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*The Safeguard of Indigenous Peoples within
International and EU Law on Investment. An overview*

The present contribution discusses regulatory changes within international investment law due to the political shift in the approach of a number of states and of the European Union. These changes have revised the traditional pro-investor framework and attributed relevance to a few non-investment concerns related to sustainable development. The safeguard of the specific interests of indigenous peoples can be seen as one of these concerns. However, this safeguard has been mostly indirect, in light of the widely-accepted market-oriented conceptualization of sustainable development and of the regulatory diversification typical of international law. A few concluding remarks highlight the main reasons why a multilateral approach to international investment law might contribute to enhance the safeguard of the specific interests of indigenous peoples.

1. *Introductory Remarks*

At the time of the worldwide expansion of the process of liberalization and interdependence, over the nineties of the last century and at the beginning of this Millennium, the United Nations, particularly the General Assembly, the Secretary General and the Human Rights Council, and several international organizations belonging to the United Nations system, such as the Food and Agriculture Organization (FAO), the International Fund for Agricultural Development (IFAD), the World Bank Group, the UN Educational, Scientific and Cultural Organization (UNESCO), endorsed the protection of indigenous peoples.¹ This occurred through the insertion

¹ For an overview, see, among others, M. C. Lãm, 'Minorities and Indigenous Peoples' in T. G. Weiss and S. Daws (eds), *The Oxford Handbook of the United Nations* (2nd edn, Oxford University Press 2018) 619; A. O. Jegede, 'Protecting Indigenous Peoples' Land Rights in Global Climate Governance' in S. Duyck, S. Jodoin and A. Johl (eds), *Routledge Handbook of Human Rights and Climate Governance* (Routledge 2018) 199; B. Powless, 'The Indigenous Rights Framework and Climate Change' in S. Duyck, S. Jodoin and

of specific provisions in international conventions on the protection of the environment, such as the 1992 Convention on Biodiversity,² through the adoption of specific acts, like the 2007 Declaration on indigenous peoples,³ and through the establishment of *ad hoc* monitoring mechanisms, such as the Permanent Forum on Indigenous Issues in 2000, the Special Rapporteur on the Rights of Indigenous Peoples in 2001 and the Expert Mechanism on the Rights of Indigenous Peoples in 2007.⁴

However, this specific international protection has not prevented or mitigated conflicts of interests due to certain foreign private activities of explorations and exploitations of rural lands and other natural resources in developing countries. Particularly in Central and Latin America, Africa and Asia, the territorial states allowed foreign investors to use large tracts of land for the implementation of their projects in the mining, oil, gas, hydroelectric and agribusiness sectors.⁵

Some of these activities have had a detrimental impact on the access to land, water, other natural resources, food and/or religious sites by indigenous peoples and have therefore been considered contributing factors to the commodification of those resources and assets when an adequate protection of the interests of indigenous peoples lacked at the domestic regulatory level.⁶ Other conflicts of interests have arisen from the exploitation of

A. Johl (eds), *Routledge Handbook of Human Rights and Climate Governance* (Routledge 2018) 213.

² See the 1992 Convention on Biological Diversity, particularly its preamble, Articles 8, (j), 17, para. 2, and 18, para. 4.

³ See the UN Declaration on the Rights of Indigenous Peoples, A/RES/61/295, Resolution adopted by the UN General Assembly on 13 September 2007.

⁴ For further information, see Di Blase's chapter in this book.

⁵ See, among others, World Bank, International Finance Corporation and Multilateral Investment Guarantee Agency, *Extractive Industries and Sustainable Development. An Evaluation of World Bank Group Experience* (Washington, D.C., 2005) < ifcln1.ifc.org/ifcext/oeg.nsf/Content/EIE > (accessed 30 March 2019) especially 98; Asian Development Bank, *Indigenous Peoples Safeguards* (Special Evaluation Study, February 2007) especially 113.

⁶ For an overview, see, among others, J. P. Eaton, 'The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment' (1997) 15 *Boston University International Law Journal*, 261; M. A. Geer, 'Foreigners in Their Own Land: Cultural Land and Transnational Corporations – Emergent International Rights and Wrongs' (1998) 38 *Virginia Journal of International Law*, 331; J. M. Wagner and N. A. F. Popovic, 'Environmental Injustice on United States Bases in Panama: International Law and the Right to Land Free from Contamination and Explosives' (1998) 38 *Virginia Journal of International Law*, 401; G. K. Foster, 'Foreign Investment and Indigenous Peoples: Options for Promoting Equilibrium between Economic Development and Indigenous Rights' (2011-2012) 33 *Michigan Journal of International Law*, 627; A. Tomaselli, 'Natural Resources Claims, Land Conflicts and Self-Empowerment of

traditional knowledge of indigenous peoples in the industrial production of pharmaceuticals and/or cosmetics by foreign companies. A number of non-governmental organizations have endorsed the complaints of the affected indigenous communities and expressed their discontent, by referring to such activities as ‘land grabbing’, ‘bio-colonialism’ or ‘bio-piracy’, and by calling for international regulatory and policy responses. As a result, certain international organizations adopted specific guidelines and/or principles of conduct to prevent such conflicts by influencing the conduct of host states and/or private investors and by facilitating the respect of traditional practices of local indigenous peoples. Important examples are the ‘Operational Policy 4.10’ of the World Bank,⁷ the ‘Performance Standard No. 7’ of the International Finance Corporation,⁸ the Recommendation of the OECD Council on ‘Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas’⁹ and the ‘Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries’ of the FAO.¹⁰

Conflicts of interests related to the safeguard of indigenous peoples

Indigenous Movements in the *Cono Sur* - The Case of the Mapuche People in Chile’ (2012) 19 *International Journal on Minority and Group Rights*, 153; S. Smis, D. Cambou and G. Ngende, ‘The Question of Land Grab in Africa and the Indigenous Peoples’ Right to Traditional Lands, Territories and Resources’ (2012-2013) 35 *Loyola L.A. International and Comparative Law Review*, 493; V. Jaichand and A. A. Sampaio, ‘Dam and Be Damned: The Adverse Impacts of Belo Monte on Indigenous Peoples in Brazil’ (2013) 35 *Human Rights Quarterly*, 408; R. Pereira and O. Gough, ‘Permanent Sovereignty over Natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-Determination of Indigenous Peoples under International Law’ (2013) 14 *Melbourne Journal of International Law*, 451; U. Khatri, ‘Indigenous Peoples’ Right to Free, Prior, and Informed Consent in the Context of State-Sponsored Development: The New Standard Set by *Sara Yaku v. Ecuador* and Its Potential to Delegitimize the Belo Monte Dam’ (2013-2014) 29 *American University International Law Review*, 165; K. Cordes, ‘Investments and Human Rights in the Agricultural Sector’ in Y. Radi (ed), *Research Handbook on Human Rights and Investment* (Edward Elgar Publishing 2018) 414; V. Vadi, ‘Power and Destiny: the Protection of Indigenous Heritage in International Investment Law and Arbitration’ (2018) 50 *George Washington International Law Review*, 101.

