¶ 219.

116. *Id.*

117. NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (July 31, 2001), http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp.

118. Grand River Enterprises Six Nations, ¶ 213 (arguing that “[t]he notion of specialized procedural rights protecting some investors, but not others, cannot readily be reconciled with the idea of a minimum customary standard of treatment due to all investments.”).

defragment international law.¹¹⁹ Article 31(3)(c) requires adjudicators to take account of “any relevant rules of international law applicable in the relations between the parties.”¹²⁰ Although Article 31(3)(c) cannot trigger the importation of external norms into a given treaty system or provide the claimants with the capacity to claim for the breach of such external obligations, it enables such external rules to shape an arbitral tribunal’s interpretation of a given investment treaty provision.

In conclusion, the *Grand River* award is significant because it admits, albeit in passing, that Indigenous peoples should be consulted on matters potentially affecting them. The Tribunal states that the fair and equitable treatment standard cannot be used to import external norms into the text of IIAs. Nonetheless, the award does not discuss the potentially significant role that Article 31(3)(c) could play in investment arbitration.

B. *States as Respondents and Trustees of Indigenous Peoples’ Rights*

Foreign investors have filed claims against the host state contending that regulatory measures protecting Indigenous cultural rights or their heritage were in breach of relevant investment treaty provisions. In these cases, the respondent states act as trustees of Indigenous peoples’ rights.

For instance, in *Ras al-Khaimah Inv. Authority v. India*, an Emirati investor in an aluminum refinery project served India with a notice of arbitration under the U.A.E.–India Bilateral Investment Treaty (BIT).¹²¹ The company had signed a Memorandum of Understanding (MoU) with the state of Andhra Pradesh, under which the latter would supply the former with bauxite.¹²² However, the project was met with local opposition, reportedly because the government planned to mine the bauxite on reserved tribal land.¹²³ After the government cancelled the MoU, the company filed a formal

119. Vienna Convention on the Law of Treaties, art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

120. *Id.*

121. Zoe Williams, *Emirati Investor Files UNCITRAL BIT Arbitration Against India*, INV. ARB. REP. 1 (2017).

122. *Id.*

123. *Id.*

notice.¹²⁴

According to an international development scholar, “[t]wo dominant discourses” have emerged with regard to bauxite mining in Eastern India.¹²⁵ On the one hand, the “life-giving discourse” opposes mining because it sees the bauxite-bearing hills as “an essential part of a wider ecosystem that supports sustainable, [I]ndigenous communities,” such as the Adivasi.¹²⁶ This view favors the conservation of “holistic ecosystems in support of traditional lifestyles”¹²⁷ by noting that bauxite hills have geological features that can be “life-giving”; in fact, because the bauxite ore has a porous structure and the “unique ability to store water from the previous monsoon, it “slowly release[s] it into hill streams” throughout the year.¹²⁸ On the other hand, “the pro-mining ‘treasure chest’ discourse” considers bauxite hills as possible mines “for the benefit of the nation.”¹²⁹ This “materialistic” vision of mineral extraction “builds on an ideology of modernization and economic development via industrialization present in top policymaking circles ever since independence.”¹³⁰ Yet, under the Indian Forest Rights Act (FRA), “tribal people are the natural owners of minerals available in reserve forests.”¹³¹ As the case is still at a very early phase, it is not possible to foresee whether the case will be settled or how the Arbitral Tribunal will decide it.

Analogously, in 2015, a Costa Rican company and several Dutch investors, all shareholders of an ecotourism project called Cañaveral in Bocas del Toro, Panama, filed a claim against Panama at the International Center for the Settlement of Investment Disputes (ICSID).¹³² Reportedly, the

124. *Id.*

125. Patrik Oskarsson, *Diverging Discourses on Bauxite Mining in Eastern India: Life-Supporting Hills for Adivasis or National Treasure Chests on Barren Lands?*, 30 SOC’Y & NAT. RESOURCES 994 (2017).

126. *Id.* at 994.

127. *Id.* at 996.

128. *Id.* at 1002.

129. *Id.* at 994.

130. *Id.* at 997.

131. Santosh Patnaik, *Agitation Brewing Against Move on Bauxite Mining*, THE HINDU (Aug. 9, 2015), <http://www.thehindu.com/news/cities/Visakhapatnam/agitation-brewing-against-move-on-bauxite-mining/article7517531.ece>.

132. Álvarez y Marín Corporación S.A. v. Republic of Panama, ICSID Case No. ARB/15/14 (Apr. 20, 2015).

company contested decisions taken by the Panamanian National Land Management Agency concerning the question on whether the claimants' property is located within the protected area inhabited by the Ngöbe Buglé Indigenous peoples in Western Panama.¹³³

Ngöbe land originally extended from the Pacific Ocean to the Caribbean Sea¹³⁴ and the Ngöbe tend to rely on subsistence activities such as farming, fishing, and hunting.¹³⁵ In 1997, a state law established the Comarca Ngöbe-Buglé, a specially designated area (*comarca*) to promote the wellbeing of these Indigenous communities.¹³⁶ This law also recognized the right of Indigenous persons to collective ownership of land within these zones and grants Indigenous tribes a certain autonomy.¹³⁷ For human rights scholars, this and similar laws were interpreted to constitute "one of the foremost achievements in terms of the protection of Indigenous rights in the world."¹³⁸

Reportedly, "the investment at the heart of the dispute . . . comprised of four farm properties situated along the Panamanian coast, which the investors planned to develop as an eco-tourist project"¹³⁹ and the dispute focused on "whether two of these farms are located in the Comarca."¹⁴⁰ In fact, the National Authority for Lands Administration "issued a report that officially located two of the claimants'

133. See Clovis Trevino, *Panama Faces New ICSID Arbitration Over Thwarted Hotel Tourism Development*, INV. ARB. REP. (2015).

134. See P.D. YOUNG, *NGAWBE: TRADITION AND CHANGE AMONG THE WESTERN GUAYMÍ OF PANAMA* 38–42 (Univ. of Ill. Press, 1971).

135. Cindy Campbell, *Protecting the Ngäbe Buglé. Community of Panama with Clean Development Mechanism Safeguards to Promote Culturally Sensitive Development*, 2 AM. INDIAN L.J. 547, 547 (2014).

136. Álvarez y Marín Corporación S.A., ICSID Case No. ARB/15/14, *Motivación de la decisión sobre las excepciones preliminares de la demandada en virtud de la regla 41(5) de las reglas de arbitraje del CIADI del 27 de enero de 2016*, ¶ 22.

137. See *Kuna Indigenous People of Madungandi v. Panama*, Preliminary Objections, Merits, Reparations and Costs. Judgment, Inter Am. Ct H.R. (ser. C) No. 284, ¶ 59 (Oct. 14, 2014).

138. James Anaya, Special Rapporteur on the Rights of Indigenous Peoples, U.N. Hum. Rts. Council, *The Status of Indigenous Peoples' Rights in Panama*, A/HRC/27/52/Add.1, ¶ 13 (July 3, 2014).

139. Zoe Williams, *Arbitrators in Panama Eco-Tourism BIT Dispute Weigh in With Ruling on Preliminary Objections*, INV. ARB. REP. 2 (2016).

140. *Id.* at 2.

properties outside this special zone.”¹⁴¹ According to the claimants, “this led to the invasion of these properties by Indigenous groups.”¹⁴² The claimants alleged that Panama’s treatment of their investment constitutes an indirect expropriation and a breach of the fair and equitable treatment as well as the full protection and security standards.¹⁴³ As the case is still at a very early phase, it is not possible to foresee whether the case will be settled or how the Arbitral Tribunal will decide it.

In another pending case against Panama, *Dominion Minerals Corp. v. The Republic of Panama*,¹⁴⁴ the claimant, a U.S. company, contended that Panama used environmental pretexts to deny renewal of a mining exploration permit to the local subsidiary of the company and this amounted to an indirect expropriation of the claimant’s investment in Cerro Chorcha, a mining property in Western Panama.¹⁴⁵ For the claimant, the fact that a subsequent law admitted foreign investments in the mineral sectors showed that the mineral moratorium was enacted to expropriate the investment of the claimant rather than to generally halt the extraction of mineral resources.¹⁴⁶ After the regulatory change that permitted mining, the government faced social unrest. In fact, “the Ng[ö]be-Bugl[é] [I]ndigenous people . . . staged a series of violent protests and road blockades” in opposition to such law, because they “[f]ear[ed] that [it] would allow foreign state-owned companies to undertake large-scale mining projects on [I]ndigenous lands.”¹⁴⁷ Furthermore, they were “outraged” by the adoption of the law despite “their public opposition.”¹⁴⁸ Reportedly, “various representatives of the Panamanian government tried to persuade the Ng[ö]be-Bugl[é] [I]ndigenous people to accept mining in Cerro Chorcha . . . given the economic benefits

141. Williams, *supra* note 139; Álvarez y Marín Corporación S.A., ICSID Case No. ARB/15/14, Motivación de la decisión sobre las excepciones preliminares, ¶ 26.

142. *Id.* ¶ 27.

143. *Id.* ¶ 28.

144. *Dominion Minerals Corp. v. Panama*, Request for Arbitration, ICSID Case No. ARB/16/13 (Mar. 29, 2016).

145. *See id.* ¶¶ 2, 36.

146. *See id.* ¶ 36.

147. *Id.* ¶ 42.

148. *Id.* ¶ 42.

such activity brought.”¹⁴⁹ Because the government “faced . . . the threat of continuing social unrest[,]” it finally placed “a moratorium on all mining activity within the . . . regions inhabited by the Ng[ö]be-Bugl[é] [I]ndigenous peoples, which included Cerro Chorcha.”¹⁵⁰ In conclusion, the claimant contends that “Panama’s actions amounted to an expropriation . . . as they had the effect of depriving Claimant of . . . its investment in Cerro Chorcha”¹⁵¹ and a breach of the fair and equitable treatment standard.

Yet, for the Indigenous peoples “[t]hese mountains are sacred”¹⁵² For the Ngöbe, their ancestors buried:

[E]vil spirits in these mountains so that they could not disturb the villages on the slopes below. To make sure the spirits remained imprisoned, the hills have been off-limits to farming, hunting, and logging for generations, in effect creating an ecological preserve that protects the natural resources on which the Ngöbe depend.¹⁵³

Therefore, it seems that for the Ngöbe, the prospect of an open-pit copper mine threatens the destruction of the landscape of Cerro Chorcha, eventually releasing the spirits confined in it, and altering the fragile balance of this mountain ecosystem.

In the renowned case, *Glamis Gold v. United States*,¹⁵⁴ a Canadian investor claimed, inter alia, that measures requiring the backfilling of a previously extracted open-pit gold mine to preserve the skyline of ancient Indigenous pilgrimage route amounted to an indirect expropriation of its investment and/or a violation of fair and equitable treatment.¹⁵⁵ The Arbitral Tribunal, however, dismissed the claims, holding that the investment remained profitable¹⁵⁶ and that none of the government actions breached the fair and equitable treatment standard.

