

PART III
INDIGENOUS PEOPLES
AND INTERNATIONAL ECONOMIC LAW

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*The Protection of Indigenous Cultural Heritage
in International Investment Law and Arbitration*

The protection of cultural heritage is a fundamental public interest that is closely connected to fundamental human rights and is deemed to be among the best guarantees of international peace and security. Economic globalization and international economic governance have spurred a more intense dialogue and interaction among nations—potentially promoting cultural diversity and providing the funds to recover and preserve cultural heritage. However, these phenomena can also jeopardise cultural heritage. Foreign direct investments in the extraction of natural resources have the potential to change cultural landscapes and erase memory, and foreign investments in the cultural industries can induce cultural homogenization. In parallel, international investment law constitutes a legally binding and highly effective regime that demands that states promote and facilitate foreign direct investment. Does the existing legal framework adequately protect indigenous cultural heritage vis-à-vis the economic interests of foreign investors? This chapter aims to address this question by examining recent arbitrations and proposing legal tools to foster a better balance between economic and cultural interests in international investment law and arbitration.

1. *Introduction*

Although the protection of indigenous rights has gained some momentum at the international law level since the adoption of the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),¹ many of the

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¹ United Nations Declaration on the Rights of Indigenous Peoples, (UNDRIP) A/RES/61/295, 13 September 2007. The Declaration was approved by 143 nations, but

estimated 370 million indigenous peoples around the world have lost, or are under imminent threat of losing, their ancestral lands because of the exploitation of natural resources. In fact, 'a large proportion of the world's remaining natural resources ... are located on indigenous-occupied lands ... [and] global demand for natural resources has skyrocketed in recent years.'²

This chapter explores the clash between economic development and indigenous peoples' rights from the perspective of international investment law. The protection of the rights of indigenous peoples has increasingly intersected with the promotion of foreign investments in international investment law. In fact, when a state adopts policies to protect the rights of indigenous peoples that interfere with foreign investments then this may be perceived as to indirect expropriation or a violation of other investment treaty provisions. While traditionally, international investment law and arbitration had developed only limited tools for the protection of human rights through dispute settlement,³ recent arbitral awards have shown a growing awareness of the need to consider human rights within investment disputes. The incidence of cases in which arbitrators have taken non-economic values into account is increasing.⁴

This chapter will proceed as follows. First, the chapter examines the international norms protecting indigenous cultural heritage with particular reference to the UNDRIP. Second, the international investment law regime will be briefly sketched out. Third, relevant arbitrations will be analysed and critically assessed. Fourth, this contribution offers some legal options to better reconcile the different interests at stake. Fifth, some conclusions shall be drawn. The chapter argues that the collision between investors' rights and indigenous entitlements makes the case for strengthening the current regime protecting indigenous peoples' rights. In particular, the participation of indigenous peoples in the decisions that affect them and their heritage is crucial. In parallel, such interplay also requires further reflection on the

was opposed by the United States, Canada, New Zealand, and Australia. However, these four nations subsequently endorsed the Declaration.

² 'The Double Life of International Law: Indigenous Peoples and Extractive Industries' (2016) 129 *Harvard Law Review* 1755–1778, 1756.

³ For a seminal study, see V. Vadi, 'When Cultures Collide: Foreign Direct Investment, Natural Resources and Indigenous Heritage in International Investment Law' (2011) 42 *Columbia Human Rights Law Review* 797–889. See also V. Vadi, *Cultural Heritage in International Investment Law and Arbitration* (Cambridge: CUP 2014) 204–36; G. K. Foster, 'Foreign Investment and Indigenous Peoples: Options for Promoting Equilibrium Between Economic Development and Indigenous Rights' (2012) 33 *Michigan Journal of International Law* 627.

⁴ Vadi, *Cultural Heritage in International Investment Law and Arbitration*.

emerging contribution of international investment law and arbitration to the development of international law.

The chapter then proposes three principal mechanisms to address the existing power imbalances among indigenous peoples, investors, and states: treaty drafting, treaty interpretation, and counterclaims. While these techniques are more evolutionary than revolutionary, they can prevent conflicts between different treaty regimes and contribute to the humanization of international investment law and the harmonious development of international law.

2. The International Protection of Indigenous Heritage

In the past decades, there has been ‘a paradigm shift in international law.’⁵ International law has finally recognised that indigenous peoples are bearers of rights both as individuals and as communities. Not only has international law increasingly regulated indigenous peoples’ matters, but indigenous peoples are directly influencing and contributing to international law making.⁶ Existing international law has been interpreted in a way favourable to indigenous peoples⁷ and new international instruments have specifically recognized the rights of indigenous peoples.⁸ For instance, the 1989 International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169)⁹ and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)¹⁰ are special instruments for the protection of indigenous peoples. Indigenous peoples have supported the creation of special forums and bodies that exclusively deal with their situation and focus on their

⁵ M. Åhrén, *Indigenous Peoples’ Status in the International Legal System* 149 (Oxford: 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.’).

⁶ K. A. Carpenter and A. R. Riley, ‘Indigenous Peoples and the Jurisgenerative Moment in Human Rights’ (2014) 102 *Berkeley Law Review* 173, at 177 (noting that ‘Indigenous peoples are influencing law around and outside of their communities, all the way up into state and international practice.’).

⁷ ‘The Double Life of International Law’, 1758.

⁸ *Id.*

⁹ International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169), 27 June 1989, 28 *ILM* 1382.

¹⁰ UNDRIP, *supra* note 1.

rights.¹¹ For instance, the creation of the United Nations Permanent Forum for Indigenous Issues (UNPFII) reflects the efforts of indigenous peoples 'to create space for themselves and their issues within the United Nations human rights machinery.'¹² Finally, an emerging jurisprudence of various human rights bodies has coalesced reaffirming their rights.¹³

Among the human rights entitlements of indigenous peoples, cultural entitlements are of particular importance.¹⁴ While the claims and aspirations of indigenous peoples are diverse, they do present a common thread: the quest to safeguard their heritage.¹⁵ For indigenous peoples, cultural heritage is a mix of tangible and intangible elements that contribute to personal identity, life-values, and resilience. On the one hand, for indigenous peoples, cultural heritage has 'a temporal dimension that moves simultaneously in two directions': the past and the future.¹⁶ For indigenous peoples, cultural heritage transforms the past into a tool to address present needs and future challenges.¹⁷ On the other hand, indigenous peoples hold a holistic view of land;¹⁸ they do not differentiate between cultural heritage on the one hand and natural heritage on the other.¹⁹ Rather, their cultural traditions 'are inseparable from their lands, territories, and natural resources.'²⁰ Tangible and intangible qualities of heritage 'become blurred when viewed through an indigenous lens' and 'fuse into one.'²¹ Therefore, the safeguarding of indigenous cultural heritage is indissolubly tied to the ancestral land and human rights of indigenous peoples.

Indigenous heritage appears in a number of international law

¹¹ K. Göcke 'Protection and Realization of Indigenous Peoples' Land Rights at the National and International Level' (2013) 5 *Goettingen Journal of International Law* 124.

¹² S. Sargent 'Transnational Networks and United Nations Human Rights Structural Change: The Future of Indigenous and Minority Rights' (2012) 16 *International Journal of Human Rights* 123–151, 136.

¹³ See Citroni's chapter in this volume.

¹⁴ L. Westra, *Environmental Justice and the Rights of Indigenous Peoples* (London: Earthscan 2008) 10.

¹⁵ S. Wiessner, 'The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges' (2011) 22 *EJIL* 121.

¹⁶ T. te Heuheu, M. Kawharu and R. Ariihau Tuheiava, 'World Heritage and Indigeneity' (2012) *World Heritage* 17.

¹⁷ J. Josefsson and I.-L. Aronsson, 'Heritage as Life-Values: A Study of the Cultural Heritage Concept' (2016) 110 *Current Science* 2091, 2093–95.

¹⁸ 'Interview with Myrna Cunningham, Chair of the United Nations Permanent Forum on Indigenous Issues' (2012) *World Heritage* 54–57.

¹⁹ Josefsson and Aronsson, 'Heritage as Life-Values', 2098.

²⁰ 'Interview with Myrna Cunningham', *supra* note 18, 54.

²¹ te Heuheu, Kawharu and Tuheiava, 'World Heritage and Indigeneity', 17.

instruments, and plays a central role in the UNDRIP.²² The Declaration is the product of two decades of preparatory work and ‘a milestone of re-empowerment’ of indigenous peoples.²³ 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.²⁴ The Declaration constitutes a significant achievement for indigenous peoples worldwide as it brings indigenous peoples’ rights and cultural heritage to the forefront of international law.²⁵ Indigenous culture is a key theme of the Declaration. Many articles are devoted to different aspects of indigenous culture; in fact, the word ‘culture’ appears no less than thirty times in its text.²⁶ 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 civilizations and cultures’, which constitute the ‘common heritage’ of humanity.²⁷

The Declaration recognizes the right of indigenous peoples to practice their cultural traditions²⁸ and maintain their distinctive spiritual and material relationship with the land that they have traditionally owned, occupied, or otherwise used.²⁹ For most, if not all, indigenous peoples, land is not only the basis of economic livelihood, but also the source of spiritual and cultural

²² International Labour Organization, Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169), adopted 27 June 1989, in force 5 September 1991, 28 *ILM* 1382, Article 13(1).

