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Indigenous Groups as Non-Disputing Parties in Investor-State ICSID Arbitration: Can the Subaltern Speak?

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Abstract

This article examines how the rules governing amicus curiae submissions from Non-Disputing Parties in Investor-State ICSID arbitration can operate to silence Indigenous groups and other third parties with a direct interest. It interrogates how the nexus that Indigenous groups have with investment disputes is more akin to that of an intervener than an amicus. It critiques the bounded conception of international investment law adopted by certain Tribunals demonstrating an intolerance which makes the law unable to accommodate a plurality of voices, by denying that Indigenous law and rights can form part of the applicable law, and by finding Indigenous groups have too much of an interest to be amici. It argues that the 2022 ICSID Rules were a missed opportunity to create a new category of Third-Party Intervener.

Key words

amicus curiae; human rights; Indigenous rights; international investment law; ICSID; Arbitration Rules 2022; non-disputing parties

*Before the law sits a gatekeeper. To this gatekeeper comes a man from the country who asks to gain entry into the law. But the gatekeeper says that he cannot grant him entry at the moment. The man thinks about it and then asks if he will be allowed to come in later on. 'It is possible,' says the gatekeeper, 'but not now'. (Franz Kafka, 'Before the Law', *Selbstwehr* 1915)*

I repeat that we all stand before history. I and my colleagues are not the only ones on trial. Shell is here on trial and it is as well that it is represented by counsel said to be holding a watching brief. The Company has, indeed, ducked this particular trial, but its day will surely come and the lessons learnt here may prove useful to it for there is no doubt in my mind that the ecological war that the Company has waged in the Delta will be called to question sooner than later and the crimes of that war duly punished. The crime of the Company's dirty wars against the Ogoni people will also be punished. (Ken Saro-Wiwa, *Final Statement to the Military Appointed Tribunal*, which he was prevented from reading before his execution on 10 November 1995)

1 Introduction

This article explores how the International Centre for Settlement of Investment Disputes (ICSID) procedural rules that govern *amicus curiae* submissions render legal interests of Indigenous groups invisible. These rules are ill-suited to accommodate third parties with a *direct interest of a legal nature*. Indigenous groups do not fit adequately within the category of Non-Disputing Parties under what is now Rule 67 of the ICSID 2022 Arbitration Rules governing the participation of *amici*.¹ The nature of their legal stake means that they are often not friends of the tribunal and are often in dispute with one or both parties. The discretion afforded to Tribunals privilege *non-state actors* speaking in recognisable dialects of professional expertise that are removed from a dispute rather than local actors that petition Tribunals to address a perceived injustice often in the language of dissent with a vested stake in the outcome.² Moreover, some Tribunals have used this direct interest of a legal nature as a means of exclusion for having too much of an interest. The case of *Bernhard von Pezold & Others v Republic of Zimbabwe and Border Timbers Ltd v Republic of Zimbabwe*, in which the Tribunal rejected the participation of Indigenous groups for an 'apparent lack of independence or neutrality', illustrates this dynamic at work.³ The silencing of Indigenous groups in the case of *Von Pezold/Border Timbers* on the additional basis that their concerns were not relevant is indicative of an intolerant conception of international investment law unable to accommodate a plurality of third-party voices.⁴ International investment law is set apart as *lex specialis* removed from the general obligations of public international law. It interrogates this dynamic of exclusion through procedure and advocates for

¹ ICSID Arbitration Rules (2022) https://icsid.worldbank.org/sites/default/files/Arbitration_Rules.pdf (accessed 14 September 2023).

² Gayatri Chakravorty Spivak, 'Can the Subaltern Speak?' in Cary Nelson and Lawrence Grossberg (eds.), *Marxism and the Interpretation of Culture* (University of Illinois, 1988) 271-313.

³ *Bernhard von Pezold and Border Timbers v Republic of Zimbabwe*, ICSID Case No ARB/10/25 and ICSID Case No ARB/10/15 Procedural Order No 2 (26 June 2012) para 56 <https://www.italaw.com/sites/default/files/case-documents/ita1044.pdf> (accessed 14 September 2023).

⁴ *Ibid*, para 57.

treating Indigenous groups as a distinct type of *amici* with greater procedural rights because of the nature of their interest and historic exclusion by international law. It proposes a new category of Third-Party Intervener. Whereas the role of amicus is to assist the court, the role of an intervener is to represent the intervener's own legal interests in proceedings.

At the outset, I discuss how the lexicon of international law can operate to silence Indigenous peoples engaged in disputes with foreign investors and how their historic oppression justifies a privileged position (Section 2). I explain how non-disputing parties can participate in investor-state arbitration (Section 3), analysing the most common form of participation through written submissions, I discuss the difficulty of Indigenous groups making submissions under what is now ICSID Rule 67 (3.3.1). Next, I argue that there is a category of NDPs that does not fit into the category of *amici* because of the nature of their legal interest, which includes Indigenous groups (Section 4). I consider cases in which Indigenous groups possessed a nexus to the dispute and whether the procedural device of *amicus curiae* participation was adequate in allowing the Indigenous voices to be conveyed to the Tribunal (Section 5). I suggest solutions for elevating the *jus standi* of Indigenous peoples as third parties (Section 6). Section 7 offers my conclusion.

2 'Silence would be treason':⁵ Indigenous Conflicts with Investors as a Blind Spot of International Law

Indigenous peoples occupy a distinctive position within international law. 'Their land is, by definition, occupied by others. They are peripheral international-law subjects of who remain invisible to many international courts and tribunals.'⁶ Meanwhile, investor-state arbitration is structured around a bipolar relationship between investor and state. This framework leaves little space to articulate investor conduct towards third parties, including Indigenous communities. While investor rights are protected, obligations are weakly defined or absent. For this reason, it is all the more important that Indigenous communities are granted an elevated standing as an aspect of self-determination.

Tribunals have tended to reinforce this separation. In *Von Pezold*, for example, the tribunal treated Indigenous rights as outside applicable law despite treaty references to international law, reflecting resistance to integrating broader norms into

⁵ Ken Saro Wiwa, 'Keep out of Prison' in Ide Corley, Helen Fallon and Laurence Cox (eds.), *Silence would be Treason: Last Writings of Ken Saro Wiwa* (Daraja Press 2017) 227.

⁶ Anna Meijknecht, *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law* (Hart, 2001) 177. The ICJ does not permit *amici* submission from indigenous groups even when directly implicated in the adjudication of territorial disputes between States. See Michael Reisman, 'Protecting Indigenous Rights in International Adjudication' (1995) 89:2 *American Journal of International Law* 350, at 354. See also Article 34 of the Statute of the ICJ (1945) <https://www.icj-cij.org/statute> (accessed 10 October 2026).

investment reasoning.⁷ This reflected the view that Indigenous rights could never form part of the applicable law notwithstanding reference to international law in the BITs. The Tribunal considered that it was outside the subject matter of an investor-state arbitration. In general, with a few exceptions, tribunals have generally been reluctant to hear human rights arguments.⁸

Puig also identifies this in his research monograph stating: '[a] narrow, specialised and hermetic version of international economic law facilitates complex negotiations, but its result...is the weakening of the tools available within international law to protest against the unequal distribution of resources and the consequent marginalisation and inequality.'⁹ Behind a veil of neutrality is a privileging of economic interests and a marginalisation of human-centred interests.