In *Crystallex v. Venezuela*,¹⁵⁷ a Canadian company that

149. *Id.* ¶ 43.

150. *Id.* ¶ 44.

151. *Id.* ¶ 51.

152. Marian Ahn Thorpe, *The Other Side of the Mountain*, CULTURAL SURVIVAL Q., June 2010.

153. *Id.*

154. See *Glamis Gold, Ltd. v. United States*, Award, UNCITRAL (June 8, 2009). <http://www.state.gov/documents/organization/125798.pdf>.

155. *Id.* ¶ 359.

156. *Id.* ¶ 366 (holding that “the California backfilling measures did not result in a radical diminution in the value of the . . . Project”).

157. *Crystallex Int’l Corp. v. Venezuela*, Award, ICSID Case No.

had invested in one of the largest gold deposits in the world, the Las Cristinas deposit in Venezuela, claimed that the conduct of Venezuela in relation to the mine amounted to an expropriation, a violation of the fair and equitable treatment standard, and a violation of the full protection and security standard.¹⁵⁸ The state authorities denied an environmental permit that Crystallex needed for the exploitation of the mine because of concerns about the project's impact on the environment and on an Indigenous community at the Imataca Forest reserve.¹⁵⁹ Yet, the claimant pointed out that "the justifications adduced by the Ministry of Environment" for denying the permit, that is, "concerns for the environmental and [I]ndigenous people . . . had never been raised during the four-year approval process and were not supported by a single study . . . to demonstrate that the project would adversely impact the Imataca region."¹⁶⁰ While Crystallex claimed that it had consulted the relevant Indigenous communities,¹⁶¹ Venezuela argued that the company had inadequately addressed "specific issues or concerns identified by the Ministry (such as . . . local [I]ndigenous culture and traditions)."¹⁶²

The Tribunal found that Venezuela breached the fair and equitable treatment standard when it denied the environmental permit. In fact, a letter from the state authorities had created legitimate expectations that the project would proceed.¹⁶³ Moreover, the Tribunal found that the subsequent permit denial letter did not sufficiently elucidate reasons for denial; rather, it "extend[ed] to a mere two and a half pages," and vaguely referred to "serious environmental deterioration in the rivers, soils, flora, fauna

ARB(AF)/11/2, (Apr. 4, 2016).

158. *See id.* ¶¶ 184–203.

159. *Id.* ¶ 204 (Venezuela points out that "Las Cristinas lies in the Imataca Reserve, which is a fragile rainforest with an extremely varied biodiversity and a significant [I]ndigenous population."), ¶ 378 (Venezuela contended that because "the environmental and socio-cultural impact of the project proposed by Crystallex could not be mitigated[,] "its authorization would have been a violation of the Venezuelan government's obligation to 'ensure protection of the environment and the population from situations that constitute imminent damages.'").

160. *Id.* ¶ 277.

161. *Id.* ¶ 289.

162. *Id.* ¶ 351.

163. *Id.* ¶ 588.

and biodiversity in general in the plot” and climate change.¹⁶⁴ While the Tribunal did not contest the state’s “right (and the responsibility) to raise concerns relating to global warming, environmental issues in respect of the Imataca Reserve, biodiversity, and other related issues,” it held that the specific way the state put forward such concerns in the permit denial letter “present[ed] significant elements of arbitrariness.”¹⁶⁵

Analogously, in *Cosigo Resources v. Colombia*,¹⁶⁶ the claimants contended that the creation of a national park in an area including their gold mining concession amounted to a wrongful expropriation of the latter.¹⁶⁷ Reportedly, “the prospect of extractive activity in the area sparked conflict among local Indigenous groups.”¹⁶⁸ The claimants stated that although the state authorities granted the final legal approval of the project,¹⁶⁹ the creation of the Yaigojié Apaporis national park encompassing the area of the mining concession led to the suspension of all mining activities in the same.¹⁷⁰ The claimants also contended that the consultations with the Indigenous communities led by the government were insufficient and violated the standards set by International Labour Organization (ILO) Convention 169 (ILO Convention 169).¹⁷¹

In its response, Colombia referred to its constitutional and international law obligations to protect biodiversity and Indigenous peoples’ rights (referring to both the Convention on Biological Diversity and the ILO Convention 169).¹⁷²

164. *Id.* ¶ 590.

165. *Id.* ¶ 591.

166. *Cosigo Resources, Ltd. v. Republic of Colombia*, Notice of Demand and Demand for Arbitration and Statement of Claim, UNCITRAL (Feb. 19, 2016).

167. *Id.* ¶ 1.

168. Luke Eric Peterson & Zoe Williams, *Two New Treaty-Based Disputes Center on Friction Between Colombian Mining and National Parks – and Highlight Differing Transparency Rules in Canada and US FTAs*, INV. ARB. REP. 3 (Mar. 2016); *see also* *Cosigo Resources*, Notice of Demand, UNCITRAL, ¶ 11 (noting, however, that the Association of Indigenous Communities of Taraira and Vaupés “would have a twenty percent ownership share in the mining concession.”).

169. *Cosigo Resources*, Notice of Demand, UNCITRAL, ¶ 12.

170. *See* Peterson & Williams, *supra* note 168, at 3–4.

171. *Cosigo Resources*, Notice of Demand, UNCITRAL, ¶ 13.

172. *Id.*, Respuesta de la República de Colombia a la Solicitud de Arbitraje de las Demandantes, ¶¶ 8–9.

The state highlighted that the Amazonian forest is one of the richest areas of the world in biological and cultural diversity¹⁷³ and that the establishment of a natural park was intended to protect the natural and cultural values associated with the same. As the case is still at a very early phase, it is not possible to foresee whether the case will be settled or how the Arbitral Tribunal will decide it.

C. *Indigenous Protests and the Full Protection and Security Standard*

Foreign investors can file claims against a host state contending that it failed to protect their investments against actions of Indigenous peoples. Customary law and most IIAs require full protection and security for foreign investors and their investments.¹⁷⁴ This standard “requires, inter alia, that the host state use due diligence in protecting the investor against injuries from host state nationals and provide redress to the investor for any violations of its rights by its nationals.”¹⁷⁵ In some awards, arbitral tribunals have considered state response to social unrest to be in breach of the full protection and security standard.¹⁷⁶

For instance, in *Burlington v. Ecuador*, the claimant sought, inter alia, to hold Ecuador liable for failing to provide physical protection and security for the company’s hydrocarbon concession in blocks twenty-three and twenty-four of the Amazonian rain forests.¹⁷⁷ Burlington complained that the opposition of Indigenous communities to oil development had impeded its business and that Ecuador’s purported failure to provide physical security violated the standard of full protection and security under the U.S.–Ecuador BIT.¹⁷⁸ In its decision, the Arbitral Tribunal dismissed this specific claim on jurisdictional grounds,

173. Respuesta de la República de Colombia a la Solicitud de Arbitraje de las Demandantes, ¶ 11.

174. VADI, CULTURAL HERITAGE, *supra* note 6, at 228–29.

175. Foster, *Investors, States, and Stakeholders*, *supra* note 5, at 382.

176. On the role of grassroots movements in investor–state arbitration, see Valentina Vadi, *Energy Security v. Public Health? Nuclear Energy in International Investment Law and Arbitration*, 47 GEO. J. INT’L L. 1069, 1130–35 (2016).

177. *Burlington Resources, Inc. v. Republic of Ecuador*, Decision on Jurisdiction, ICSID Case No. ARB/08/5, ¶¶ 27–37 (June 2, 2010).

178. *Id.* ¶¶ 26, 53.

stressing the importance of informing states of disputes so that they have the opportunity to remedy a possible breach and thereby avoid arbitration proceedings.¹⁷⁹ Because Burlington failed to give clear notice to Ecuador of its claims for denial of full protection and security, arbitrators ruled that the treaty’s mandatory six-month waiting period before arbitration can be initiated had not run. As a result, the claim was declared inadmissible.¹⁸⁰

In *Bear Creek v. Peru*,¹⁸¹ the claimant, a Canadian company contended that Peru had failed to afford its investment, the Santa Ana Silver mining project, the protection set out in the Free Trade Agreement (FTA) between Canada and Peru. In particular, it claimed that Peru unlawfully expropriated its investment and violated the fair and equitable treatment and full protection and security standards.¹⁸² The Santa Ana project lies in a border region¹⁸³ and under Peruvian law, “a foreign national can only gain rights to natural resources in border regions when the foreign national makes a case to the Peruvian Government for a public necessity.”¹⁸⁴ The company “initiated the procedure to obtain the necessary mining rights.”¹⁸⁵ A subsequent decree declared that the Santa Ana project was “a public necessity” and authorized the claimant to acquire mining concessions.¹⁸⁶

However, the project lies in a region traditionally inhabited by the Aymara peoples, pre-Inca communities who have been in Peru for a long time.¹⁸⁷ For the Aymara, “this land is not only a geographical” but also a spiritual space as it includes “the guardian mountains (*Apus*), which represent extremely important spiritual sanctuaries for all the

179. *Id.* ¶ 315.

180. *Id.* ¶¶ 317, 336.

181. *Bear Creek Mining Corp. v. Peru*, Award, ICSID Case No. ARB/14/21 (Nov. 30, 2017) [hereinafter *Bear Creek Mining Corp. v. Peru*, Award].

182. *Id.* ¶ 113.

183. *Bear Creek Mining Corp. v. Peru*, Partial Dissenting Opinion, ¶ 25 (Sept. 12, 2017).

184. *Bear Creek Mining Corp. v. Peru*, Award, ¶ 124.

185. *Id.* ¶ 140.

186. *Id.* ¶ 149.

187. *Bear Creek Mining Corp. v. Peru*, Partial Dissenting Opinion, ¶ 25.

population in the area.”¹⁸⁸ Some Indigenous communities protested against the project.¹⁸⁹ For the respondent, the project divided and caused resentment among the Indigenous communities because some of them “were to be involved in (and would benefit from) the Project, whereas others would not, with the consequence that those [who] received jobs were placated, and those who received nothing were angry.”¹⁹⁰ Despite several workshops among the company’s representatives, state authorities, and local communities,¹⁹¹ protests continued to take place against the mining project.¹⁹² Protesters required the cancellation of all mining projects and the protection of Khapia Hill, a sacred place for the Aymaras.¹⁹³ After the protest became violent,¹⁹⁴ Peru revoked the finding of a public necessity, thereby annulling the legal condition for the claimant’s ownership of mineral concessions.¹⁹⁵

According to the *Amici Curiae*, the company “did not do what was necessary to understand the doubts, worries and anxieties and the Aymara culture and religiosity.”¹⁹⁶ For the *Amici*, “the company acted as if it were sufficient to promise benefits to some of the . . . communities in the areas surrounding the project, to hold public meetings announcing their plans without needing to work closely with the communities.”¹⁹⁷ Therefore, some communities opposed the project and the company “did not obtain the social license to develop its project,” that is, the approval of the population.¹⁹⁸ According to the *Amici*, the conflict started due to, *inter alia*,

188. *Id.* ¶ 16 (footnote omitted).