²³ S. Wiessner, ‘Indigenous Self-Determination, Culture and Land: A Reassessment in Light of the 2007 UN Declaration on the Rights of Indigenous Peoples’ in E. Pulitano (ed), *Indigenous Rights in the Age of the UN Declaration* (Cambridge: CUP 2012) 31–63, 31.

²⁴ On the legal status of the Declaration, see M. Barelli, ‘The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples’ (2009) 58 *ICLQ* 957, 983 (arguing that ‘regardless of its non-binding nature, the Declaration has the potential effectively to promote and protect the rights of the world’s indigenous peoples.’) See also International Law Association, Comm. on the Rights of Indigenous Peoples, Res. No. 5/2012 (August 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.’)

²⁵ E. Pulitano, ‘Indigenous Rights and International Law: An Introduction’, in E. Pulitano (ed), *Indigenous Rights in the Age of the UN Declaration* (Cambridge: CUP 2012) 25.

²⁶ See Y. Donders, *The UN Declaration on the Rights of Indigenous Peoples. A Victory for Cultural Autonomy?*, in I. Boerfijn and J. Goldschmidt (eds.) *Changing Perceptions of Sovereignty and Human Rights* (Intersentia 2008) 99.

²⁷ UNDRIP preamble.

²⁸ Id. Article 11.

²⁹ Id. Articles 8, 11, 12.1, 13.1.

identity.³⁰ 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.’³¹ Because indigenous peoples often have this holistic approach, a UN study acknowledges that ‘[a]ll elements of heritage should be managed and protected as a single, interrelated, and integrated whole.’³² For the same reason, indigenous culture ‘often cannot be preserved in locations outside traditionally indigenous territories.’³³

Some scholars caution that emphasizing the cultural entitlements of indigenous peoples can reduce their political rights and limit their claims to self-determination.³⁴ They warn that there is tendency to treat cultural rights as less fundamental than other human rights. On the contrary, this chapter argues that without the protection of indigenous cultural identity, heritage, and rights, all of the other claims of indigenous peoples lose strength. Cultural claims do not replace other claims; rather, they complement and reinforce them. Not only have cultural rights gradually become more central in current debates, but human rights have long been considered to be indivisible.³⁵ 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 of indigenous peoples is at the heart of the UNDRIP,³⁶ and ‘one can find the cultural rights angle in each article of the Declaration.’³⁷ Therefore, recognizing the

³⁰ J. Gilbert, ‘Custodians of the Land – Indigenous Peoples, Human Rights and Cultural Integrity’, in M. Langfield, W. Logan, and M. Nic Craith (eds), *Cultural Diversity, Heritage and Human Rights* (London: Routledge 2010) 31–44.

³¹ C. O’Faircheallaigh, *Negotiating Cultural Heritage? Aboriginal Mining Company Agreements in Australia* (2003) 39 *Development & Change* 25, 27.

³² E.-I. 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 (1993) 9.

³³ ‘The Double Life of International Law’, 1759.

³⁴ K. Engle, *The Elusive Promise of Indigenous Development—Rights, Culture, Strategy* (Durham, NC: Duke University Press 2010) 1–2 (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.’)

³⁵ A. Sinding-Larsen, ‘Our Common Dignity: Rights-Based Approaches to Heritage Management’ (2012) 68 *World Heritage* 58, 58.

³⁶ F. Francioni, ‘The Human Dimension of International Cultural Heritage Law: An Introduction’ (2011) 22 *EJIL* 9, 15.

³⁷ E. Stamatopoulou, ‘Taking Cultural Rights Seriously: The Vision of the UN Declaration on the Rights of Indigenous Peoples’, in S. Allen and A. Xanthaki (eds.) *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Oxford: Hart Publishing 2011) 387, 392.

importance of indigenous culture is vital for the recognition, protection, and fulfillment of the human rights of indigenous peoples.

Indigenous peoples can raise complaints regarding measures that affect them before national courts and regional human rights courts, as well as through particular complaint mechanisms at the UN level.³⁸ Several human rights treaties set up international mechanisms for monitoring states' compliance with human rights and some even enable individuals or groups to file complaints before a court or commission alleging state human rights violations.³⁹ However, none of these mechanisms has jurisdiction over private parties.⁴⁰ At best, communities impacted by foreign direct investment (FDI) can 'obtain an award against the state in which violations [of human rights] occurred.'⁴¹ 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.'⁴² Finally, regional human rights courts have 'a limited geographical scope' and are present only in certain regions of the world.⁴³ 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.'⁴⁴

3. 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. As there is no single comprehensive global treaty, investors' rights are defined by an array of bilateral and regional investment treaties and by customary international law, general principles,

³⁸ I. Watson and S. Venne, 'Talking Up Indigenous Peoples' Original Intent in a Space Dominated by State Interventions', in E. Pulitano (ed), *Indigenous Rights in the Age of the UN Declaration* (Cambridge: CUP 2012) 87, 96, 106.

³⁹ G. K. Foster, 'Investors, States, and Stakeholders: Power Asymmetries in International Investment and the Stabilizing Potential of Investment Treaties' (2013) 17 *Lewis & Clark L. Review* 361, 390.

⁴⁰ Id.

⁴¹ Id.

⁴² Id. 391.

⁴³ Id.

⁴⁴ K. Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' (2011) 22 *EJIL* 141, 163.

and other subsidiary sources of law. International investment law provides extensive protection to investors' rights in order to encourage foreign direct investment (FDI) and to foster economic development. At the substantive level, investment treaties provide *inter alia* for: adequate compensation for expropriated property; protection against discrimination; fair and equitable treatment; full protection and security; and assurances that the host country will honour its commitments regarding the investment.

At the procedural level, international investment law is characterised by sophisticated dispute settlement mechanisms. While state-to-state arbitration has been rare,⁴⁵ investor–state arbitration has become the most successful mechanism for settling investment-related disputes.⁴⁶ Nowadays, international investment agreements (IIAs) provide investors with direct access to an international arbitral tribunal. The use of the arbitration model is aimed at depoliticising disputes, avoiding potential national court bias, and ensuring the advantage of effectiveness.⁴⁷ 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.⁴⁸

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

⁴⁵ On state-to-state investment treaty arbitration, *see generally* M. Potestà, 'Towards a Greater Role for State-to-State Arbitration in the Architecture of Investment Treaties?', in S. Lalani and R. Polanco Lazo (eds.) *The Role of the State in Investor–State Arbitration* (Leiden: Brill 2015) 249, 250.

⁴⁶ S. Franck, 'Development and Outcomes of Investor–State Arbitration' (2009) 9 *Harvard Journal of International Law* 435–489.

⁴⁷ U. Kriebaum, 'Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes' (2018) 33 *ICSID Review* 14–28.

⁴⁸ 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.

may interfere with economic interests. 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 investment treaties 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, on the one hand, and private individuals on the other.⁴⁹ 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.⁵⁰ From this, it is clear that disputes determined within this model can potentially affect the inherent rights of indigenous peoples. The following section addresses the question of whether the inherent rights of indigenous peoples play any role in investor-state arbitrations.

4. *When Cultures Collide*

The development of natural resources is growing increasingly in, or very close to, traditional indigenous areas. While development analysts consider extractive projects as anti-poverty measures and advocate FDI as a major catalyst for development,⁵¹ 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 the development through reduced access to resources and direct exposure to pollution and environmental degradation. In particular, rising investment in the extractive industries can have a devastating impact on the livelihood of indigenous peoples.⁵²

The interplay between investors' rights and indigenous peoples' rights has been discussed by domestic courts,⁵³ and by human rights bodies at

⁴⁹ G. Van Harten *Investment Treaty Arbitration and Public Law* (Oxford: OUP 2007) 70.

⁵⁰ M. Sornarajah, 'The Clash of Globalizations and the International Law on Foreign Investment' (2003) 10 *Canadian Foreign Policy* 1.

⁵¹ OECD, *Foreign Direct Investment for Development* (Paris: OECD 2002) 3.

⁵² K. Tienhaara, 'What You Don't Know Can Hurt You: Investor-State Disputes and The Protection of the Environment in Developing Countries' (2006) 6 *Global Environmental Politics* 73–100.

⁵³ At the national level, see e.g. *Hupacasath First Nation v. The Minister of Foreign Affairs*

the regional and international level.⁵⁴ This jurisprudence and the relevant literature are extensive; what is less known is the emerging jurisprudence of investment treaty arbitral tribunals dealing with elements of indigenous cultural heritage. This chapter contributes to the existing literature by examining and critically assessing a number of recent arbitrations and proposing policy options to reconcile the interests at stake.

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 into 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 reduce the institutional imbalance with international investment law.

To date, the crossover of international investment law and the rights of indigenous peoples has arisen in three ways.⁵⁵ 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.⁵⁶ 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, indigenous communities have sought permission to intervene in the proceedings.⁵⁷ This

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 stall the Canada–China Investment Treaty until First Nations had been consulted, holding that any potential adverse impacts were non-appreciable and speculative in nature).

⁵⁴ See Citroni's chapter in this volume.

⁵⁵ For a similar analytical framework, see J. Levine, 'The Interaction of International Investment Arbitration and the Rights of Indigenous Peoples', in F. Baetens (ed) *Investment Law within International Law—Integrationist Perspectives* (Cambridge: CUP 2013) 107–128.

