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Trade, Law *and* Development

Vol. 3, No. 2

2011

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Published by

The Registrar, National Law University, Jodhpur

ISSN : 0976-2329 | eISSN : 0975-3346

Patrick Wieland, *Why the Amicus Curia Institution is Ill-Suited to address Indigenous People's Rights before Investor-State Arbitration Tribunals: Glamis Gold and the Right of Intervention*

3(2) TRADE L. & DEV. 334 (2011)

WHY THE AMICUS CURIA INSTITUTION IS ILL-SUITED
TO ADDRESS INDIGENOUS PEOPLES' RIGHTS BEFORE
INVESTOR-STATE ARBITRATION TRIBUNALS: *GLAMIS GOLD*
AND THE RIGHT OF INTERVENTION

PATRICK WIELAND*

Over the last decade, investor-state arbitration tribunals have shown more willingness to provide non-disputing parties with some possibility to participate through written amicus briefs. However, amicus participation is not a panacea to cure all of the existing shortcomings in investment law as regards transparency and access to justice. In fact, amicus has not yet been recognized as a right and is still subject to a series of limitations, all of which restrict its effectiveness. This article argues that such restrictions should be tempered in the case of indigenous peoples, in the light of their distinct cultural identity and the right to self-determination. To avoid the defenselessness of indigenous peoples and potential areas of overlap with their human rights, this article proposes the incorporation into international arbitration of the procedural institution of "intervention"—as opposed to amicus—from municipal law.

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I. INTRODUCTION

Investor-state arbitration is a private dispute resolution mechanism between investors and states. However, arbitration awards may affect a broader range of actors than the two parties involved in the dispute, impinging on the interests of the public in general or third parties, who remain unrepresented during the procedure. This is why investor-state arbitration has been criticized for lacking transparency, legitimacy, and democratic accountability. In this context, the amicus curia institution offers a way to overcome the spillover effects of arbitration awards. Indeed, by giving a voice to the unrepresented, non-disputing parties, amicus briefs tend to dissipate the secrecy and contribute to the procedural legitimacy and quality of the awards. However, the institution of amicus curiae is being used in a restricted fashion. On the one hand, amicus submissions have not yet been recognized as a right: they are a procedural prerogative subject to the tribunal's discretion. On the other hand, international arbitration tribunals usually impose a set of restrictions on amici: they are limited to written briefs, they must comply with page limits, and they are generally not granted access to the arbitral records or the arbitration proceedings either.

In this regard, it is imperative to distinguish those cases where third parties seek to intervene as impartial “friends of the court” representing a broad public concern from those where the arbitration award has the potential to impinge on their rights or interests. While the factual, technical or expert opinions of non-governmental organizations (“NGO”) can be adequately channeled through an amicus brief, this institution is ill-suited to safeguard the right of parties who hold a legitimate, direct interest in the outcome of the procedure.

This shortcoming is evidenced in the North Atlantic Free Trade Agreement (NAFTA) tribunal’s award in *Glamis Gold v. United States*.¹ In this case, the Quechan Indian Nation sought to participate as amicus because a particular project, the Glamis’ gold mining project would have a significant impact on their ability to travel physically and spiritually along the Indian trails located next to the project, therefore restricting their freedom of religion. Though the tribunal granted the Quechan Indian Nation leave, their participation was conditioned to the discretion of the tribunal and subjected to the restrictions that are generally imposed on amicus participation. In this way, *Glamis Gold* evidences that the awards issued by international arbitrators, if they were in the favour of the investor, could have serious ramifications on indigenous peoples’ rights to land and religion, as recognized in international human rights instruments.

This article contends that investor-state arbitration should gradually move towards the recognition of an absolute right of participation of indigenous peoples. For this, it proposes incorporating the procedural institution of “intervention” from municipal law into international arbitration law. “Intervention” in the United States (U.S) is conceived as a procedural device whereby a stranger is permitted to become a party to a pending action to prevent peril to the non-disputing parties. Singling out indigenous peoples by granting this special status as “interveners” before investor-state arbitration is justified because they possess a distinct cultural identity and, have the right to self-determination.

Part II of this article provides a brief overview of the evolution of amicus participation in investor-state arbitration and highlights the limits that have been imposed by arbitrators. Part III presents the framework that has emerged in international law to protect indigenous rights. It also shows the incidence that international investments may have on issues that concern indigenous groups and nation-states. To exemplify this conundrum, a typology of potential overlap between nation-states and indigenous peoples in issues such as natural resources, religion, and intellectual property is presented. Finally, Part IV, after introducing

¹ See *Glamis Gold Ltd v. the Government of the United States of America*, Award (Aug. 8, 2009) available at: <http://www.state.gov/documents/organization/125798.pdf> (hereinafter *Glamis Gold*).

the *Glamis Gold* award, unpacks the need to incorporate “intervention” rules to international arbitration law as a way to address indigenous issues more comprehensively.

Before proceeding, it is imperative to outline the scope and limitations of this article. First, the conflicts referred to are limited to those circumstances of legal uncertainty arising from undefined or unrecognized indigenous rights, that is to say, those cases where indigenous rights have not been settled by the law. Such controversies should, in principle, be adjudicated by domestic courts. Second, the article begins with the assumption that indigenous peoples can benefit from the international investment law “infrastructure” already in place. Indeed, the urgency and gravity of indigenous claims presumably justifies having as many legal tools as possible, especially in a context of domestic closure. Third, the article also assumes that traditional leaders elected by indigenous groups are not only identifiable, but are also representative and accountable.

II. OVERVIEW OF THE AMICUS CURIA INSTITUTION IN INTERNATIONAL INVESTMENT LAW

A. The Spill-over Effects of Investor-State Arbitration

The driving forces behind arbitration are party autonomy and mutual consent.² Even though arbitration is primarily a private dispute resolution mechanism, it can have significant repercussions for the public in general.³ Hence, in investor-state arbitration there is an underlying tension between the parties’ need for confidentiality and privacy of proceedings on the one hand, and the public claim for transparency and inclusiveness on the other.⁴ Anthony De Palma portrays this tension as follows:

Their meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a group of international tribunals handles disputes between investors and foreign governments can lead to national laws being revoked and environmental regulations changed. And it is all in the name of protecting foreign investors.⁵

² See Dora Marta Gruner, *Accounting for Public Interest in International Arbitration: The Need for Procedural and Structural Reform*, 41 COLUM. J. TRANSNAT’L L. 923 (2003) (hereinafter Gruner).

³ See *id.*

⁴ See Alessandra Asteriti and Christian J. Tams, *Transparency and Representation of the Public Interest in Investment Treaty Arbitration* (June 1, 2010), available at: <http://ssrn.com/abstract=1618843> (last visited Nov. 2, 2010) (hereinafter Asteriti & Tams).

⁵ *Id.* at 5.

Not surprisingly, in recent years there has been an intense debate about the transparency and inclusiveness in arbitral proceedings.⁶ The involvement of the state and public policy in the investment context can lead to arbitral decisions that affect a significantly broader range of actors than the two parties to the dispute.⁷ Some disputes involve challenges to government measures intended to promote or achieve important public policy goals, such as environmental protection, labor standards, minority rights, or policies of affirmative action.⁸ Accordingly, critics of investor-state arbitration consider that such public policy issues, which penetrate deeply into traditionally domestic sovereign prerogatives,⁹ should be adjudicated before open courts and be subject to full judicial oversight, rather than be adjudicated by international private arbitrators.¹⁰ In this vein, there is a concern that unaccountable private arbitrators, rather than a country's judges, lawmakers or citizens, will determine "the status of statutes",¹¹ and that corporations will direct public policy through the use of, or threat to use, investment arbitration.¹²

⁶ See *id.*, at 2; See also, Alexis Mourre, *Are Amici Curiae the Proper Response to the Public's Concerns on Transparency in Investment Arbitration?*, 5 LAW & PRAC. INT'L CTS. & TRIBUNALS 257, 266 (2006) (hereinafter Mourre).

⁷ See Eugenia Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 29 BERKELEY J. INT'L L. 200 (2011) (hereinafter Levine).

⁸ See J. Anthony VanDuzer, *Enhancing the Procedural Legitimacy of Investor-State Arbitration through Transparency and Amicus Curiae Participation*, 52 MCGILL L.J. 681 (2007) (hereinafter VanDuzer); Daniel Barstow Magraw Jr. & Niranjali Manel Amerasinghe, *Transparency and Public Participation in Investor-State Arbitration*, 15 ILSA J. INT'L & COMP. L. REV. 337 (2009) (hereinafter Magraw & Amerasinghe); and Francesco Francioni, *Access to Justice, Denial of Justice and International Investment Law*, 20(3) EUR. J. INT'L L. 729, 738 (2009) (hereinafter Francioni).

⁹ Magraw & Amerasinghe, *supra* note 8.

¹⁰ See Craig Forcese, *Does the Sky Fall? NAFTA Chapter 11 Dispute Settlement and Democratic Accountability*, 14 MICH. ST. J. INT'L L. 315 (2006) (hereinafter Forcese); Naveen Gurudevan, *An Evaluation of Current Legitimacy-based Objections to NAFTA's Chapter 11 Investment Dispute Resolution Process*, 6 SAN DIEGO INT'L L.J. 399 (2005) ("Some scholars argue that states should be free from interference and from the fear of an adverse arbitration outcome in order to effectively deploy its police powers to protect the health and safety of its citizens. . . . There may be some validity to the concern that important questions of domestic public policy and state liability to foreign investors should not be left to ad hoc arbitral panels that unlike domestic courts are unaccountable. The objection takes either of two forms: 1) that adjudication of investment disputes should not be left to supranational entities of any kind, or 2) that it should not be delegated to ad hoc arbitration").

¹¹ See Levine, *supra* note 7, at 7 (claiming that international investment arbitration has created a "global administrative law").