189. *See* *Bear Creek Mining Corp. v. Peru*, Award, ¶ 152 (noting that some indigenous communities that would be affected by the Santa Ana project threatened and attacked the company’s staff when the corporation tried to explain its management of the environmental impact of mining.), ¶ 155 (noting that members of local communities invaded the campsite causing some damage and objected to the project).

190. *Id.* ¶ 155.

191. *Id.* ¶ 159.

192. *Id.* ¶¶ 178, 182.

193. *Id.* ¶¶ 183, 186 (noting that the government subsequently declared Khapia Hill to be part of the nation’s cultural heritage.)

194. *See id.* ¶¶ 189–190.

195. *See id.* ¶ 202.

196. *Id.* ¶ 218.

197. *Id.*

198. *Id.* ¶¶ 218, 221.

“lack of respect for the peasant communities and respect for the rights of Indigenous peoples.”¹⁹⁹ Further, according to the Amici’s brief, “the Aymara have a deep respect for mother earth (*Pachamama*), and it is their responsibility to protect her.”²⁰⁰ The Aymara had “concerns regarding change to the natural landscape, the integrity of their territories, and the negative effects on their sanctuaries and culture.”²⁰¹ They also feared that the open pit mine would affect the quantity of available water.²⁰² This led to social protests.²⁰³

In turn, the claimant contended that it engaged in “meaningful and extensive community relations programs”²⁰⁴ and that it obtained the communities’ support for the Santa Ana project and the “social license” to operate.²⁰⁵ The company also stressed that it was the state’s duty to consult with local communities before granting rights over their lands.²⁰⁶ For the claimant, Peru’s action amounted to an indirect expropriation because it permanently deprived the company of “its ability to own and operate its lawfully acquired mining concessions.”²⁰⁷ For the company, there was disproportion between such deprivation and “the stated goal of quelling political pressure and social protests.”²⁰⁸

The Tribunal acknowledges the “strong political pressure” on Peru due to “social unrest.”²⁰⁹ It also questioned “whether Claimant took the appropriate and necessary steps to engage all of the relevant and likely to be affected local communities, and whether its approach contributed significantly to the nature and extent of the opposition that followed.”²¹⁰ It then noted that “support for the Project came from communities that were receiving some form of benefits (i.e., jobs, direct payments for land use, etc.) and that those

199. *Id.* ¶ 218.
200. *Id.* ¶ 226.
201. *Id.*
202. *See id.*
203. *See id.* ¶ 228.
204. *Id.* ¶ 232.
205. *See id.* ¶¶ 235, 246.
206. *See id.* ¶ 236.
207. *Id.* ¶ 347.
208. *Id.*
209. *Id.* ¶ 401.
210. *Id.* ¶ 406.

communities that remained silent or objected were either not receiving benefits, were uninformed, or both.”²¹¹

Yet, the Tribunal noted that:

[T]he ILO Convention 169 imposes direct obligations only on States. Contrary to Respondent’s arguments, private companies cannot “*fail to comply*” with ILO Convention 169 because it imposes no direct obligations on them. The Convention adopts principles on how community consultations should be undertaken, but does not impose an obligation of result. It does not grant communities veto power over a project.²¹²

The Tribunal concluded that the company “could take it for granted to have complied with all legal requirements with regard to its outreach to the local communities.”²¹³ Instead, the Tribunal found that Peru’s conduct amounted to an indirect expropriation of the company’s investment.²¹⁴ The Tribunal noted that “those members of the [I]ndigenous population that opposed the Santa Ana Project have achieved their wishes: the Project is well and truly at an end. However, this does not relieve Respondent from paying reasonable and appropriate damages for its breach of the FTA.”²¹⁵

In his partial dissenting opinion, appended to the final award, Arbitrator Professor Sands largely agreed with the conclusions of the Tribunal. In his view, “the circumstances which the Peruvian government faced—massive and growing social unrest caused in part by the Santa Ana Project—left it with no option but to act in some way to protect the well-being of its citizens; however, other and less draconian options were available” to the government, which the respondent did not consider.²¹⁶ Nonetheless, Arbitrator Professor Sands disagreed with the other members of the Arbitral Tribunal on how to assess damages. He “conclude[d] that the assessment of damages should be reduced.”²¹⁷ For the Arbitrator, “the Project collapsed because of the investor’s inability to obtain a ‘social license,’ the necessary understanding between the Project’s

211. *Id.* ¶ 407.

212. *Id.* ¶ 664 (emphasis in original).

213. *Id.* ¶ 412.

214. *Id.* ¶¶ 416, 447–448.

215. *Id.* ¶ 657.

216. Bear Creek Mining Corp. v. Peru, Partial Dissenting Opinion, ¶ 2.

217. Bear Creek Mining Corp. v. Peru, Award, ¶ 663.

proponents and those living in the communities most likely to be affected by it.”²¹⁸ As the Arbitrator pointed out, “the viability and success of a project such as this, located in the community of the Aymara peoples, a group of interconnected communities, was necessarily dependent on local support.”²¹⁹ However, for the Arbitrator, the company “did not . . . take real or sufficient steps . . . to engage the trust of all potentially affected communities” and this “appears to have contributed, at least in part, to some of the population’s general discontent with the Santa Ana Project.”²²⁰ The Arbitrator concluded that “[t]he Canada-Peru FTA is not, any more than ICSID, an insurance policy against the failure of an inadequately prepared investor to obtain such a license.”²²¹

Referring to the preamble of the ILO Convention 169, to which Peru is a party, Arbitrator Professor Sands highlighted that such preamble “recognizes ‘the aspirations of [Indigenous and tribal] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live.’”²²² For him, the preamble also highlights “the distinctive contributions of Indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind and to international cooperation and understanding.” For Arbitrator Professor Sands, “[t]his preambular language offers encouragement to any investor to take into account as fully as possible the aspirations of [I]ndigenous and tribal peoples.”²²³

Although Article 15 of the ILO Convention 169 imposes the duty to consult Indigenous peoples on governments, rather than investors, “the fact that the Convention may not impose obligations directly on a private foreign investor as such does not, however, mean that it is without significance or legal effects for them.”²²⁴ Rather, the Arbitrator pointed

218. Bear Creek Mining Corp. v. Peru, Partial Dissenting Opinion, ¶ 6.

219. *Id.*

220. *Id.* ¶ 19.

221. *Id.* ¶ 37.

222. *Id.* ¶ 7.

223. *Id.* (internal references omitted).

224. *Id.* ¶ 10.

out that “human rights . . . ‘are complemented by an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights.’”²²⁵ He further added that “[a]s an international investor the Claimant has legitimate interests and rights under international law; local communities of Indigenous and tribal peoples also have rights under international law, and these are not lesser rights.”²²⁶

In *South American Silver Limited (SAS) v. Bolivia*, the Bermudan subsidiary of a Canadian company alleged that the host state unlawfully expropriated the ten mining concessions the company had near the village of Malku Khota in the Bolivian Province of Potosí.²²⁷ In addition, it alleged the breach of the fair and equitable treatment standard and the prohibition of unreasonable or discriminatory measures.²²⁸ The company requested restitution in kind and damages or, alternatively, full compensation.²²⁹ The company noted that “[t]he vast majority of local residents in and around the Malku Khota Mining Project are [I]ndigenous people, of the Aymara or Quechua ethnic groups,”²³⁰ and that it had tried to maintain ongoing dialogue with the communities “to educate them about, and integrate them into [the] project.”²³¹ According to the company, tensions emerged because of the state’s encouragement of illegal mining.²³² The company contended that the Bolivian government “granted complete immunity to the opposition leaders and authors of violence against the [c]ompany,” and that it expropriated the company’s investment without compensation.²³³ For the company, “the [g]overnment itself, and not the local communities, was the one pressing for the nationalization of

225. *Id.* (quoting *Urbaser S.A. v. Argentine Republic*, Award, ICSID Case No. ARB/07/26, ¶ 1199 (Dec. 8, 2016) [hereinafter *Urbaser S.A. v. Argentine Republic*, Award]).

226. *Id.* ¶ 36.

227. *See* *South American Silver Ltd. v. Bolivia*, Claimant’s Statement of Claim and Memorial, PCA Case No. 2013-15, ¶¶ 8–9 (Perm. Ct. Arb. 2014), <https://www.pccases.com/web/sendAttach/801>.

228. *See id.* ¶¶ 147, 157.

229. *See id.* ¶ 10.

230. *Id.* ¶ 45 (emphasis in original).

231. *Id.* ¶ 47.

232. *See id.* ¶ 49.

233. *Id.* ¶¶ 1, 85.

the Malku Khota Project” for economic reasons.²³⁴ For the claimant, the expropriation did not have a public purpose as it “bear[s] no logical or proportional relationship with the stated objective of pacifying the area”²³⁵

In its counter-memorial,²³⁶ the respondent alleged that the claimant violated “human, social and collective rights of the Indigenous Communities that live in the area” and that such violations operate as a jurisdictional bar to admissibility.²³⁷ For Bolivia, the reversion of the concessions to state ownership was justified by a public interest: the need to restore public order in the area and to protect the rights of the Indigenous communities.²³⁸ Bolivia highlighted that it is “the country with the highest percentage of [I]ndigenous population in Latin America,”²³⁹ and acknowledged “[t]he precolonial existence of Indigenous nations and peoples and [their] ancestral domain over the territories.”²⁴⁰ It also maintained that the state “guarantees th[e] free determination [of Indigenous peoples] with the frame of the unity of the State”²⁴¹ and that such self-determination consists in the right of Indigenous peoples to “autonomy, self-government, [and] their culture . . . in accordance with [the] Constitution and the law.”²⁴²

Bolivia noted that “several Indigenous Communities [live] in the area of the Project,” that they have inhabited since time immemorial before the Spanish colonization, and “shar[e]

234. *Id.* ¶¶ 96, 98.

235. *Id.* ¶ 144.

236. *See generally* South American Silver Ltd. v. Bolivia, Objections to Jurisdiction, Admissibility and Counter-Memorial on the Merits (Perm. Ct. Arb. 2015), <https://www.pccases.com/web/sendAttach/801> (detailing the host state’s defense on procedural and substantive grounds).

237. *Id.* ¶ 4.

238. *Id.* ¶¶ 6–7 (noting that “the protection of Indigenous Communities is an essential mandate of the State that prevails over the rights of the private companies.”).

239. *Id.* ¶ 33 (noting that “62% of the Bolivian population identif[ie]s themselves as [I]ndigenous.”).

240. *Id.* ¶ 35 (citation omitted).