⁷ The ‘Operational Policy 4.10’ of the World Bank was prepared for the staff of the Bank in 2005 and revised in 2013, with the aim of injecting the safeguard of local indigenous communities within the implementation of the Development Policy Lending and Program-for Results-Financing of the World Bank.

⁸ See, specifically, the ‘Performance Standards’ adopted by the International Finance Corporation in 2012.

⁹ The Guidance was amended on 17 July 2012. For further information, see < oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf > (accessed 30 March 2019).

¹⁰ The 2015 text is available on < fao.org/3/a-i4356en.pdf > (accessed 30 March 2019).

within international trade law have arisen with regard to the implementation of the Trade-related Intellectual Property Rights (TRIPS) Agreement. These conflicts have prompted further relevant discussions within the WTO TRIPs Committee, conferences and special reports, but not international disputes before the WTO Dispute Settlement Body (DSB) so far.¹¹

The Special Rapporteur on the Rights of Indigenous Peoples has planned to submit three Reports on the ‘impact of international investment agreements on the rights of indigenous peoples’ to the Human Rights Council. The first and the second of these Reports clarify how the safeguard of the ‘rights’ of indigenous peoples – mainly provided in non-binding regulatory instruments – has been neglected or subordinated to the safeguard of the ‘rights’ of foreign investors that are ensured by international treaties, that is international binding rules.¹² The different regulatory intensity of the level of protection results in a phenomenon referred to as ‘regulatory chill’ upon the host state.

According to the Special Rapporteur on the Rights of Indigenous Peoples, the inclusion of ‘the right to regulate in the public interest’ of the host state into international investment treaties would be an adequate solution to mitigate the different interests and concerns at stake.¹³ In her

¹¹ For further information, see <https://www.wto.org/english/tratop-e/trips-e/art27-3b-e.htm> (accessed 12 November 2019).

¹² Special Rapporteur on the Rights of Indigenous Peoples, second Report on the ‘Impact of international investment agreements on indigenous peoples’ rights’ – submitted to the Human Rights Council on 11 August 2016 (A/HRC/33/42) - para. 81 (underlining that ‘[h]armonizing international investment law with international human rights law is a fundamental precondition to addressing this legitimacy crisis, to respecting indigenous peoples’ rights and to ensuring a coherent body of international law’) and para. 85 (adding that ‘[t]he outdated belief of States that they are in a position to guarantee security for investors while ignoring the human rights of indigenous peoples must be debunked. Investors must take responsibility for assessing the social and political risk associated with their investments. Otherwise, their expectations cannot be legitimate’). The Special Rapporteur also submitted a Report on the same topic to the UN General Assembly on 7 August 2015 (A/70/301, Report of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples on the ‘Impact of international investment and free trade on the human rights of indigenous peoples’).

¹³ Second Report on the ‘Impact of international investment agreements on indigenous peoples’ rights’, para. 82, stating that ‘[a] synergy therefore exists between protecting the State’s right to regulate in the public interest and ensuring the protection of indigenous peoples’ rights, as recognizing indigenous peoples’ rights provides a means through which States can limit the abrogation of control over decisions pertaining to natural resources to foreign investors and to tribunals charged with protecting their interests’; paras 86-87, requiring ‘properly constructed clauses in relation to the right to regulate’; para. 93, requiring ‘[a]ppropriate consultation procedures and mechanisms’ and ‘[h]uman rights impact assessments’,

second Reports to the Human Rights Council the Special Rapporteur underlines that a number of international regulatory instruments on the protection of indigenous peoples provide for the establishment of ‘culturally appropriate mechanisms’, for the ‘effective participation of indigenous peoples in all decision-making processes that directly affect their rights’ and for ‘good-faith consultations to obtain their free, prior and informed consent’.¹⁴ The third report will be about the relevance of international investment law for the safeguard of the ‘rights’ of indigenous peoples, in light of a possible interaction among international investment law, international human rights law and the sustainable development agenda. The Report will make proposals on how a coherent regulatory interaction between the rules on the protection of investment and those on the safeguard of indigenous peoples might be designed at an international law level.

States and international organizations have adopted a market-based approach to sustainable development. Instead, a number of non-governmental organizations, indigenous minorities and other non-state actors would have preferred an ecological approach to the promotion of development, in conformity with the spirit of the 1982 ‘World Charter for Nature’. According to an ecological approach, the preservation of the eco-system, the satisfaction of the basic needs of indigenous peoples, and the safeguard of their religious and cultural traditions would have prevailed over economic interests within the international political and legal frameworks. Such an ecological approach would have facilitated the protection of practices, as well as cultural diversity of indigenous peoples, because of their traditional connection - both spiritual and economic - to land and its resources.

As will be illustrated in the following section of this chapter and also in another chapter of this book,¹⁵ relevant cases before investment treaty-based arbitral tribunals have arisen when a host state adopted a regulatory

with the aim of establishing how international investment agreements might be a tool for the observance of human rights of indigenous peoples, such as ‘the right to consultation’; para. 96, specifying how ‘[i]nvestment dispute settlement bodies addressing cases having an impact on indigenous peoples’ rights should promote the convergence of human rights and international investment agreements’; and para. 97, requiring states to ‘[a]ppoint arbitrators with knowledge of indigenous peoples’ rights and cooperate jointly to interpret relevant international investment agreements in relation to indigenous peoples’ rights’.

¹⁴ Second Report on the ‘Impact of international investment agreements on indigenous peoples’ rights’, para. 17, specifying that the free, prior and informed consent by indigenous peoples should be a requirement that ‘applies prior to the enactment of legislative or administrative measures, the development of investment plans or the issuance of concessions, licenses or permits for projects in or near their territories.’ See also para. 22 of such a Report.