¹² See Anne Deveboise Ostby, *Will Foreign Investors Regulate Indigenous Peoples' Right to Self-determination?*, 21 WIS. INT'L L.J. 223 (2003) (hereinafter Ostby); and Alison A. Ochs, *Glamis Gold Ltd.—A Foreign United States Citizen? NAFTA and its Potential Effect on Environmental Regulations and the Mining Law of 1872*, 16 COLO. J. INT'L ENVTL. L. & POL'Y 495, 508-518

As arbitrators begin to strike down national regulations,¹³ critics fear that the investor-state dispute resolution system is transferring decision-making from the national to the international level.¹⁴ Such a situation diminishes democratic control of government agendas and interferes with government accountability to a broad constituency.¹⁵ Others attribute this increasing interest in investor-state arbitration to the fact that when the arbitral awards find the state responsible for a treaty breach, they may order payment of damages, which would have a direct impact on the national budget.¹⁶

Owing to all the above factors, investor-state arbitration has been criticized for its lack of transparency, legitimacy, and democratic accountability.¹⁷ Notwithstanding these criticisms, international arbitration cannot be vested with all the features of an actual court without losing its attractiveness to investors.¹⁸ Opening up the arbitration system to the general public may convert it into a “court-like” system and thus make it lose its appealing attributes like cost-effectiveness, celerity and -most importantly- confidentiality.¹⁹ Consequently, it is imperative “to balance the attractive features of investment arbitration with acknowledgment and accommodation of the impact of investor-state arbitration on broader public policy and third-party interests”.²⁰ The problem, however, is that the desired level of openness and transparency is not always obvious for it varies from polity to polity.²¹

To give a voice to unrepresented parties and provide an extra layer of public oversight, domestic and international tribunals have progressively relied on the

(2005) (hereinafter Ochs)(arguing that companies bringing NAFTA claims use NAFTA to pressure governments to change environmental and public health laws because of their large compliance costs, which poses a fundamental challenge to a government’s ability to regulate private economic activity in the public interest).

¹³ See e.g. Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41. VAND. J. TRANSNAT’L L. 775 (hereinafter Choudhury).

¹⁴ See *id.*, at 777.

¹⁵ See Forcese, *supra* note 10.

¹⁶ See Asteriti and Tams, *supra* note 4, at 5-6

¹⁷ See e.g. Choudhury, *supra* note 13.

¹⁸ See Levine, *supra* note 7, at 8.

¹⁹ See *id.*, at 23-24; and Jorge Viñuales, *Human Rights and Investment Arbitration: The Role of Amici Curiae* (2006) at 254, available at: <http://redalyc.uaemex.mx/pdf/824/82400806.pdf> (last visited Nov. 1, 2011) (“[More openness] may come to the cost of pushing investors to look for other dispute settlement mechanisms. This is the basic dilemma underlying the admission of amici curiae in international arbitration”) (hereinafter Viñuales)

²⁰ Levine, *supra* note 7, at 8.

²¹ See VanDuzer, *supra* note 8, at 696.

amicus curia institution as an important procedural tool.²² This institution is explored subsequently.

B. The Role and Limitations of the Amicus Curia Institution

Amici or “friends of the court” participants in a procedure are not “interveners” in a technical sense, since they do not vindicate their own rights.²³ Nevertheless, they help improve, though indirectly, the opportunities of access to justice by providing useful factual information and legal insights in addition to those provided by the disputing parties.²⁴ Indeed, when a public entity such as a governmental organ or agency is permitted to submit an amicus brief to a tribunal, that entity is likely to speak for the ‘public’ and to address the ramifications of a claim that go beyond the effects on the individual parties.²⁵

Overall, allowing amicus submissions contributes to the procedural legitimacy, protection of third party interests, and quality of the award.²⁶ Third party collaboration can provide an extra layer of expertise or perspective to the issues discussed,²⁷ providing factual information and legal arguments that the parties may choose not to raise.²⁸ It encourages future involvement by other amicus groups, infuses the arbitration process with elements of democracy, and helps dissipate the criticisms based upon secrecy.²⁹ In short, letting amici curiae “enter the dark room” can show the world how concerned international arbitrators are about issues like the environment, welfare or public health.³⁰

However, the amicus curia institution is not exempt from criticism. In the U.S., Judge Richard Posner argues that most amicus briefs are not helpful because they frequently include duplicative arguments and serve mainly as a means to extend one of the party’s brief.³¹ It also affects the scope, complexity, and length of the arbitration,³² elevating the overall costs and generating delays in the

²² See Viñuales, *supra* note 19, at 237.

²³ See Francioni, *supra* note 8, at 740; and Gruner, *supra* note 2.

²⁴ *Id.*

²⁵ Gruner, *supra* note 2, at 43.

²⁶ See Magraw & Amerasinghe, *supra* note 8.

²⁷ See Kyla Tienhaara, *Third Party Participation in Investment-Environment Disputes: Recent Developments*, 16 REV. EUR. COMMUNITY & INT’L ENVTL. L. 230, 239 (2007) (hereinafter Tienhaara).

²⁸ See Magraw & Amerasinghe, *supra* note 8.

²⁹ See Choudhury, *supra* note 13, at 818.

³⁰ Mourre, *supra* note 6, at 266.

³¹ See Chris Ford, *What are ‘Friends’ for? In Chapter 11 Disputes, Accepting Amici would Help Lift the Curtain of Secrecy Surrounding Investor-state Arbitrations*, 11 SW. J. L. & TRADE AM. 207 (2005).

³² See Meg Kinnear, *Transparency and Third Party Participation in Investor-State Dispute*

procedure, as they have an additional set of pleadings to address.³³ From the claimants' viewpoint, investors may fear that the increased openness will jeopardize confidentiality.³⁴ Other concerns pertain to the amici's legitimacy (to what extent do they represent the interests of all or part of the civil society?) and ethical conduct (are they really independent and immune to manipulation by one party?).³⁵ Nonetheless, some these criticisms can be resolved by establishing clear procedures as to when and how amicus can participate³⁶. To be clear, when improperly used, amicus collaboration could undermine the very arbitration regime it is supposed to strengthen.³⁷

C. *Amici Briefs in International Investment Law*

Historically, the amicus curia institution played no role in investor–state arbitration. At first, arbitration tribunals refused to allow third-party participation due to the inherent differences between arbitration proceedings and those before domestic or international courts.³⁸ However, over the last decade, certain arbitration tribunals have shown more willingness to provide third parties with some possibility to participate through written amicus briefs,³⁹ though the different arbitration frameworks have not responded in similar ways.⁴⁰

The first two cases in which arbitration tribunals recognized their power to admit and consider amicus submissions came up under the NAFTA framework. In the 2001 *Methanex Corporation v. United States of America*⁴¹ and *United Parcel Services v.*

Settlement (2005) at 7, available at: <http://www.oecd.org/dataoecd/25/3/34786913.pdf> (last visited Oct. 29, 2011) (hereinafter Kinnear).

³³ See *id.*; and, Martin Hunter & Alexei Barbuk, *Procedural Aspects of Non-disputing Party Interventions in Chapter 11 Arbitrations*, 3 ASPER REV. INT'L BUS. & TRADE L. 151 (2003); and Héctor Mauricio Medina-Casas, *Las partes en el arbitraje CLADI*, 15 INT'L LAW, REVISTA COLOMBIANA DE DERECHO INTERNACIONAL 215-242 (2009).

³⁴ See Levine, *supra* note 7, at 24.

³⁵ Mourre, *supra* note 6, at 266-270.

³⁶ See Tienhaara, *supra* note 27, at 240.

³⁷ Jorge Viñuales, *supra* note 19, at 25.

³⁸ See Levine *supra* note 7, at 10 (“In *Aguas del Tunari SA v. The Republic of Bolivia* [the Bechtel case] . . . the tribunal denied citizens and environmental groups standing at the arbitration due to the parties’ unwillingness to consent to their participation. The tribunal, which was operating under the auspices of ICSID, found that the “interplay of the ICSID Convention and the BIT, and the consensual nature of arbitration” left the decision as regards amicus participation in the hands of the parties to the arbitration; since the parties did not consent, the tribunal lacked the power to allow any form of third-party intervention”). See also Francioni, *supra* note 8, at 742; and Choudhury, *supra* note 13, at 814.

³⁹ See Levine, *supra* note 7, at 2.

⁴⁰ See Asteriti & Tams, *supra* note 4, at 6.

⁴¹ See *Methanex Corp. v. United States*, Decision of the Tribunal on Petitions from

*Canada*⁴² awards, the NAFTA tribunals held that even though they had no power to admit parties to the arbitration, receiving written submissions from third parties was within their powers to manage the procedure. Moreover, they acknowledged that amicus briefs would help the tribunals' process of understanding and resolving the dispute:⁴³

There is an undoubted public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between private parties. This is not merely because one of the disputing parties is a State. . . The public interest in this arbitration arises from its subject matter, as powerfully suggested in the Petitions. There is also a broader argument, as suggested by the [United States] and Canada: the Chapter 11 arbitral process could benefit from being perceived as more open or transparent, or conversely be harmed if seen as unduly secretive.⁴⁴

Subsequently, the NAFTA tribunals have allowed several NGOs to submit written briefs.⁴⁵

Following the *Methanex* and *UPS* awards, the Free Trade Commission (FTC) in 2003 issued a statement recommending that NAFTA tribunals adopt procedures to deal with participation by non-disputing parties.⁴⁶ The FTC Statement states that 'nothing in the NAFTA limits a tribunal's discretion to accept written submissions from a non-disputing party'. Among other recommendations, it suggests the form and content of an application for leave; it sets several criteria for the tribunal to consider in determining whether to grant leave to file a non-disputing party submission, and it establishes that the non-disputing party that filed a submission is not entitled to make further submissions.⁴⁷

It is worth mentioning that two NAFTA parties—Canada and the U.S.—have reformulated their bilateral investment treaty (BIT) models to include provisions

Third Persons to Intervene as Amici Curiae (Jan. 15, 2001) (hereinafter *Methanex*).