Indigenous groups suffer a double marginalisation. First, because Indigenous groups live outside state systems with their own territory, customs, traditions and identity, they are often perceived as a threat to the sovereignty of the nation state. Secondly, their spiritual connection with land, which has a sacred value and is a source of sustenance, frequently puts them at odds with foreign investors who tend to regard land as a commodity to be exploited for economic profit.¹⁰

An increasing body of literature has examined the interaction between the different regimes of international investment law and human rights law¹¹ and

⁷ Agreement between the Republic of Zimbabwe and the Federal Republic of Germany Concerning the Encouragement and Protection of Foreign Investments (signed 29 September 1995, entered into force 14 April 2000), Article 11(2) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1453/download> (accessed 10 October 2026); Swiss – Zimbabwe BIT, Article 10(3) (1996) <https://edit.wti.org/document/show/d743a640-3f8d-4431-ae33-e39595fbff0d> (accessed 10 October 2026). In contrast, the Tribunal in *Urbaser* stated that reference to the 'general principles of international law'... 'would be meaningless if...the BIT were construed as an isolated set of rules of international law for the sole purpose of protecting investments through rights exclusively granted to investors.' *Urbaser S A and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentina* ICSID Case No ARB/07/26 Award para 1189 (8 December 2016) https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf (accessed 10 October 2026).

⁸ Ernst-Ulrich Petersmann, 'Introduction and Summary: "Administration of Justice" in International Investment Law and Adjudication' in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds.), *Human Rights in International Investment Law and Arbitration* (OUP, 2009) 3, at 12; Moshe Hirsch, 'Investment Tribunals and Human Rights: Divergent Paths' in International Investment Law and Adjudication' in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds.), *Human Rights in International Investment Law and Arbitration* (OUP, 2009) 97, at 106.

⁹ Sergio Puig, *At the Margins of Globalisation: Indigenous Peoples and International Economic Law* (CUP, 2021) 127.

¹⁰ The figure of *Pachamama* (Mother Earth) is a goddess of fertility in Aymara and Quechua mythology and considered sacred. See Sam Adelman, 'Rio+20: Sustainable Injustice in a time of Crises' (2013) 4:1 *Journal of Human Rights and the Environment* 6, at 24.

¹¹ Brunno Simma and Theodore Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology' in Christina Binder, Ursula Kriebaum, August Reinisch *et al.* (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christopher Schreuer* (OUP, 2009) 678-707. Stephan Schill and Vladislav Djanic, 'Wherefore Art Thou? Towards a Public Interest-Based Justification of International Investment Law' (2018) 33:1 *ICSID Review - Foreign Investment Law Journal* 29, at 32-33.

Indigenous rights, more specifically.¹² Meanwhile, the treatment of Indigenous peoples within the jurisprudence of international investment law has also come under the scrutiny of global human rights mechanisms.¹³ However, international human rights law does not recognise investors as holding binding obligations in international law towards third parties, but holds the host state responsible for failing to protect Indigenous people from corporations.¹⁴ Both international investment law and international human rights law therefore suffer from a blind-spot in addressing corporate misconduct to Indigenous groups.

3 Whether Indigenous Groups Can Participate Adequately through the Mechanism of Non-Disputing Parties (NDPs)

In 2006, the ICSID Rules were amended to permit written submissions from non-disputing parties as *amici*, or “friends of the tribunal”. This section considers the extent to which Indigenous peoples can adequately participate as Non-Disputing Parties. *Amici* fulfil several functions in international adjudication including: providing information, undertaking systemic reform and espousing a direct interest.¹⁵ Besides Indigenous groups, actors that have sought to participate in ICSID arbitration have included NGOs; international organisations; specialised agencies and regional organisations such as the World Health Organisation (WHO) and the European Commission; individuals; industry associations; and states.¹⁶ While the rules have been drafted to accommodate the expertise of professional NGOs, they are ill-suited to

¹² Valentina Vadi, ‘When Cultures Collide: Foreign Direct Investment, Natural Resources, and Indigenous Heritage in International Investment Law’ (2011) 42:3 *Columbia Human Rights Review* 797, at 797; Judith Levine, ‘The Interaction of International Investment Arbitration and the Rights of Indigenous People’ in Freya Baetens (ed.), *Investment Law within International Law: Integrationist Perspectives* (CUP, 2013) 106-128; Christine Binder, ‘Investment, Development and Indigenous Peoples’ in Stephan Schill, Rainer Hofmann and Christian Tams (eds.), *International Investment Law and Development: Bridging the Gap* (Edward Elgar, 2015) 423-452; Christina Binder, ‘The UNDRIP and Interactions with International Investment Law’ in Jessie Hohmann and Marc Weller (eds.), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (OUP 2018) 87-111.

¹³ Alfred-Maurice de Zayas, Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order, UN Doc A/HRC/30/44, which calls for the dismantling of the current order (2015) <https://digitallibrary.un.org/record/803449?ln=en&v=pdf>, (accessed 10 October 2026); Victoria Tauli-Corpuz, Report of the Special Rapporteur on the Rights of Indigenous Peoples (A/HRC/33/42) (2016) <https://docs.un.org/en/A/HRC/33/42> (accessed 10 October 2026).

¹⁴ *Social and Economic Rights Action Center (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria (Ogoniland Case)*, Communication No 155/96 found Nigeria responsible for failing to protect the Ogoni peoples’ right to a healthy environment from the actions of the NNPC and SPDC (2001) <https://achpr.au.int/en/decisions-communications/social-and-economic-rights-action-center-serac-and-center-economic-15596> (accessed 10 October 2026).

¹⁵ Astrid Wiik, *Amicus Curiae Before International Courts and Tribunals* (Nomos, 2018) 133-154.

¹⁶ For a recent study of *Amicus* Applications in ICSID Cases between 2003-2016, see Sophie Lamb, Daniel Harrison and Jonathan Hew, ‘Recent Developments in the Law and Practice of Amicus Briefs in Investor-State Arbitration’ (2017) 5:2 *Indian Journal of Arbitration Law* 72, 92.

accommodate third parties with a direct legal interest that might be adversely affected by a tribunal's decision.¹⁷ This section looks at the extent to which Indigenous groups can: (4.1) access documents, (4.2) attend a hearing and (4.3) file written submissions. It argues that the rule on third party submissions is insufficient for third parties with a direct interest and argues that the latest iteration of the ICSID Rules 2022 was a missed opportunity to address this problem.

There is a two-stage process for participation as a Non-Disputing Party. The first step is to petition the tribunal to seek leave to file an *amicus* brief.¹⁸ If permission is granted, the second step is to file an *amicus* brief. Those petitioning a tribunal can seek access to the documents of the case, the opportunity to attend the hearing, and the opportunity to file written submissions.¹⁹

The extent of third party participation will depend on: (i) the investment instrument (e.g. treaty, contract or law);²⁰ (ii) the application of procedural Rules (e.g. ICSID Rules or UNCITRAL Rules and the UNCITRAL Transparency Rules if applicable);²¹ (iii) party agreement in each case.²² Article 44 of the ICSID Convention provides that, 'except as the parties otherwise agree', the tribunal has discretion to resolve any question of procedure not covered by the rules. Parties can agree amongst themselves even after the arbitration has commenced to exclude Non-Disputing Parties, for example, in the first Procedural Order, since it is open to the parties to vary or exclude non-mandatory ICSID Rules, in other words, rules that are not derived from the Convention itself.²³ These rules on submissions by NDPs therefore apply in

¹⁷ This article agrees with the conclusions in Farouk El-Hosseny, *Civil Society in Investment Treaty Arbitration* (Brill, 2018).

¹⁸ Human Rights Program (IHRP) at the University of Toronto, Faculty of Law and the Center for International Environmental Law (CIEL), *Guide for Potential Amici* (January 2014) https://www.ciel.org/Publications/Guide_PotentialAmici_Full_Jan2014.pdf (accessed 10 October 2026); Jeffery Commission, *Procedural Issues in International Investment Arbitration* (OUP, 2018) 86-112.

¹⁹ Some *amici* have adopted the practice of filing a version of the brief whilst petitioning the Tribunal.

²⁰ Older BITs are unlikely to deal with transparency.

²¹ Article 17(1) UNCITRAL Rules 2010 provides the tribunal with a general discretion to accept *amicus* submissions. However, it is also open to modify these rules by agreement under Article 1. UNCITRAL Rules 2010, <https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/arb-rules-revised-2010-e.pdf> (accessed 10 October 2026); Clyde Croft, Christopher Kee and Jeff Waincymer, *A Guide to the UNCITRAL Arbitration Rules* (CUP, 2013) 178.