241. *Id.*

242. *Id.* (also noting, at ¶ 36, that the Plurinational Constitutional Tribunal of Bolivia has further clarified that the state “not only acknowledges the Indigenous peoples as different cultures . . . but also as nations,” that is, “as historical communities with a determined home territory that shar[e] differentiated language and culture, and “with the political capability to define their destiny . . . within the . . . State.”)

territory, culture, history, languages and organizations or legal, political, social and economic institutions of their own.”²⁴³ According to the Bolivian Constitution, such communities have, inter alia, “the right to land,” that is, “the exclusive use and exploitation of the renewable natural resources” and the right to the “prior and informed consultation and the participation in the benefits for the exploitation of the non-renewable natural resources that are located in their territory.”²⁴⁴ Moreover, they have “the power to apply their own norms . . . and [to define] . . . their development in accordance with their cultural criteria and principles of harmonic coexistence with Mother Nature.”²⁴⁵

Bolivia noted that Indigenous peoples consider Mallku Khota as “a sacred place”²⁴⁶ despite the fact that the hill has been exploited since the Spanish colonization,²⁴⁷ and “consider themselves ancestral owners of the minerals of the Andean mountains.”²⁴⁸ Therefore, the state contended, “any mining activity in the area of Mallku Khota is a particularly sensitive matter from the social point of view.”²⁴⁹ For Bolivia, opposition to the project came from “the neighboring Indigenous Communities of the Project that saw in it a violation to their ancestral beliefs and an impending risk to the environment on which their survival depended on.”²⁵⁰ Bolivia accused the company of fomenting division and violence among the Indigenous communities, interfering with their right to self-government, and disregarding the traditions of Indigenous communities. For Bolivia, the government “did not have any other option but to declare the Reversion to re-establish the public order.”²⁵¹

With regard to the applicable law, the investor argued that international investment law requires arbitral tribunals to “apply the treaty itself, as *lex specialis*, supplemented by international law if necessary.”²⁵² Bolivia expressly required

243. *Id.* ¶ 41.

244. *Id.* ¶ 47.

245. *Id.*

246. *Id.* ¶ 90.

247. *Id.* ¶ 71.

248. *Id.* ¶ 72.

249. *Id.* ¶ 74.

250. *Id.* ¶ 80.

251. *Id.* ¶ 84.

252. *See* South American Silver Ltd. v. Bolivia, Claimant’s Statement of

the tribunal “to interpret the Treaty in light of the sources of international and internal law that guarantee the protection of the rights of the Indigenous peoples.”²⁵³ In this regard, it referred to customary norms of treaty interpretation as restated by the VCLT, requiring, *inter alia*, adjudicators to take the context of a treaty into account, which includes, according to its Article 31(3)(c), “any relevant rules of international law applicable in the relations between the parties.”²⁵⁴

Moreover, Bolivia argued that “under international public law, the obligations concerning the fundamental rights of the Indigenous Communities prevail over the obligations concerning foreign investment protection.”²⁵⁵ In support of this argument, Bolivia relied on *Indigenous Peoples of Sawhoyamaya v. Paraguay*, in which the Inter-American Court of Human Rights held that “applying bilateral commercial agreements does not justify breaching State obligations arising out of the American Convention.”²⁵⁶ Bolivia derived the “superior position or special status” of human rights in the international legal system from Article 103 and Article 56 of the Charter of the United Nations (Charter). The former states “the supremacy” of the obligations established in the Charter over any other obligation acquired by its members. The latter includes the pledge of U.N. Members to take action for the achievement of several purposes including the respect of human rights.²⁵⁷ Moreover, the latter argues that norms concerning the fundamental human rights of human beings are *erga omnes* obligations.²⁵⁸ According to Simma and Kill:

[I]t is possible that norms relating to economic, social and cultural rights could also constitute rules applicable in the relations among States, even if there is no independent treaty obligation running between the States in question, and even if we assume that such

Claim and Memorial, ¶ 116.

253. South American Silver Ltd. v. Bolivia, Objections to Jurisdiction, Admissibility and Counter-Memorial on the Merits, ¶ 192.

254. *Id.* ¶ 193, n.278 (referring to Campbell MacLachan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT’L & COMP. L.Q. 280 (2005) (noting that “[Article 31(3)(c)] has the status of a constitutional norm within the international legal system.”).

255. *Id.* ¶ 202.

256. *Id.* ¶ 203.

257. *See id.* ¶ 205.

258. *Id.* ¶ 206.

obligations are not owed *erga omnes* . . . the fact that the Vienna Convention’s preamble proclaims the State Parties universal respect for, and observance of, human rights and fundamental freedoms for all may tip the scale towards a broader conception of applicability.²⁵⁹

Bolivia also recalled various international law instruments protecting Indigenous rights, including the American Convention on Human Rights,²⁶⁰ the UNDRIP, the ILO Convention 169,²⁶¹ and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women.²⁶² It also referred to the U.N. Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises “as evidence of the international public order.”²⁶³

In its “Reply to Respondent’s Counter-Memorial,”²⁶⁴ the claimant denied any allegation of unlawful conduct and restated that “[t]he Tribunal . . . must rely upon the Treaty as the primary source of applicable law.”²⁶⁵ It “does not dispute the basic notion that treaties should generally be construed in harmony with international law”²⁶⁶ and that “a systemic interpretation of the Treaty is called for under international law.”²⁶⁷

Yet, the company contended that “Bolivia has not satisfactorily established why the Tribunal should give primacy to the rights of Indigenous communities over the clear terms of the Treaty.”²⁶⁸ In fact, quoting Bruno Simma,

259. *Id.* (quoting Bruno Simma & Theodor Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology*, in CHRISTINA BINDER ET AL., *INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOR OF CHRISTOPH SCHREUER 702* (Oxford 2009)).

260. *See* OAS, American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123.

261. International Labor Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries, *adopted* June 27, 1989, ILO Convention 169, *reprinted in* 28 I.L.M. 1382, 383.

262. OAS, Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, 33 I.L.M. 1534.

263. South American Silver Ltd. v. Bolivia, Objections to Jurisdiction, Admissibility and Counter-Memorial on the Merits, ¶ 220.

264. South American Silver Ltd. v. Bolivia, Claimant’s Reply to Respondent’s Counter-Memorial on the Merits and Response to Respondent’s Objection and Admissibility.

265. *Id.* ¶ 238.

266. *Id.* ¶ 245.

267. *Id.* ¶ 238.

268. *Id.*

the company contended that Article 31(3)(c) “can only be employed as a means of harmonization qua interpretation, and not for the purpose of modification, of an existing treaty.”²⁶⁹ The company also pointed out that “[t]he phrase ‘relevant rules of international law’ in Article 31(3)(c) of the Vienna Convention refers to the sources of law set forth in Article 38 of the Statute of the International Court of Justice, i.e., international conventions, customary international law, general principles of law recognized by civilized nations.”²⁷⁰ Therefore, it contests that the UNDRIP, the U.N. Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises can be considered “rules of international law” that may be taken into account in the interpretation of treaties.²⁷¹ The company qualified these instruments as “non-binding, *de lege ferenda* instruments” that “lack the State practice and *opinio juris* elements that would transform them into embodiments of customary international law.”²⁷² With regard to the American Convention on Human Rights, the ILO Convention 169, and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, the claimant noted that the United Kingdom is not party to these treaties.²⁷³ Moreover, the company argued that “Bolivia has not established, let alone suggested, that [all the mentioned instruments] . . . constitute either customary international law or general principles of law.”²⁷⁴ For the claimant, “Bolivia seeks to use Indigenous peoples’ rights as a shield to justify their unlawful conduct.”²⁷⁵ The case has not been decided yet; it will be interesting to see how the Arbitral Tribunal will settle the dispute.

D. *Indigenous Peoples as Amici Curiae*

Several arbitration rules and IIAs now authorize arbitral tribunals to allow third party submissions.²⁷⁶ Groups of

269. *Id.* ¶ 245 (quoting Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 INT’L COMP. LEGAL Q. 573, 584 (2011)).

270. *Id.* ¶ 246.

271. *Id.* ¶ 247.

272. *Id.*

273. *Id.* ¶ 249.

274. *Id.* ¶ 251.

275. *Id.* ¶ 253.

276. *See, e.g.*, ICSID Convention, Regulations and Rules, Arbitration

Indigenous peoples who are not party to a given arbitration but have an interest in the outcome of the same can seek permission to intervene in the proceedings as friends of the court (*amici curiae*). *Amicus curiae* submissions can assist arbitral tribunals in the determination of a factual or legal issue related to the arbitration, by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties. They can be useful when there is a public interest in the dispute. At the same time, the arbitral tribunals must ensure that the participation of *amici curiae* does not disrupt the proceedings and that the submission of *amici curiae*'s briefs does not unduly burden either party.

Indigenous peoples have increasingly participated in investment arbitrations through *amici curiae*. For instance, in *Bear Creek Mining v. Peru*,²⁷⁷ concerning the development of a silver mining project, the Tribunal granted the permission to submit an *amicus curiae* brief to DHUMA, a Peruvian private non-profit organization which promotes the human rights of the Aymara and Quechua Indigenous peoples, and a Peruvian lawyer with expertise in business and human rights.²⁷⁸ The Tribunal considered that the combination of their expertise and “local knowledge of the facts m[ight] add a new perspective that differs from that of the Parties . . . irrespective of whether DHUMA speaks for the Aymara communities, or whether its interests may be synonymous with the communities’ interests.”²⁷⁹

The *Amici* contributed to the factual and legal architecture of the case. On the factual level, they “present[ed] the concerns of the population with regard to the social, cultural and environmental impact that would occur if the Santa Ana mining project were developed.”²⁸⁰ From the *amicus curiae* brief, it appears that the Santa Ana project was taking place in a land principally inhabited by the Aymara people, mainly

Rule 37, May 29, 2008, <https://icsid.worldbank.org/en/documents/icsiddocs/icsid%20convention%20english.pdf>.

277. *Bear Creek Mining Corp. v. Peru*, Award, ICSID Case No. ARB/14/21, ¶ 663 (Nov. 30, 2017).

278. *Bear Creek Mining Corp. v. Peru*, Procedural Order No. 5 (July 21, 2016).

279. *Id.* ¶ 40.