⁴² See *United States Parcel Service of America v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae (Oct. 17, 2001) (hereinafter *UPS*).

⁴³ See VanDuzer, *supra* note 8, at 712.

⁴⁴ *Supra* note 41, ¶ 49.

⁴⁵ See Choudhury, *supra* note 13, at 815; and Francioni, *supra* note 8, at 741.

⁴⁶ See NAFTA Free Trade Commission, Statement of the Free Trade Commission on Non-Disputing Party Participation, available at: <http://www.naftaclaims.com/Papers/Nondisputing-en.pdf> (last visited December 5, 2011).

⁴⁷ Nonetheless, the FTC Statement is a non-binding document for Chapter 11 tribunals.

that empower tribunals to consider, though on a discretionary basis, granting third parties the right to submit briefs in investment arbitration and require that all hearing be open to the public.⁴⁸ These new provisions are found in the free trade agreements entered into between the U.S and Chile, Colombia, Dominican Republic, Morocco, Peru, Singapore, and Uruguay.⁴⁹ Generally speaking, both the new BIT models attend to several core transparency issues and undertake openness exceeding that under the NAFTA.⁵⁰

As regards the International Centre for Settlement of Investment Disputes (ICSID) framework, while at first arbitration tribunals denied amici submissions due to the disputing parties' reluctance,⁵¹ in subsequent cases certain tribunals have extended amicus rights to NGOs, in cases such as *Bivater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*⁵² and *Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v. The Argentina*.⁵³ These cases were decided under Rule 37(2) of the ICSID Arbitration Rules,⁵⁴ as amended in 2006,⁵⁵ which grant the arbitral

⁴⁸ See Levine *supra* note 7, at 10-11. See also <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx> (last visited Dec. 8, 2010) (Canadian Foreign Investment Promotion and Protection Agreements); and <http://www.state.gov/documents/organization/38710.pdf> (last visited Dec. 2, 2010) (US-BIT Model).

⁴⁹ See Kinnear, *supra* note 32, at 233.

⁵⁰ See Jack J. Coe Jr., *Transparency in the Resolution of Investor-state Disputes: Adoption, Adaptation, and NAFTA Leadership*, 54 KAN. L. REV. 1339 (2006) (hereinafter Coe).

⁵¹ See *supra* note 38 (Referring to *Aguas del Tunari SA v. The Republic of Bolivia*)

⁵² See *Bivater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22.

⁵³ See *Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v. The Argentina*, ICSID Case No. ARB/03/19.

⁵⁴ Rule 37(2) is as follows:

After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

- (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
- (b) the non-disputing party submission would address a matter within the scope of the dispute;
- (c) the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either

tribunal discretion to allow third-party submission of written briefs and make hearings open to the public under certain circumstances.⁵⁶ The new ICSID rules correspond “to the seemingly irreversible trend toward openness affecting investor-state arbitration”.⁵⁷

In sum, amicus participation in investor-state arbitration has taken the form of written submissions addressed to the arbitrators, even though third party involvement is not limited to written submissions by definition.⁵⁸ In fact, amici could also be granted the right to attend and participate in oral hearings; access the disputing parties’ documents on the record; and cross-examine witnesses.⁵⁹ In this regard, international human rights tribunals like the European Court of Human Rights and the Inter-American Court of Human Rights have permitted third parties to participate in the oral hearings stage of the proceedings.⁶⁰ However, investor-state arbitration has generally imposed a set of restrictions on amicus submissions in proceedings before them, such as fixing a number of pages for the written briefs; not allowing the submission of exhibits or other evidence unless requested expressly by the tribunal; not granting access to the evidentiary record or to the disputing parties’ submissions; and not permitting oral submissions or attending the proceedings if closed to the general public.⁶¹

Even though there seems to be an overall trend in investor-state tribunals to provide more transparency in their deliberations by acknowledging the importance

party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

⁵⁵ The amendments came into effect in April 2006. *Available at:* www.worldbank.org/icsid/basicdoc/CRR_English-final.pdf.

⁵⁶ See e.g. Levine *supra* note 7, at 13; and Andrew de Lotbiniere McDougall & Ank Santens, *ICSID Tribunals Apply New Rules on Amicus Curiae*, 22 MEALEY’S INT’L ARB. REP. 69 (2007).

⁵⁷ Coe, *supra* note 50.

⁵⁸ See Levine *supra* note 7, at 9.

⁵⁹ *Id.*

⁶⁰ See Viñuales *supra* note 19, at 244 (arguing that the amici have a stronger bargaining power in human rights cases because these are areas where the participation of civil society is increasingly regarded as important).

⁶¹ See Epaminontas Triantafilou, *A More Expansive Role for Amici Curiae in Investment Arbitration?*, Kluwer Arbitration Blog (May 11, 2009), *available at:* <http://kluwerarbitrationblog.com/blog/2009/05/11/a-more-expansive-role-for-amici-curiae-in-investment-arbitration/> (last visited October 20, 2011) (hereinafter Triantafilou). See also, Levine *supra* note 7, at 15 (emphasizing that investor-state tribunals have not generally extended participation rights beyond submission of written briefs); and Choudhury, *supra* note 13, at 817 (contending that although several investment arbitral tribunals have been eager for amicus input, they have systematically denied amici any involvement beyond the submission of briefs).

of the participation of civil society in the resolution of investment disputes, amicus participation “is certainly not a panacea to cure all the existing defects and limits of access to justice in the context of investment arbitration”.⁶² On the one hand, it has not yet been recognized as a right:⁶³ it remains a procedural prerogative subject to the parties’ and the tribunal’s discretion.⁶⁴ On the other hand, it is still subject to a series of limitations that make this institution inadequate to address the rights of third parties, especially vulnerable groups.

III. INDIGENOUS PEOPLES AND INTERNATIONAL LAW

A. General Protection Framework

Colonization left indigenous peoples relegated to “minor spaces, reservations, bread-crumbs of land conceded by the dominant society”.⁶⁵ They were separated from their sacred lands, deprived of their traditional environments, and politically, economically, culturally, and religiously dispossessed.⁶⁶ They became “entrapped peoples, nations within”.⁶⁷ Today, there are around 300 million indigenous peoples in the world, most of whom exist under conditions of severe disadvantage and poverty within domestic jurisdictions- victims of discrimination and exclusion- and struggle to preserve their culture and original way of life.⁶⁸

Even though there is no definition in international law of “indigenous peoples” (or “indigenoussness”),⁶⁹ the term generally describes a population which shares a common historical tradition, culture, language, race, religion or territory

⁶² Francioni, *supra* note 8, at 742.

⁶³ Coe, *supra* note 50 (arguing that “those systems that contemplate amicus participation confer large measures of discretion on tribunals and correspondingly discourage any notion that amicus participation is a right”).

⁶⁴ See Levine, *supra* note 7, at 17 (underscoring that the current institutional and practical approach to amicus intervention in investment arbitration can be categorized as discretionary and largely informal). Another instance where amicus briefs have been admitted on a discretionary basis is in the World Trade Organization dispute settlement system.

⁶⁵ Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57 (1999) (hereinafter Wiessner).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See Jose Paulo Kastrup, *The Internationalization of Indigenous Rights from the Environmental and Human Rights Perspective*, 32 TEX. INT’L L.J. 97 (1997).

⁶⁹ See e.g. Russell Lawrence Barsh, *Indigenous Peoples*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 835 (Daniel Bodansky, Jutta Brunée & Ellen Hey eds., Oxford Univ. Press, 2d ed. 2007) (“The term indigenous peoples has never been authoritatively defined, [so] there continue to be instances where the indigenoussness of a particular individual or group is ambiguous and contested by the state”) (hereinafter Barsh).

connection (the “objective” element); and a self-identity as a distinctive cultural or ethnic group (the “subjective” element).⁷⁰ Providing a definition of indigenous peoples is beyond the aim of this article. Nonetheless, for the purpose of this article, indigenous peoples are understood as those communities that pre-date colonization processes, inhabit ancestral lands, and are still characterized by a distinctive culture.⁷¹

For the past few decades, international organizations and NGOs have been working to formulate human rights standards applicable to the world’s indigenous peoples.⁷² As a result, several international instruments have emerged to restrict state sovereignty in the treatment of the indigenous populations that inhabit its territory.⁷³ In this vein, there is “[a]n increasing trend towards [the] internationalization of disputes between indigenous peoples and their governments”.⁷⁴ Among other instruments addressing indigenous issues,⁷⁵ it is imperative to highlight the 1987 ILO Convention No. 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal

⁷⁰ See Paul J. Magnarella, *The Evolving Right of Self-determination of Indigenous Peoples*, 14 ST. THOMAS L. REV. 425 (2001); and Stephan Marquardt, *International Law and Indigenous Peoples*, 3 INT’L J. GROUP RTS. 47, 68 (1995-1996).

⁷¹ See S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 4 (Oxford Univ. Press, 2d ed. 2004) (hereinafter ANAYA) (proposing the following definition: “Indigenous peoples, nations, or communities are culturally distinctive groups that find themselves engulfed by settler societies born of the forces of empire and conquest. The diverse surviving Indian communities and nations of the Western Hemisphere, the Inuit and Aleut of the Arctic, the Aborigines of Australia, the Maori of New Zealand, the tribal peoples of Asia, and other such groups are among those generally regarded as indigenous. They are indigenous because their ancestral roots are imbedded in the lands in which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity. Furthermore, they are peoples to the extent they comprise distinct communities with a continuity of existence and identity that links them to the communities, tribes, or nations of their ancestral past”).