¹⁵ See Vadi’s chapter in this volume.

measure for the benefit of specific local indigenous communities in terms of access to natural resources,¹⁶ cultural and/or religious sites.¹⁷ This has occurred in host states where indigenous communities live, during the implementation of a foreign investment project.¹⁸ The competent treaty-based arbitral tribunals have not been consistent in relation to the relevance of the specific needs of local indigenous communities for the settlement of these cases. In *Grand River Enterprises Six Nations Limited and Others v. The United States* the Arbitral Tribunal did not consider the needs of indigenous peoples to be relevant for the final decision on the merits of the case. In effect, the local indigenous community unsuccessfully claimed that the domestic regulatory measures of the United States for the protection of public health had a detrimental impact on its investment in terms of loss of tax preferential treatments.¹⁹ The complexity of the contentious facts at the root of such disputes and the different intensity and effectiveness of the international regulatory safeguards for foreign investors, on the one hand, and for indigenous peoples, on the other, appear to have been the main reasons for the arbitral approach.

Treaty-based arbitrations arising from the need of a host respondent

¹⁶ See, for instance, *Bear Creek Mining Corporation v. The Republic of Peru*, ICSID Case No. ARB/14/21, Award 30 November 2017 and *South American Silver Limited v. Bolivia*, UNCITRAL Arbitration, Award 30 August 2018.

¹⁷ See, for instance, *Glamis Gold Limited v. The United States*, NAFTA/UNCITRAL Arbitration, Award, 8 June 2009.

¹⁸ Special Rapporteur on the Rights of Indigenous Peoples, *Second Report on the 'Impact of international investment agreements on indigenous peoples' rights* illustrating how conflicts of interest and hence conflicts of norms have arisen and become disputes before international investment treaty-based arbitral tribunals and noting at para. 27 that '[t]ypically, the host states involved employ economic development policies aimed at the exploitation of energy, mineral, land or other resources that are predominantly located in the territories of indigenous peoples. The government agencies responsible for implementing those policies regard such lands and resources as available for unhindered exploitation and actively promote them as such abroad to generate capital inflows. Recognition of indigenous peoples' rights in the domestic legal framework is either non-existent, inadequate or not enforced. Where they exist, institutions mandated to uphold indigenous peoples' rights are politically weak, unaccountable or underfunded. Indigenous peoples lack access to remedies in home and host states and are forced to mobilize, leading to criminalization, violence and deaths. They experience profound human rights violations as a result of impacts on their lands, livelihoods, cultures, development options and governance structures, which, in some cases, threaten their very cultural and physical survival. Projects are stalled and there is a trend towards investor-state dispute settlements related to fair and equitable treatment, full protection and security and expropriation.'

¹⁹ *Grand River Enterprises Six Nations Limited and Others v. The United States*, NAFTA/UNCITRAL Arbitration, Award 12 January 2011.

state to protect a general interest related to non-investment concerns, such as a local indigenous community, have contributed to discontent and criticism towards the typical structure of international investment treaties and, as will be seen, encouraged its revision by a few states and by the European Union.²⁰

The chapter proceeds as follows. Section 2 will discuss the main features of foreign investment as a special field of international law. Section 3 will examine and critically assess its on-going revision since the 2008 worldwide financial crisis. Finally, a few concluding remarks will discuss the reasons why regulatory diversification – typical of international law – has to be attained for the safeguard of heterogeneous interests, that is economic and non-economic interests. The attainment of regulatory diversification through a multilateral approach would contribute not only to prevent conflicts of norms and possibly of interests, but also to enhance the predictability and perceived legitimacy of international investment law.

2. The Features of International Investment Law at the Time of the Expansion of the Liberalization Process

Since the end of World War II, international investment law has been a specific field of international law in light of the conclusion of a huge number of investment treaties, mainly bilateral, between industrialized states, usually potential home states of a foreign investor, and developing states, that is, potential host states. Since the nineties of the last century, investment chapters have also been included in ‘regional’ agreements establishing free trade areas.

In order to encourage private initiatives, all these treaties have been designed to protect the interests of foreign investors and to promote their activities worldwide. The traditional regulatory structure of investment

²⁰ See, among others, A. Dimopoulos, ‘EC Free Trade Agreements: An Alternative Model for Addressing Human Rights in Foreign Investment Regulation and Dispute Settlement?’ in P.-M. Dupuy, F. Francioni and E.-U. Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) 565; N. Lavranos, ‘How the European Commission and the EU Member States Are Reasserting Their Control over Their Investment Treaties and ISDS Rules’ in A. Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (Cambridge University Press, 2017) 309; D. M. Trubek, ‘Foreign Investment, Development Strategies, and the New Era in International Economic Law. An Afterword’ in F. Morosini (ed), *Reconceptualizing International Investment Law from the Global South* (Cambridge: CUP 2017) 284.

treaties has been almost the same. Such treaties provide for open-ended definitions of 'foreign investment', for non-discriminatory treatment standards, that is 'most-favoured-nation' and 'national' treatment standards, for the 'fair and equitable' treatment standard, for the obligation of the payment of compensation, in accordance with market-oriented requirements, in case of an expropriation or any other measure tantamount to an expropriation. Most treaties also provide for 'direct arbitration' for the settlement of disputes between a contracting state and a foreign investor national of another contracting state, referring to the International Centre for the Settlement of Investment Disputes (ICSID) and/or the International Chamber of Commerce (ICC) and/or the United Nations Commission on International Trade Law (UNCITRAL). These regulatory commonalities have established a stable and predictable legal environment and facilitated foreign investments.²¹

Because of international regulatory diversification, many investment treaties do not include provisions on the safeguard of non-investment concerns such as human rights, the environment, public health, cultural heritage, and indigenous peoples. Separate instruments protect all these interests at the international law level.

Such a regulatory diversification and the consequent different regulatory intensity of the applicable rules for the protection of foreign investment, chiefly binding rules, and for the safeguard of indigenous peoples, commonly non-binding rules both at the international and domestic law levels, have impacted on the settlement of the cases concerning the safeguard of indigenous peoples before treaty-based arbitral tribunals. Non-binding instruments protecting the rights of indigenous peoples have been ineffective before treaty-based arbitral tribunals.²² The competent

²¹ See, among others, I. F. I. Shihata, 'Promotion of Foreign Direct Investment – A General Account, with Particular Reference to the Role of the World Bank' (1991) 6 *ICSID Review*, 484; P. Juillard, 'L'évolution des sources du droit des investissements' (1994) 250 *Recueil des cours* VI, 11; G. Sacerdoti, 'Bilateral Treaties and Multilateral Instruments on Investment Protection' (1997) 269 *Recueil des Cours*, 251; P. Weil, 'The State, the Foreign Investor, and International Law: The No Longer Stormy Relationship of a *Ménage À Trois*' (2000) 15 *ICSID Review*, 401; P. Kahn, 'Les investissements internationaux, nouvelles donnes: un droit transnational de l'investissement' in P. Kahn and T. W. Wälde (eds), *New Aspects of International Investment Law* (Martinus Nijhoff Publishers, 2007) 3.