280. *Bear Creek Mining Corp. v. Peru*, Brief for the Association of Human Rights and the Environment et al. as *Amicus Curiae*, at 2 (June 9, 2016).

involved in agriculture, small-scale fishing, and livestock farming.²⁸¹ The brief highlighted the “deep cultural and social ties” of the Aymara people “with their . . . land and natural resources”²⁸² as well as the cultural and environmental concerns of these communities.²⁸³ At the legal level, the Amicus Curiae brief referred to human rights law and corporate social responsibility.²⁸⁴ In particular, they referred to “the right of Indigenous peoples to free and informed prior consultation, the responsibility of the company to respect human rights and conduct itself with due diligence with the aim of obtaining local consent and social license to operate.”²⁸⁵

The assessment of the Amici’s contribution to the factual and legal architecture of the *Bear Creek* case varies. For the respondent, the amicus curiae brief is “a critical portion of the record” to assess the claimant’s conduct.²⁸⁶ By contrast, for the claimant, “[t]he Amici’s account of the events is incomplete, unsupported by any credible, competent or even verifiable evidence . . . and therefore inaccurate.” The claimant contended that “even if the Amici’s version of the events were accurate (it is not), it implicates the conduct of the Government of Peru, not Bear Creek, and in fact complements Claimant’s position in this arbitration regarding Respondent’s shortcomings.”²⁸⁷ Despite these diverging assessments, the Tribunal considered the Amici’s submission in the final award.²⁸⁸

Yet, arbitral tribunals can decline third parties’ submissions. For instance, in *Border Timbers Limited v. Republic of Zimbabwe*, and *Bernhard von Pezold v. Republic of Zimbabwe*,²⁸⁹ the claimants alleged unlawful

281. *Id.* at 3.

282. *Id.* at 7.

283. *Id.*

284. *Id.* at 14 (referring to the Declaration on the Rights of Indigenous Peoples (arts. 12 & 26 on the right to culture and land of Indigenous peoples) and Convention 169 of the ILO.)

285. *Id.* at 2.

286. *Bear Creek Mining Corp. v. Peru*, Respondent’s Comments to the Third Party Submission, at 15 (Aug. 18, 2016).

287. *Bear Creek Mining Corp. v. Peru*, Plaintiff’s Reply to the Amicus Curiae Submission, ¶ 2 (Aug. 18, 2016).

288. *See supra* Part III.C.

289. *Bernhard von Pezold v. Zimbabwe*, Award, ICSID Case No. ARB/10/15 (July 28, 2015) [hereinafter *Bernhard von Pezold v. Zimbabwe*,

expropriation of their farms in Zimbabwe, compulsorily acquired by the government of Zimbabwe as part of its land reform program in the 2000s. An NGO and four Indigenous communities requested for the permission to file a written submission as *amicus curiae* to the arbitral tribunals²⁹⁰ because the farms were allegedly located on the ancestral territories of Indigenous peoples.²⁹¹ The Indigenous communities submitted that “the outcome of the present arbitral proceedings w[ould] determine not only the future rights and obligations of the disputing parties with regard to these lands, but m[ight] also potentially impact the Indigenous communities’ collective and individual rights.”²⁹²

The Tribunal rejected the petition.²⁹³ The Tribunal acknowledged that the Indigenous tribes have “some interest in the land over which the Claimants assert full legal title,” and that “it may therefore well be that the determinations of the Arbitral Tribunal in these proceedings will have an impact on the interests of the Indigenous communities.”²⁹⁴ Yet, it held that the “apparent lack of independence or neutrality of the petitioners [wa]s a sufficient ground for denying the application.”²⁹⁵ In fact, the Tribunal considered that by requiring that the *amicus curiae* briefs bring a perspective that is “different from that of the parties,” Article 37(2)(a) of the ICSID Rules implied a requirement of independence from the same parties.²⁹⁶

Moreover, the Tribunal noted that “neither Party has put the identity and/or treatment of Indigenous peoples . . . under international law . . . in issue in these proceedings.”²⁹⁷ Therefore, for the Tribunal, the proposed *amicus curiae* briefs would not address a matter within the scope of the dispute as required by Article 37(2)(b).²⁹⁸ While the

Award].

290. *Id.*; *Border Timbers Ltd. v. Zimbabwe*, Procedural Order No. 2, ICSID Case No. ARB/10/25 (June 26, 2012).

291. *Id.* ¶ 18.

292. *Id.* ¶ 21.

293. *Id.* ¶ 64.

294. *Id.* ¶ 62.

295. *Id.* ¶ 56.

296. *Bernhard von Pezold v. Zimbabwe*, Award, ¶ 49.

297. *Id.* ¶ 57.

298. *Id.*

proposed submission purported to focus on the rights of Indigenous peoples under international law, the ICSID dispute concerned measures adopted by Zimbabwe that, according to the claimants, infringed provisions of the applicable BITs.²⁹⁹ For the Tribunal, the former was not within the scope of the latter. Finally, the Tribunal decided that ascertaining whether the local communities constituted Indigenous peoples under international law was outside the proper scope of the dispute.³⁰⁰ In conclusion, the Tribunal adopted “a conservative reading of the ICSID arbitration.”³⁰¹

Even if arbitral tribunals allow third party submissions, they are not obligated to consider their arguments. For instance, in the *Glamis Gold* case, the Tribunal granted the Quechan Indian Nation leave to file a non-party submission.³⁰² However, in reaching its decision, it did not refer to any of the arguments advanced by their brief.

In conclusion, Indigenous peoples have sought to participate, and in certain cases have participated in, arbitral proceedings as amici curiae. Amici curiae are not particularly controversial in investor–state arbitration as a number of arbitration rules provide for the admissibility of their submissions if certain basic conditions are met. Amicus curiae briefs can illuminate the stance of historically marginalized communities and contribute to ensure that the rights of Indigenous peoples are respected in the implementation of IIAs. They can contribute to the factual and legal architecture of a case. However, they do not constitute an ideal participatory mechanism as arbitral tribunals are not required to accept such submissions; rather, they can accept them, provided that certain conditions are met, including but not limited to timeliness, brevity, and independence. Moreover, even when arbitral tribunals decide to accept amicus curiae briefs, they may impose restrictive word limits and short timeframes to present arguments. More importantly, by serving as amici curiae, Indigenous peoples do not become parties to the

299. *Id.* ¶ 60.

300. *Id.*

301. Luke Eric Peterson, *Analysis: Tribunal’s Reading of Amicus Curiae Tests Could Make Life Difficult for Antagonistic Amici – And Those Seeking to Raise Novel Concerns such as Human Rights Law*, INV. ARB. REP. 1 (June 2012).

302. *Glamis Gold, Ltd. v. United States*, Decision on Application and Submission by Quechan Indian Nation, UNCITRAL (Sept. 16, 2005).

proceedings; they have limited rights in the course of the same and cannot file annulment claims. Finally, arbitral tribunals are not obligated to discuss arguments presented in *amicus curiae* briefs in their awards.

IV. CRITICAL ASSESSMENT

What is the relevance of these and similar arbitrations to international investment law and international law more generally? In several investment treaty arbitrations, the arguments of investors are intertwined with Indigenous claims. In general terms, these cases have a significance that extends beyond international investment law itself because of their potential impact on Indigenous rights. They show that international investment law is not a self-contained regime; rather, it is part and parcel of international law and can contribute to the development of the same.

From an investment law perspective, these cases show how arbitral tribunals have dealt with (or chosen not to deal with) arguments concerning Indigenous peoples' rights. While arbitral tribunals have shown some level of deference to state regulatory measures aimed at protecting Indigenous cultural heritage, they have adopted a more cautious stance when Indigenous peoples themselves directly articulated arguments as claimants or as *amici curiae*. If the right of Indigenous peoples to participate in the decisions that affect them is crucial to the protection of their cultural heritage,³⁰³ investor–state arbitration constitutes an uneven playing field. Rarely have Indigenous peoples filed investor–state arbitration as investors.³⁰⁴ The FDI-impacted Indigenous peoples do not have direct access to arbitral tribunals; rather, the host state needs to espouse their arguments.³⁰⁵ While Indigenous peoples can, and have, presented *amicus curiae* briefs reflecting their interests, investment tribunals are not legally obligated to accept, let alone consider, such briefs—rather, they have the ability to do so should they deem it

303. See Declaration on the Rights of Indigenous Peoples, *supra* note 2, art. 18 (stating that “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own Indigenous decision-making institutions.”).

304. See *supra* Part III.A.

305. See *supra* Part II.

appropriate.³⁰⁶ On other occasions, where Indigenous peoples respond to investor activities by protest, investors have alleged violations of the full protection and security standard.³⁰⁷

From a human rights perspective, the interplay between international investment law and human rights law highlights “the power imbalance between two international legal regimes”³⁰⁸ and makes the case for rethinking and/or strengthening the current regime protecting the rights of Indigenous peoples. International investment law requires states to grant foreign investors fair and equitable treatment, full protection and security, and nondiscrimination in addition to prohibiting unlawful expropriation and other forms of state misconduct.³⁰⁹ Human rights law requires the protection of the rights of Indigenous peoples and the property rights of the investors.³¹⁰ If there is no inherent tension between these different subfields of international law in theory, potential overlapping tensions often arise in practice.

While the international investment regime is characterized by binding, efficient, and effective dispute settlement mechanisms, the human rights system is characterized by diverse mechanisms for assessing violations of human rights. There is no dedicated tribunal empowered to adjudicate violations of Indigenous rights. Human rights mechanisms usually require the exhaustion of internal remedies, which is often time-consuming.³¹¹ Furthermore, certain areas such as South Asia lack regional systems capable of delivering binding judgments.³¹² In addition, even where there are regional human rights courts, “human rights courts face difficulties securing compliance with their judgments.”³¹³ In other words, “[I]ndigenous rights are the subject of much more variable enforcement” than investors’ rights.³¹⁴

306. *See supra* Part III.D.

307. *See supra* Part III.C.

308. *The Double Life of International Law*, *supra* note 4, at 1757.

309. *See* VADI, PROPORTIONALITY, *supra* note 81.

310. *See generally* UNDHR, *infra* note 380 (affirming a range of human rights).

311. *See* Francioni, *Access to Justice*, *supra* note 11, at 64.

312. *The Double Life of International Law*, *supra* note 4, at 1770.

313. *Id.*

314. *Id.* at 1765.

The power imbalance between the relative strength of the investment regime and the relative weakness of the human rights system intensifies “already-existing power imbalances between [I]ndigenous communities, states and investors.”³¹⁵ Respondent states can raise human rights issues “as a means of justifying [their] action” before arbitral tribunals.³¹⁶ Yet, they rarely raise human rights arguments in investment arbitrations “to avoid the negative repercussions that could result from investors . . . deciding to invest in other states.”³¹⁷ Nonetheless, it may be persuasive to a tribunal for host states to assert human rights arguments on behalf of Indigenous communities.³¹⁸ In fact, scholars argue that “arbitrators may be prone to the ‘David Effect’”—an inclination to favor the perceived weaker party.³¹⁹ Investors can also raise human rights issues to reinforce their investment claims. However, investors rarely raise human rights issues, and if they do, they refer to the rights they allegedly are entitled to, rather than those of the FDI-impacted population. Certain treaties permit home states, the states that investors are from, to intervene in investment arbitrations to raise human rights issues.³²⁰ However, this rarely occurs. Finally, amici curiae can also raise human rights issues. However, arbitral tribunals have no duty to admit such submissions, or to consider these briefs in their awards. To sum up, investor–state arbitrations and human rights adjudication seem to speak two different languages even when they deal with similar issues. The power imbalance between the two treaty regimes plays a key role in perpetuating the power imbalance between states, foreign investors, and Indigenous peoples.