⁵⁶ *Grand River Enterprises Six Nations, Ltd. v. United States*, Award, NAFTA Tribunal, 12 January 2011. For commentary, see V. Vadi, 'Heritage, Power, and Destiny: The Protection of Indigenous Heritage in International Investment Law and Arbitration' (2018) 50 *George Washington International Law Review* 742–744.

⁵⁷ See e.g. *Border Timbers Ltd. v. Zimbabwe*, Procedural Order No. 2, ICSID ARB/10/25, 26 June 2012; *Glamis Gold, Ltd. v. United States*, Decision on Application and Submission by Quechan Indian Nation, UNCITRAL, 16 September 2005. For commentary, see Vadi, 'Heritage, Power, and Destiny', 761–4.

chapter focuses on the second type of case, those in which investors have contended that state measures allegedly intended to protect indigenous peoples were in breach of relevant investment treaty provisions. In particular, it proceeds as follows. First, it sheds light on a recent award which declined jurisdiction. Second, it deals with claims of breach of fair and equitable treatment. Third, it discusses claims of unlawful expropriation. Other claims, including violation of full protection and security, are not examined here due to space limitations.⁵⁸

4.1 *Jurisdiction*

In some cases, arbitral tribunals have declined their jurisdiction. In this regard, it may be interesting to examine a recent award, which has been neglected by the literature so far, in which the arbitral tribunal declined jurisdiction because the investors had not complied with the domestic law of the host state to safeguard indigenous peoples' rights. 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).⁵⁹ The investors contested decisions made by the Panamanian National Land Management Agency about whether the claimants' property was located within the protected area inhabited by the Ngöbe Buglé indigenous peoples in Western Panama.⁶⁰ The Ngöbe land originally extended from the Pacific Ocean to the Caribbean Sea and the Ngöbe have traditionally relied on subsistence activities such as farming, fishing, and hunting.⁶¹ Nowadays they mostly live in the Comarca Ngöbe-Buglé, which is a specifically designated area to protect the cultural heritage and the political autonomy of these indigenous communities.⁶² The 1997 law

⁵⁸ Other claims include violation of full protection and security. See, e.g. *Burlington Resources, Inc. v. Republic of Ecuador*, Decision on Jurisdiction, ICSID ARB/08/5, 2 June 2010) paras 27–37. For commentary, see Vadi, 'Heritage, Power, and Destiny', 750-1.

⁵⁹ *Álvarez y Marín Corporación S.A. v. Republic of Panama*, ICSID ARB/15/14, 20 April 2015.

⁶⁰ See C. Trevino, 'Panama Faces New ICSID Arbitration Over Thwarted Hotel Tourism Development', *Investment Arbitration Reporter* (2015) 1.

⁶¹ C. Campbell, 'Protecting the Ngäbe Buglé Community of Panama with Clean Development Mechanism Safeguards to Promote Culturally Sensitive Development' (2014) 2 *American Indian Law Journal* 547, 547.

⁶² *Álvarez y Marín Corporación S.A. y Otros c. República de Panamá*, ICSID ARB/15/14, Motivación de la decisión sobre las excepciones preliminares de la demandada en virtud

establishing the Comarca Ngöbe-Buglé recognized the right of indigenous persons to collective ownership of land and prohibited private property within these zones, as well as granting indigenous tribes a certain autonomy.⁶³ In the region, only land that has been privately-held before 1997 can be sold to private parties, and Comarca's authorities retain a right of preferential acquisition of any privately-owned land for sale.⁶⁴ Human rights scholars have interpreted this and similar laws to constitute 'one of the foremost achievements in terms of the protection of indigenous rights in the world.'⁶⁵

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.'⁶⁶ The investors bought these properties, supposedly belonging to the Comarca, from an intermediary who bought such properties and resold them to the investors.⁶⁷ Because the press questioned the legitimacy of the acquisition, the National Authority for Lands Administration 'issued a report that officially located two of the claimants' properties outside this special zone.'⁶⁸ Reportedly, the Report 'provoked a wave of indignation among the indigenous population'⁶⁹ and 'this led to the invasion of these properties.'⁷⁰ The claimants alleged that Panama's treatment of their investment constituted an indirect expropriation and a breach of the fair and equitable treatment as well

de la regla 41(5) de las reglas de arbitraje del CIADI del 27 de enero de 2016, para. 22; *Álvarez y Marín Corporación S.A., Bartus Van Noordenne, Cornelis Willem Van Noordenne, Estudios Tributarios AP SA, Stichting Administratiekantoor Anbadi c. República de Panamá*, ICSID ARB/15/14, laudo 12 October 2018, para. 206.

⁶³ *Kuna Indigenous People of Madungandi v. Panama*, Preliminary Objections, Merits, Reparations and Costs, IACtHR (ser. C) No. 284, para. 59, Judgment 14 October 2014; *Álvarez y Marín Corporación y Otros*, laudo, para. 208.

⁶⁴ *Álvarez y Marín Corporación y Otros*, laudo, para. 209.

⁶⁵ J. Anaya, Special Rapporteur on the Rights of Indigenous Peoples, UN Hum. Rts. Council, *The Status of Indigenous Peoples' Rights in Panama*, A/HRC/27/52/Add.1, 3 July 2014, para. 13.

⁶⁶ Z. Williams, 'Arbitrators in Panama Eco-Tourism BIT Dispute Weigh in With Ruling on Preliminary Objections' (2016) *Investment Arbitration Reporter* 2.

⁶⁷ D. Charlotin and F. Perez Aznar, 'In previously-unseen *Álvarez y Marín v. Panama* award, reasons are revealed for why a majority declined to take jurisdiction over investment in indigenous territory – and why Grigera Naon dissented', *Investment Arbitration Reporter*, 13 March 2019, 1.

⁶⁸ Williams, 'Arbitrators in Panama Eco-Tourism BIT Dispute'; *Álvarez y Marín Corporación S.A. y Otros c. República de Panamá*, Motivación de la decisión sobre las excepciones preliminares, para. 26.

⁶⁹ Charlotin and Perez Aznar, 'In previously-unseen', 1.

⁷⁰ *Álvarez y Marín Corporación S.A. y Otros c. República de Panamá*, Motivación de la decisión sobre las excepciones preliminares, para. 27.

as the full protection and security standards.⁷¹ Panama denied having violated the treaties and raised several jurisdictional objections, arguing mainly that the investments had been unlawfully acquired.

The Arbitral Tribunal declined jurisdiction over the case on the basis of the investors' lack of compliance with domestic law.⁷² Although neither of the two treaties invoked by the investors contained an express requirement of legality, the Tribunal held that a legality requirement should be deemed implicit in all investment treaties, so that only investments acquired legally could benefit from a treaty's protection.⁷³ The Tribunal noted that the Law establishing the Comarca and the Panamanian Constitution aimed at protecting indigenous peoples' cultural, economic, and social well-being.⁷⁴ It also considered the commonality of land as a fundamental condition for the survival and continuity of the ethnic identity of indigenous peoples.⁷⁵

4.2 *Fair and Equitable Treatment*

This subsection examines selected investors' claims of breach of the fair and equitable (FET) treatment.⁷⁶ The fair and equitable treatment standard requires host states to treat foreign investors and their investments in good faith. Because of its vagueness and potential comprehensiveness, the standard has become the most popular type of claim today because it is easier to establish than an expropriation claim. A flexible standard, it is susceptible to specification through arbitral practice.

In *Crystalex v. Venezuela*,⁷⁷ a Canadian company that 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

⁷¹ Id. para. 28.

⁷² *Álvarez y Marín Corporación y Otros*, laudo, para. 296 ('*El Tribunal ha decidido que no merecen protección ius-internacional aquellas inversiones en las que el inversor, al momento de realizarlas, haya incurrido en un incumplimiento grave de la legislación nacional.*')

⁷³ *Álvarez y Marín Corporación S.A., Bartus Van Noordenne, Cornelis Willem Van Noordenne, Estudios Tributarios AP SA, Stichting Administratiekantoor Anbadi c. República de Panamá*, ICSID ARB/15/14, laudo 12 October 2018, para. 118 (noting that '*el requisito de legalidad, aunque no expresado explícitamente en los Tratados, forma parte implícita del concepto de inversión protegida.*')

⁷⁴ Id. paras. 318–319 (referring to Article 127 of the Panamanian Constitution).

⁷⁵ Id. para. 327 ('*Las tierras comunales son consideradas elemento fundamental para la supervivencia y perpetuación de la identidad étnica de los pueblos indígenas.*')

⁷⁶ For the examination of earlier awards, such as *Glamis Gold v. United States*, Award, UNCITRAL, 8 June 2009, see Vadi, 'Heritage, Power and Destiny', 748.

⁷⁷ *Crystalex Int'l Corp. v. Venezuela*, Award, ICSID ARB(AF)/11/2, 4 April 2016.

amounted to an expropriation, a violation of the fair and equitable treatment standard, and a violation of the full protection and security standard.⁷⁸ 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.⁷⁹ Yet, the claimant pointed out that the Ministry of Environment had never raised concerns for the environment and indigenous peoples during the four-year approval process and no study supported such concerns or demonstrated that the project would adversely affect the Imataca region.⁸⁰ While Crystallex claimed that it had consulted the relevant indigenous communities,⁸¹ Venezuela argued that the company had inadequately addressed issues concerning 'local indigenous culture and traditions.'⁸²

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.⁸³ 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 and biodiversity in general in the plot' and climate change.⁸⁴ While the Tribunal did not contest the state's right and responsibility to raise environmental issues in respect of the Imataca Reserve, it held that the specific way the state put forward such concerns in the permit denial letter 'present[ed] significant elements of arbitrariness.'⁸⁵

4.3 Expropriation

Two important arbitrations have centered on claims of expropriation. In *Bear Creek Mining Corporation v. Peru*,⁸⁶ 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)

⁷⁸ Id. paras 184–203.