²² Special Rapporteur on the Rights of Indigenous Peoples, second Report on the 'Impact of international investment agreements on indigenous peoples' rights', para. 22 highlighting that '... implementation of those commitments remains poor, and issues remain surrounding the interpretation of indigenous peoples' rights, in particular the right to give or withhold free, prior, and informed consent.'

investment treaty-based arbitral tribunals did not endorse the interests of indigenous peoples, as a non-investment concern. One reason was that the applicable investment treaties did not include provisions on the safeguard of these interests.²³

The breach of one treaty obligation on the protection of foreign investments due to the adoption of a domestic regulatory measure for the protection of human rights and/or on the environment and/or on indigenous peoples could be justified by a host respondent state if such a measure could be seen as compliance with an international *jus cogens* customary rule. The invocation of such a rule would justify the breach of a specific obligation provided in the applicable investment treaty.

However, the ascertainment of a *jus cogens* customary rule is difficult and, to some extent, unlikely, especially in cases concerning indigenous peoples that may not have an adequate legal support.

In effect, arbitral tribunals have not engaged in this line of reasoning. After the ICSID revised its Arbitration Rules in 2006, with the inclusion of Articles 36 and 37, to enhance the openness of its arbitral proceedings, through the admission of *amici curiae* briefs,²⁴ a few tribunals have admitted the submission of such briefs by local non-governmental organizations for the safeguard of the interests of allegedly affected indigenous peoples. Specifically, a few non-governmental organizations have used this procedural innovation to request, as *amici curiae*, competent arbitral tribunals specific interpretations of the applicable international investment treaty, in accordance with relevant international instruments on the safeguard of the non-economic concerns at stake. For instance, a group of local non-governmental organizations submitted an *amici curiae* brief for the safeguard of affected local indigenous communities in *von Pezold et al. v. Zimbabwe*²⁵ and in *Border Timbers v. Zimbabwe*.²⁶ According to the *amici curiae* brief,

²³ See, among others, M. Krepchev, 'The Problem of Accommodating Indigenous Land Rights in International Investment Law' (2015) 6 *Journal of International Dispute Settlement*, 42.

²⁴ See <https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention-Arbitration-Rules.aspx>. For an overview, see A. Antonietti, 'The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules' (2006) 21 *ICSID Review*, 427.

²⁵ See *Bernhard von Pezold and Others v. The Republic of Zimbabwe*, ICSID Case No ARB/10/15. The ICSID tribunal published its award on this case on 28 July 2015. The application for annulment of this award submitted by Zimbabwe was dismissed (Decision on annulment, ICSID *ad hoc* Committee, 21 November 2018).

²⁶ See *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangan Development Co. (Private) Limited v. The Republic of Zimbabwe*, ICSID Case No. ARB/10/25. This case was joined with *Bernhard von Pezold and Others v. The Republic of Zimbabwe*.

the applicable investment treaties should have been interpreted and implemented in line with a few international instruments on the protection of human rights and indigenous peoples, such as the UN Covenant on the Protection of Economic, Social and Cultural Human Rights and the 2007 UN Declaration on the Rights of Indigenous Peoples. The consideration of these instruments would have led the tribunal to reject or, at least, to mitigate the requests of the claimants, in particular those related to the amount of compensation. The competent arbitral tribunal did not admit the request of the petitioners to make a submission as *amici curiae*, finding that the petitioners - the group of non-governmental organizations - did not have 'a significant interest in the proceeding'.²⁷ The text of the applicable investment treaties, the 1995 bilateral investment treaty between Germany and Zimbabwe and the 1996 bilateral investment treaty between the Swiss Confederation and Zimbabwe, including rules applicable both to the procedural and the substantive matters of the case, did not contain useful provisions for the adoption of a 'pro-indigenous peoples' approach. The Tribunal could confine itself to the letter of such applicable law as the root of its jurisdiction. In *Glamis Gold Limited v. The United States* the Arbitral Tribunal reached the same conclusion as to the report submitted by third parties as *amici curiae*.²⁸

However, in the *Glamis* case the respondent state succeeded in challenging the requests made by the claimant. In brief, the Arbitral Tribunal concluded that the host state's domestic regulatory measures aimed at safeguarding a traditional religious site, the California Desert Conservation Area, for the local indigenous community, the Quechan Indian Tribe, did not constitute

²⁷ The ICSID Tribunal found that the petitioners – the group of non-governmental organizations – did not have a 'significant interest in the proceeding.' The Tribunal did not admit the request of the petitioners to make a submission as *amici curiae*. According to the petitioners, the cases 'raise[d] critical questions of international human rights law, which engage[d] both the duty of the Zimbabwean state and the responsibility of the investor company, with regard to the affected indigenous peoples' (*Border Timbers Limited, Border Timbers International (Private) Limited, and Hangan Development Co. (Private) Limited v. The Republic of Zimbabwe*, ICSID ARB/10/25, Procedural Order No. 2, 26 June 2012, in particular para. 61). The petitioners also aimed to protect the capacity of local indigenous peoples to manage the land where they lived and to exploit local natural resources in accordance with the UN Declaration on the Rights of Indigenous Peoples. The Tribunal denied the relevance of such a Declaration in the arbitral proceedings (paras 56-63, especially paras 58-59, of the same Procedural Order).

²⁸ The Tribunal confined itself to the 'letter of the law' of the NAFTA Treaty that was at the base of its jurisdiction and did not refer to other international rules, as requested by a group of interested non-disputing parties. *Glamis Gold Limited v. The United States*, NAFTA/UNCITRAL Arbitration, Award 8 June 2009, para. 8.

a breach of the fair and equitable treatment standard as provided in Article 1105 of the NAFTA Treaty.²⁹ This Treaty was at the base of the jurisdiction of the arbitral tribunal. The respondent state also succeeded in *Burlington v. The Republic of Ecuador*.³⁰ The dispute arose because of the opposition of local indigenous communities to hydrocarbon operations related to the realization of the foreign investment project. According to the claimant, the host state had breached the applicable international investment treaty, the 1993 Bilateral Investment Treaty between the United States and Ecuador, as it had failed to provide full protection and security against such an opposition. After reviewing the relationship between the foreign investor and the host state at the time of the opposition of local indigenous communities, the Tribunal concluded in favour of the host state, as Ecuador had assisted the claimant during that period of time, by making efforts to find a compromise between its interests and those of the local indigenous communities.³¹

Instead in *Copper Mesa Mining Corporation v. The Republic of Ecuador* and *South American Silver Ltd. v. Bolivia* both respondent states did not succeed. In *Copper Mesa Mining Corporation v. The Republic of Ecuador* the respondent state did not succeed in persuading the arbitral tribunal - established in accordance with the 1996 Bilateral Investment Treaty between Canada and Ecuador - that its conduct was in conformity with the 'fair and equitable treatment' and 'full protection and security' standards under the Canada-Ecuador BIT.³² The Tribunal, however, reduced the awarded compensation by 30%, as this acknowledged that Copper Mesa had engaged in 'reckless escalation of violence... particularly with the employment of organised armed men in uniform using tear gas canisters and firing weapons at local villagers and officials.'³³ To justify its decision to award compensation, the Tribunal clarified that the office of the local

²⁹ Id., paras 824-829.