⁷² See Sharon O’Brien, *Federal Indian Policies and the International Protection of Human Rights* (hereinafter O’Brien), in *AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY* 35 (Vine Deloria, Jr. ed., Univ. of Oklahoma Press 1985) (hereinafter Deloria, Jr. ed.).

⁷³ See Patrick Macklem, *Indigenous Peoples Recognition in International Law: Theoretical Observations*, 20 MICH. J. INT’L L. 177 (2008) (hereinafter Macklem).

⁷⁴ Lila Barrera-Hernandez, *Got title, Will sell: Indigenous rights to land in Chile and Argentina*, in *PROPERTY AND THE LAW IN ENERGY AND NATURAL RESOURCES* 185 (Aileen McHarg et al. eds., Oxford Univ. Press 2010) (hereinafter Barrera-Hernandez).

⁷⁵ See *THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: HOW IT CAME TO BE AND WHAT IT HERALDS* 10 (Claire Charters & Rodolfo Stavenhagen eds., IWGIA 2009) (hereinafter Charters & Stavenhagen eds.).

Populations in Independent Countries;⁷⁶ the 1989 ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries,⁷⁷ and the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).⁷⁸ This process of internationalization has not only been characterized by the emergence of ad hoc international standards, but also by the progressive (or extensive) interpretation of existing human rights instruments not originally designed to address indigenous issues. This is the case with the United Nations Human Rights Committee,⁷⁹ the Committee on the Elimination of Racial Discrimination,⁸⁰ and the Inter-American Commission of Human Rights (IACmHR).⁸¹ One example of an instrument with more 'teeth' is the American Convention of Human Rights, a regional human rights treaty ratified by twenty-five states in the Americas, which has been interpreted over the years by the Inter-American Court of Human Rights (IACtHR) in favour of indigenous peoples' rights,⁸² especially with regard to their communal property.⁸³ Accordingly, states

⁷⁶ Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, Convention C107 (adopted June 26, 1957) available at: <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C107>. See also Barsh, *supra* note 69, at 832 (observing that ILO Convention 107 was the first international instrument to address the situation of indigenous peoples as a separate category from non-self governing territories or minorities).

⁷⁷ Convention concerning Indigenous and Tribal Peoples in Independent Countries, Convention C169 (adopted June 27, 1989) available at: <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>

⁷⁸ United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), G.A. Resolution 61/295 (adopted Sept. 13, 2007) available at: http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf.

⁷⁹ See e.g., Haraldsson and Sveinsson v. Iceland, Comm. 1306/2004, U.N. Doc. A/63/40, Vol. II, at 56 (HRC 2007) (finding a violation of Article 26 of the International Covenant on Civil and Political Rights); and Lubicon Lake Band v. Canada, U.N. Doc. CCPR/C/38/D/167/1984 (March 28, 1990).

⁸⁰ See e.g. S. James Anaya, *Book Review of PAUL KEAL, EUROPEAN CONQUEST AND THE RIGHTS OF INDIGENOUS PEOPLES: THE MORAL BACKWARDNESS OF INTERNATIONAL SOCIETY*, 99(1) AM. J. INT'L L. 306 (2005).

⁸¹ See e.g., Dann v. United States, Case 11.140, Report No. 113/01, Inter-Am. C.H.R. (2001), available at: <http://www.cidh.org/annualrep/2002eng/usa.11140.htm>

⁸² In spite of the liberal tone of Article 21 (right to property) of the American Convention, the IACtHR has made a *pro hominem* interpretation of this article, recognizing that it also embraces indigenous, communal land tenure regimes: "The close ties the members of indigenous communities have with their traditional lands and the natural resources associated with their culture thereof, as well as the incorporeal elements deriving there from, must be secured under Article 21 of the American Convention", Case of the Indigenous Community Sawhoyamaya, Judgment of March 29, 2006 (Merits, Reparations and Costs), ¶ 118, available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_146_ing.pdf. See also Thomas T. Ankersen & Thomas K. Ruppert, *Defending the Polygon: The Emerging Human Right to Communal Property*, 59 OKLA. L. REV. 4 (2006).

are required to officially title and demarcate indigenous ancestral land, restitute lands to those indigenous peoples who were dispossessed, conserve and protect indigenous peoples' right to environment, among others.⁸⁴

B. Foreign Direct Investment and Potential Areas of Overlap with Indigenous Peoples' Rights

International investment law has the potential to offset the gains achieved in human rights fora.⁸⁵ In this regard, Anne Deveboise Ostby contends that under an international investment regime, indigenous peoples' rights have become more tenuous.⁸⁶ Her argument is two-fold. First, investors' rights under investment treaties may affect indigenous peoples to a greater degree than any other minority groups because the "boundaries of their sovereignty remain disputed".⁸⁷ In light of this uncertainty, Deveboise claims, investors may refuse to recognize indigenous peoples' rights to land and natural resources. Even worse, nation-states themselves may refuse to recognize indigenous rights to avoid confrontations with foreign investors in international fora and also to maintain a "pro-investment" climate.⁸⁸

Second, considering their right of self-government and political participation, Deveboise argues that indigenous peoples should be able to determine when, where and how their land is to be used, if used at all.⁸⁹ Investment treaties, nonetheless, have the potential "to constrict independent decisions made by indigenous peoples, limiting their ability to control the effect of an investment within their lands and communities".⁹⁰ Indeed, any action that indigenous peoples take to protect their cultural activity and secure their lands or resources may be subject to challenge before investor-state arbitration as measures which tantamount to expropriation.

Deveboise's second argument, however, should be tempered as the right to communal property is not absolute; it can be restricted under certain circumstances. According to the IACtHR, states can grant the right to exploit

⁸³ See S. James Anaya & Robert A. Williams, *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33 (2001); and Jo M. Pasqualucci, *International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in light of the United Nations Declaration on the Rights of Indigenous Peoples*, 27 WIS. INT'L L.J. 51 (2009).

⁸⁴ See *id.*

⁸⁵ See Ostby, *supra* note 12.

⁸⁶ See *id.*

⁸⁷ *Id.*

⁸⁸ Barrera-Hernandez, *supra* note 74.

⁸⁹ See Ostby, *supra* note 12.

⁹⁰ *Id.*

natural resources within indigenous lands provided that these entitlements “do not deny their survival as tribal peoples”.⁹¹ States should thus (i) respect public consultation mechanisms, (ii) share the benefits of the extractive activities in a “reasonable way”, and (iii) conduct social and environmental impact assessments *ex ante*.⁹² Yet, for large-scale or “investment projects that would have a major impact” on the territory of indigenous peoples, the IACtHR has set a higher threshold: such cases require the free, prior, and informed consent of indigenous peoples.⁹³

Building on Deveboise’s two-fold analysis, it is critical to recognize the existing areas of potential overlap between indigenous peoples, nation-states, and foreign investors. The next section provides examples from comparative law in an effort to unveil some areas of divergence. The selected case laws deal with natural resources, religion, and intellectual property rights.

1. Right to Lands, Territories and Resources

For indigenous peoples, the right to control over land and resources is critical to their survival as distinct peoples.⁹⁴ Article 26 of the UNDRIP states that indigenous peoples have the right to own, use, develop, and control the lands, territories and resources that they have traditionally owned, occupied or otherwise used or acquired. It also requires states to give legal recognition and protection to these lands, territories, and resources. Further, Article 25 of the UNDRIP recognizes indigenous peoples’ right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources.

A series of cases adjudicated by both the IACmHR and the IACtHR, deal with the grant of extraction rights to private corporations by national governments in areas traditionally occupied by indigenous peoples. Some of these cases are discussed below.

Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua:⁹⁵ In 1996, the Nicaraguan government granted a logging concession to a Korean corporation. The Awas

⁹¹ Case of the Saramaka People. v. Suriname, Inter-American Court of Human Rights (Preliminary Objections, Merits, Reparations, and Costs), Judgment of Nov. 28, 2007, paragraphs 126-132, *available at*: http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.doc.

⁹² *Id.* ¶ 129.

⁹³ *Id.* ¶ 134.

⁹⁴ See Lorie M. Graham, *Resolving Indigenous Claims to Self-determination*, 10 ILSA J. INT’L & COMP. L. 385 (2004).

⁹⁵ See Case of the Mayagna (Sumo) Awas Tingni Community. v. Nicaragua, Inter-

Tingni people, who inhabited the area involved in the concession, claimed that the grant of the logging concession and the ongoing failure of Nicaragua to demarcate their territories infringed their right to property over their ancestral lands. The IACtHR sanctioned Nicaragua for breaching the Awas Tingni's right to property enshrined in the ACHR, and ordered the state to demarcate and title their ancestral territories.

Saramaka People v. Suriname:⁹⁶ Between 1997 and 2004, Suriname issued logging and mining concessions to foreign companies within territory traditionally owned by members of the Saramaka community. The IACtHR found that Suriname failed to put in place adequate safeguards and mechanisms to ensure that the logging and mining concessions would not cause major damage to Saramaka territory and communities. Hence it ruled that Suriname had breached the Saramaka people's right to property.

Mary and Carrie Dann v. United States:⁹⁷ In this case, members of the Western Shoshone aboriginal people, the Dann, alleged that the U.S. government's grant of gold mining prospecting within their traditional lands in Nevada, affected their use of the lands and polluted the water. The IACmHR concluded that the U.S. government failed to ensure the Dann's right to property under conditions of equality contrary to the 1948 American Declaration of the Rights and Duties of Man.

2. Religious and Spiritual Rights

Article 11 of the UNDRIP recognizes that indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies, and the right to maintain, protect, and have access in privacy to their religious and cultural sites. While indigenous rights to their ancestral lands, territories and resources have a spiritual component, as evidenced above, this section deals with cases where indigenous groups have attempted to halt megaprojects undertaken by the U.S. government on the grounds that they would destroy sacred sites and restrict their right to freedom of religion.⁹⁸ Some of the cases where such challenges have been made, albeit unsuccessfully, are discussed below.