⁷⁹ Id. paras 204 and 378.

⁸⁰ Id. para. 277.

⁸¹ Id. para. 289.

⁸² Id. para. 351.

⁸³ Id. para. 588.

⁸⁴ Id. para. 590.

⁸⁵ Id. para. 591.

⁸⁶ *Bear Creek Mining Corp. v. Peru*, Award, ICSID ARB/14/21, 30 November 2017.

between Canada and Peru. In particular, it claimed that Peru unlawfully expropriated its investment.⁸⁷ The Santa Ana project was located in a border region⁸⁸ 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.'⁸⁹ After the company 'initiated the procedure to obtain the necessary mining rights,'⁹⁰ a decree declared that the Santa Ana project was 'a public necessity' and authorized the claimant to acquire mining concessions.⁹¹

However, the project was in a region traditionally inhabited by the Aymara peoples, pre-Inca communities who have been in Peru for a long time.⁹² For the Aymara, this land is a spiritual space as it includes 'the guardian mountains (*Apus*), which represent extremely important spiritual sanctuaries for all the population in the area.'⁹³ Some indigenous communities protested against the project, requiring the cancellation of all mining projects and the protection of Khapia Hill, a sacred place for the Aymaras.⁹⁴ After the protest became violent,⁹⁵ Peru revoked the finding of public necessity, thereby annulling the legal condition for the claimant's ownership of mineral concessions.⁹⁶

The claimant contended that it obtained the communities' support for the Santa Ana project and the 'social license' to operate.⁹⁷ The company also stressed that it was the state's duty to consult with local communities before granting rights over their lands.⁹⁸ For the claimant, Peru's actions amounted to an indirect expropriation because it permanently deprived the company of 'its ability to own and operate its lawfully acquired mining concessions.'⁹⁹ For the company, there was disparity between such deprivation and 'the stated goal of quelling political pressure and social protests.'¹⁰⁰

⁸⁷ Id. para. 113.

⁸⁸ *Bear Creek Mining Corp. v. Peru*, Partial Dissenting Opinion, 12 September 2017, para. 25.

⁸⁹ *Bear Creek Mining Corp. v. Peru*, Award, para. 124.

⁹⁰ Id. para. 140.

⁹¹ Id. para. 149.

⁹² *Bear Creek Mining Corp. v. Peru*, Partial Dissenting Opinion, para. 25.

⁹³ Id. para. 16 (footnote omitted).

⁹⁴ *Bear Creek Mining Corp. v. Peru*, Award, paras 183 and 186 (noting that the government subsequently declared Khapia Hill to be part of the nation's cultural heritage.)

⁹⁵ Id. paras 189–190.

⁹⁶ Id. para. 202.

⁹⁷ Id. paras 235, 246.

⁹⁸ Id. para. 236.

⁹⁹ Id. para. 347.

¹⁰⁰ Id.

The Tribunal acknowledged the ‘strong political pressure’ on Peru due to ‘social unrest.’¹⁰¹ It also questioned whether the 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.’¹⁰² 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 communities that remained silent or objected were either not receiving benefits, were uninformed, or both.’¹⁰³

Yet, the Tribunal noted that ‘[T]he ILO Convention 169 imposes direct obligations only on States... [I]t 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.’¹⁰⁴ Therefore, the Tribunal concluded that the company ‘complied with all legal requirements with regard to its outreach to the local communities.’¹⁰⁵ Instead, the Tribunal found that Peru’s conduct amounted to an indirect expropriation of the company’s investment.¹⁰⁶ The Tribunal noted that ‘those members of the indigenous 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 the Respondent from paying reasonable and appropriate damages for its breach of the FTA.’¹⁰⁷

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.¹⁰⁸ Nonetheless, Professor Sands disagreed with the other members of the Arbitral Tribunal on how to assess damages, arguing that the assessment of damages should be reduced.¹⁰⁹ For the Arbitrator, ‘the Project collapsed because of the investor’s

¹⁰¹ Id. para. 401.

¹⁰² Id. para. 406.

¹⁰³ Id. para. 407.

¹⁰⁴ Id. para. 664 (emphasis in original).

¹⁰⁵ Id. para. 412.

¹⁰⁶ Id. paras 416, 447–448.

¹⁰⁷ Id. para. 657.

¹⁰⁸ *Bear Creek Mining Corp. v. Peru*, Partial Dissenting Opinion, para. 2.

¹⁰⁹ *Bear Creek Mining Corp. v. Peru*, Award, para. 663.

inability to obtain a “social license,” the necessary understanding between the Project’s proponents and those living in the communities most likely to be affected by it.’¹¹⁰ 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.’¹¹¹ However, for the Arbitrator, the company ‘did not . . . take real or sufficient steps . . . to engage the trust of all potentially affected communities’ and this ‘contributed, at least in part, to some of the population’s general discontent with the Santa Ana Project.’¹¹² 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.’¹¹³

Referring to the preamble of the ILO Convention 169, to which Peru is a party, 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.’¹¹⁴ 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 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.’¹¹⁵

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.’¹¹⁶ Rather, the Arbitrator pointed 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.’¹¹⁷ He further added that ‘[a]s an international investor the Claimant has

¹¹⁰ *Bear Creek Mining Corp. v. Peru*, Partial Dissenting Opinion, para. 6.

¹¹¹ *Id.*

¹¹² *Id.* para. 19.

¹¹³ *Id.* para. 37.

¹¹⁴ *Id.* para. 7.

¹¹⁵ *Id.* (internal references omitted).

¹¹⁶ *Id.* para. 10.

¹¹⁷ *Id.* (quoting *Urbaser S.A. v. Argentine Republic*, Award, ICSID ARB/07/26, 8 December 2016, para. 1199).

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.¹¹⁸

In *South American Silver Limited (SAS) v Bolivia*, the Bermudan subsidiary of a Canadian company alleged that the host state, *inter alia*, expropriated the company's ten mining concessions near the village of Malku Khota in the Bolivian province of Potosí.¹¹⁹ Although several indigenous communities had lived in the area of the Project since time immemorial, for the company, the government itself, and not the local Aymara communities, pressed for the nationalization of the project for economic reasons, namely the benefits associated with SAS's discovery of a large deposit of silver, indium, and gallium.¹²⁰ For the claimant, the expropriation did not have a public purpose, as 'it b[ore] no logical or proportional relationship with the stated objective of pacifying the area.'¹²¹

In its Counter-Memorial,¹²² the respondent alleged that the claimant had violated the rights of the indigenous communities that lived in the area, and that such violations operated as a jurisdictional or admissibility bar.¹²³ 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 indigenous peoples.¹²⁴ Bolivia noted that according to the Bolivian Constitution indigenous communities have, *inter alia*, the right to land, including '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.'¹²⁵ Moreover, they have recognized autonomy, that is, '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.'¹²⁶ Bolivia also

¹¹⁸ Id. para. 36.

¹¹⁹ *South American Silver Limited v the Plurinational State of Bolivia* (hereafter *SAS v Bolivia*), PCA Case No. 2013-15, Claimant's Statement of Claim and Memorial, 24 September 2014, para. 9.

¹²⁰ Id. para. 96.

¹²¹ Id. para. 144.

¹²² *SAS v Bolivia*, PCA Case No. 2013-15, Objections to Jurisdiction, Admissibility and Counter-Memorial on the Merits, 31 March 2015 (unofficial English translation).

¹²³ Id. para. 4.

¹²⁴ Id. paras 6–7.

¹²⁵ Id. para. 47.

¹²⁶ Id.

noted that indigenous peoples consider Malku Khota as ‘a sacred place’,¹²⁷ despite the fact that it has been exploited since Spanish colonization,¹²⁸ and ‘consider themselves ancestral owners of the minerals of the Andean mountains.’¹²⁹ Therefore, the state contended, opposition to the project came from indigenous communities that perceived the project as a violation of their ancestral beliefs and an impending risk to the environment on which their survival depended.¹³⁰ From its perspective, the government ‘did not have any other option but to re-establish the public order.’¹³¹

With regard to the applicable law, the investor argued that international investment law required arbitral tribunals to ‘apply the treaty itself, as *lex specialis*, supplemented by international law if necessary.’¹³² Instead, Bolivia expressly required that the Tribunal ‘interpret the Treaty in light of the sources of international and internal law that guarantee the protection of the rights of the Indigenous peoples.’¹³³ In this regard, it referred to customary norms of treaty interpretation as restated in the Vienna Convention on the Law of Treaties,¹³⁴ requiring adjudicators to take into account the context of a treaty, which included, according to article 31(3)(c) of the same Convention, ‘any relevant rules of international law applicable in the relations between the parties.’¹³⁵

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.’¹³⁶ In support of this argument, Bolivia relied on *Indigenous Peoples of Sawhoyamaxa 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.’¹³⁷ Bolivia derived the ‘superior position or special status’

¹²⁷ Id. para. 90.