²² A 'serious departure from a fundamental rule of procedure' can be grounds for annulment under Article 52(1)(d) ICSID Convention (2006) <https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf> (accessed 10 October 2026).

²³ ICSID Conciliation Rules, Rule 20(2) 'In the conduct of the proceedings the Tribunal shall apply any agreement between the parties on procedural matters, except as otherwise provided in the Convention or the Administrative and Financial Regulations.' <https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf> (accessed 10 October 2026).

default when the parties have not provided for an alternative procedure for NDPs that is either wider or narrower than these rules.

3.1 *Access to the Documents of the Case*

The ICSID 2022 Rules now by default publish written submissions or supporting documents unless excluded by the parties.²⁴ The rules also state that, '[t]he Tribunal shall provide the non-disputing party with relevant documents filed in the proceedings, unless either party objects.'²⁵ This is a significant change from the earlier rules which were silent on this point and left to the discretion of the Tribunal. The lack of publicly available documents can limit meaningful participation in the absence of written pleadings because, as Fernando Simões puts it, *amici* have a 'myopic vision of the dispute'.²⁶ In *Piero Foresti et al v South Africa* in which five petitioning NGOs were permitted access to redacted versions of the pleadings to enable them to focus their written submissions, the tribunal made it clear that this was not intended to be a mechanism for enabling NDPs to obtain information from the Parties.²⁷ The updated rules are a step forwards for transparency to produce more focused written submissions by non-disputing parties.

3.2 *The Opportunity to Observe or Attend the Hearing as a Non-Disputing Party*

The new ICSID rules increase the transparency by making hearing public unless either party objects but also limit the ability of NDP to make oral submissions. The default position now is third parties will be allowed to observe proceedings unless either party objects. This means that the parties retain the power to veto any third-party observing proceedings. This does not go as far as Article 6 of the UNCITRAL Rules on Transparency, which provides that hearings 'shall be public'.²⁸ Like the UNCITRAL Transparency Rules, Tribunals also have the power to close parts of an open hearing

²⁴ ICSID Arbitration Rules 2022, Rule 64 Publication of Documents Filed in the Proceedings.

²⁵ Ibid, Rule 67(6).

²⁶ Fernando Simões, 'Myopic Amici? The Participation of Non-disputing Parties in ICSID Arbitration' (2016) 42:3 *North Carolina Journal of International Law* 791, at 810.

²⁷ *Piero Foresti et al v Republic of South Africa*, ICSID Case No ARB(AF)/07/01 (5 October 2009) <https://www.italaw.com/sites/default/files/case-documents/ita0334.pdf> (accessed 10 October 2026). The Claim settled.

²⁸ Article 6(2) UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ('UNCITRAL Rules on Transparency') effective from 1 April 2014, <https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/rules-on-transparency-e.pdf> (accessed 10 October 2026); Dimitrij Euler, Markus Gehring and Maxi Scherer (eds.), *Transparency in International Investment Arbitration* (CUP, 2015).

to prevent the disclosure of confidential information. This is a step forward for transparency as third parties have rarely been permitted to observe hearings.²⁹

On the other hand, the newly amended ICSID rules only allow for observance and delete the word “attendance” which could have been read as permitting oral submissions.³⁰ Despite the fact that many NDPs have applied under to make oral submissions, on the basis of publicly available decisions, they are not normally permitted to make oral submissions at Hearings as *amicus curiae*. Given that the Rules explicitly provide for written submissions, but are silent on oral submissions, it is unlikely that many tribunals would permit oral submissions going forward. Although tribunals possess a residual power to fill gaps not covered by the Arbitration Rules under Article 44 of the ICSID Convention, this is reserved for genuine gaps. In the case of *Abaclat v Argentina*, the tribunal made a distinction between a ‘qualified silence’, meaning an intended silence that the ICSID Convention does not allow for something that is not provided, and a gap which was unintended, which a tribunal can fill. The silence on oral submissions by third parties suggests that this is a qualified silence and therefore not permitted. Unless there is agreement between the parties, NDPs are unlikely to be permitted to make oral submissions at a hearing or to be questioned.

3.3 *The Opportunity to File Written Submissions as a ‘Non-Disputing Party’: A Deconstruction of Rule 67*

The 2006 ICSID rules were amended to permit a Non-Disputing Party to file an *amicus* brief, which is the most common form of third-party participation. The acceptance of third parties in ICSID arbitration followed the lead of the Free Trade Commission (FTC) Statement in 2003 under the North American Free Trade Agreement (NAFTA).³¹ Initially, *AdT v Bolivia* found that permitting *amicus* briefs would be beyond its power because the ‘consensual nature of arbitration places the control of the issues you raise with the parties, not the Tribunal.’³² The very first tribunal to accept a written submission from *amici* in an ICSID arbitration was *Suez/Vivendi* in 2005, which accepted it on the basis of its inherent jurisdiction.³³ The ICSID rules, amended in

²⁹ *Piero Foresti v South Africa*, ICSID Case No ARB(AF)/07/1, Letter from the Tribunal 5 October 2009. *Pacific Rim Cayman v El Salvador* was the first arbitration to be webcast online in 2010.

³⁰ ICSID Arbitration Rules 2006, Rule 37(2).

³¹ *Methanex v US* (NAFTA) 2001 (UNCITRAL Rules), Decision of the Tribunal on Petitions from Third Persons to Intervene as ‘Amici Curiae’ (15 January 2001) https://www.italaw.com/sites/default/files/case-documents/ita0517_0.pdf (accessed 10 October 2026).

³² Letter by the late Professor David Caron on behalf of the Tribunal to Martin Wagner, Director of Earthjustice, *Aguas del Tunari v The Republic of Bolivia* ICSID Case No ARB/02/03 (29 January 2003) https://www.italaw.com/sites/default/files/case-documents/ita0019_0.pdf (accessed 10 October 2026).

³³ *Suez/Vivendi v Argentina* ICSID Case No ARB/03/19. Order in Response to a Petition for Transparency and Participation as *Amicus Curiae* (19 May 2005) <https://www.italaw.com/sites/default/files/case->

2006, set out a test largely based on the (FTC) Statement of 2003 for *amici* submission, reversing the position taken in *AdT*.³⁴ Recent years have seen an increase in the number of *amicus* applications to file written submissions.³⁵ This section examines the effectiveness of the rules governing written submissions by NDPs under what is now Rule 67 Submission of Non-Disputing Parties of the ICSID Arbitration Rules 2022.

3.3.1 The Test for Third Party Submissions

'shall consider all relevant circumstances, including'

The new rules clarify that the relevant circumstances in Rule 67(2) are criteria rather than conditions.³⁶ This was the interpretation adopted by the tribunal in *Bear Creek v Republic of Peru* in interpreting the provisions of Article 836.4 of the US-Peru FTA.³⁷ This raises the possibility that an *amicus curiae* submission could be admitted even if it does not strictly satisfy all of the criteria. Other Tribunals had interpreted the language of Rule 37(2) of the 2006 Rules as conditions.³⁸ In *Border Timbers/Von Pezold* the Tribunal adopted a restrictive interpretation of the old Rule 37(2) regarding these as minimum criteria that needed to be met by the NDP.³⁹

The word “including” makes it clear that, like the previous rule the list is not exhaustive, leaving it tribunals open to consider other circumstances as to why an NDP should or should not be heard. There is therefore also some room for NDPs and the parties to point to other factors that should be taken into consideration by the tribunal in making its decision. In *Border Timbers/Von Pezold*, for example, the tribunal proposed the additional requirement of an apparent lack of independence or neutrality

documents/ita0815.pdf (accessed 10 October 2026). Article 44 grants residual power to the Tribunal to decide procedural questions not treated in the Convention itself or the rules.