Certainly, the investment law obligations of the state towards foreign investors do not justify violations of its human rights obligations towards Indigenous peoples. In the

315. *Id.* at 1757.

316. *Id.* at 1774.

317. James D. Fry, *International Human Rights Law in Investment Arbitration: Evidence of International Law’s Unity*, 18 *DUKE J. COMP. & INT’L L.* 77, 108 (2007).

318. *See* Puig & Strezhnev, *supra* note 99, at 39.

319. *Id.* at 39–40.

320. Patrick Dumberry & Gabrielle Dumas-Aubin, *When and How Allegations of Human Rights Violations Can Be Raised in Investor–State Arbitration*, 13 *J. WORLD INV. & TRADE* 349, 350 (2012).

Sawhoyamaxa case,³²¹ the Inter-American Court of Human Rights held Paraguay liable for violating various human rights of the Sawhoyamaxa Indigenous community under the American Convention on Human Rights. These communities claimed that Paraguay had, inter alia, violated their right to property by failing to recognize their title to ancestral lands.³²² For its part, Paraguay had attempted to justify its conduct contending that the lands in question belonged to German investors and were protected under the Germany–Paraguay BIT.³²³ According to the government, the BIT prohibited the expropriation of foreign investors’ lands.

However, after noting the linkage between land rights and the culture of Indigenous peoples,³²⁴ the Court clarified that the investment law obligations of the state did not exempt the state from protecting and respecting the property rights of the Sawhoyamaxa.³²⁵ Rather, the Court noted that compliance with investment treaties should always be compatible with the human rights obligations of the state.³²⁶ Moreover, the Court pointed out that the relevant BIT does not prohibit expropriation; rather, it allows expropriation subject to several requirements including the existence of a public purpose and the payment of compensation.³²⁷ Therefore, the Court found a violation of Article 21 of the Convention³²⁸ and ordered the government to return the land to the Sawhoyamaxa community.

From a general international law perspective, the collision between international investment law and the norms of international law protecting the rights of Indigenous peoples

321. *Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 248 (Mar. 29, 2006).*

322. *Id.* ¶ 2.

323. *Id.* ¶ 115(b).

324. *Id.* ¶ 118 (noting that “[t]he culture of the members of Indigenous communities reflects a particular way of life, of being, seeing and acting in the world, the starting point of which is their close relation with their traditional lands and natural resources, not only because they are their main means of survival, but also because they form part of their worldview, of their religiousness, and consequently, of their cultural identity.”).

325. *Id.* ¶ 140.

326. *Id.*

327. *Id.*

328. *Id.* ¶ 144.

constitutes a paradigmatic example of the possible interaction between different treaty regimes. The increased proliferation of treaties and specialization of different branches of international law make some overlapping among the latter unavoidable. General treaty rules on hierarchy—namely *lex posterior derogat priori*³²⁹ and *lex specialis derogat generali*³³⁰—may not be entirely adequate to govern the interplay between treaty regimes because the given bodies of law do not exactly overlap; rather, they have different scopes, aims, and objectives.³³¹ Unless a norm constitutes *jus cogens*,³³² it is difficult to foresee and govern the interaction of different legal regimes.

Can investment treaty tribunals consider and/or apply other bodies of law in addition to international investment law? Given their institutional mandate, which is to settle investment disputes, there is a risk that investment treaty tribunals water down or overlook noteworthy cultural aspects of a given case. International adjudicators may be perceived as detached from Indigenous communities and their cultural concerns and may not have specific expertise in Indigenous human rights law. Furthermore, due to the emergence of a *jurisprudence constante* in international investment law, there is a risk that tribunals do conform to these de facto precedents without necessarily considering analogous Indigenous cultural heritage-related cases adjudicated before other international courts and tribunals. This is not to say that consistency in decision-making is undesirable; obviously, it can enhance the coherence and predictability of the system contributing to its legitimacy. Yet, the selection of the relevant precedents matters as it can have an impact on the decision.

329. Vienna Convention, *supra* note 119, art. 30.

330. The concept *lex specialis derogat legi generali* is “a generally accepted technique of interpretation and conflict resolution in international law.” It indicates that “whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific.” See Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law (adopted by the International Law Commission at its Fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/61/10, ¶ 251), 408).

331. Donald McRae, *International Economic Law and Public International Law: The Past and the Future*, 17 J. INT’L ECON. L. 627, 635 (2014).

332. For discussion see Vadi, *When Cultures Collide*, *supra* note 6, at 857.

V. POLICY OPTIONS

The previous Part critically assessed the interplay between international investment law and human rights law protecting the rights of Indigenous peoples. It highlighted the power imbalance between the two systems, which perpetuates the power imbalance among states, investors, and Indigenous peoples. Against this background, this Part now examines two avenues that can facilitate the consideration of local communities' entitlements in international investment law: (i) a "treaty-driven approach" and (ii) a "judicially driven approach."³³³

A. *A Treaty-driven Approach to Promote the Consideration of Indigenous Rights in International Investment Law*

A treaty-driven approach suggests reform to bring international investment law better in line with human rights.³³⁴ It promotes the consideration of Indigenous rights in international investment law relying on the periodical renegotiation of IIAs. Treaty drafters can expressly accommodate Indigenous peoples' entitlements in the text of future IIAs or when renegotiating existing ones.³³⁵ For instance, Indigenous communities' interests can be mentioned in the preambles, exceptions, carve-outs, annexes, and provisions of IIAs.³³⁶ Such provisions would empower states to adopt measures to protect Indigenous peoples' rights. For instance, IIAs might require foreign investors to comply with existing human rights law as a condition for claiming rights under the treaty.³³⁷

333. Mihail Krepchev, *The Problem of Accommodating Indigenous Land Rights in International Investment Law*, 6 J. INT'L DISP. SETTLEMENT 42, 45 (2015).

334. Stephan W. Schill & Vladislav Djanic, Soc'y of Int'l Econ. Law, *International Investment Law and Community Interests*, Working Paper No. 2016/01, at 4 (2016).

335. VADI, CULTURAL HERITAGE, *supra* note 6, at 277–86; Krepchev, *supra* note 333, at 45.

336. Schill & Djanic, *supra* note 334, at 15.

337. *The Double Life of International Law*, *supra* note 4, at 1773–74 (adding that "in this manner, the mechanism that gives international investment law so much power—dispute settlement—is infused with the need to respect international Indigenous rights"); Foster, *Investors, States and Stakeholders*, *supra* note 5, at 407 ("Given the near-universal endorsement of UNDRIP by the international community, investors could not legitimately claim surprise or

The duty to protect the legitimate exercise of Indigenous peoples' cultural rights has led a number of states to include specific Indigenous exceptions in international environmental law instruments banning the hunt of protected species. "Aboriginal exemptions" commonly feature in a number of international environmental treaties, which include derogations to their main principles to accommodate the needs of Indigenous peoples.³³⁸ For instance, the 1946 International Convention for the Regulation of Whaling retains aboriginal rights to subsistence whaling.³³⁹ Such special measures and forms of differential treatment to protect the rights of Indigenous peoples are justified under human rights law. Therefore, there is no theoretical obstacle to prevent the insertion of similar aboriginal exemptions in the context of IIAs.

IIAs might require compliance with the requirements of free, prior, and informed consent and benefit-sharing for investments taking place in Indigenous lands.³⁴⁰ Under human rights law, the duty of the state to obtain the free, prior, and informed consent of the Indigenous peoples before approving any project affecting them requires *governments* to engage in a meaningful dialogue and consensus-building process with Indigenous communities. Nonetheless, nothing

prejudice if an investment treaty conferring benefits on them also memorialized an obligation on their part to respect the Indigenous rights enshrined in that instrument, or at least those applicable to the private sector.”).

338. See, e.g., Convention on Conservation of Migratory Species, art. 3.5, June, 23 1979, 19 I.L.M. 11; Interim Convention on Conservation of North Pacific Fur Seals, art. 7, Feb. 9, 1957, 314 U.N.T.S. 105 (describing the aboriginal hunting practices that are exempted by the application of the Convention).

339. International Convention for the Regulation of Whaling, art. III(13)(b), Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72 (permitting the taking of various baleen whales by Aborigines, but stipulating that “the meat and products of such whales are to be used exclusively for local consumption by the Aborigines”).

340. On benefit sharing, see Elisa Morgera, *The Need for an International Legal Concept of Fair and Equitable Benefit Sharing*, EUR. J. INT'L L. 27, 353 (2016) (noting that “a growing number of international legal materials refer to ‘benefit sharing’ with regard to natural resource use” and that “benefit sharing applies to relations between communities and private companies that may be protected by international investment law”). On the linkage between FPIC and benefit sharing, see Morgera, *The Need for an International Legal Concept of Fair and Equitable Benefit Sharing*, 376 (noting that “much remains to be clarified about the interaction between benefit sharing and FPIC. On the one hand, benefit sharing may serve as a condition for the granting of FPIC On the other hand, benefit sharing may represent the end result of an FPIC process”).

precludes states from requiring *investors* to consider the existence of protected groups when assessing the economic risks of a given investment³⁴¹ and obtain a social license to operate. While some scholars have suggested incorporating local communities as a part of multi-actor contracts,³⁴² other scholars have cautioned that “extractive industries can tackle the underlying causes of the growing opposition to their projects . . . by engaging in consent processes with [Indigenous] communities . . . with a view to obtaining their free, prior, and informed consent.”³⁴³

In this regard, “[t]here is a growing trend of seeing business enterprises . . . as having human rights obligations in their own rights, separate and apart from state obligations.”³⁴⁴ According to the Ruggie’s Framework for Business and Human Rights³⁴⁵ that is now embedded in the U.N. Guiding Principles on Business and Human Rights, a company is “responsible for respecting all human rights” and “ha[s] the obligation to obtain consent of the local population to its operation in order to ensure its own sustainability.”³⁴⁶ In other words, “for a social license to exist, there must be consent.”³⁴⁷ As the *Bear Creek* Tribunal put it, “[e]ven though the concept of ‘social license’ is not clearly defined in international law, all relevant international instruments are clear that consultations with Indigenous communities are to be made with the purpose of obtaining consent from all the relevant communities.”³⁴⁸

What does free, prior, and informed consent mean? The term *free* indicates that Indigenous peoples must be free from

341. Krepchev, *supra* note 333, at 71.

342. Ibrionke T. Odumosu-Ayanu, *Governments, Investors and Local Communities: Analysis of a Multi-Actor Investment Contract Framework*, 15 MELBOURNE J. INT’L L. 473 (2014).