¹²⁸ Id. para. 71.

¹²⁹ Id. para. 72.

¹³⁰ Id. para. 80.

¹³¹ Id. para. 84.

¹³² *SAS v Bolivia*, Claimant’s Statement of Claim and Memorial, para. 116.

¹³³ *SAS v Bolivia*, Objections to Jurisdiction, Admissibility and Counter-Memorial on the Merits, para. 192

¹³⁴ Vienna Convention on the Law of Treaties (VCLT), 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, in force 27 January 1980.

¹³⁵ *SAS v Bolivia*, Objections to Jurisdiction, Admissibility and Counter-Memorial on the Merits, para. 193.

¹³⁶ Id. para. 202.

¹³⁷ Id. para. 203.

of human rights in the international legal system from two pillars. First, article 103 of the Charter of the United Nations provides ‘the supremacy’ of the obligations established in the Charter over any other obligation acquired by its members. Under article 56 of the Charter, its members pledge to take action for the achievement of several purposes, including the respect of human rights.¹³⁸ Second, Bolivia argued, norms concerning the fundamental rights of human beings are *erga omnes* obligations.¹³⁹ According to Simma and Kill, ‘norms relating to economic, social, and cultural rights could also constitute rules applicable in the relations among States, even if there [was] no independent treaty obligation running between the States in question ... [T]he 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.’¹⁴⁰ Bolivia also recalled various international law instruments protecting indigenous rights, including the American Convention on Human Rights,¹⁴¹ the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the International Labour Organization (ILO) Convention 169,¹⁴² and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women.¹⁴³ It also referred to the United Nations Guiding Principles on Business and Human Rights¹⁴⁴ and the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises¹⁴⁵ ‘as evidence of the

¹³⁸ Id. para. 205.

¹³⁹ Id. para. 206.

¹⁴⁰ Id. quoting B. Simma and T. Kill, ‘Harmonizing Investment Protection and International Human Rights: First Steps towards a Methodology’, in C. Binder, U. Kriebaum, A. Reinisch and S. Wittich (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford: Oxford University Press 2009) 702.

¹⁴¹ American States Organization, American Convention on Human Rights, 7 to 22 of November of 1969, 1144 *UNTS* 123; 9 *ILM* 99 (1969).

¹⁴² ILO Convention 169, *supra* note 22.

¹⁴³ American States Organization, Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 9 June 1994, 33 *ILM* 1534 (1994).

¹⁴⁴ United Nations Guiding Principles on Business and Human Rights Implementing the United Nations ‘Protect, Respect and Remedy’ Framework (2011), developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.

¹⁴⁵ J. G. Ruggie and T. Nelson, *Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges* (Harvard Kennedy School Working Paper No. 15-045 2015).

international public order.’¹⁴⁶

In its Reply to the respondent’s Counter-Memorial,¹⁴⁷ the claimant denied any allegation of unlawful conduct and restated that ‘[t]he Tribunal ... [should] rely upon the Treaty as the primary source of applicable law.’¹⁴⁸ The claimant did ‘not dispute the basic notion that treaties should generally be construed in harmony with international law’¹⁴⁹ and conceded that ‘a systemic interpretation of the Treaty [was] called for under international law.’¹⁵⁰ Yet, the company contended that ‘Bolivia ha[d] not satisfactorily established why the Tribunal should give primacy to the rights of indigenous communities over the clear terms of the Treaty.’¹⁵¹ In fact, quoting Bruno Simma, the company contended that Article 31(3)(c) of the VCLT ‘can only be employed as a means of harmonization qua interpretation, and not for the purpose of modification, of an existing treaty.’¹⁵² The claimant thus argued that ‘Bolivia [sought] to use indigenous peoples’ rights as a shield to justify their unlawful conduct.’¹⁵³

The Arbitral Tribunal found that the applicable BIT was ‘the principal instrument by which it [should] resolve the dispute between the Parties.’¹⁵⁴ After noting that both parties agreed that ‘Article 31 of the Vienna Convention sets forth the rules of interpretation for the Treaty’,¹⁵⁵ it held that as a tool for treaty interpretation, systemic interpretation as restated by Article 31(3)(c) of the Vienna Convention should be applied ‘with caution.’¹⁵⁶ The Tribunal recalled Judge Bruno Simma’s warning that ‘systemic interpretation allows for harmonization through interpretation but it cannot be used to modify a treaty.’¹⁵⁷ It then concluded that its jurisdiction could not ‘be extended to cover other treaties via Article 31(3)

¹⁴⁶ *SAS v Bolivia*, Objections to Jurisdiction, Admissibility and Counter-Memorial on the Merits, para 220.

¹⁴⁷ *SAS v Bolivia*, Claimant’s Reply to Respondent’s Counter-Memorial on the Merits and Response to Respondent’s Objection and Admissibility, 30 November 2015.

¹⁴⁸ *Id.* para. 238.

¹⁴⁹ *Id.* para. 245.

¹⁵⁰ *Id.* para. 238.

¹⁵¹ *Id.*

¹⁵² *Id.* para. 245 (quoting B. Simma, ‘Foreign Investment Arbitration: A Place for Human Rights?’ (2011) 60 *International Comparative Legal Quarterly* 573, 584.

¹⁵³ *Id.* para. 253.

¹⁵⁴ *South American Silver Limited v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Award, 22 November 2018, para. 208.

¹⁵⁵ *Id.* para. 210.

¹⁵⁶ *Id.* para. 212.

¹⁵⁷ *Id.* para. 214.

(c) of the Vienna Convention if the States have not consented to such jurisdiction.’ In other words, the Tribunal held that it could not ‘alter the applicable law through rules of treaty interpretation.’¹⁵⁸ With regard to the applicability of Bolivian law, the Tribunal held that the domestic law was applicable to determine whether an investment was legal; however, it added that it did not ‘find support for a general rule that the provisions of Bolivian law should always prevail over those of the Treaty.’¹⁵⁹ Although the Tribunal acknowledged that the claimant’s community relations program had ‘serious shortcomings’ in its relationship with indigenous communities,¹⁶⁰ it held that the host state’s annulment of mining concessions amounted to an unlawful expropriation because it failed to compensate the company. The Tribunal found that Bolivia did not breach any other treaty standard of protection, and only awarded the investor its sunk costs.

5. *Critical Assessment*

What is the relevance of these and similar arbitrations to international investment law and international law more generally? In general terms, while these awards are binding on the parties to the specific disputes they are not binding on future arbitral tribunals as there is no *stare decisis* in international law. Nonetheless, arbitral tribunals usually refer to previous cases. Moreover, the significance of such cases extends beyond international investment law itself. The emerging arbitral jurisprudence concerning indigenous cultural heritage shows that international investment law is not a self-contained regime; rather, it may crossover with other fields of international law. Being part of international law, it 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. Some arbitral tribunals have shown some level of deference to state regulatory measures aimed at protecting indigenous cultural heritage. Other tribunals however, have struggled to properly interpret the human rights law requirement of free, prior, and informed consent. Arbitral tribunals have generally ascribed the duty to consult indigenous peoples to

¹⁵⁸ Id. paras 215–6.

¹⁵⁹ Id. para. 218.

¹⁶⁰ Id. para. 480.

states; but questions arise as to the correctness of their interpretation of the requirement of free, prior, and informed consent. If the right of indigenous peoples to participate in the decisions that affect them is crucial to the protection of their cultural heritage,¹⁶¹ investor–state arbitration itself constitutes an uneven playing field. The FDI-impacted indigenous peoples do not have direct access to arbitral tribunals; rather, the host state needs to espouse their arguments. Where indigenous peoples respond to investor activities by protest, investors have alleged violations of investment treaty standards. The possibility to file *amicus curiae* briefs does not transform indigenous peoples into parties to a given dispute. Arbitral tribunals have no duty to admit such submissions, or to consider these briefs in their awards. In sum, the voice of indigenous peoples does not reach arbitral tribunals distinctly. Rather, their claims are often hidden among the various arguments and counterarguments of the parties. Recent jurisprudential developments considering compliance with domestic law as a prerequisite for establishing the jurisdiction of the arbitral tribunal should be welcome, as they impede abuse of law.

From a human rights perspective, the interplay between international investment law and human rights law highlights ‘the power imbalance between two international legal regimes’¹⁶² 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, and nondiscrimination in addition to prohibiting unlawful expropriation and other forms of state misconduct.¹⁶³ Human rights law requires the protection of the rights of indigenous peoples and the property rights of the investors. If there is no inherent tension between these different subfields of international law in theory, potential 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. Human rights mechanisms usually require the exhaustion of internal remedies, which is often time-consuming.¹⁶⁴ Furthermore, certain areas such as South Asia lack regional systems capable of delivering binding judgments.¹⁶⁵ In addition, even where there are regional human rights courts, human rights courts

¹⁶¹ UNDRIP Article 18.

¹⁶² ‘The Double Life of International Law’, 1757.

¹⁶³ D. Collins, *An Introduction to International Investment Law* (Cambridge: CUP 2017).

¹⁶⁴ F. Francioni, ‘Access to Justice, Denial of Justice and International Investment Law’ (2009) 20 *European Journal of International Law* 729–747.