³⁴ NAFTA Free Trade Commission ‘Statement on Non-Disputing Party Participation’ in Note of Interpretation of Certain Chapter 11 Provisions (7 October 2003), para 6, https://ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file660_6893.pdf (accessed 10 October 2026).

³⁵ Sophie Lamb, Daniel Harrison and Jonathan Hew (2017). NDPs that are listed on the ICSID website (September 2023), <https://icsid.worldbank.org/cases/content/tables-of-decisions/ndp> (accessed 10 October 2026).

³⁶ The UNCITRAL Rules on Transparency uses the term ‘factors’ in Article 4(3) but also note Article 1(4) requiring the Tribunal to consider (a) public interest and (b) the disputing parties’ interest in a fair and efficient resolution of their dispute (n 28).

³⁷ *Bear Creek Mining Corporation v Republic of Peru* ICSID Case No ARB/14/21, Procedural Order No 5 (21 July 2016), para 35, <https://www.italaw.com/sites/default/files/case-documents/italaw7447.pdf> (accessed 10 October 2026); *Bewater Gauff Ltd v Tanzania* ICSID Case No ARB/05/22 Procedural Order No 5 (2 February 2007), para 50, https://www.italaw.com/sites/default/files/case-documents/ita0091_0.pdf (accessed 10 October 2026).

³⁸ *Philip Morris Brand Sàrl v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Procedural Order No 3 (17 February 2015), para 25, <https://www.italaw.com/sites/default/files/case-documents/italaw4161.pdf> (accessed 10 October 2026).

³⁹ *Border Timbers/Von Pezold* Procedural Order No 2 (2012), para 48.

to exclude an *amicus* which had associated with a person who had publicly supported the resettlement of white Zimbabwean farmers.⁴⁰

'address a matter within the scope of the dispute' 67(2)(a)

Third parties make written submissions that address a wide range of subjects from human rights, public health, the environment, labour rights, Indigenous rights and European Union law, as well as representing the views of disenfranchised communities. This can present a challenge to interveners whose role is to protect an interest that may not fall squarely within the scope of the dispute. Such third parties may be adversely affected by the execution of a Tribunal award or its determination of facts. Under the principle of due process, everyone adversely affected by a decision should have the opportunity to be heard.

In *Biwat v Tanzania*, the Claimant alleged that the arguments on the right of access to water and sustainable development raised by the Petitioners did not fall within the scope of the dispute which concerned the expropriation of a water and sewage concession following a failed water privatisation. The tribunal rejected this, finding that the Petitioners' indication that their submissions would address matters within the scope of the dispute was enough and, where they did not, those parts of the submission would simply be disregarded. The tribunal in *Border Timbers/von Pezold* took a different approach, finding that submissions on Indigenous peoples under international human rights law lay outside the dispute because this was not something that had been put in issue between the parties. The tribunal also expressed concern that it would need to decide whether such communities were Indigenous in order to accept their written submission and expressed apprehension about 'whether or not Arbitral Tribunals are appropriate arbiters of this decision'.⁴¹ The approach taken by *Biwat* is preferable since the issues between the parties may not have fully crystallized yet.

'assist the Tribunal' 67(2)(b)

This phrase is unproblematic and reflects the view that third parties act as friends of the tribunal. The non-disputing submission should (i) assist the tribunal in determining a factual or legal issue related to the proceedings, (ii) bring a perspective, particular knowledge or insight that is (iii) different from that of the disputing parties.⁴² '[A]ssisting' the Tribunal has been emphasised as the most important criterion in Rule

⁴⁰ See Section 6.

⁴¹ *Border Timbers/Von Pezold* Procedural Order No 2, para 60.

⁴² ICSID Rule 37(1).

37(2) so we can draw similar conclusions about Rule 67(2).⁴³ The role of petitioners is to assist the tribunal 'not to serve as a litigant' and 'not to challenge arguments or evidence'.⁴⁴ Before the ICSID Rules came into force in *Suez/Vivendi v Argentina*, the suitability of a petitioner was assessed on the basis of their expertise, experience or independence, which implies that they should be professionals with a degree of distance and detachment from the dispute.⁴⁵ While Indigenous groups can often satisfy the criterion of bringing a perspective, experience, or particular knowledge, or insights that are different from those of the disputing parties when asserting their rights, they are less likely to be independent when engaged in a conflict with one or both parties. In *Philip Morris v Uruguay*, the tribunal did not use the word assist but reformulated this as 'may be beneficial to its decision-making process'.⁴⁶ This more relaxed formula is to be welcomed given that the tribunal may not be able to judge the utility of an *amicus* submission without seeing it first. In *Glencore International AG* the Tribunal permitted the Indigenous groups to intervene to present on factual issues because they brought perspective, knowledge, or insight different from the parties, but not the legal issues on the basis that the parties were represented by experienced lawyers.⁴⁷

'a significant interest' Rule 67(2)(c)

NDPs are required to possess a significant interest, but the rule has also been interpreted to argue that NDPs should not have too much of an interest so as to unfairly prejudice either party. An apparent interest by an NGO did not amount to a significant interest.⁴⁸ Similarly, lawyers working on other investment arbitrations might be affected by the outcome of a dispute, but they failed to satisfy the threshold of having a significant interest.⁴⁹ Such a threshold is likely to be easier to meet when a

⁴³ *Bear Creek* Procedural Order No 5, para 36.

⁴⁴ *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/03/19, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an Amicus Curiae Submission (12 February 2007), para 25, <https://www.italaw.com/sites/default/files/case-documents/ita0823.pdf> (accessed 10 October 2026).

⁴⁵ *Ibid*, Order in Response to a Petition for Transparency and Participation as Amicus Curiae (19 May 2005), para 24, <https://www.italaw.com/sites/default/files/case-documents/ita0815.pdf> (accessed 10 October 2026).

⁴⁶ Procedural Order No 3 (17 February 2015), para 28, <https://www.italaw.com/sites/default/files/case-documents/italaw4161.pdf> (accessed 10 October 2026).

⁴⁷ *Glencore International AG v Republic of Colombia* ICSID Case No. ARB/21/30, Procedural Order No 3 (10 October 2024), paras. 57-58, <https://www.italaw.com/sites/default/files/case-documents/italaw182435.pdf> (accessed 10 October 2026).

⁴⁸ *Apotex Holdings Inc and Apotex Inc v United States*, ICSID Case No ARB(AF)/12/1, Procedural Order on the Participation of Business Neatness Magnaminty (BNM) (4 March 2013), para 33, <https://www.italaw.com/sites/default/files/case-documents/italaw1320.pdf> (accessed 10 October 2026).

⁴⁹ *Ibid*, Procedural Order on the Participation of Barry Appleton (4 March 2013), para 40, <https://www.italaw.com/sites/default/files/case-documents/italaw3001.pdf> (accessed 10 October 2026).

third party purports to represent a public interest, and when a dispute affects a large number of people. Moreover, increasing the transparency of investor-state arbitration by allowing third-party submissions can itself amount to fulfilling such an interest as was suggested in *Bivater*.⁵⁰

Border Timbers/von Pezold also suggests that third parties should not possess too much of an interest. In that case, the tribunal noted that, while the Indigenous communities were not aligned with the position of the Respondent, they conflicted with, and adverse to, the claimant and therefore had an apparent lack of independence. As other tribunals have pointed out, the role of an NDP is to act as a friend, providing an offer of assistance to the tribunal, not as a party or litigant.⁵¹ This marginalises those third parties with a direct legal interest that may be affected by the outcome of the arbitration since they are not neutral bystanders. In contrast, *Glencore International AG* took an opposing view finding that: 'The NDP mechanism does not require an NDP to be neutral, independent, or objective.'⁵²

'identity, activities, organization and ownership of the NDP, including any direct or indirect affiliation between the NDP, a party or a Non-Disputing Treaty Party NDTP' Rule 67(2)(d) and financial assistance Rule 67(2)(e)

The newly amended rules have added to the criteria when deciding on written submissions from an NDP to include the identity of the NDP and its links with either party⁵³ and disclosure of information on any person or entity providing financial or other assistance.⁵⁴ This change which concerns the suitability of an NDP on the basis of its independence is a sensible amendment to avoid NDPs being used as instruments of the parties or other actors with vested interests in the outcome of the case.⁵⁵

'Parties shall have the right to make observations' Rule 67(3)

The tribunal can receive written submissions from a Non-Disputing Party even if opposed by one party.⁵⁶ However, parties have the right to make observations

⁵⁰ *Bivater Gauff Ltd* Procedural Order No 5, para 54 following *Methanex* Procedural Order Decision on *Amici Curiae*, para 49.