343. Lisa J. Laplante & Suzanne A. Spears, *Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector*, 11 YALE HUM. RTS. & DEV. L.J. 69 (2008).

344. Sarah Sargent, *What’s in a Name? The Contested Meaning of Free, Prior and Informed Consent in International Financial Law and Indigenous Rights*, in VALENTINA VADI & BRUNO DE WITTE, CULTURE AND INTERNATIONAL ECONOMIC LAW 87–103 (Routledge 2015).

345. John Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, UN Doc A/HRC/8/5 (Apr. 7, 2008).

346. *Bear Creek Mining Corp. v. Peru*, Award, ICSID Case No. ARB/14/21, ¶ 227 (Nov. 30, 2017) (internal reference omitted).

347. *Id.*

348. *Id.* ¶ 406.

violence, intimidation, or harassment by the government or company. The term *prior* indicates that the government (and ideally companies) must seek approval from Indigenous communities *before* commencing any economic activity in their lands. The term *informed* signifies that the Indigenous community must receive all the information needed to make informed decisions in a language they can understand. As noted by Myrna Cunningham, the chair of the U.N. Permanent Forum on Indigenous Issues, “[l]ack of free, prior, and informed consent can have far reaching consequences on th[e] lives and human rights [of Indigenous peoples].” In particular, free, prior, and informed consent can be a tool to safeguard Indigenous peoples’ “rights over ancestral lands . . . their ability to carry out subsistence activities, and their ability to freely pursue their economic, social and cultural development in accordance with their right to self-determination.”³⁴⁹

Free, prior, and informed consent is a crucial legal tool for restoring an appropriate balance of power among states, investors, and Indigenous peoples. On the one hand, it enables Indigenous peoples to decide for themselves whether a given project is suitable to their own needs and aspirations or whether they prefer not to proceed. It enables them to shape their future and select the development model they prefer. It also “may provide Indigenous communities with a better ability to shape and derive benefits from projects on traditional lands.”³⁵⁰ On the other hand, through free, prior, and informed consent, investors can assess the viability of the intended investment. The support of local communities contributes to the viability of a project and even constitutes a necessary condition for its success in the long term. In turn, projects that local Indigenous communities veto should not proceed. The respect of free, prior, and informed consent by transnational corporations may provide them with “competitive advantage in a number of areas, such as preference in gaining government contracts, expedited developmental approvals and lower risks of litigation in the

349. *Interview with Myrna Cunningham, supra* note 60, at 55.

350. Risa Schwartz, *Realizing Indigenous Rights in International Environmental Law: A Canadian Perspective*, CIGI Papers No. 109/2016, at 5. (2016)

future.”³⁵¹ Finally, through free, prior, and informed consent, states can better implement their human rights obligations towards Indigenous peoples and acknowledge their parallel sovereignty (i.e., an Indigenous sovereignty that coexists with that of the state).³⁵²

Free, prior, and informed consent is a legal tool that bridges the gap between international investment law and human rights law and can contribute to the harmonious development of public international law. It is a crucial tool of self-determination: preventing the imposition of values, fashions, and economic models that may undermine the cultural identity, human rights, and core values of Indigenous peoples. If the U.N. practice concerning self-determination used to be restrictive, exclusively concerning the decolonization process and the emergence of new states, since the inception of the UNDRIP the concept of self-determination has expanded to include the self-determination of nations within given states.³⁵³ This new understanding of self-determination is consistent with the doctrine of the parallel sovereignty of Indigenous peoples within states. In fact, some recognize that “the existence of a given degree of [I]ndigenous sovereignty [is] parallel to the sovereign power held by the State.”³⁵⁴ The concept of self-determination also distinguishes ILO Convention 169, the most recent ILO instrument concerning Indigenous peoples, from its predecessor ILO Convention 107 (no longer open for signing).³⁵⁵ ILO Convention 107 was “the first international convention on the subject” and it “contained a fundamental flaw” as “it promote[d] eventual integration of . . . [I]ndigenous [persons] into the society at large rather than

351. Alexandra S. Wawryk, *Minimizing the Environmental and Cultural Impacts of Oil Operations in Emerging Economies: Transnational Oil Companies and Voluntary International Environmental Standards*, in BARBARA T. HOFFMAN, ART AND CULTURAL HERITAGE—LAW, POLICY AND PRACTICE 278 (CUP 2006).

352. Lenzerini, *supra* note 29, at 156 (“asserting the existence of a given degree of Indigenous sovereignty parallel to the sovereign power held by the state.”).

353. *Id.* at 160–61.

354. *Id.* at 156.

355. International Labor Organization, Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, ILO Convention No. 107, June 26, 1957, 328 U.N.T.S. 247.

promoting their right to self-determination.”³⁵⁶ ILO Convention 169 overcomes this flaw, assuming that Indigenous peoples have the right to determine their own development.³⁵⁷

Free, prior, and informed consent prominently features in the UNDRIP, being mentioned six times.³⁵⁸ Although the instrument is not legally binding, arguably its provisions can be considered as coalescing rules of customary law because a substantial number of states have adhered to it.³⁵⁹ Article 15 of the ILO Convention 169 has a more conservative wording, providing that Indigenous peoples have “the right . . . to participate in the use, management and conservation” of the natural resources pertaining to their lands. In cases in which the state retains the ownership of resources:

[G]overnments shall establish or maintain procedures through which they shall *consult* these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.³⁶⁰

Although “ambiguities persist over whether [I]ndigenous land rights encompass a right to veto decisions regarding development projects which are likely to affect [I]ndigenous traditional lands and resources,”³⁶¹ human rights courts have held that informed *consent* is required for large-scale development projects that would have a major impact on Indigenous land.³⁶² Therefore, for some scholars, the right of Indigenous peoples to free, prior, and informed consent does not merely have a procedural nature; rather, it has a

356. Campbell, *supra* note 135, at 563.

357. *Id.*

358. Declaration on the Rights of Indigenous Peoples, *supra* note 2, arts. 32, 10 (stating that “no relocation shall take place without free, prior and informed consent”), arts. 11, 19 (stating that “States shall consult and cooperate in good faith . . . in order to obtain their free, prior, and informed consent”), arts. 28, 29.

359. JAMES ANAYA, *INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES* 79 (2009).

360. ILO Convention 169, *supra* note 42, art. 15 (emphasis added).

361. Gaetano Pentassuglia, *Towards a Jurisprudential Articulation of Indigenous Land Rights*, 22 *EUR. J. INT’L L.* 165, 169 (2011).

362. *See, e.g., Saramaka Peoples v. Suriname*, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 172, ¶ 134 (Nov. 28, 2007).

substantive gate-keeping function by “enabl[ing] Indigenous peoples to protect their substantive land rights . . . and culture.”³⁶³ The right to free, prior, and informed consent can enable Indigenous peoples to exercise the right to self-determination and determine the model of development they prefer in conformity with their worldview.³⁶⁴

A number of IIAs include clauses expressly acknowledging the rights of Indigenous peoples. For instance, New Zealand has included an exception in its IIAs that recognizes the state’s right to protect the Maori under the Treaty of Waitangi and exempts such measures from the scrutiny of arbitral tribunals.³⁶⁵ Analogously, the Energy Charter Treaty³⁶⁶ allows the contracting parties to adopt “measures designed to benefit investors who are aboriginal people.”³⁶⁷ Canada’s new model Foreign Investment Protection Agreement (FIPA) also includes preferential treatment for aboriginals in its annex.³⁶⁸ Malaysia has similarly excluded measures designed to promote economic empowerment of the Bumiputras ethnic group from the scope of its BITs.³⁶⁹

The participation of Indigenous representatives in the drafting and renegotiation of IIAs has been recently recommended by the Special Rapporteur on the rights of Indigenous peoples Victoria Tauli-Corpuz.³⁷⁰ After finding that nondiscrimination and expropriation provisions in IIAs have “significant potential to undermine the protection of Indigenous peoples’ land rights and the strongly associated cultural rights,”³⁷¹ she recommended states to develop participatory mechanisms so that Indigenous peoples have the ability to comment and provide

363. Lillian Aponte Miranda, *The Role of International Law in Intrastate Natural Resource Allocation: Sovereignty, Human Rights, and Peoples-based Development*, 45 VAND. J. TRANSNAT’L L. 785, 828 (2012).

364. See Sargent, *supra* note 344, at 95.

365. See VADI, CULTURAL HERITAGE, *supra* note 6, at 279.

366. Energy Charter Treaty, Dec. 17, 1994, 2080 U.N.T.S. 95.

367. See VADI, CULTURAL HERITAGE, *supra* note 6, at 279–80.

368. *Id.* at 279–80.

369. *Id.*

370. See Victoria Tauli-Corpuz, Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples, Report on the Impact of International Investment and Free Trade on the Human Rights of Indigenous Peoples, U.N. Doc A/70/301 (2015).

371. *Id.* ¶ 23.

inputs in the negotiation of IIAs.

Yet, the practice remains relatively scarce. Most of the existing IIAs do not contain any explicit reference to Indigenous interests.³⁷² Moreover, IIAs generally include “survival clauses that guarantee protection under the treaty . . . for a substantial period after the treaty has elapsed.”³⁷³ Therefore, “it is unrealistic to expect that treaty drafting can solve the conflict between [international investment law] and other community interests on its own.”³⁷⁴ While treaty-drafting can “stabilize relations” between investors, states, and Indigenous peoples,³⁷⁵ it seems crucial to consider other mechanisms to promote the consideration of Indigenous rights in international investment law and arbitration.³⁷⁶

B. *A Judicially-driven Approach to Promote the Consideration of Indigenous Rights in International Investment Law*

A judicially driven approach suggests that international investment law and arbitration already possess the tools to address the interplay between investors’ rights and community interests.³⁷⁷ Such an approach promotes the consideration of Indigenous rights in international investment arbitration relying on the interpretation and application of international investment law by arbitral tribunals. Its implicit assumption is that “[w]hile [international investment law] is a highly specialized system, it is not a self-contained one, but forms part of the general

372. Pushkar Anand & Amit Kumar Sinha, *Protecting the Rights of Tribals*, THE HINDU (Feb. 22 2017), <http://www.thehindu.com/opinion/oped/protecting-the-rights-of-tribals/article17372134.ece> (noting that “none of the 80-plus BITs signed by India contains . . . [a] provision on the rights [of Indigenous peoples]. Even the 2015 Model Indian agreement does not contain any such provision”).

373. See Schill & Djanic, *supra* note 334, at 16.

374. *Id.*

375. See Foster, *Investors, States and Stakeholders*, *supra* note 5, at 420; Kenneth J. Vandavelde, *Rebalancing Through Exceptions*, 17 LEWIS & CLARK L. REV. 449, 451 (2013) (noting that “countries already are engaged in rebalancing through treaty exceptions” but also aptly highlighting, at 459, that “if the . . . provisions of the BITs are interpreted as they should be interpreted, there is very little in them that would impede legitimate measures to protect the environment [and community interests]”).