³⁰ See *Burlington Resources Incorporation v. The Republic of Ecuador (formerly Burlington Resources Incorporation and Others v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador))*, ICSID ARB/08/5, Decision on Jurisdiction, 2 June 2010.

³¹ Id., para. 298 specifying that '[w]hile Claimant's expectation is conceivably a diplomatic request for further assistance in connection with the indigenous opposition in the Block, this request for assistance does not express disagreement with the manner in which the Respondent has fulfilled its obligation to provide protection and security in the Block. In and of itself, a request for assistance does not express disagreement on the parties' rights and obligations are, unless the surrounding context suggests otherwise, i.e. that the party whose assistance is requested has thus far failed to abide by its duty to assist.'

³² *Copper Mesa Mining Corporation v. The Republic of Ecuador*, PCA Case No. 2012-2, Award 15 March 2016, Part 6, paras 6.82-6.85.

³³ Id., para. 4.265.

subsidiary, rather than the ‘negligent’ management of the Canadian claimant, was responsible for such a ‘malicious and reckless’ conduct.³⁴

In *South American Silver Ltd. v. Bolivia* the respondent state did not succeed in ‘meet[ing] its burden of proof that indigenous rights prevail over the protections granted to the Claimant under the Treaty in case of conflict’.³⁵ The respondent state relied on a ‘systemic interpretation’ of the applicable investment treaty, the 1988 Bilateral Investment Treaty between the United Kingdom and Bolivia, based on Article 31(3)(c) of the Vienna Convention’ to highlight that the compliance with its international human rights obligations explained the breach of its obligations under the applicable investment treaty.³⁶ The Arbitral Tribunal denied that this kind of interpretation could justify the reversion of the ownership of the investment project, more specifically could justify the conduct of Bolivia under the principles of proportionality and necessity.³⁷ The Tribunal concluded that the reversion of the ownership of the investment project had been tantamount to an expropriation, in accordance with the applicable investment treaty, rather than the exercise of the host state’s police powers for the protection of the human rights of the local indigenous community.³⁸ However, the arbitrator Mr. Osvaldo Cesar Guglielmino did not agree with this conclusion by attaching his dissenting opinion to the award. In order to show the lack of jurisdiction, both *ratione materiae* and *ratione personae*, of the Arbitral Tribunal under the Bilateral Investment Treaty between the United Kingdom and Bolivia, the dissenting arbitrator underlined that the claimant – a company based in Bermuda – was a shell company. This company was different from the Canadian company that, by relying, among others, on its pro-sustainable development approach, managed

³⁴ Id., para. 6.100.

³⁵ The claimant had pointed to the failure of the respondent host state in showing the prevalence of the human rights of the local indigenous communities over the treaty protection of the investment (*South American Silver Limited v. Bolivia*, UNCITRAL Arbitration, Award 30 August 2018, especially para. 189). The claimant also succeeded in showing that in other cases, such as the *Glamis Gold Limited v. The United States* and *von Pezold v. The Republic of Zimbabwe* cases, ‘international arbitration tribunals have had an opportunity to make issues of indigenous peoples’ rights outcome-determinative, and have declined to do so’ (*South American Silver Limited v. Bolivia*, UNCITRAL Arbitration, Award 30 August 2018, para. 191).

³⁶ Id., paras 195-196, as to the host state’s counter-claim based on the importance of international obligations on human rights for the protection of the local indigenous community.

³⁷ Id., paras 217-218.

³⁸ Id., paras 519-526, 541, 622-630. See also Professor Francisco Orrego Vicuña’s separate opinion.

the relationship with Bolivia and the implementation of the investment project.³⁹

In *Bear Creek Mining Corp. v. Peru* the respondent state, Peru, also did not succeed in relying on the opposition of a part of the local indigenous community to justify its choice to terminate the foreign investment.⁴⁰ The Arbitral Tribunal decided that Peru had to pay ‘reasonable and appropriate damages for its breach’ of the applicable international treaty, that is the 2008 Free Trade Area Agreement between Canada and Peru.⁴¹

In addition to such international treaty-based investment arbitral cases, there have been a few relevant cases arisen from a foreign investment before the Inter-American Court of Human Rights.⁴²

³⁹ At para. 74 of his dissenting opinion, the arbitrator Mr. Osvaldo Cesar Guglielmino points out that ‘[t]he facts as analyzed above establish the following: a Canadian company that is not a party to this arbitration (SASC) asserts ownership of the purported investment and performs all of the management and control acts attributable to an actively involved company that owns the purported investment. However, the party appearing before this Tribunal as an investor is not the Canadian company, but another company from Bermuda (territory covered by the scope of the BIT between Bolivia and the United Kingdom), a shell company with a negligible capital and a nominal and passive shareholding in Bahamian companies and in connection with which no active involvement in the object of this dispute was established.’

⁴⁰ *Bear Creek Mining Corporation v. The Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, paras 231-250 (as to the position of the claimant), para. 244 (as to the sustainability of its investment project), and paras. 251-266, particularly paras 257-259 (as to the position of the respondent state).

⁴¹ *Id.*, para. 657 rejecting the claimant’s request for ‘punitive damages’, in accordance with the ‘discounted cash flow’ method, and (para. 656) deciding that ‘this Award will focus on the value of what Claimant actually invested’. *Id.*, paras 663-668, as to the conclusion of the majority of the arbitrators in relation to the assessment of damages. See also Professor Philippe Sands’s dissenting opinion.