American Court of Human Rights, Judgment of Aug. 31, 2001, ¶ 149, available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.doc.

⁹⁶ See *supra* note 91.

⁹⁷ See *supra* note 81.

⁹⁸ See e.g. George Linge, *Ensuring the Full Freedom of Religion on Public Lands: Devils Tower and the Protection of Indian Sacred Sites*, available at: http://www.bc.edu/bc_org/avp/law/lwsch/journals/bcealr/27_2/04_TXT.htm (last visited Dec. 2, 2010) (hereinafter Linge).

Sequoyah v. Tennessee Valley Authority:⁹⁹ In this case, the Cherokee people asserted that the flooding of the Little Tennessee River Valley by the Tellico Dam project would deny them access to sacred sites indispensable to exercise their religion. The court dismissed the claim on the grounds that the sacred sites to be flooded were not central to the Cherokee religion, and therefore there was no First Amendment violation.¹⁰⁰

Inupiat Community v. United States:¹⁰¹ The court considered Inupiat opposition to oil development in large portions of the Beaufort and Chukchi seas in Alaska on the grounds that it would disrupt their hunting and gathering lifestyle, which they claimed was inextricable from their religious beliefs. The court rejected their claim because the Inupiat offered no explanation of either the religious significance of the hunting grounds or how the proposed development would interfere with the free exercise of their religion. It also found that the government had a compelling interest in developing oil exploration.¹⁰²

Wilson v. Block:¹⁰³ The Hopi and Navajo people opposed a state decision to permit the expansion of the Snow Bowl ski area in the San Francisco Peaks area of Arizona. The Hopi and Navajo people asserted that the peaks were sacred land, but the court ruled that the expansion of the ski area did not burden the Red-Indians' religion by denying them access to the sacred sites or impairing their ability to conduct ceremonies.¹⁰⁴

Havasupai Tribe v. United States:¹⁰⁵ The Havasupai Tribe challenged state authorisation of a mining operation on grounds that the mine would deny them access to sacred sites and destroy the very essence of their religious and cultural system. In this case, the court dismissed the claims, arguing that "giving the Indians a veto power over activities on federal land would easily require *de facto* beneficial ownership of some rather spacious tracts of public property".¹⁰⁶

3. Intellectual Property Rights

Article 31 of the UNDRIP establishes that indigenous peoples have the right to maintain, control, protect and develop their traditional cultural expressions, as

⁹⁹ See *Sequoyah v. Tennessee Valley Auth.*, 620 F.2d 1159 (6th Cir. 1980).

¹⁰⁰ See Linge, *supra* note 98.

¹⁰¹ See *Inupiat Community of the Arctic Slope v. United States*, 548 F. Supp. 182 (D. Ala. 1982).

¹⁰² See Linge, *supra* note 98.

¹⁰³ See *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983).

¹⁰⁴ See Linge, *supra* note 98.

¹⁰⁵ See *Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991).

¹⁰⁶ *Id.*

well as the manifestations of their sciences, technologies and cultures, including designs, and the intellectual property over such expressions. In this line, Article 8(j) of the UN Convention on Biological Diversity obliges state parties to promote the wider use of indigenous knowledge and practices with the approval and involvement of the holders of that knowledge.¹⁰⁷ In Australia, legal actions, as shown in the case below, have been sought to stop the commercial exploitation of indigenous designs used without their express consent.

Milpururru v. Idofurn Pty Ltd.:¹⁰⁸ In 1991, Mr. Bethune, an Australian entrepreneur, produced hand-knotted, wool carpets which reproduced Australian aboriginal designs.¹⁰⁹ The designs selected were some of the most sacred aboriginal images, so much so that only fully trained and approved artists were permitted by the clan to reproduce them, and outsiders were not allowed to execute them. Considering their sacred character, only certain members of the clan could view the designs during certain ceremonies. The artists whose paintings were copied sued Bethune's company in an Australian federal court for copyright infringement. The court agreed with the plaintiffs; and the case became the first in which an Australian court declared that aboriginal artists should be compensated for the unauthorized use of their art.¹¹⁰

4. Summary

The cases presented above are but a small sample of the multiplicity of controversies pertaining to indigenous issues that have been adjudicated domestically and internationally. The origin of the conflict tends to be the grant by the government of an entitlement to conduct an extractive activity or a project without regard of the pre-existing rights of indigenous peoples. Given that the boundaries of their lands or the scope of their rights remain undefined within national borders, they are potentially subject to neglect both from foreign investors (who may take their lands and resources pursuant to the entitlement issued by the government),¹¹¹ or from governments (who have incentives to disregard

¹⁰⁷ Convention on Biological Diversity (adopted June 5, 1992) available at: <http://www.cbd.int/doc/legal/cbd-en.pdf>.

¹⁰⁸ See Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1 (1997).

¹⁰⁹ *Id.*

¹¹⁰ Cited in *id.*

¹¹¹ See Barrera-Hernandez, *supra* note 74 ("Some companies may be happy to take advantage of the murkiness that surrounds indigenous property rights and take a *fait accompli* approach to socially sensitive projects by doing first and negotiating later. However, if experience in neighboring countries is any indication, in the long term, the odds are against them. Already, increasing levels of conflict and insecurity are a powerful reminder that development cannot be sustained if indigenous land issues are routinely ignored").

indigenous peoples' interests fearing an international claim and maintain a pro-investment climate).

Furthermore, the conflict is exacerbated when foreign investors resort to international investment arbitration seeking compensation for a specific 'measure'¹¹² or omission by the government that constitutes a wrongful interference with the investment. To unpack this idea, let us assume that these instances involved foreign investments protected by a BIT concluded between two countries. Pursuant to the special assurances included in the BIT, the foreign investor can relocate disputes and their settlement from the domestic jurisdiction of the host state to international arbitration. In other words, had the Korean logging company been considered an "investment" under a hypothetical Korea-Nicaragua BIT in the *Amas Tigni* case; had Belize granted oil concessions to a company protected by a hypothetical Belize-United States BIT in the *Saramaka* case; had the Tellico Dam construction been granted to a Canadian company under the NAFTA in the *Sequoyah* case; or had Mr. Bethune's company been considered an investment under a hypothetical Australia-United States BIT in the *Milpurrurru* case, these disputes could have been brought by a foreign investor to international investment arbitration tribunals against the state party to the BIT on grounds of indirect expropriation or inequitable treatment. In such circumstances, the awards, if they were in the favour of the investor, could have serious repercussions on indigenous peoples' rights to land, religion, and intellectual property as recognized in the UNDRIP and other international instruments.

In sum, these instances evidence that investor-state arbitration is a potential decision-maker in matters concerning the relationship between indigenous peoples and the nation-state. *Glamis Gold* precisely demonstrates that indigenous rights are sometimes at stake in an international arbitration procedure; as will be unpacked in Part IV. The question that follows is whether indigenous peoples should be entitled to take part in the arbitration of such claims and, if so, to what extent.

Next, this article briefly discusses whether indigenous peoples' legal status in international law grants them that privilege.

C. Indigenous Peoples' Status in International Law

During the first encounters between indigenous peoples and other civilizations in the fifteenth century, there was a trend to treat indigenous peoples as sovereign entities capable of concluding treaties.¹¹³ According to Mark Frank Lindley, "there

¹¹² Article 201(1) of NAFTA defines 'measure' to include any law, regulation, procedure, requirement or practice.

¹¹³ See ANNA MEIJKNECHT, TOWARDS INTERNATIONAL PERSONALITY: THE POSITION OF MINORITIES AND INDIGENOUS PEOPLES IN INTERNATIONAL LAW 1 (Intersentia 2001)

is abundant evidence to show that advanced Governments [did] recognize sovereign rights in less advanced peoples with whom they c[a]me in contact, and [did], in general, deal with such peoples on a treaty basis when acquiring their territory".¹¹⁴ The European powers and the early U.S. governments originally dealt with indigenous peoples through the treaty process.¹¹⁵ In annexing New Zealand, the British Government gave full effect to the sovereignty of the native chiefs and tribes.¹¹⁶ By the same token, in the U.S., solemn treaties (mostly of friendship, trade, and land settlement) were concluded with indigenous peoples and were ratified by the U.S. Senate according to the constitutional procedure.¹¹⁷ However, the legal force of these treaties is contested to date.¹¹⁸

Nonetheless, "due to a process of domestication of indigenous peoples issues, in which relations of states with indigenous peoples were perceived as matters of purely internal jurisdiction, indigenous peoples . . . gradually lost the legal status they originally possessed in international law".¹¹⁹ This process implied the gradual transfer of the relations with indigenous peoples from international to municipal law, and was justified by the alleged lack of civilization of indigenous peoples.¹²⁰ From then on, indigenous peoples were considered to have no international legal status.

Instances of such transformation in international law are the 1926 *Cayuga Indians* award (ruling that an Indian tribe "is not a legal unit of international law"),¹²¹ and the 1928 award in the *Island of Palmas Case* (holding that treaties entered into by the island's indigenous authorities and the Dutch East India Company were not treaties or conventions capable of creating rights and obligations such as may arise out of treaties).¹²² Such a trend in domestic law is

(hereinafter MEIJKNECHT).

¹¹⁴ MARK FRANK LINDLEY, *THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW* 46 (Longmans, Green & Co. 1926).

¹¹⁵ See O'Brien, *supra* note 72, at 43.

¹¹⁶ See *id.*, at 41-43.

¹¹⁷ See Wiessner, *supra* note 65.