376. See Schill & Djanic, *supra* note 334, at 16.

377. *Id.* at 4.

system of international law.”³⁷⁸

Arbitral tribunals are of limited jurisdiction and cannot adjudicate on the eventual infringement of Indigenous peoples’ rights. Arbitral tribunals lack the jurisdiction to hold states liable for breach of their human rights obligations. Rather, they can only determine if the protections in the relevant investment treaty have been breached.

However, this does not mean that Indigenous rights are and/or should be irrelevant in the context of investment disputes. IIAs are international treaties; they belong to international law. Therefore, arbitral tribunals can and should interpret international investment law in conformity with international law.³⁷⁹ Because international investment law constitutes an important field of international law, it should not frustrate the aim and objectives of the latter. Several international law instruments recognize and protect the human rights of Indigenous peoples, including the UNDRIP, the Universal Declaration of Human Rights (UDHR),³⁸⁰ the International Covenant on Civil and Political Rights (ICCPR),³⁸¹ the Covenant on Economic, Social and Cultural Rights (ICESCR),³⁸² and ILO Convention 169.³⁸³ Arbitral tribunals should interpret international investment law by taking into account “any relevant rules of international law applicable in the relations between the parties.”³⁸⁴ In fact, according to customary rules of treaty interpretation as restated by the VCLT, when interpreting a treaty, arbitrators can take other international obligations of the parties into account.³⁸⁵ As the *Urbaser* Tribunal put it,

378. *Id.* at 16.

379. *Id.*

380. *See* Universal Declaration of Human Rights, G.A. Res. 217A, art. 17, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948) [*hereinafter* UNDHR].

381. *See* International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368, 999 U.N.T.S. 171.

382. *See* International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360, 993 U.N.T.S. 3.

383. ILO Convention 169, *supra* note 42.

384. Vienna Convention, *supra* note 119, art. 31(3)(c).

385. *Id.* For commentary, *see generally* McLachlan, *Investment Treaties and General International Law*, 57 INT’L & COMP. L.Q. 361, 369 (2008) (explaining the key relevance of this provision for defragmenting international law); RAINER HOFMANN & CHRISTIAN TAMS, *INTERNATIONAL INVESTMENT LAW AND GENERAL INTERNATIONAL LAW: FROM CLINICAL ISOLATION TO SYSTEMIC INTEGRATION?* (Nomos 2011); TRINH HAI YEN, *THE INTERPRETATION*

IAs “ha[ve] to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights.”³⁸⁶

International law provisions protecting Indigenous peoples’ rights include both hard law and soft law.³⁸⁷ Examples of binding cultural entitlements abound. For instance, Article 1 of both the ICCPR and the ICESCR recognize the right of self-determination in referring to the peoples’ right to “freely determine their political status and freely pursue their economic, social and *cultural* development.”³⁸⁸ The same provision also clarifies that international economic cooperation is “based upon the principle of mutual benefit[] and international law” and that “in no case may a people be deprived of its own means of subsistence.”³⁸⁹ Significantly, the principle of self-determination is commonly regarded as a *jus cogens* rule.³⁹⁰ Other norms protecting Indigenous rights with *jus cogens* status³⁹¹ include the prohibitions of discrimination and

OF INVESTMENT TREATIES 55–61 (Brill 2014).

386. Urbaser v. Argentina, Award, ICSID Case No. ARB/07/26, ¶ 1200 (Dec. 8, 2016).

387. Due to space limits, this Part can provide only a limited number of examples of human rights law provisions recognizing cultural entitlements.

388. International Covenant on Civil and Political Rights, *supra* note 381, art. 1.1; International Covenant on Economic, Social and Cultural Rights, *supra* note 382, art. 1.1 (emphasis added).

389. International Covenant on Civil and Political Rights, *supra* note 381, art. 1.2; International Covenant on Economic, Social and Cultural Rights, *supra* note 382, art. 1.2.

390. ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 51 (2006) (noting that “[t]he right of peoples to self-determination is undoubtedly part of *jus cogens* because of its fundamental importance”); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 511, 582 (7th ed. 2008); JOSHUA CASTELLINO, INTERNATIONAL LAW AND SELF-DETERMINATION 99, 101, 123 (2000); RAIC, STATEHOOD AND THE LAW OF SELF-DETERMINATION 289 n.254 (Martinus Nijhoff ed. 2002). *But see* Matthew Saul, *The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?*, HUM. RTS. L. REV. 11 609, 610 (2011) (noting that “international lawyers continue to be troubled by the question of whether or not any aspect of the legal norm has *jus cogens* status”); Daniel Thürer & Thomas Burri, *Self-Determination*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT’L L., ¶ 45 (arguing that the “function of the principle of self-determination to maintain and promote stability and justice in international relations. It seems more productive to conceive self-determination in such a broad and functional fashion, than to lay much emphasis on neuralgic points, such as its possible dogmatic qualification as a peremptory norm of international law”).

391. Vienna Convention, *supra* note 119, art. 53 (recognizing a *jus cogens* norm as one “accepted and recognized by the international community of states as

genocide.

There are more instances of nonbinding cultural entitlements. For instance, Indigenous culture plays a central role in the UNDRIP. Although the UNDRIP is not binding *per se*, it can coalesce customary international law and therefore become binding. Some of its contents already express customary international law or repeat provisions appearing in (binding) treaty law.³⁹²

Over the past twenty years, “there has been a robust development of jurisprudence regarding the land and resource rights of Indigenous peoples under international law.”³⁹³ Such jurisprudence “generally emphasizes the unique and enduring cultural relationship of peoples to their territory.”³⁹⁴ “[F]or Indigenous peoples, the ability to reside communally on their lands . . . is inextricably tied to the preservation of communal identity, culture, religion and traditional modes of subsistence.”³⁹⁵

In conclusion, international investment law does not pay too much attention to culture, at least when it comes to the current texts of IIAs. International arbitral tribunals have no specific mandate (or a limited mandate at best) to protect Indigenous peoples’ rights. Nonetheless, interpretation in conformity with general international law is required by the principle of systemic integration as restated in Article 31(3)(c) of the VCLT. Therefore, human rights law and general international law can influence the interpretation and application of international investment law. This argument is even stronger with regard to cultural entitlements that are binding or have a peremptory character. Because arbitral tribunals often seem reticent when referring to, let alone considering, such rights, increased efforts by all actors involved—treaty negotiators, arbitrators, academics, and

a whole as a norm from which no derogation is possible”). On *jus cogens* and international investment law, see Andrea K. Bjorklund, *Mandatory Rules of Law and Investment Arbitration*, 18 AM. REV. INT’L ARB. 175, 175–203 (2007); Valentina Vadi, *Jus Cogens in International Investment Law and Arbitration*, 46 NETH. Y.B. INT’L L. 357–388 (2015).

392. On the effectiveness of soft law in international investment law, see *e.g.*, Andrea K. Bjorklund, *Assessing the Effectiveness of Soft Law Instruments in International Investment Law*, in ANDREA K. BJORKLUND & AUGUST REINISCH, INTERNATIONAL INVESTMENT LAW AND SOFT LAW 51–81 (2012).

393. Aponte Miranda, *supra* note 363, at 813.

394. *Id.* at 825.

395. *Id.* at 814.

Indigenous peoples—are needed to foster such consideration.

CONCLUSIONS

The effective protection of Indigenous cultural heritage is crucial for the effective protection of the rights of Indigenous peoples. Cultural heritage is “something that is left behind, to be discovered and rediscovered over and over again, that is filled with meanings conveying values in the present as well as for future generations.”³⁹⁶ The UNDRIP has emphasized the importance of Indigenous peoples’ cultural entitlements and highlighted the linkage between the protection of their cultural identity and their human rights.³⁹⁷ Although the Declaration is not binding *per se*, it may be or become so, insofar as it reflects customary international law, general principles of law, and/or *jus cogens*. At the very least, the UNDRIP constitutes a standard that states should strive to achieve.

The interplay between FDI on the one hand, and Indigenous cultural heritage on the other, in international investment law is coming to the forefront of legal debate. The arbitrations analyzed in this Article provide a snapshot of the clash of cultures between international investment law and human rights law requiring the protection of Indigenous heritage. These arbitrations also highlight a fundamental power imbalance between the two regimes that perpetuates a historical power imbalance among states, investors, and Indigenous communities. Because of the power imbalance between the two regimes, states tend to favor transnational business interests over Indigenous peoples’ fundamental rights. This favoritism further exacerbates the power imbalance between multinational corporations and Indigenous peoples.

Investment disputes concerning Indigenous cultural heritage often involve the conflict between rights of the investors and the rights of Indigenous peoples under different branches of international law. Therefore, arbitral tribunals

396. See Josefsson & Aronsson, *supra* note 55, 2098.

397. See Isabelle Schulte-Tenckhoff, *Treaties, Peoplehood, and Self-Determination: Understanding the Language of Indigenous Rights*, in ELVIRA PULITANO, *INDIGENOUS RIGHTS IN THE AGE OF THE UN DECLARATION* 64, 67 (CUP 2012).

may not be the most suitable fora to settle this kind of dispute. They may face difficulties in finding an appropriate balance between the different interests concerned. They are courts of limited jurisdiction and cannot adjudicate on state violations of Indigenous peoples' entitlements.

This does not mean, however, that arbitrators should not take Indigenous entitlements into account. This Article identified two main avenues for considering Indigenous peoples' concerns in the context of investment treaty arbitration. First, *de lege lata*, according to Article 31(3)(c) of the VCLT, arbitrators can interpret international investment law by taking into account other international law commitments of the state. Moreover, arbitral tribunals should be sympathetic to amicus curiae briefs presented by Indigenous tribes, accepting them as a matter of course in disputes that can affect their interests. This would enable Indigenous communities to have a say in proceedings that can affect them, even though participation as amici curiae does not amount to a right.

Second, *de lege ferenda*, states can negotiate future IIAs and renegotiate existing ones to facilitate the consideration of community interests in investor–state arbitration. This process is already under way, as states have inserted references to important values in treaty preambles, exceptions, carve outs, and annexes. Of particular importance would be the requirements of free, prior, and informed consent and benefit-sharing. Such provisions protect paramount interests and facilitate tribunals' duty to consider international law when interpreting and applying international investment provisions.

In conclusion, this Article does not exclude the potential for FDI to represent a positive force for development. It highlights that international investment arbitration has started to address the power imbalance between foreign investors and host states. At the same time, however, this vital field of international law risks maximizing and/or perpetuating power asymmetries among states, investors, and Indigenous peoples. Therefore, the Article proposes two avenues for creating a balance of power that enables the protection of FDI and ensures the protection of Indigenous cultural heritage. Only by interpreting international investment law in conformity with international law and/or fine-tuning its language can international investment law

develop its potential to enable peaceful and prosperous relations among nations and contribute to the development of international law.