⁴² For further information, see Citroni’s and Focarelli’s respective chapters in this volume. For an overview of relevant cases, see, among others, S. J. Anaya and R. A. Williams Jr., ‘The Protection of Indigenous Peoples’ Rights over Lands and Natural Resources under the Inter-American Human Rights System’ (2001) 14 *Harvard Human Rights Journal*, 33; P. Nikken, ‘Balancing of Human Rights and Investment Law in the Inter-American System of Human Rights’ in P.-M. Dupuy, E.-U. Petersmann and F. Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) 246; R. Polanco and R. Mella, ‘Investment Arbitration and Human Rights Cases in Latin America’ in Y. Radi (ed), *Research Handbook on Human Rights and Investment* (Edward Elgar Publishing, 2018) 41.

3. The Revision of International Investment Law after the 2008 Financial Crisis, with Particular Regard to the Position of the European Union

Over the last decade, international investment law has no longer focused on the protection of a foreign investor's interests only. Regulatory changes have occurred because of the political shift in the approach of international organizations and of a number of states, such as the United States (at the time of the Obama Administration), Canada, Australia, and India. The EU institutions, mainly the Commission and the European Parliament, have also referred to the importance of the safeguard of a few general interests related to the quality of the development process within the exercise of the EU competence on foreign direct investment provided in the 2007 EU Lisbon Treaty.⁴³

This has led to changes in international investment treaty practice to provide states adequate regulatory spaces for the safeguard of certain non-investment concerns through the adoption of specific public policies. A number of investment treaties have been revised, in order to include, for instance, non-relaxation clauses,⁴⁴ general exceptions to treaty obligations on the treatment of investors as 'non-precluded measures',⁴⁵ specific exceptions to treaty obligations on performance requirements,⁴⁶ special clauses on the safeguard of the environment⁴⁷ and on the 'right to regulate'

⁴³ See, in particular, the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Towards a comprehensive European international investment policy', COM/2010/0343 final; the 'Conclusions on a comprehensive European international investment policy' adopted by the EU Council on 25 October 2010; and the Report on the 'Future European International Investment Policy' adopted by the Committee on International Trade of the European Parliament on 22 March 2011.

⁴⁴ See, for instance, Article 9, para. 9, ch. 9, of the 2011 Korea-Peru Free Trade Agreement; Article 10, para. 20, of the 2011 India-Malaysia Comprehensive Economic Cooperation Agreement; Article 12, para. 5, of the 2012 US Model BIT; Article 15 of the 2019 Australia-Uruguay BIT.

⁴⁵ See, among others, Article XVII of the 1997 Canada-Armenia BIT; Article 11, para. 3, of the 1998 Switzerland-Mauritius BIT; Article 5, para. 3, of the 1999 New Zealand-Argentina BIT; Article 10, para. 1, of the 2004 Model BIT of Canada; Article 19, para. 1, of the 2018 Kazakhstan-Singapore BIT; Article 4, para. 2, of the 2018 Cambodia-Turkey BIT.

⁴⁶ See, for instance, Article 5, para. 3, letter c, of the 2003 Australia-Singapore Free Trade Agreement; Article 8, para. 3, letter c, of the 2012 US Model BIT; Article 14.10, para. 3, letter c, of the 2018 agreement among Canada, Mexico and the United States (USMCA); Article 9.10, para. 3, letter d, of the 2018 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

⁴⁷ See Article 12 of the 2012 US Model BIT.

of contracting states.⁴⁸

As mentioned, the ICSID Arbitration Rules were revised to render arbitral proceedings more inclusive.

The UNCITRAL has enhanced the transparency of treaty-based investment arbitration, by adopting special rules on its arbitral proceedings.⁴⁹

Provisions on the safeguard of indigenous peoples, and more specifically on the safeguard of their relationship with land and natural resources, have been included in certain relevant treaties. A few 'comprehensive and trade' agreements signed or concluded by the European Union, as a new influential player,⁵⁰ and by a few economic advanced states, such as

⁴⁸ See, for instance, Article 20, para. 8, of the Investment Agreement for the 2007 COMESA Common Investment Area; Article 20 of the 2012 SADC Model BIT; Article 4 (b) of the Annex B to the 2012 US Model BIT; the preamble of the 2016 Comprehensive Economic and Trade Agreement (CETA) among the European Union, its Member States and Canada; Article 23, para. 1, of the 2016 Nigeria-Morocco BIT; the preamble of the 2019 Australia-Uruguay BIT; the preamble of the 2019 Facilitation and Cooperation Investment Agreement between Brazil and the United Arab Emirates.

⁴⁹ See, in particular, the 2014 UNCITRAL 'Rules on Transparency in Treaty-based Investor-State Arbitration' <<https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf>> (accessed 12 November 2019).

⁵⁰ See, for instance, the 2008 Economic Partnership Agreement between the European Union, its Member States and the CARIFORUM States, that is Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, the Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Lucia, Saint Vincent and Grenadine, Saint Christopher and Nevis, Suriname and Trinidad and Tobago. Its Article 45 reads as follows: '1. [t]he Parties respecting and promoting their national, regional and international obligations agree that cooperation activities shall enhance the protection and promotion of the rights and fundamental freedoms of indigenous peoples, as recognised by the United Nations Declaration on the Rights of Indigenous Peoples. Further, cooperation activities shall enhance and promote the human rights and fundamental freedoms of persons belonging to minorities and ethnic groups. 2. Special attention should be paid to poverty reduction, and to the fight against inequality, exclusion and discrimination. Relevant international documents and instruments addressing the rights of indigenous peoples such as United Nations Resolution 59/174 on the Second Decade of the World's Indigenous Peoples, and, as ratified, the International Labour Organization 169 Convention concerning Indigenous and Tribal Peoples in Independent Countries, should guide the development of cooperation activities, in line with the national and international obligations of the Parties. 3. The Parties further agree that cooperation activities shall systematically take into account the social, economic and cultural identities of these peoples and shall ensure as appropriate their effective participation in cooperation activities, in particular in those areas most relevant to them, notably sustainable management and use of land and natural resources, environment, education, health, heritage and cultural identity. 4. Cooperation shall contribute to promoting the development of indigenous peoples. Cooperation shall also contribute to promoting the development of persons belonging to minorities and ethnic groups organisations. Such cooperation shall strengthen as well their negotiation, administrative and management capacities.' Relevant provisions are also included in the 2012 Trade

Canada,⁵¹ are important examples.