¹¹⁸ See Macklem *supra* note 73 ("These treaties did not possess international legal force. International law stipulates that only an agreement between 'two independent powers' constitutes a treaty binding on the parties to its terms . . . Regardless of whether imperial powers had entered into treaties with indigenous populations, international law began to validate imperial claims of sovereign power over indigenous peoples and territories on the basis that indigenous peoples were insufficiently civilized to merit legal recognition as sovereign legal actors"). By contrast, Article 37 of the UNDRIP requires states to honour and respect such treaties.

¹¹⁹ MEIJKNECHT, *supra* note 113, at 17.

¹²⁰ See *id.*

¹²¹ See Wiessner, *supra* note 65.

¹²² See *id.*

evident in the decisions of the Supreme Court of the United States determining that Indian nations are “domestic dependant nations” and that Indians are “mere occupants who are incapable of giving or granting land”.¹²³

Issues on indigenous peoples have, however, re-emerged as questions of contemporary international law and policy.¹²⁴ Current developments evidence 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 decision-making”.¹²⁵ As Russel Lawrence Barsh puts it, “in the past decades, the legal status of indigenous peoples has been changing incrementally”.¹²⁶ Anna Meijknecht contends that most indigenous peoples have obtained external political acceptance or recognition of their representatives.¹²⁷ They are now engaged in international forums like the United Nations, where they discuss the scope and nature of their rights. By the same token, Meijknecht points out that international instruments like the UNDRIP recognize non-state entities as the bearers of rights and duties, showing that indigenous peoples are now re-emerging as ‘subjects of international law’.¹²⁸ Some claim that the UNDRIP has reinforced indigenous peoples status in international law,¹²⁹ as they are no longer “simply objects of international concern but have a recognized status and capacity in the international context”.¹³⁰

Yet, whether indigenous peoples have gained an “international legal personality”¹³¹ is a different question altogether.¹³² Although an affirmative answer

¹²³ See e.g., *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); and Joyotpaul Chaudhuri, *American Indian Policy*, in Deloria, Jr., ed., *supra* note 72, at 24.

¹²⁴ See Douglas Sanders, *The Re-emergence of Indigenous Questions in International Law*, in INTERNATIONAL LAW AND INDIGENOUS PEOPLES (S. James Anaya ed., Ashgate 2003).

¹²⁵ Russell Lawrence Barsh, *Indigenous Peoples in the 1990s: from Object to Subject of International Law?*, 7 HARV. HUM. RTS. J. 33 (1994) (hereinafter Barsh—*from Object to Subject*). See also, Barsh, *supra* note 69, at 841.

¹²⁶ See *id.*, Barsh—*from Object to Subject*, at 118.

¹²⁷ See MEIJKNECHT, *supra* note 113, at 231.

¹²⁸ See *id.*

¹²⁹ See e.g. Macklem, *supra* note 73; and Romeo Saganash & Paul Joffe, The Significance of the UN Declaration to a Treaty Nation: A James Bay Cree Perspective, in REALIZING THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: TRIUMPH, HOPE, AND ACTION (Jackie Hartley, Paul Joffe, & Jennifer Preston eds., Purich Pub. 2010) (hereinafter Hartley, Joffe & Preston eds.).

¹³⁰ Hartley, Joffe, & Preston eds., *id.*, at 140.

¹³¹ The concept of international legal personality is not devoid of controversy and confusion. Personality comes from the Latin word *persona* which means “mask”, an attribute used to represent and also to exclude from representation. As Janne Elisabeth Nijman describes, “in international law, *persona* has become the concept which handles the question of who is an actor on the international stage, or: who is allowed to participate in

would help the purpose of this article, that is to say, to recognize their broader participation rights before investor-state arbitration, it does not provide a definitive solution. Indeed, even if we agree that indigenous peoples possess international legal personality, and thus international *jus standi* (the right to bring a claim at the international level), this would not grant them the right to participate in an arbitration proceeding initiated under the auspices of a particular investment treaty that involves only a certain group of states. In the same way that other subjects of international law like states or international organizations cannot access tribunals in which they have no legal standing, indigenous peoples cannot access investor-state arbitration solely on the grounds of their alleged international personhood. Therefore, having discarded the international legal personality argument, we need

international law and society, and who is not. . . . The history of the concept of international legal personality is also the history of the attempts to scrutinize and interpret the mask". Traditionally, states have been considered to have that international mask. But in the twentieth century states permitted the development of new rules in international law that conferred rights and obligations on entities other than themselves, such as international organizations, sub-national groups and individuals. See MEIJKNECHT, *supra* note 113, and JANNE ELISABETH NIJMAN, THE CONCEPT OF INTERNATIONAL LEGAL PERSONALITY: AN INQUIRY INTO THE HISTORY AND THEORY OF INTERNATIONAL LAW vii-viii (TMC Asser Press 2004). See also ANTONIO CANÇADO-TRINDADE, INTERNATIONAL LAW FOR HUMAN KIND, TOWARDS A NEW JUS GENTIUM 165 (The Hague Academy of International Law 2010) ("In recent decades there has been an expansion of international legal personality [to non-state actors]"); DAVID RAIĆ, STATEHOOD AND THE LAW OF SELF-DETERMINATION 10 (Kluwer International Law 2002); and JOHN H. CURRE, PUBLIC INTERNATIONAL LAW 56 (Irwin Law Inc., 2d ed. 2008).

¹³² See MEIJKNECHT, *supra* note 113, at 232 (claiming that the concept of "international personality", as formulated by the International Court of Justice (ICJ) in the *Reparation for Injuries Suffered in the Service of the United Nations* case, consists of three elements: (i) international legal capacity, (ii) international legal subjectivity, and (iii) international *jus standi*. Meijknecht argues that indigenous peoples lack the third element, international *jus standi*. She underscores the fact that many existing judicial and semi-judicial international procedures deal with direct individual complaints and give individual tailor-made decisions, such as the Human Rights Committee or the regional human rights courts. Nonetheless, she contends that in these procedures the peoples are "captured" in an international *jus standi* which is based on the individual approach. Hence, indigenous peoples do not have international *jus standi* as a collective body, but have to air their claims using mechanisms granted to individuals. As a result, Meijknecht concludes that the main obstacle on indigenous peoples' road to international legal personality lies at the level of international *jus standi*. So, notwithstanding certain gains in the international domain, indigenous peoples do not have the capacity to bring their claims to international fora, though the question whether they will at some point in the future is open. In consequence, even though indigenous peoples are subjects of international law, as they are bearers of international rights and duties under international law, to date they still lack international legal remedies to enforce such rights).

to examine other reasons that justify indigenous peoples' broader participation rights in investor-state arbitration.

IV. RECOGNIZING BROADER PARTICIPATION RIGHTS TO INDIGENOUS GROUPS

*A. Glamis Gold, Ltd. v. United States*¹³³

Glamis Imperial, a wholly owned subsidiary of the Canadian company Glamis Gold, Ltd., acquired and explored several mining claims located on federal lands in the California Desert, in an area known as Indian Pass.¹³⁴ Glamis' proposed gold open-pit mine, the Imperial Project, anticipated the production of 1.17 million ounces of gold, which required the excavation 150 million tons of ore and the production of 300 million tons of waste rock. But, as the company later discovered, its mining claims were located next to designated Native American lands and areas of cultural and religious concern.

To protect the environment and Native American cultural sites, California State Mining and Geology Board passed a series of regulations that required complete backfilling of open-pit metallic mines, regardless of their proximity to Native American sacred sites. In addition, in April 2003 the California legislature enacted Senate Bill 22, which demanded the complete backfilling of open-pit metallic mines located on or within one mile of any Native American sacred site; the grading of the excavations to the approximate original contours of the land; and financial assurances sufficient to provide for this backfilling and grading.

Consequently, in December 2003, Glamis submitted a takings claim under Article 1110 of NAFTA claiming that the measures adopted by the state of California "destroyed" the economic value of the Imperial Project. It argued that the U.S. government had "expropriated" its mining investment through the enactment and implementation of retroactive regulations with imposed significant

¹³³ See e.g. Ochs, *supra* note 12; Joshua Elcombe, *Regulatory Powers vs. Investment Protection under NAFTA's Chapter 11: Metalclad, Methanex, and Glamis Gold*, 68 U. TORONTO FAC. L. REV. 71 (2010); Allan Ingelson & Lincoln Mitchell, *The Glamis Regulatory Takings Claim and Compensation under NAFTA*, 2(1) J. WORLD ENERGY L. & BUS. 68 (2009); Eloise Obadia, *Introductory Note to NAFTA/UNCITRAL: Glamis Gold Ltd. v. United States*, 48 I.L.M. 1035 (2009); Jordan C. Kahn, *Striking NAFTA Gold: Glamis Advances Investor-State Arbitration*, 33 FORDHAM INT'L L.J. 101 (2009-2010); and Stephan W. Schill, *Glamis Gold, Ltd. v. United States (note)*, 104 AM. J. INT'L L. 253 (2010).

¹³⁴ For a critique on how Glamis managed to access NAFTA forum, see Judith Wallace, *Corporate Nationality, Investment Protection Agreements, and Challenges to Domestic Natural Resources Law: The Implications of Glamis Gold's NAFTA Chapter 11 Claim*, 17 GEO. INT'L ENVTL. L. REV. 365 (2004-2005).

costs and hence eliminated any chance of operating the project at a profit. Furthermore, invoking Article 1105 of NAFTA, Glamis alleged that it had been discriminated against as its proposed project was subject to more onerous land reclamation than had been imposed on other mineral operators in the general area.