¹⁶⁵ ‘The Double Life of International Law’, 1770.

face difficulties securing compliance with their judgments. In other words, 'indigenous rights are the subject of much more variable enforcement' than investors' rights.¹⁶⁶ The power imbalance between the two treaty regimes plays a key role in perpetuating the power imbalance between states, foreign investors, and indigenous peoples.

Respondent states can (and have) raise(d) human rights issues 'as a means of justifying [their] action' before arbitral tribunals.¹⁶⁷ 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.'¹⁶⁸ When states have asserted human rights arguments on behalf of indigenous communities,¹⁶⁹ the protection of indigenous peoples' rights has not automatically justified the violation of the rights of investors. Rather, states ought to prevent disputes by adopting general transparent regulations that can make any interference with foreign investments foreseeable. The protection of indigenous peoples' rights is certainly a legitimate public objective. The fact that indigenous peoples' rights are recognised in constitutional law instruments and international treaties and customary international law confirms the legitimacy of their protection. However, the modalities of state action should not be arbitrary or unreasonable, rather they should follow the rule of law. This is not to say that states should not protect paramount interests—they have the right and the duty to do so—rather, they should follow transparent, and foreseeable procedures. Before granting concessions, they should condition such granting to the obtainment of free, prior, and informed consent by the relevant indigenous communities and, if such communities gave their consent, compulsorily require foreign investors to share benefits with those communities. Because indigenous peoples may object to proposed developments, states should adopt laws that recognize indigenous self-determination, including economic self-determination, and thus provide for no-development of their land if indigenous peoples so wish. Any permanent alterations to the landscape or impact upon traditional cultural practices that are incompatible with minimal subsistence requirements constitute irreparable harms to indigenous

¹⁶⁶ Id. 1765.

¹⁶⁷ Id. 1774.

¹⁶⁸ J. D. Fry, 'International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity' (2007) 18 *Duke Journal of Comparative & International Law* 77, 108.

¹⁶⁹ See S. Puig and A. Strezhnev, 'The David Effect and ISDS' (2017) 28 *European Journal of International Law* 731–761.

peoples that are difficult, if not impossible to quantify in monetary terms.¹⁷⁰ By adopting general laws and regulations, and implementing their human rights obligations towards indigenous peoples and investors, states can thus shield themselves from international responsibility before human rights courts and before arbitral tribunals alike.

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 *Sawhoyamaxa* case,¹⁷¹ 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.¹⁷² 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.¹⁷³ 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,¹⁷⁴ 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.¹⁷⁵ Rather, the Court noted that compliance with investment treaties should always be compatible with the human rights obligations of the state.¹⁷⁶ 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.¹⁷⁷ Therefore, the Court found a violation of Article 21 of the Convention¹⁷⁸ 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 constitutes a paradigmatic example of the possible interaction between different treaty regimes. General treaty rules

¹⁷⁰ Id.

¹⁷¹ *Sawhoyamaxa Indigenous Community v. Paraguay* (Merits, Reparations, and Costs) Judgment, IACtHR (ser. C) No. 146, 29 March 2006, para. 248.

¹⁷² Id. para. 2.

¹⁷³ Id. para. 115(b).

¹⁷⁴ Id. para. 118.

¹⁷⁵ Id. para. 140.

¹⁷⁶ Id.

¹⁷⁷ Id.

¹⁷⁸ Id. para. 144.

on hierarchy—namely *lex posterior derogat priori*¹⁷⁹ and *lex specialis derogat generali*¹⁸⁰—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.¹⁸¹ Unless a norm constitutes *jus cogens*,¹⁸² 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 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.

In conclusion, investment treaty arbitral tribunals are not the best *fora*, let alone the only *fora*, in which to adjudicate this collision of norms. They may not have a specific expertise on indigenous peoples' rights. However, this does not mean that these *fora* cannot take into account other international law obligations of the host state. The collision between international investment law and other fields of international law can be solved through international investment law itself, albeit to a limited extent. The next sec-

¹⁷⁹ VCLT Article 30.

¹⁸⁰ 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, para. 251) 408.

¹⁸¹ D. McRae, 'International Economic Law and Public International Law: The Past and the Future' (2014) 17 *Journal of International Economic Law* 627, 635.

¹⁸² For discussion see V. Vadi, 'Jus Cogens in International Investment Law and Arbitration' (2015) 46 *Netherlands Yearbook of International Law* 357–388; Vadi, 'When Cultures Collide', 857.

tion will examine three avenues that help to promote the consideration of indigenous entitlements in international investment disputes.

6. Policy Options

This section now examines three avenues that can facilitate the consideration of indigenous communities' entitlements in international investment law: (i) a 'treaty-driven approach'; (ii) a 'judicially driven approach';¹⁸³ and (iii) counterclaims.

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.¹⁸⁴ 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.¹⁸⁵ For example, indigenous communities' interests can be mentioned in the preambles, exceptions, carve-outs, annexes, and provisions of IIAs.¹⁸⁶ 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.¹⁸⁷

The duty to protect the legitimate exercise of indigenous peoples' cultural rights has led a number of states to include specific indigenous exceptions

¹⁸³ M. Krepchev, 'The Problem of Accommodating Indigenous Land Rights in International Investment Law' (2015) 6 *Journal of International Dispute Settlement* 42, 45.

¹⁸⁴ S. W. Schill and V. Djanić, 'International Investment Law and Community Interests', Society of International Economic Law Working Paper No. 2016/01 (2016) 4.

¹⁸⁵ Vadi, *Cultural Heritage in International Investment Law and Arbitration*, 277–86.

¹⁸⁶ Schill and Djanić, 'International Investment Law and Community Interests', 15.

¹⁸⁷ 'The Double Life of International Law', 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', 407 ('Given the near-universal endorsement of UNDRIP by the international community, investors could not legitimately claim surprise or 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.')

in international environmental law instruments banning the hunting 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.¹⁸⁸ For instance, the 1946 International Convention for the Regulation of Whaling retains aboriginal rights to subsistence whaling.¹⁸⁹ 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.

A parallel inclusive way states can build some safeguards within international investment treaties is by requiring compliance with domestic law. For instance, states can clarify that the relevant investment treaty protects only those investments that comply with domestic law. Such a clause can enable an adaptation of the treaty to the social, cultural, and political needs of the state. Recent international investment agreements tend to add 'legality requirements' – an obligation for foreign investors to conform to and respect the domestic laws of the host state (including human rights).¹⁹⁰ For instance, Article 15.3 of the 2012 Southern African Development Community Model BIT prohibits investors from operating their investment 'in a manner inconsistent with international, environmental, labour, and human rights obligations binding on the host state or the home state, whichever obligations are the higher.' Analogously, under Article 11 of the 2016 Indian Model BIT, 'the parties reaffirm and recognize that: (i) Investors and their investments shall comply with all laws, regulations, administrative guidelines and policies of a Party concerning the establishment, acquisition, management, operation, and disposition of investments.'

IIAs might require compliance with the requirements of free, prior, and informed consent and benefit-sharing for investments taking place in indigenous lands.¹⁹¹ Under human rights law, the duty of the state to

¹⁸⁸ See, e.g., Convention on Conservation of Migratory Species, 23 June 1979, 19 *ILM* 11, Article 3.5; Interim Convention on Conservation of North Pacific Fur Seals, 9 February 1957, 314 *UNTS* 105, Article 7 (describing the aboriginal hunting practices that are exempted by the application of the Convention).

¹⁸⁹ International Convention for the Regulation of Whaling, 2 December 1946, 161 *UNTS* 72, Article III(13)(b) (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.')

¹⁹⁰ E. De Brabandere, 'Human Rights and International Investment Law', *Leiden Law School Grotius Centre Working Paper* 2018/75-HRL (2018) 1–22.

¹⁹¹ On benefit sharing, see E. Morgera, 'The Need for an International Legal Concept of

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 precludes states from requiring *investors* to consider the existence of protected groups when assessing the economic risks of a given investment and to obtain a social license to operate.¹⁹² While some scholars have suggested incorporating local communities as a part of multi-actor contracts,¹⁹³ 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.’¹⁹⁴

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.’¹⁹⁵ According to the Ruggie’s Framework for Business and Human Rights¹⁹⁶ that is now embedded in the UN 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.’¹⁹⁷ In

Fair and Equitable Benefit Sharing’ (2016) 27 *EJIL* 353 (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.’)

¹⁹² Krepchev, ‘The Problem of Accommodating Indigenous Land Rights in International Investment Law’, 71.

¹⁹³ I. T. Odumosu-Ayanu, ‘Governments, Investors and Local Communities: Analysis of a Multi-Actor Investment Contract Framework’ (2014) 15 *Melbourne Journal of International Law* 473.

¹⁹⁴ L. J. Laplante and S. A. Spears, ‘Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector’ (2008) 11 *Yale Human Rights & Development L.J.* 69.

¹⁹⁵ S. Sargent, ‘What’s in a Name? The Contested Meaning of Free, Prior and Informed Consent in International Financial Law and Indigenous Rights’, in V. Vadi and B. De Witte (eds), *Culture and International Economic Law* (London: Routledge 2015) 87–103.

¹⁹⁶ J. Ruggie, Protect, Respect and Remedy: A Framework for Business and Human Rights, UN Doc A/HRC/8/5, 7 April 2008.