The objective of connecting the safeguard of certain non-investment concerns and that of foreign investments has also been pursued through voluntary rules. International organizations have published non-binding acts and reports in order to support such a revision of international investment law. Specifically, the UNCTAD has engaged in publishing specific statistics, annual reports, technical notes, and principles of conduct, like the 2012 *Investment Policy Framework for Sustainable Development* to support the mainstreaming of sustainable development within the negotiations of international investment treaties. The UNCTAD has also organized annual *Forum* and managed databases to facilitate the search of relevant materials by government officials, scholars, and any other interested actor. The website of the UNCTAD is a significant tool for useful materials and updates on the main trends in the international regulatory and policy framework on investment.⁵² A few companies have adopted principles of ‘responsible’ conduct and/or established special initiatives to ‘build alliances’ with indigenous people communities.⁵³ Academic actors and civil society groups have also contributed to this new approach.⁵⁴

Agreement between the European Union, its Member States, Colombia and Peru. A Protocol of Accession to this Agreement was signed with Ecuador in 2016.

⁵¹ See the 2016 Investment Treaty between Canada and Senegal, Annex I which safeguards the ‘right to regulate’ of Canada in favour of ‘the rights or preferences provided to aboriginal peoples, where the measure does not conform with the obligations imposed by Article 4 (National Treatment), Article 5 (Most-Favoured-Nation Treatment), Article 8 (Senior Management, Boards of Directors and Entry of Personnel) or Article 9 (Performance Requirements) of this Agreement.’ A similar provision is included, for instance, in Annex X-07 of the 2016 Comprehensive Economic and Trade Agreement (CETA) between Canada, the European Union and its Member States; in Annex II of the 2015 Investment Treaty between Canada and the Republic of Serbia and in Annex II of the 2009 Free Trade Agreement between Canada and Peru.

⁵² See <<https://unctad.org/en/Pages/Home.aspx>> (accessed 12 November 2019).

⁵³ See, for instance, the ‘Smallholder and Agri-Small and Medium Enterprise (SME) Finance and Investment Network (SAFIN)’, that is an inclusive partnership for supporting the investment capacity of smallholders and agri-SMEs. For further information, see <safinetwork.org> (accessed 30 May 2019); and the ‘Michelin’s Strategic Partnership with Indigenous People’ among Michelin Canada, Aboriginal organizations, the Government of Canada and the Government of Nova Scotia. For further information, see <evalorix.com/boutique/outils-pedagogiques/etudes-de-cas-en-management-et-de-la-strategie/michelin-strategic-partnership-indigenous-peoples-2-2/> (accessed 30 May 2019). Cf., in particular, J. Mandelbaum and J. Loutit, ‘Extractive Industry Investments and Human Rights’ in Y. Radi (ed), *Research Handbook on Human Rights and Investment* (Edward Elgar Publishing, 2018) especially 402-404.

⁵⁴ See, in particular, P. Acconci, ‘The Integration of Non-investment Concerns as an

4. Concluding Remarks

Arbitral treaty-based cases have shown how international regulatory diversification can be a contentious issue where non-economic and economic interests clash.

The reorientation of the approach of a few states to the design of international investment treaties and the innovative approach of the EU Commission have been an important change over the last decade. This has contributed to the promotion of friendly relations between foreign investment and a host state's general interests.

The safeguard of the specific interests of indigenous peoples within the international and EU regulatory frameworks on the protection of foreign investments however appears to be mostly indirect, through the preservation of certain non-investment concerns, such as sustainable development, the environment, and public health.

The broad acceptance of sustainable development, as the chief macro-economic objective at the time of globalization, and of the possible deglobalization⁵⁵ of today, has not been enough. The market-based approach to sustainable development has been the regulatory reference point since the 'World Conference on Sustainable Development' organized by the UN Secretary General in Rio de Janeiro in 1992. As far as the safeguard of the interests of indigenous peoples is concerned, the reconceptualization of the market-based approach to the promotion of sustainable development would be desirable. This would integrate health, labour rights, the environment and the conservation, use and management of natural resources, as 'public

Opportunity for the Modernization of International Investment Law: Is a Multilateral Approach Desirable?' in G. Sacerdoti, P. Acconci, M. Valenti and A. De Luca (eds), *General Interests of Host States in International Investment Law* (Cambridge University Press, 2014) 165; C. S. Levy, 'Drafting and Interpreting International Investment Agreements from a Sustainable Development Perspective' (2015) 3 *Groningen Journal of International Law*, 59; M. Langford, D. Behn and O. Kristian Fauchald, 'Backlash and State Strategies in International Investment Law' in T. Aalberts and T. Gammeltoft-Hansen (eds), *The Changing Practices of International Law* (Cambridge University Press, 2018) 70.

⁵⁵ The reduction of interdependence and integration among states and other actors of transnational economic relations and the parallel decline of trade and investment may bring about a deglobalization process, together with policy choices in favour of nationalism, populism and unilateralism. Cf. W. Bello, *Deglobalization: Ideas for a New World Economy* (Zed Books, 2005); J. Harold, 'Deglobalization: The Rise of Disembedded Unilateralism' (2018) 10 *Annual Review of Financial Economics*, 219; P. A. G. van Bergeijk, *Deglobalization 2.0. Trade and Openness During the Great Depression and the Great Recession* (Edward Elgar Publishing, 2019).

policy priorities', into international actions for growth and development through foreign investments and would thus prevent an inconsistent orientation.

Regulatory diversification cannot be overcome by the revision of the typical structure of international investment treaties through the inclusion of references to relevant non-investment concerns in their preambles, exceptions, and special safeguards. This method has not been satisfactory so far.

Diversification preserves and prolongs differences in the intensity of regulatory and adjudicatory safeguards provided in international law instruments in relation to the protection of foreign investments, on the one hand, and indigenous peoples, on the other. Foreign investors can rely on binding rules that they can enforce through a strong remedy like 'direct arbitration', in particular the ICSID arbitration, whereas indigenous peoples depend on the possible counter-actions of their territorial states within investment arbitration proceedings and/or can file claims before international courts, such as the Inter-American Court of Human Rights. The latter may also not be an adequate remedy because this Court can judge the conduct of the contracting states of the Inter-American Convention of Human Rights but not that of private parties, like a foreign investor national of one of those states. Besides, the different intensity and effectiveness of the international regulatory safeguards for foreign investors and for indigenous peoples contributes to the complexity of international law, especially with regard to its effective implementation and predictability. That appears to be the main reason why representatives of indigenous peoples and/or interested non-governmental organizations have preferred to take direct actions before domestic courts of their territorial states and/or of the national state of a foreign investor. However, this kind of litigation can be difficult, lengthy, expensive, and ineffective, as the *Chevron v. Ecuador* case has shown.⁵⁶

⁵⁶ See *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23. This case arose from the alleged misconduct by the host respondent state during a proceeding before a Lago Agrio court against Texaco Petroleum Corporation for remediation of the environmental contamination due to its crude oil production in that region of Ecuador. The claimants brought the case before the Permanent Court of Arbitration on 23 September 2009, in accordance with the UNCITRAL arbitration clause provided in the 1993 Bilateral Investment Treaty between the United States and Ecuador. On 26 July 2010, Ecuador submitted its Memorial on Jurisdictional Objections. Later, on 22 October 2010, Fundación Pachamama and the International Institute for Sustainable Development (IISD) submitted a petition for participation as non-disputing parties and, on 2 November 2010, an *Amici Curiae* report to show, in particular, the "extraordinary nature" of the case, in light of the environmental and human rights matters at stake, and the lack of

Because of international regulatory diversification, the mainstreaming of sustainable development policy priorities, including the protection of the environment, public health, and cultural heritage, into international investment law, through the adoption of multilateral non-binding instruments and/or a multilateral convention, would facilitate the connection between the promotion of developmental needs and the safeguard of private interests within arbitration proceedings.