The Quechan Indian tribe opposed to the Imperial Project because it would destroy the "Trail of Dreams", which is part of a network of Quechan ceremonial paths and sacred sites, and prevent them from practicing their cultural and religious traditions as they have since time immemorial. In fact, the tribe alleged that the gold mine would impede its members to travel, both physically and spiritually, along the Trail of Dreams; to make ceremonial use of the prayer circles, rock alignments, and other cultural features in the project area; to gain protection from metaphysical dangers; and to continue to use the project area for vision quests and teaching tribal youths about their culture.¹³⁵

During the arbitration proceedings, Friends of the Earth Canada, Friends of the Earth United States, Sierra Club, Earthworks, the National Mining Association, and the Quechan Indian Nation sought to participate as amici. With regard to the Quechan Indian Nation in particular, the arbitrators did not engage in a discussion of the reasons for allowing or disallowing its participation as amicus, as they directly applied the FTC Statement.¹³⁶ Accordingly, the Quechan Indian Nation made written submissions regarding the government's duty under international law to preserve sacred lands on which the plaintiff's gold mines were located,¹³⁷ and provided confidential information on the Indian trails that were valuable to their culture and religion.¹³⁸ They also invoked their constitutional right to freedom of religion.¹³⁹ Further, the Quechan people were also allowed to view the proceedings in a separate room via closed circuit television,¹⁴⁰ but did not intervene in them. The tribunal explicitly underlined the fact that the granting of leave did not entitle

¹³⁵ See *Glamis Gold Award*, *supra* note 1, § 111 ("Mr. Cachora, Quechan Tribal Historian, described the importance of the area to the Quechan people's cultural resources and religious values; he likened the religious significance of the area to Jerusalem or Mecca").

¹³⁶ See Decision on Application and Submission by Quechan Indian Nation, § 8, Sept. 16, 2005, available at: <http://www.state.gov/documents/organization/53592.pdf>. As regards to the FTC Statement, see note 47, *supra*.

¹³⁷ See Levine, *supra* note 7, at 24.

¹³⁸ See *Glamis Gold Award*, *supra* note 1, § 8.

¹³⁹ See *id.*, § 111.

¹⁴⁰ See *id.*, § 290 ("The public was invited to view the proceedings in a separate room via closed circuit television. The Quechan were invited to view the proceedings from a different location with a separate video feed to allow their viewing of otherwise restricted discussion of cultural locations; tribal identification would be required for admission to this location").

the Quechan Indian Nation to make any further submissions.¹⁴¹

Finally, the tribunal concluded that the U.S. did not breach Articles 1110 or 1105 of NAFTA. On the one hand, it found that the California backfilling measures did not result in a radical diminution in the value of the Imperial Project.¹⁴² In fact, according to the tribunal's valuation, after a complete backfilling, the project would exceed US\$ 20 million. With regard to the fair and equitable treatment standard, the tribunal considered that the regulations passed in California were proven of general application, both in form and in effect.¹⁴³

B. Analysis of Glamis Gold and its Ramifications

Glamis Gold reveals the imperative need to distinguish those cases where third parties seek to participate in a procedure as impartial "friends of the court" from those where they have a legitimate interest in the outcome. NGO submissions, such as the one submitted by Friends of the Earth, clearly belong to the first group: they seek to participate in investor-state disputes representing a broad concern with key thematic issues and ultimately claim to be impartial to the outcome of the dispute.¹⁴⁴ In consequence, their factual, technical, or expert opinions can be adequately channeled through amicus briefs. In this case, the restrictions generally imposed on amici, as noted in Part II, seem somewhat justified.

By contrast, when the international arbitration award has the potential to impinge on the rights or interests of a non-disputing party the circumstances are radically different. The Quechan Indian Nation sought to intervene in *Glamis Gold* because it was directly involved in the dispute, considering its spiritual and cultural connection with the land comprised in the Imperial Project, and especially because of the direct consequences that the eventual overturning of Senate Bill 22 (the impugned legislative measure) by the arbitrators could have had on their (human) rights. As mentioned earlier, the arbitration tribunal permitted the Quechan Indian Nation to submit an amicus brief, but did not warrant them further participation rights. So, by treating indigenous peoples as a mere "friend of the court" (i.e. giving them the same treatment as Friends of the Earth), and not as a disputing party, the arbitrators substantially narrowed their possibility of access to justice.¹⁴⁵

¹⁴¹ See *id.*, § 274.

¹⁴² See *id.*, § 366.

¹⁴³ See *id.*, § 819-821.

¹⁴⁴ See Levine, *supra* note 7, at 18; and Triantafilou, *supra* note 61.

¹⁴⁵ See Triantafilou, *supra* note 61 ("Given the unavailability of intervention in investment arbitration, participation as amicus is, in effect, the only recourse an interested third party has to participate in the proceedings").

Thus, this article claims that the amicus curia institution is inadequate to address indigenous peoples' interests in a comprehensive manner.

From the above, it is evident that non-disputing parties' interest in arbitration may vary in nature, significance, and directness. Not all third parties' interests can be channeled through amicus participation. When a third party can prove to have a direct interest in the outcome of the arbitration proceedings, international arbitration regimes should vest such persons with ample participation rights to ensure a legitimate and democratic award, and avoid defenselessness. Rather than being conditioned to the discretion of the parties and tribunals, this dispute resolution regime should gradually move towards the recognition of an absolute right of participation of indigenous peoples. In effect, given that investor-state arbitration tribunals are emerging, even by accident, as decision-makers in matters concerning indigenous peoples and nation-states, as mentioned in Part III, recognizing the Quechan Indian Nation and other indigenous groups the right to intervene in a dispute is a matter of justice.

C. Incorporating the Rules of Intervention as a Panacea

Furthering the above line of reasoning, this article proposes the incorporation into international arbitration of the procedural institution of "intervention"—as opposed to amicus—from municipal law. In some countries, the procedural legislation differentiates amicus from individuals claiming a direct interest in the transaction under judicial review. In the U.S., Rule 24(a) of the Federal Rules of Civil Procedure,¹⁴⁶ which governs the usual cases of "intervention" in federal practice,¹⁴⁷ permits anyone with a reasonable claim of potential injury from existing

¹⁴⁶ In the United States, the Federal Rules of Civil Procedure offer non-parties the opportunity to get into a lawsuit, even though none of the existing parties wants them there. See WRIGHT & MILLER, 20 FED. PRAC. & PROC. DESKBOOK, § 80:

Rule 24: Intervention

(a) Intervention of Right.

On timely motion, the court must permit anyone to intervene who. . . .

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

This rule requires the applicant to show three things: (i) that it has an interest relating to the property or transaction involved in the action; (ii) that disposition of the action may impair the applicant's ability to protect its interest "as a practical matter"; and (iii) that its interest is not adequately represented by the present parties.

¹⁴⁷ Note, *Intervention and the Meaning of "bound" under Federal Rule 24(a)(2)*, 63(3) YALE L.J. 408 (1954).

litigation to join the fray as a matter of right when they show a legitimate interest in the outcome, a potential peril, or when their interests are unrepresented by the parties already in the procedure.¹⁴⁸ In other words, intervention “is a procedural device whereby a stranger is permitted to become a party to a pending action”.¹⁴⁹ It recognizes a substantive right to intervene in certain circumstances to protect non-parties from the injurious effects of the judicial processes¹⁵⁰ and reduce multiplicity of litigation.¹⁵¹ In this way, “intervention” acts as an equity device.¹⁵² Of course, each municipal procedural rule entails its own particularities and complexities which this article does not aim to discuss.

Thus, the rules governing investor-state arbitration should be amended to incorporate indigenous peoples as “interveners” in certain circumstances. To request “intervention”, indigenous peoples would have to show that they have an interest relating to the property or transaction involved; that they are potentially “bound” by the outcome; or that their interests are not adequately represented by one of the original parties.¹⁵³ Awarding indigenous groups the status of interveners would assure them the right to, among others, submit briefs with no restrictions on the number of pages; attend and participate in oral hearings; have access the disputing parties’ documents on record; cross-examine witnesses and challenge arbitral awards or the appointment of arbitrators themselves. Even though the exact scope of these “new” procedural rights requires further analysis, a gradual move towards a system in which arbitral tribunals allow indigenous peoples to participate more freely is imperative.

Needless to say, this new set of “intervention” rules would impose an extra burden on the international arbitration tribunal and the original parties. Nevertheless, indigenous peoples should be granted this special or differentiated status because they are “peoples-nations”¹⁵⁴ with a distinct cultural identity; possess the right to self-determination; and are in a better position than nation-states to defend their rights. These ideas are unpacked in the subsequent section.

¹⁴⁸ See e.g., Donald Hilliker, *Rule 24: Effective Intervention*, 7 LITIGATION 21 (1980-1981); and John E. Kennedy, *Let's All Join In: Intervention under Federal Rule 24*, 57 KY. L.J. 329 (1968-1969).

¹⁴⁹ M.J.K., *Pleading: Intervention under Rule 24 (b) (2) of Federal Rules of Civil Procedure*, 29 CAL. L. REV. 515, 539 (1940-1941) (hereinafter M.J.K.).

¹⁵⁰ *Id.*

¹⁵¹ Note, *Intervention of Private Parties under Federal Rule 24*, 52 COLUM. L. REV. 922, 931 (1952) (hereinafter Note—*Intervention of Pvt. Parties*).

¹⁵² M.J.K., *supra* note 149, at 542.

¹⁵³ Note—*Intervention of Pvt. Parties*, *supra* note 151, at 924.

¹⁵⁴ See Jarle Weigard, *Is there a Special Justification for Indigenous Rights?*, in INDIGENOUS PEOPLES: SELF-DETERMINATION, KNOWLEDGE, INDIGENEITY 177 (Henry Minde ed., Eburon Academic Publishers 2008)(hereinafter Weigard).