⁵¹ *Suez/InterAguas v Argentina* ICSID Case No ARB/03/17, Order in Response to a Petition for Participation as *Amicus Curiae* (17 March 2006) para 13, <https://www.italaw.com/sites/default/files/case-documents/ita0803.pdf> (accessed 10 October 2026).

⁵² *Glencore International AG v Republic of Colombia*, Procedural Order No 3, 10 October 2024, para 62.

⁵³ ICSID Arbitration Rules 2022, Rule 67(2)(d).

⁵⁴ ICSID Arbitration Rules 2022, Rule 67(2)(e).

⁵⁵ The additional criteria mirror provisions found in the NAFTA FTC Statement B. Procedures 2(c) – 2(e). Annex 836.1(c)-(e) of the Canada-Peru FTA.

⁵⁶ Though not if both parties have excluded the possibility of *amicus* submissions from the outset.

opposing the submission. It seems that, mindful of the principle of party autonomy, tribunals would be reluctant to allow an *amicus* submission in the face of opposition from both sides.⁵⁷ For example, in the *Chevron* case, in which Ecuador opposed the participation of Indigenous groups, the tribunal stated that in exercising its discretion to refuse *amicus* participation, it placed weight on the view shared by both parties that *amicus* submissions would not be helpful to the tribunal at the jurisdictional phase of the arbitration, in which the issues to be decided are primarily legal.⁵⁸ Both Ecuador and the investor opposed the NDP submitting an *amicus* submission at such an early stage of the proceedings. States accused of violating Indigenous rights might, therefore, be reluctant to have these matters brought to the attention of a tribunal by an NDP.

'Not to disrupt the proceedings, or unduly burden or unfairly prejudice either party' Rule 67(4)

In *Philip Morris v Uruguay*, the tribunal found that the need to safeguard the integrity of the arbitral process requires that no procedural rights or privileges be granted to the non-disputing parties. An example of what would disrupt the proceedings and unduly burden or unfairly prejudice one or both parties was the filing of an application to make an *amicus* submission at too late a stage one month before the hearing in *LSF-KEB Holdings SCA and Others v Republic of Korea*.⁵⁹ In *Border Timbers/von Pezold*, the petitioners were denied permission on grounds that the Claimants may be unfairly prejudiced, presumably because in the Tribunal's view the NDP lacked independence.⁶⁰ Following this line of reasoning, almost any petition that strongly contradicts the position of either party could be excluded for causing a party to be unfairly prejudiced. This marginalises third parties with a legal interest that conflicts with a party or both parties. Undoubtedly, the submissions of an *amicus* party may prove embarrassing to either side. However, preventing an *amicus* submission on grounds that what is said might be adverse to, or embarrass, one party would effectively deprive the process of any meaning for third parties. This criterion again suggests deference and friendly behaviour towards all parties and towards the Tribunal and a reluctance to have unpalatable truths spoken.

'a reasoned decision' Rule 67(5)

⁵⁷ Some NDPs have adopted the practice of attaching their *amicus* submission with their petition to participate.

⁵⁸ *Chevron Corporation and Texaco Petroleum Corporation v. Ecuador*, PCA Case No. 2009-23, Procedural Order No 8 (18 April 2011) <https://www.italaw.com/sites/default/files/case-documents/ita0169.pdf> (accessed 10 October 2026).

⁵⁹ *LSF-KEB Holdings SCA and Others v Republic of Korea* ICSID Case No ARB/12/37, Procedural Order No 15 (21 December 2015), para 25, <https://www.italaw.com/sites/default/files/case-documents/italaw171086.pdf> (accessed 10 October 2026).

⁶⁰ *Border Timbers/von Pezold* Procedural Order No 2 (n 3) para 62.

A welcome change is the requirement that the 'Tribunal shall issue a reasoned decision'.⁶¹ This is a beneficial amendment which will hopefully deter the unfortunate practice of tribunals refusing NDPs without providing adequate reasoning justifying their decision.⁶²

Non-Disputing Treaty Parties (NDTPs) Rule 68

The new ICSID Rules created a new category of NDTP, which allow a State not party to the dispute the right to make a written submission on the interpretation of the treaty.⁶³ On all other matters within the scope of the dispute, non-disputing treaty parties would be subject to the same rules as *amici*. This new amendment emulates the NAFTA Convention⁶⁴ and the UNCITRAL Rules on Transparency⁶⁵ which both have a similar category of participation. The language used suggests greater deference by Tribunals to NDTPs than NDPs. The creation of the new category is significant in that it recognises that there is a hierarchy amongst Non-Disputing Parties.⁶⁶

4 Defining the Direct Interest of NDPs that do not fit into the Category of *Amici*

4.1 A Class of Third Parties with a "direct interest"

I argue that certain third parties do not fit within the category of a Non-Disputing Third Party because the nature of their direct legal interest gives them a nexus with a dispute that is more akin to an intervener than an *amicus*. Such third parties differ from *amici* in the sense they are not neutral bystanders that are friends of the court but operate to protect a legal interests that may be adversely affected by the decision of the tribunal. This article has argued this class of third party should be able to intervene as of right rather than solely at the discretion of the tribunal. Broadly speaking, these direct legal interests may be divided into three categories that are not mutually exclusive: rights, disputes with third parties and public interest.

⁶¹ ICSID Arbitration Rules 2022, Rule 67(5).

⁶² *Bear Creek Mining Corporation v Peru*, Procedural Order Refusing CCSI NDP status (21 July 2016) <https://www.italaw.com/sites/default/files/case-documents/italaw7448.pdf> (accessed 10 October 2026); CCSI letter to the Tribunal, Response to Procedural Order No 6 (3 August 2016) <https://ccsi-website-storage.s3.amazonaws.com/columbiacsi/sites/ccsi.columbia.edu/files/content/docs/our%20focus/CCSI-Response-to-Procedural-Order-No.-6.pdf> (accessed 10 October 2026). See also *Eli Lilly and Company v Government of Canada*, Case No UNCT/14/2, Procedural Order No 4 (23 February 2016) <https://www.italaw.com/sites/default/files/case-documents/italaw7145.pdf> (accessed 10 October 2026).

⁶³ ICSID Arbitration Rules 2022, Rule 68.

⁶⁴ Article 1128 The North American Free Trade Agreement (NAFTA) (signed 12 December 1992, entry into force 1 January 1994) (1993) 32 ILM pp. 289, 605, 645.

⁶⁵ Article 5 UNCITRAL Rules on Transparency.

⁶⁶ ICSID Arbitration Rules 2022, Rule 68.

The first example of direct interests is when the rights of a third party have or may be affected, by the outcome of a dispute. Cases of water privatization are examples where the right of access to water may be impacted by a dispute.⁶⁷ Another example is the collective rights of Indigenous peoples when ownership of land is contested. Investor-caused pollution similarly affects both the individual and collective right to a healthy environment.⁶⁸ Similarly, legislation promoting affirmative action of a particular group provides another example. Such an interest might be directly implicated even though it does not strictly fall within the scope of dispute. Such groups should be able to intervene as of right to ensure their interests are considered. Tribunals need to be conscious of these third-party rights to ensure that their awards do not impact or prejudice third party rights and are consistent with international law. The nature of such a legal interest should not be solely at the discretion of the Tribunal.