The revision of the traditional regulatory structure of international investment treaties through the adoption of a multilateral regulatory instrument, even non-binding, would contribute to dealing with most of the political risks that undermine the relationship between host states and foreign investors. This would also contribute to the prevention of conflict of interests, as well as of conflict of norms, eventually improving the international climate for foreign investments and the safeguard of the special relationship of indigenous peoples with the earth.

In addition, a reform of the typical investor-state dispute settlement, that is 'direct arbitration', would be desirable. The Special Rapporteur on

jurisdiction of the arbitral tribunal under the US-Ecuador BIT. Since then, the disputing parties raised different procedural questions. The case was also brought before domestic courts of various states - specifically, the United States, Ecuador, Argentina, Brazil, the Netherlands - and finally, on 30 August 2010, decided by the Permanent Court of Arbitration in favour of the claimants. See the Second Partial Award on Track II, 30 August 2018, para. 8.78 deciding that 'the Respondent is liable to make reparations to each of Chevron and TexPet for injuries caused by the breaches of the FET standard and customary international law in Article II(3)(a) of the Treaty and for breaches of the Umbrella Clause in Article II (3) (c) of the Treaty, as further addressed in Parts IX and X below.' However, para. 8.80 of the 'Postscript' at the end of the Award underlines that '[i]f the Claimants' assessment (above) of the full costs of remediating environmental damage in the concession area were correct (as to which the Tribunal here expresses no conclusion), it is deeply regrettable that individual claims for personal harm caused by such damage were not amicably settled long ago, without the massive costs expended on the multiple lawsuits and arbitrations (including this arbitration) and, also, without the involvement of non-party funders and other third persons. The latter groups ostensibly rank in priority far above the Lago Agrio Plaintiffs for any proceeds from the Lago Agrio Litigation, as to which, again in the words of the Respondent's Counsel, the 'real plaintiffs' with 'real claims' are likely to receive nothing after 25 years of continuous litigation.' The 'Postscript' 'does not form part of the reasons in this Award, or its Operative Part,' as specified at para. 8.79 of the same Award. For all the materials of the case, see <italaw.com/cases/257> (accessed 30 April 2019). Cf. also L. Johnson, 'Case Note: How *Chevron v. Ecuador* is Pushing the Boundaries of Arbitral Authority' (April 13, 2012) *Investment Treaty News*, <iisd.org/itn/2012/04/13/case-note-how-chevron-v-ecuador-is-pushing-the-boundaries-of-arbitral-authority/> (accessed 30 May 2019).

the Rights of Indigenous Peoples favours such a reform,⁵⁷ stressing that '[d]ispute resolution systems can no longer exclude those who are most affected by the disputes they purportedly resolve, otherwise their awards lack legitimacy. Full and effective participation of indigenous peoples in accordance with their right to give or withhold consent, together with ensuring equity of remedies, are key principles in moving beyond the current unbalanced and incoherent system.'⁵⁸ So far, the Special Rapporteur has not referred to the *post*-Lisbon EU approach to this matter based on the establishment and functioning of a permanent investment court.⁵⁹

An international organization would be a significant framework to promote specific discussions and negotiations for a multilateral regulatory instrument on investment. In particular, the UNCTAD would be able to give operational and technical support to member states that have indigenous communities within their territories, also with the aim of effectively implementing the 'prior, free, and informed consent' tool, by involving representatives of indigenous peoples.

⁵⁷ Special Rapporteur on the Rights of Indigenous Peoples, second Report on the 'Impact of international investment agreements on indigenous peoples' rights', para. 84 (highlighting that '[m]echanisms aimed at resolving disputes between investors and states that extend to affected communities and individuals through the use of fact-finding and mediation, and possibly through judicial powers, modelled on a body such as the Inter-American Court of Human Rights, have been proposed').

⁵⁸ *Id.*, para. 85.

⁵⁹ Following public consultations on investment protection and investor-to-state dispute settlement in the TTIP agreement, in 2015 the EU Commission published a 'Concept Paper' on 12 May named '*[i]nvestment in TTIP and beyond – the path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court*' and an unofficial document on 16 September providing for an informal proposal to the United States as to a revision of the TTIP draft investment chapter suggesting the establishment of a permanent investment court system. See European Commission, 'Public Consultations on Modalities for Investment Protection and ISDS in TTIP', Consultation Document (2014), available on the EU website. The 2016 Comprehensive Economic and Trade Agreement among the European Union, its Member States and Canada (CETA), at Articles 8.22-8.43 of its 'Investment Chapter', refers to a permanent investment arbitral tribunal for the settlement of disputes between Canada, the European Union or one of its Member States and an investor of another Contracting Party. The CETA, at Article 8.29 of its 'Investment Chapter', also refers to the possible "establishment of a multilateral investment tribunal and appellate mechanism" between its Contracting Parties and 'other trading partners.' For the settlement of the same kind of disputes, 'Chapter 3 on Dispute Settlement' of the Investment Protection Agreement signed by the European Union, its Member States and Vietnam in 2018 provides for the establishment of an 'Investment Tribunal System' (Article 3.38), and of a 'permanent Appeal Tribunal' (Article 3.39).

In conclusion, these proposed reforms might accommodate heterogeneous interests, overcoming the reluctance of certain states to recognize, protect, and fulfil indigenous rights and hear the ‘voice’ of indigenous communities in their territories also in relation to the establishment of special mechanisms for ‘sharing’ the benefits generated by a foreign investment.⁶⁰

⁶⁰ Cf., among others, E. Morgera, ‘The Need for an International Legal Concept of Fair and Equitable Benefit Sharing’ (2016) 27 *European Journal of International Law*, 353; F. Cittadino, *Incorporating Indigenous Rights in the International Regime on Biodiversity Protection* (Brill 2019).

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