¹⁹⁷ *Bear Creek Mining Corp. v. Peru*, Award, ICSID ARB/14/21, 30 November 2017, para. 227 (internal reference omitted).

other words, 'for a social license to exist, there must be consent.'¹⁹⁸ 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.'¹⁹⁹

What does free, prior, and informed consent mean? The term *free* indicates that indigenous peoples must be free from 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, a former chair of the UN 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.'²⁰⁰

Free, prior, and informed consent enables indigenous peoples to decide for themselves whether a given project is suitable to their own needs and aspirations or whether they would prefer not to proceed. It enables them to shape their future and select the development model they prefer. It can also provide indigenous communities with the ability to shape and derive benefits from projects on traditional lands. In parallel, 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. 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).²⁰¹

¹⁹⁸ Id.

¹⁹⁹ Id. para. 406.

²⁰⁰ 'Interview with Myrna Cunningham, Chair of the United Nations Permanent Forum on Indigenous Issues', *supra* note 18, 55.

²⁰¹ F. Lenzerini, 'Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples' (2006–7) 42 *Texas International Law Journal* 155–189, 156 ('asserting

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 economic models that may undermine the cultural identity, human rights, and core values of indigenous peoples. If the UN 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.²⁰² 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 indigenous sovereignty [is] parallel to the sovereign power held by the State.’²⁰³ 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).²⁰⁴ ILO Convention 107 contained a major flaw as it supported the eventual assimilation of indigenous persons into the society at large rather than promoting their right to self-determination. ILO Convention 169 overcomes this flaw, assuming that indigenous peoples have the right to determine their own development.

Free, prior, and informed consent prominently features in the UNDRIP, being mentioned six times.²⁰⁵ 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.²⁰⁶ 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, it ‘shall *consult* these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any

the existence of a given degree of Indigenous sovereignty parallel to the sovereign power held by the state.’)

²⁰² Id. 160–61.

²⁰³ Id. 156.

²⁰⁴ 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) 26 June 1957, 328 *UNTS* 247.

²⁰⁵ UNDRIP, Articles 10, 11, 19, 28, 29, and 32.

²⁰⁶ J. Anaya, *International Human Rights and Indigenous Peoples* (New York: Aspen 2009) 79.

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.’²⁰⁷

Although ‘ambiguities persist over whether indigenous land rights encompass a right to veto decisions regarding development projects which are likely to affect indigenous traditional lands and resources,’²⁰⁸ human rights courts have held that informed *consent* is required for large-scale development projects that would have a major impact on indigenous land.²⁰⁹ 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 substantive function by ‘enabl[ing] indigenous peoples to protect their substantive land rights . . . and culture.’²¹⁰ 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.²¹¹

A number of international investment agreements 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.²¹² Analogously, the Energy Charter Treaty²¹³ allows the contracting parties to adopt ‘measures designed to benefit investors who are aboriginal people.’²¹⁴ Canada’s new model Foreign Investment Protection Agreement (FIPA) also includes preferential treatment for aboriginals in its annex.²¹⁵ Malaysia has similarly excluded measures designed to promote economic empowerment of the Bumiputras

²⁰⁷ ILO Convention 169, Article 15 (emphasis added).

²⁰⁸ G. Pentassuglia, ‘Towards a Jurisprudential Articulation of Indigenous Land Rights’ (2011) 22 *EJIL* 165, 169.

²⁰⁹ *Saramaka Peoples v. Suriname*, Judgment, IACtHR (ser. C), No. 172, 28 November 2007, para. 134.

²¹⁰ L. Aponte Miranda, ‘The Role of International Law in Intrastate Natural Resource Allocation: Sovereignty, Human Rights, and Peoples-based Development’ (2012) 45 *Vanderbilt Journal Transnational Law* 785, 828.

²¹¹ Sargent, ‘What’s in a Name? The Contested Meaning of Free, Prior and Informed Consent in International Financial Law and Indigenous Rights’, 95.

²¹² Vadi, *Cultural Heritage in International Investment Law and Arbitration*, 279.

²¹³ Energy Charter Treaty, 17 December 1994, 2080 *UNTS* 95.

²¹⁴ Vadi, *Cultural Heritage in International Investment Law and Arbitration*, 279–80.

²¹⁵ *Id.* 279–80.

ethnic group from the scope of its BITs.²¹⁶

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.²¹⁷ 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,’²¹⁸ she recommended that states develop participatory mechanisms so that indigenous peoples have the ability to comment and provide 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.²¹⁹ Moreover, IIAs generally include ‘survival clauses that guarantee protection under the treaty . . . for a substantial period after the treaty has elapsed.’²²⁰ Therefore, treaty drafting can but does not necessarily solve the conflict between international investment law and other community interests on its own.²²¹ While treaty-drafting can ‘stabilize relations’ between investors, states, and indigenous peoples,²²² it seems crucial to consider other mechanisms to promote the consideration of indigenous rights in international investment law and arbitration.²²³

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’ and Indigenous peoples’ Rights.²²⁴ Such an approach promotes the consideration of indigenous rights in international investment

²¹⁶ Id.

²¹⁷ V. 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*, UN Doc A/70/301 (2015).

²¹⁸ Id. para. 23.

²¹⁹ P. Anand and A. Kumar Sinha, ‘Protecting the Rights of Tribals’, *The Hindu* 22 February 2017, <<http://www.thehindu.com/opinion/op-ed/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.’)

²²⁰ Schill and Djanic, ‘International Investment Law and Community Interests’, 16.

²²¹ Id.

²²² Foster, ‘Investors, States and Stakeholders’, 420.

²²³ Schill and Djanic, ‘International Investment Law and Community Interests’, 16.

²²⁴ Id. 4.

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 system of international law.'²²⁵

Arbitral tribunals are of limited jurisdiction and cannot adjudicate on the eventual infringement of indigenous peoples' rights. They 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.²²⁶ 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),²²⁷ the International Covenant on Civil and Political Rights (ICCPR),²²⁸ the Covenant on Economic, Social and Cultural Rights (ICESCR),²²⁹ and ILO Convention 169.²³⁰

Arbitral tribunals should interpret international investment law by taking into account 'any relevant rules of international law applicable in the relations between the parties.'²³¹ 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.²³² This provision expresses the principle of systemic integration within the international legal system, indicating that treaty regimes are

²²⁵ Id. 16.

²²⁶ Id.

²²⁷ Universal Declaration of Human Rights (UNDHR) G.A. Res. 217A, 10 December 1948, Article 17.

²²⁸ International Covenant on Civil and Political Rights, 16 December 1966, 6 *ILM* 368, 999 UNTS 171.

²²⁹ International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 6 *ILM* 360, 993 UNTS 3.

²³⁰ ILO Convention 169, *supra* note 22.

²³¹ VCLT, Article 31(3)(c).

²³² For commentary, *see generally* C. McLachlan, 'Investment Treaties and General International Law' (2008) 57 *ICLQ* 361, 369 (explaining the key relevance of this provision for defragmenting international law); T. Hai Yen, *The Interpretation of Investment Treaties* (Leiden: Brill 2014) 55–61.

themselves creatures of international law.²³³ Therefore, arbitral tribunals have some interpretative space to consider other international law rules, especially when the host state invokes them. In fact, customary rules of treaty interpretation require that international law protecting indigenous peoples' rights serve as an interpretive context if they are relevant to the interpretation of the respective international investment law provisions. As the *Urbaser* Tribunal put it, IIAs 'ha[ve] to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights.'²³⁴

International law provisions protecting indigenous peoples' rights include both hard law and soft law. 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.'²³⁵ 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.'²³⁶ Significantly, the principle of self-determination is commonly regarded as a *jus cogens* rule.²³⁷ Other norms protecting indigenous rights with *jus cogens* status include the prohibitions of discrimination and genocide.²³⁸ No protection can be granted to investment that violate *jus cogens* or human rights law.²³⁹

If certain indigenous rights have acquired the status of *jus cogens* norms, those norms should prevail in case of conflict with international

²³³ C. McLachlan, 'The Principles of Systematic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 *ICLQ* 279–320, 280.

²³⁴ *Urbaser v. Argentina*, ICSID ARB/07/26, Award 8 December 2016, para. 1200.

²³⁵ ICCPR, Article 1.1; ICESCR, Article 1.1 (emphasis added).

²³⁶ ICCPR, Article 1.2; ICESCR, Article 1.2.

²³⁷ A. Orakhelashvili, *Peremptory Norms in International Law* (Oxford: OUP 2006) 51 (noting that '[t]he right of peoples to self-determination is undoubtedly part of *jus cogens* because of its fundamental importance'). *But see* M. Saul, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?' (2011) 11 *Human Rights Law Review* 609, 610 (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.')

²³⁸ VCLT, Article 53 (recognizing a *jus cogens* norm as one 'accepted and recognized by the international community of states as a whole as a norm from which no derogation is possible.'). On *jus cogens* and international investment law, see V. Vadi, '*Jus Cogens* in International Investment Law and Arbitration' (2015) 46 *Netherlands Yearbook of International Law* 357–388.