The second category consists of third parties that are in dispute with either of the parties because of the nature of the investment itself. The object of an investment may be contested when, for example, a state grants ownership of Indigenous land to a foreign investor without securing free, prior and informed consent. These categories of disputes may also be manifested in the form of domestic litigation⁶⁹ or social unrest.⁷⁰ Other domestic litigation may concern conflicts between local residents and foreign investors over pollution, or conflicts with employees of a foreign investor. This category does not fit well within the category of an *amicus* submission because the third party is often adversarial.

The third category of direct interest arises from the nature an investment that touches on a public interest, which affects many people or a large segment of the population. This could include situations of water supply, public sanitation, or public health. This group does not fit well because they are not neutral and consider themselves to have a stake in the outcome of the Award. However, granting the right to intervene to this third group can present logistical challenges in permitting intervention in cases that affect large numbers of people with direct interests.

⁶⁷ *Aguas del Tunari SA v Republic of Bolivia*, ICSID Case No ARB/02/03, Petition Martin Wagner, Director of Earthjustice (29 August 2002) <https://www.italaw.com/sites/default/files/case-documents/ita0018.pdf> (accessed 10 October 2026).

⁶⁸ The Wayuu community submission argues that diversion of Bruno Creek for the expansion of La Puente pit would negatively affect their communities' food, water and health in Submission of Non-Disputing Parties La Gran Parada and Paradero Wayuu Indigenous Communities, 2 May 2025; *Glencore International AG v Republic of Colombia*.

⁶⁹ In *Infinito Gold Costa Rica* ICSID Case No ARB/14/5, Procedural Order No 2 (1 June 2016) the Tribunal granted permission to the APREFLOFAS (Asociación Preservacionista de Flora y Fauna Silvestre), which had been the plaintiff in domestic litigation that resulted in the cancellation of the concession, <https://www.italaw.com/sites/default/files/case-documents/italaw7339.pdf> (accessed 10 October 2026).

⁷⁰ *Bear Creek Mining Corporation v Peru; Lupaka Gold Corp v Republic of Peru* ICSID Case No ARB/20/46, Award (30 June 2025), <https://www.italaw.com/sites/default/files/case-documents/italaw1827033.pdf> (accessed 10 October 2026).

4.2 The “direct legal interest” of Indigenous Peoples

One possible way of defining the direct legal interest of Indigenous peoples is through the language of rights. As explained earlier, human rights law is not equipped to hold investors directly responsible for human rights violations, but only the state for failing to exercise due diligence to protect Indigenous groups from the actions of a third party.⁷¹ Nevertheless, the pioneering jurisprudence of the Inter-American system in situations of conflict between foreign investors and Indigenous groups provides us with a means of defining such a direct interest.⁷² Indigenous rights that might be affected by foreign investors are broadly divided into the following categories: collective ownership (land,⁷³ resources,⁷⁴ and intellectual property⁷⁵); participation (self-determination,⁷⁶ free prior informed consent,⁷⁷ and access to information⁷⁸); well-being (including the individual right to life and the right to a healthy environment⁷⁹); and traditions (right to culture⁸⁰ and to practise spiritual beliefs⁸¹). However,

⁷¹ *SERAC v Nigeria* following *Velásquez Rodríguez v Honduras*, Merits Judgment, IACtHR 29 July 1988 (Ser C) No 4, para 172 interpreting Article 1 of the Inter-American Convention on Human Rights, https://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf (accessed 10 October 2026).

⁷² Laurence Burgogues-Larsen and Amaya Úbeda de Torres, *The Inter-American Court of Human Rights: Case Law and Commentary* (OUP 2011) 497-528; Cecilia Anicama, *State Responsibilities to Regulate and Adjudicate Corporate Activities under the Inter-American Human Rights System* April 2008; Fergus MacKay, *A Guide to Indigenous Peoples' Rights in the Inter-American Human Rights* (Forest Peoples Programme, 2001); Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources* OEC/Ser.L/VII. Doc 56/09, 30 December 2009, <https://www.oas.org/en/iachr/indigenous/docs/pdf/ancestrallands.pdf> (accessed 10 October 2026).

⁷³ Article 26 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), https://social.desa.un.org/sites/default/files/migrated/19/2018/11/UNDRIP_E_web.pdf (accessed 10 October 2026); *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Merits, Reparations and Costs, IACtHR 31 August 2001 (Ser C) No 79 (2001), https://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf (accessed 10 October 2026).

⁷⁴ Article 26 UNDRIP; *Saramaka v Suriname (Preliminary Objections, Merits, Reparations and Costs)* (2007) IACtHR (Ser C) No 172, 28 November 2007 para 96, https://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf (accessed 10 October 2026).

⁷⁵ Articles 31 and 11 UNDRIP; *Report of the Secretariat on Indigenous traditional knowledge*, UN Doc E/C.19/2007/10, 20 March 2007.

⁷⁶ Articles 3, 4, 5 and 32(1) UNDRIP.

⁷⁷ Article 32(2) UNDRIP.

⁷⁸ *Claude Reyes et al v Chile* IACtHR, Merits, Reparations and Costs, Judgment 19 September 2006 (Ser C) No 151, https://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf (accessed 10 October 2026).

⁷⁹ *SERAC v Nigeria*.

⁸⁰ Article 31 UNDRIP; Vadi (2011).

⁸¹ Article 25, 12 UNDRIP; *Centre for Minority Rights Development (on behalf of the Endorois Community) v Kenya*. (ACCommHPR No 276/2003) African Commission of Human Rights (4 February 2010), para 77, <https://achpr.au.int/en/decisions-communications/centre-minority-rights-development-kenya-and-minority-rights-group-27603> (accessed 10 October 2026).

⁸¹ *Ibid*, para 156.

Indigenous peoples may define such interests in alternative ways as defined by their own laws and through language outside the language of human rights.

5 Indigenous Groups as *Amici* in Investor-State Arbitration

This section looks at the extent to which Indigenous peoples have in practice been heard in their interventions as Non-Disputing Parties. First, it considers the nexus which Indigenous groups had with an investment dispute. Secondly, it considers whether that nexus could be adequately accommodated through an *amicus curiae* submission.

On the basis of publicly available information, there have been five cases in investor-state arbitration in which the perspective of Indigenous groups has been represented through written submissions by an NDP.⁸² In chronological order, these are: *Glamis Gold v United States* NAFTA/UNCITRAL (accepted, 16/09/05),⁸³ *Chevron and Texaco v Ecuador* BIT/UNCITRAL (refused, 18/04/11),⁸⁴ *Border Timbers/Von Pezold* BIT/ICSID (refused, 26/06/12),⁸⁵ *Bear Creek Mining Corp v Peru* FTA/ICSID (accepted, 21/07/16)⁸⁶ and *Glencore International AG v Republic of Colombia* (ICSID Case No ARB/21/30).⁸⁷

In *Glamis*, the Indigenous group controlled the process, while in *Border Timbers/Von Pezold* and *Glencore* they worked in collaboration with an NGO. In *Chevron* and *Bear Creek*, they were not involved directly, but Indigenous perspectives were represented by NGO *amici* submissions. It considers the legal nexus of the Indigenous group to the dispute, whether this interest was articulated through *amicus* submissions and to what extent Indigenous voices were reflected in the final arbitral award.

5.1 Nexus that Indigenous Peoples had with a Dispute

The nexus that Indigenous peoples have with a dispute is linked to the relief being claimed by the Claimant. In *Glamis*, a Canadian mining sought compensation for

⁸² In *Grand River v US* (12/01/2011) NAFTA a letter was sent to the tribunal, but not a formal petition to act as an NDP. Letter to the Tribunal, Assembly of First Nations, National Chief Phil Fontaine 19 January 2009, <https://2009-2017.state.gov/documents/organization/117812.pdf> (accessed 10 October 2026).

⁸³ Decision on the Application and Submission by Quechan Indian Nation, 16 September 2005, in *Glamis Gold v United States*, <https://www.italaw.com/cases/487> (accessed 10 October 2026).