1. Differentiated Cultural Identity

Indigenous peoples represent a collectivity with a clearly distinct cultural identity and are therefore “different” from the majority of a country’s population.¹⁵⁵ Indian nations “[a]re not, like a Western nation-state, entities with a distinct Hegelian existence separate from their individual members. Members of tribal communities are existentially tied to each other in a network of deeply committed horizontal relationships.”¹⁵⁶ This is why the international community has gradually recognized distinctive rights for indigenous peoples.¹⁵⁷

The principle of equal treatment “demands that appropriate steps be taken to make it possible for group members to prevent their culture from disintegrating . . . [And] these appropriate steps come in the form of a ‘differentiated citizenship’ or certain rights that apply only to minorities and not to other groups of citizens”.¹⁵⁸ Singling out indigenous people as a special group with special rights is justified on the basis of their distinctive cultural identity, which is inextricably tied to land, natural resources, cultural objects, and their right to maintain and strengthen it.¹⁵⁹ Accordingly, granting further participation rights to indigenous peoples through

¹⁵⁵ See Barsh, *supra* note 69, at 845 (arguing that for indigenous peoples there is a functional relationship between distinctiveness and the collective right to land, territory and self-determination).

¹⁵⁶ Wiessner, *supra* note 65.

¹⁵⁷ See Barsh, *supra* note 69, at 830.

¹⁵⁸ Cited in Weigard, *supra* note 154, at 181.

¹⁵⁹ Land is essential for the economic survival of indigenous culture: it is a major economic resource and, in many cases, serves as indigenous peoples’ primary means of subsistence. This is why the right to cultural self-preservation of indigenous peoples would be meaningless without a right to the continued possession and enjoyment of their lands. Yet, land is more than a means of economic sustenance for indigenous peoples. Indigenous peoples’ spiritual identity is inextricably linked to their traditional territory. They regard themselves not as homeowners or land tenants, but as trustees of the land for future generations. Hence, land tenure is not only critical for the physical and economic subsistence of indigenous groups, but it is also an intrinsic aspect of their cultural identity, religious beliefs, way of life, and an important source of historical and scientific knowledge. See e.g., DANIEL BONILLA, *LA CONSTITUCIÓN MULTICULTURAL* (Siglo del Hombre Editores, Instituto Pensar Universidad Javeriana 2007); Darlene M. Johnston, *Native Rights as Collective Rights: A Question of Group Preservation*, in *THE RIGHTS OF MINORITY CULTURES* 194 (Will Kymicka ed., Oxford Univ. Press 1995); Aoife Duffy, *Indigenous Peoples’ Land Rights: Developing a Sui Generis Approach to Ownership and Restitution*, 15 *INT’L J. ON MINORITY & GROUP RTS.* 505, 511 (2008); and Lilian Aponte Miranda, *Uploading the Local: Assessing the Contemporary Relationship Between Indigenous Peoples’ Land Tenure Systems and International Human Rights Law Regarding the Allocation of Traditional Lands and Resources in Latin America*, 10 *OR. REV. INT’L L.* 419 (2008).

“intervention” is a way through which states can fulfill their obligations to protect indigenous peoples’ differentiated cultural identity.

2. Self-Determination

Indigenous peoples remain politically and legally powerless within domestic borders. The right to self-determination¹⁶⁰, however, grants them the opportunity to participate in decision-making processes within national borders in which they should have a voice of their own different from that of the state. This is the only way in which they can gain and maintain control over their own destinies.

Several international treaties state that indigenous peoples have the right to participate in decision-making in matters that would affect their rights, through representatives chosen by themselves in accordance with their own procedures.¹⁶¹ This right does not necessarily amount to a veto power, but grants them the opportunity to influence the political order in which they live. According to Anaya:

[T]he essential idea of self-determination is that human beings, individually or as groups, are equally entitled to be in control of their own destinies . . . under conditions of equality . . . [S]elf determination means that peoples are entitled to participate equally in the constitution and development of the governing institutional order under which they live and, further, to have that governing order be one in which they may live and develop freely on a continuous basis¹⁶²

It is to be noticed that the right of indigenous peoples to influence the political order is not limited to municipal law frameworks; it also includes decision-making within the international realm, as Anaya claims.¹⁶³ In light of the right to self-determination, indigenous peoples should have the right to engage in those cases brought to investor-state arbitration that can potentially affect their collective rights. This is precisely what “intervention” purports.

3. Other Considerations

Indigenous peoples are in a better position than state agents or representatives

¹⁶⁰ Johan D. van der Vyver, *The Right to Self-determination and Its Enforcement*, 10 ILSA J. INT’L & COMP L. 421 (2004).

¹⁶¹ See e.g., Article 18 of the UNDRIP; Article 6.1(b) of ILO Convention 169; Article 1 of the ICCPR; and Article 1 of the ICESCR.

¹⁶² S. James Anaya, *The Right of Indigenous Peoples to Self-determination in the Post-Declaration Era*, in Charters & Stavenhagen eds., *supra* note 75, at 187-189.

¹⁶³ ANAYA, *supra* note 71, at 154.

to stand up for their rights before international arbitrators; there are two reasons for this. First, not always will indigenous peoples' intervention support one of the litigating parties. As Professor W. Michael Reisman contends:

[International] tribunals address only the issues raised by the formal parties before them, which, under the rules of the game established by states, can only be states . . . Indigenous peoples are still essentially invisible or, if noticed, treated, legally, along with the flora and fauna of the land concerned.¹⁶⁴

In this vein, indigenous peoples should be granted the opportunity to articulate for themselves, with no intermediaries (such as the state, company, or NGOs acting as *amicus curiae*). Indigenous peoples are not decorative elements of municipal law that require tutoring; they are subjects of international law, that is, bearers of international rights and obligations. In fact, "indigenous peoples already enjoy a privileged position as quasi-state actors, and not merely as part of the wider trend towards NGO participation in policy discussions and program implementation".¹⁶⁵ Hence, as Russell Lawrence Barsh contends, traditional leaders may be more democratically representative than institutions that depend on the state for legitimacy, recognition or financial support.¹⁶⁶

Certainly, in order to exercise their participation rights they require legal assistance and finance. Some may argue that states are required to compensate these costs as part of their obligations to accommodate indigenous peoples' rights. Others may claim that it is civil society's task to support access to justice in equal terms. What is clear from the case laws presented in Part III is that indigenous peoples have managed to gain access to several international human rights committees and tribunals already. This process has been facilitated by several human rights NGOs.

The second reason is, broader participation rights before investor-state arbitration can serve to overcome the perception that international investment arbitration is undemocratic in that it does not allow the participation of indigenous peoples in the negotiation, drafting, and ratification of foreign investment treaties that ultimately affect them as a collective whole. Taking into account the taxonomy of potential conflicts presented in Part I, it is becoming evident that indigenous peoples have stemmed as a "new" constituency in international investment arbitration. Investors and states have by and large, ignored this constituency. To

¹⁶⁴ W. Michael Reisman, *Protecting Indigenous Rights in International Adjudication*, 89 AM. J. INT'L L. 350 (1995).

¹⁶⁵ See Barsh, *supra* note 69, at 850.

¹⁶⁶ See *id.*, at 837.

redress this shortcoming, apposite and extraordinary measures are required, like the institution of intervention.

4. Summary

In light of indigenous peoples' differentiated cultural identity and right to self-determination, international investment law should derive inspiration from "intervention" rules set forth in domestic legal systems and allow indigenous peoples to participate more actively and with fewer restrictions in international arbitration beyond the amicus curia institution. These new "intervention" rules should not be regarded as revolutionary, but as a natural step to ensure greater transparency and to accommodate third party's rights in international adjudication. Investor-state arbitration, like any other legal system, must constantly evolve in response to changing circumstances in order to more effectively serve their changing constituencies.¹⁶⁷ Ultimately, the legitimacy of arbitration as a valid dispute resolution mechanism for international investment depends on its ability to adapt itself to ongoing conditions.¹⁶⁸

Even though international investment law was not originally designed to accommodate indigenous interests, in practice it has turned out to be an adjudicatory body of their rights. This is why it is imperative to avoid the defenselessness of indigenous groups. For them, investor-state adjudication seems better than no adjudication at all.

V. CONCLUSION

After an initial period of restricted access to ensure confidentiality, international investment law has demonstrated a certain degree of adaptability in allowing amicus briefs into the arbitration procedures in the past years. However, amici participation in these for a still remains discretionary, largely informal, and mainly restricted to written submissions. This is why this article suggests that the amicus curia institution is ill-suited to address, in a comprehensive manner, the rights of those non-disputing parties that have a legitimate interest in the procedure. Further, the reason why indigenous peoples should be singled-out is because they represent a group with a distinct cultural identity, different from the majority of a country's population; they have a right to influence the political order and decision-making in matters which would affect their rights; and they are more suited to defend their collective rights than nation-states before international arbitrators.

¹⁶⁷ See Gruner, *supra* note 2.

¹⁶⁸ See *id.*

In line with the above, “intervention” rules should be incorporated into international investment arbitration so that arbitration tribunals can include indigenous peoples as parties to the procedure, allowing them the right to submit briefs with no page limits, attend and participate in oral hearings and access records. Certainly, this transformation requires the introduction of new procedural rules and the building of a broad consensus on this matter. Notwithstanding the magnitude of the challenge, international investment law should evolve into this next phase of procedural openness and transparency by acknowledging the relevance of indigenous issues, their need for special accommodations and their collective autonomy. As evidenced in *Glamis Gold*, international investment arbitration is, in practice, a potential decision-maker in matters concerning the relationship between indigenous peoples and the nation-state and thus should recognize indigenous peoples as part of their new constituency.

By granting indigenous peoples the right to intervene in international arbitration, international investment law will stay attuned to the developments in international human rights, avoid potential incoherence and, more importantly, prevent the neglect of indigenous peoples’ human rights. It is about time indigenous peoples emerge from the shadows of colonialism into a growing role as non-state actors in international investment law, as they have done in other fora.¹⁶⁹

¹⁶⁹ See Barsh, *supra* note 69, at 851.