²³⁹ *Phoenix Action, Ltd. v. The Czech Republic*, ICSID/ARB/06/5, Award 15 April 2009, para. 78.

investment law.²⁴⁰ International public order requires arbitral tribunals to consider whether the proceedings do not violate competing international law obligations of a peremptory character. Yet, the present role of *jus cogens* norms in the context of investment arbitration remains unsettled at best and peripheral at worst. Rarely have the parties contended that a norm of *jus cogens* has been violated, and even when they have done so, arbitral tribunals have declined to adjudicate on the matter, stating that they have a limited mandate and cannot adjudicate on human rights claims.²⁴¹ Moreover, in some arbitrations, the host states have preferred to make reference only to domestic constitutional provisions rather than relying on the alleged *jus cogens* nature of the rights involved. This is not surprising, as such pleadings may be considered to contribute to state practice, and states are very careful about invoking *jus cogens* as the same arguments could be used against them in other contexts, such as before national constitutional courts, regional human rights courts, and international monitoring bodies. Nonetheless, in the recent practice, there have been far-sighted attempts to justify domestic measures in the light of the host state human rights obligations.²⁴² Arbitral tribunals do not contest the legitimacy of protecting indigenous peoples' rights. Rather, they have focused on the modalities of such policies, emphasizing that states should also respect their investment treaties.

There are more instances of nonbinding cultural entitlements.²⁴³ For instance, indigenous culture plays a central role in the UNDRIP. Although the UNDRIP is not binding *per se*, it can become customary international law and therefore become binding. Some of its contents already express customary international law or repeat provisions appearing in (binding) treaty law. Moreover, judicial decisions constitute a subsidiary source of international law. Over the past twenty years, there has been a robust development of jurisprudence regarding the land rights of indigenous peoples under international law. Such jurisprudence 'generally emphasizes the unique and enduring cultural relationship of peoples to their territory.'²⁴⁴ '[F]or Indigenous peoples, the ability to reside communally on

²⁴⁰ VCLT Article 64 (stating that treaties which violate peremptory norms are null and void)

²⁴¹ *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana* (UNCITRAL), Award on Jurisdiction and Liability, 27 October 1989, 95 *ILR* 184, 203.

²⁴² Vadi, 'Jus Cogens in International Investment Law and Arbitration', 357–388.

²⁴³ On the effectiveness of soft law in international investment law, see e.g., A. K. Bjorklund, 'Assessing the Effectiveness of Soft Law Instruments in International Investment Law', in A. K. Bjorklund and A. Reinisch (eds), *International Investment Law and Soft Law* (Cheltenham: Edward Elgar 2012) 51–81.

²⁴⁴ Aponte Miranda, 'The Role of International Law in Intrastate Natural Resource

their lands . . . is inextricably tied to the preservation of communal identity, culture, religion and traditional modes of subsistence.²⁴⁵ In this regard, the recognition of the linkage between indigenous land rights and indigenous cultural identity is a significant milestone reached by the Arbitral tribunal in *Álvarez y Marín Corporación S.A. v. Republic of Panama*. Although there is no binding precedent in international law, the jurisprudence of human rights courts and tribunals can have persuasive relevance in investment treaty arbitration.²⁴⁶ Vice versa, the holding of this tribunal can contribute to the consolidation of human rights law, and the consolidation of indigenous land rights as customary international law.

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 indigenous peoples—are needed to foster such consideration.

c) Counterclaims

A third way to insert cultural concerns in the operation of investor–state arbitration is by raising counterclaims for eventual violations of domestic law protecting cultural entitlements. States have increasingly tried to assert counterclaims against investors, even though 'their efforts have tended not to be successful.'²⁴⁷ While most treaties do not have broad enough dispute resolution clauses to encompass counterclaims, 'drafting treaties to permit closely related counterclaims would help to rebalance investment law.'²⁴⁸

Some investor–state dispute settlement provisions confer on tribunals the power to hear 'any dispute between an investor of one contracting

Allocation', 825.

²⁴⁵ Id. 814.

²⁴⁶ V. Vadi, *Analogies in International Investment Law and Arbitration* (Cambridge: CUP 2016).

²⁴⁷ A. K. Bjorklund, 'The Role of Counterclaims in Rebalancing Investment Law' (2013) 17 *Lewis & Clark Law Review* 461, 464.

²⁴⁸ Ibid. 461.

party and the other contracting party in connection with an investment.’²⁴⁹ Other investment treaties provide that the law applicable in investor–state arbitration is the domestic law. If domestic law is the applicable law, ‘international law plays a supplemental and corrective function in relation to domestic law.’²⁵⁰ Not only does international law ‘fill the gaps in the host state’s laws’, but in case of conflict with the latter it prevails.²⁵¹ In any case, even if the applicable law was not domestic law, investors remain under an obligation to abide by domestic laws of the state in which they operate, because of the international law principle of territorial sovereignty. These and similar textual hooks seem to enable counterclaims. The ICSID Convention also expressly contemplates the possibility of counterclaims ‘provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the centre.’²⁵² Analogously, the 2010 UNCITRAL Arbitration Rules also enable arbitral tribunals to hear counterclaims, provided they have jurisdiction over them.²⁵³

In practice, arbitral tribunals have adopted diverging approaches regarding the possibility of counterclaims.²⁵⁴ Most tribunals have declined jurisdiction to hear counterclaims, focusing on whether counterclaims were within the scope of the consent of the parties.²⁵⁵ While most tribunals are still reluctant to hear counterclaims, recent arbitral tribunals have been more willing to hear such claims.²⁵⁶ If consent to jurisdiction was explicitly granted,²⁵⁷ or if

²⁴⁹ India–Netherlands Agreement for the Promotion and Protection of Investments, 6 November 1995, Article 9.1.

²⁵⁰ Y. Kryvoi, *Counterclaims in Investor–State Arbitration*, LSE Law, Society, and Economy Working Paper 8/2011 (2011) 17.

²⁵¹ *Ibid.*

²⁵² Convention on the settlement of investment disputes between States and nationals of other States (ICSID Convention), Washington DC 18 March 1965, in force 14 October 1966, 575 UNTS 159, Article 46 (stating that ‘[e]xcept as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counter-claims arising directly out of the subject matter of the dispute, provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the centre.’)

²⁵³ UNCITRAL Arbitration Rules, Article 21(3).

²⁵⁴ Bjorklund, ‘The Role of Counterclaims’, 473.

²⁵⁵ J. Kalicki, ‘Counterclaims by States in Investment Arbitration’ *Investment Treaty News*, 14 June 2013, 5.

²⁵⁶ *Burlington v Ecuador*, ICSID ARB/08/5, Decision on Counterclaims, 7 February 2017, para. 275 (holding Burlington liable for violating Ecuador’s domestic law implementing international standards); *Urbaser v Argentina*, ICSID ARB/07/26, Award, 8 December 2016, para. 1192 (holding that a bilateral investment treaty ‘[is] not a set of rules defined in isolation without consideration given to rules of international law.’)

²⁵⁷ *Burlington v Ecuador*, Decision on Counterclaims, para. 60 (affirming jurisdiction on

it was deemed to exist implicitly, at least in those cases where the applicable law is the domestic law,²⁵⁸ investment tribunals could allow states to raise breaches of cultural policies in their counterclaims against investors, and investor–state arbitration could prompt investors to comply with domestic (and international) cultural norms.²⁵⁹ If investors knew they could be held liable for harm to cultural heritage in the event of a dispute, they would be more likely to develop investment projects that safeguard or at least respect the cultural entitlements of indigenous communities.

7. Conclusions

The effective protection of indigenous cultural heritage is crucial for the effective protection of the rights of indigenous peoples. 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.²⁶⁰ 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 chapter provide a snapshot of the clash of cultures between international investment law and international law instruments requiring the protection of indigenous heritage. Investment disputes concerning indigenous cultural heritage often involve the conflict between the rights of the investors and the rights of indigenous peoples under different branches of international law. Therefore, arbitral tribunals may not be the most suitable *fora* to settle this kind of dispute. They may face difficulties in finding an appropriate balance between

counterclaims, as the claimant did not object to the Tribunal's jurisdiction).

²⁵⁸ *Al-Warraq v Indonesia*, UNCITRAL, Final Award, 15 December 2004, para. 155 (allowing Indonesia to bring a counterclaim to seek compensation for the investor's failure to comply with domestic law).

²⁵⁹ For a similar argument, see A. Sundararajan, *Environmental Counterclaims: Enforcing International Environmental Law through Investor–State Arbitration* (Lloyd N. Cutler Center for the Rule of Law, Salzburg Global Seminar Paper 2017–2018).

²⁶⁰ I. Schulte-Tenckhoff, 'Treaties, Peoplehood, and Self-Determination: Understanding the Language of Indigenous Rights', in E. Pulitano (ed), *Indigenous Rights in the Age of the UN Declaration* (Cambridge: CUP 2012) 64, 67.

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 consider indigenous entitlements. This chapter has identified three 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. Second, *de lege ferenda*, states can negotiate future IIAs and renegotiate existing ones to facilitate the consideration of indigenous rights in investor–state arbitration. This process is already under way; states have increasingly shaped their investment treaties referring to important values in treaty preambles, exceptions, carve outs, and annexes. Of particular importance are 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. Finally, while the possibility to raise counterclaims remains debated, arbitral tribunals should not dismiss such possibility, provided they have jurisdiction on the same. Counterclaims can constitute a mechanism through which they could not only defend but also enforce human rights law against private parties, potentially resolving some of the tensions within international law.

In conclusion, this chapter does not exclude the potential for FDI to represent a positive force for development. At the same time, however, international investment law risks maximizing and/or perpetuating power asymmetries among states, investors, and indigenous peoples. Therefore, this chapter proposes avenues for enabling the protection of FDI and ensuring the protection of indigenous cultural heritage and human rights. 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.

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