⁸⁴ *Chevron and Texaco v Ecuador* PCA 2009-23 under a US-Ecuador BIT according to UNCITRAL Rules, Petition for Participation as Non-Disputing Parties by Fundación and the IISD, 22 October 2010 followed by a Submission of *Amici*, Procedural Order No 8, 18 April 2011, <https://www.italaw.com/cases/257> (accessed 10 October 2026).

⁸⁵ *Border Timbers/Von Pezold* Procedural Order No 2.

⁸⁶ DHUMA Letter to the tribunal requesting leave to file a brief of *Amicus curiae* as a third NDP 9 June 2016.

⁸⁷ Submission of Non-Disputing Parties La Gran Parada and Paradero Wayuu Indigenous Communities, 2 May 2025; *Glencore International AG v Republic of Colombia*, Procedural Order No 3, 10 October 2024.

Californian regulations, requiring the backfilling of open-pit mines on the grounds that it diminished the value of the proposed mine. Quechan Indian Nation, who held the “Trail of Dreams” sacred site, argued that the proposed open-pit mine would cause cultural, social and religious harm to the Indian Pass area. They argued that there should be no compensation in failure to comply these foreseeable obligations in customary international law to respect Indigenous rights.⁸⁸

In *Chevron*, the origins of the arbitration arose out of a dispute between a group of Ecuadorians (the Lago Agrio plaintiffs) of Indigenous people from the Amazon⁸⁹ who had been affected by environmental pollution caused in part by a subsidiary of Texaco, which was taken over by Chevron in 2001.⁹⁰ Chevron and Texaco initiated the arbitration on 23 September 2009 under the 1993 Ecuador-US BIT. Chevron had sought, among other things, declaratory relief that the Claimants had no liability or responsibility under the 1995 settlement (as finalised in the 1998 settlement) between Texaco, Ecuador and PetroEcuador.⁹¹ Fundación Pachamama, an NGO which supports local Indigenous groups, sought to participate in collaboration with the International Institute for Sustainable Development (IISD) arguing that the arbitration would amount to an interference with the rights of third parties to have their claim adjudicated.

In *Border Timbers/Von Pezold*, the European Center for Constitutional and Human Rights (ECCHR) and the Chiefs of four Indigenous communities from the Chimanimani region, petitioned the tribunal for leave to make *amicus curiae* submissions in the proceedings. Here the nexus with the dispute was the ownership of the land in question. Border Timbers Ltd is a company owned by the Von Pezold family, incorporated in 1979, after the acquisition of plantations from the British South African Company founded by Cecil Rhodes.⁹² The Claimants were members of the same family and the majority held both Swiss and German nationality and sought to rely on the Bilateral Investment Treaties between those countries and Zimbabwe. In addition to seeking compensation, the Claimants sought restitution of full legal title to

⁸⁸ Application for Leave to File a Non-Party Submission by the Quechan Indian Nation, 19 August 2005, p. 4.

⁸⁹ Judith Kimerling, ‘Disregarding Environmental Law: Petroleum Development in Protected Natural Areas and Indigenous Homelands in the Ecuadorian Amazon (1991) 14:4 *Hastings International Law & Comparative Law Review* 849, at 853.

⁹⁰ Petro Ecuador is also alleged to have some responsibility.

⁹¹ Claimants’ Notice of Arbitration, 23 September 2009, para 76(1).

⁹² ECCHR, *Amicus Curiae – International Human Rights of Indigenous Peoples to Traditional Territories in Conflict with International Investment Law Obligations*. In the constitutional application for a declaratory order in the High Court of Zimbabwe at Harare, Case No. HC 7213/15, 27 April 2016, p. 20.

the land. The Indigenous communities argued that the Tribunal's decision would impact upon their title to what they claimed was their ancestral lands.⁹³

In *Glencore International AG v Republic of Colombia* (ICSID Case No ARB/21/30) two Indigenous communities Wayuu (La Gran Parada and Paradero) were permitted to make submissions on questions of fact in relation to the Bruno Creek communities, the constitutional judgment of SU-698 (2017) and its implementation. The case is currently pending at the time of submission.

5.2 Participation of Groups Representing Indigenous Groups as *Amici*

Tribunals permitted the participation of groups representing Indigenous interests as non-disputing parties to file written submissions in *Glamis* and *Bear Creek* but refused their participation in *Border Timbers* and *Chevron*.

In *Glamis*, the Tribunal accepted that the petition satisfied the criteria of the FTC Statement without giving reasons, but significantly, the parties themselves did not oppose written submissions or access to the pleadings.⁹⁴ Meanwhile, in *Bear Creek* the tribunal found that the *amici* met the criteria in Article 836.4 of the Canada-Peru FTA irrespective of whether DHUMA speaks for the Aymara communities, or whether its interests were synonymous with the communities' interests placing greatest emphasis on whether the submission would assist the Tribunal.

The *Border Timbers* decision to refuse Indigenous communities from participating as NDPs has already been the subject of extensive criticism elsewhere, but illustrates why accommodating third parties with legal interests through an *amicus curiae* device is inadequate.⁹⁵ The Tribunal, noting that Rule 37(2) was not exhaustive, introduced an additional criterion of an 'apparent lack of independence or neutrality'

⁹³ This was because the Claimants demanded restitution of their legal title.

⁹⁴ *Glamis v US*, Procedural Order No 11 (9 July 2007), para 15.

⁹⁵ Christian Schliemann, 'Requirements for *Amicus Curiae* Participation in International Investment Arbitration: A Deconstruction of the Procedural Wall Erected in Joint ICSID Cases ARB/10/25 and ARB/10/15' (2013) 12:3 *The Law and Practice of International Courts and Tribunals* 365; Cameron Mowatt and Celeste Mowatt, 'Case Comment: *Border Timbers and Others v Zimbabwe* and *von Pezold and others v Zimbabwe*' (2013) 28:1 *ICSID Review - Foreign Investment Law Journal* 33; Lucas Bastin, '*Amici Curiae* in Investor-State Arbitrations: Two Recent Decisions' (2013) 20 *Australian Journal of International Law* 95, at 103-104; Tomaso Ferrando, 'Investment Arbitration: Restricted Area' *Critical Legal Thinking* (16 July 2012) <http://criticallegalthinking.com/2012/07/16/investment-arbitration-restricted-area/> (accessed 10 October 2026). Luke Peterson, 'Analysis: Tribunal's Reading of *Amicus Curiae* Tests Could Make Life Difficult for Antagonistic *Amici*' *Investment Arbitration Reporter* (27 June 2012) <https://www.iareporter.com/articles/analysis-tribunals-reading-of-amicus-curiae-tests-could-make-life-difficult-for-antagonistic-amicus-and-those-seeking-to-raise-novel-concerns-such-as-human-rights-law/> (accessed 10 October 2026). For a critical reflection of the ECCHR, which tried to participate, see ECCHR *Human Rights Inapplicable in International Investment Arbitration? A Commentary on the Non-Admission of ECCHR and Indigenous Communities as Amici Curiae before the ICSID Tribunal* (Berlin, 2012).

and that this alone was sufficient ground to deny the application to participate because of the conflict with the Claimant's primary position in the proceedings.⁹⁶

In addition, the tribunal did not think that submissions on Indigenous rights would assist the Tribunal because neither party had put the identity or treatment of Indigenous people as a relevant issue of the dispute. It also did not consider that the applicable law clause incorporated human rights law. Despite insisting that human rights law was not relevant, the tribunal did examine the claimant's contention that Zimbabwe's police were discriminatory deciding that it did amount to a violation of an *erga omnes* obligation, which precluded the defence by Zimbabwe of necessity. Finally, the Tribunal found that 'the circumstances surrounding these Petitioners are such that the Claimants may be unfairly prejudiced by their participation.'⁹⁷ Whilst accepting that the Indigenous groups had a significant interest, it did not accept that the ECCHR had a significant interest.

The exclusion of the Indigenous groups in *Border Timbers* was problematic not least because, in addition to other relief, the claimant had sought restitution of full legal title, which was awarded along with compensation. The tribunal was fully aware that its decision could significantly affect the third party, noting that '[i]t may therefore well be that the determinations of the Arbitral Tribunals in these proceedings will have an impact on the interests of the Indigenous communities.'⁹⁸ The case illustrates the problem with leaving such a wide discretion to Tribunals. The additional criterion of apparent lack of independence or neutrality, if adopted by other Tribunals, would set the bar at such a high level as to effectively make it impossible for any Indigenous group to participate as a third party.

In *Chevron*, the tribunal exercised its discretion by placing weight on the views of the parties that the third-party submissions would not be helpful during the jurisdictional phase.⁹⁹ Interestingly, the Ecuadorian state itself opposed the petition by Fundación Pachamama, arguing that 'the participation of non-parties on purely legal issues regarding the scope of the Tribunal's jurisdiction is unlikely to assist the Tribunal in a meaningful way.'¹⁰⁰ This was not withstanding the fact that one of Ecuador's jurisdictional objections was that the tribunal would have to determine the rights of third parties, namely of the *Lago Agrio* plaintiffs. The tribunal rejected this argument and was careful throughout proceedings to stress that the rights of the litigants of the

⁹⁶ Procedural Order No 2, para 56.

⁹⁷ Ibid, para 62.

⁹⁸ Ibid.

⁹⁹ Ibid, para 18.

¹⁰⁰ Procedural Order No 8 (2011), para 13, which refers to Ecuador's Letter to the Tribunal 10 September 2010.

Lago Agrio case were outside the jurisdiction of the Tribunal and that it did not consider that any of its decisions would be binding on them.¹⁰¹ In its Second Partial Award on Track II, the tribunal found that Ecuador had failed to observe its obligations to both TexPet and Chevron under the 1995 Settlement Agreement and the 1998 Final Release, by permitting diffuse claims which were covered by the umbrella clause in the BIT, and found that material parts of the *Lago Agrio* judgment were corruptly ghost-written for Judge Zambrano, and the failure to remedy this amounted to a denial of justice in violation of the Fair and Equitable Treatment ('FET') standard and customary international law.¹⁰²

As Diane Desierto put it, what began as an environmental catastrophe ended up as an investor dispute about denial of justice, noting the absence of any international forum open to the actual victims of environmental disasters.¹⁰³ Given that the claimant sought to annul the *Lago Agrio* judgment, it is all the more striking that the voice of the Indigenous plaintiffs is notably absent from the Track II Award and that they were not invited to submit an *amicus* brief at a later stage. Arguably, the need for a right to intervene in this particular case arose from the extensive remedies demanded by the claimant, which threatened to nullify third-party rights.

5.3 *To What Extent are the Voices of Indigenous Groups Heard as Amici When Allowed to Participate?*

This section looks at the cases of *Glamis* and *Bear Creek*, which permitted the participation of groups representing Indigenous peoples, and the extent to which Indigenous voices are reflected in the final Award.

In *Glamis*, the tribunal found that it 'does not reach the particular issues addressed by these submissions',¹⁰⁴ nor did the FTC oblige the tribunal by addressing any matters raised by the NDPs. The submission therefore had no direct effect on the award. However, the tribunal found the requirement of backfilling did not cause a sufficient economic impact to the project to amount to an indirect expropriation, and applying the *Neer* standard, found no breach of fair and equitable treatment.

¹⁰¹ *Chevron and Texaco v Ecuador*, PCA Case No 2009-23, Second Partial Award on Track II, 30 August 2018, para 7.35-7.36.

¹⁰² *Ibid*, para 10.4-10.5 and para 5.225.

¹⁰³ Diane Desierto, 'From the Indigenous Peoples' Environmental Catastrophe in the Amazon to the Investors' Dispute on Denial of Justice: The Chevron v Ecuador August 2018 PCA Arbitral Award and the Dearth of International Environmental Remedies for Private Victims' *EJIL Talk* (13 September 2018) <https://www.ejiltalk.org/from-indigenous-peoples-environmental-catastrophe-in-the-amazon-to-investors-dispute-on-denial-of-justice-the-chevron-v-ecuador-2018-pca-arbitral-award/> (accessed 10 October 2026).

¹⁰⁴ *Glamis Gol v United States*, Award 8 June 2009, para 8.

In *Bear Creek*, the Tribunal found that Peru's actions amounted to an indirect expropriation but awarded just \$18.2 million of the \$522 million claimed in damages by the Claimant. The Respondent also argued that the Claimant's conduct failed to secure a social licence from the local Indigenous communities and that this was contrary to the ILO Convention 169, but the tribunal rejected this argument, pointing out that the respondent had continuously approved and supported the claimant's conduct at the time.¹⁰⁵ Philippe Sands, in a lucid dissent, agreed with the overall decision of the tribunal, but disagreed with the its finding that there was no connection between Bear Creek's failure to secure the consent of all Indigenous communities (or the social licence) and the subsequent unrest that led to Peru revoking its concession. Sands pointed out that the fact that the ILO Convention 169 '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.'¹⁰⁶ He, therefore, would have reduced the amount of compensation by half for contributory fault because Bear Creek also bore some responsibility for failing to secure the social licence and triggering the social unrest that led to the concession being revoked. In doing so, he placed reliance primarily on expert evidence but also found that the *amici* submissions complemented this evidence.¹⁰⁷ He criticised the claimant's dismissive approach to the *amici* and the interests of the Indigenous groups highlighting that these were 'not lesser rights'.¹⁰⁸

The views of the Indigenous communities were not articulated directly in this case, but rather the views of an NGO with local knowledge of the dispute. The fact that their arguments aligned with the Respondent Peru gave them a greater impact. The case illustrates how *amicus* submissions can complement and supplement the expert evidence in the hearing, particularly in Professor Philippe Sands' dissenting opinion that Indigenous rights were part of the relevant international law applicable to the dispute.

These four cases bear out my thesis that Indigenous groups struggle to make themselves heard in investment arbitration in three different ways. First, the ability of an Indigenous group to participate was strongly influenced by whether or not the state supported them making a submission. Second, Indigenous groups were strongly reliant upon co-operation with NGOs to make their submissions, with only Glamis directly

¹⁰⁵ Ibid, para 412.

¹⁰⁶ Article 15 ILO Convention 169,
https://normlex.ilo.org/dyn/nrmlx_en/?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169
 (accessed 10 October 2026).

¹⁰⁷ Philippe Sands Dissent in *Bear Creek*, paras 35-36.

¹⁰⁸ Ibid, para 36.

instructing counsel. Finally, none of substantive arguments raised in submissions had any explicit influence on the ratio of final arbitration awards. The most problematic case thus far was *Border Timbers*, which denied third parties with a clear legal interest the ability to participate to speak to those interests.

6 Reforming International Investment Law from the Bottom-Up: Creating a New Category of a “Third Party Intervener”

This article proposes the creation of a new category of Third Party Intervener in international investment law disputes. This would give third parties the right to intervene in proceedings where their legal interests are affected. It has argued that there is a category of third parties with *direct interests of a legal nature* that may be affected by a tribunal’s decision.¹⁰⁹ These interests often cannot be adequately represented by either the investor or the State, but they also cannot be adequately represented through the category of a Non-Disputing Party, which has been framed with neutral bystanders such as NGOs in mind that do not have direct legal interests at stake.

We can see from Section 5 that NGOs play an important role as a conduit for bringing relevant human rights violations to the attention of arbitration tribunals. However, NGOs may also be seeking to bring about a clash of regimes as a means of undertaking systemic reform by addressing a wider audience. The refusal to take human rights and environmental rules into consideration discredits the system of investor-state arbitration, increasing demands for reform and change. While tribunals have been fairly accommodating of third parties undertaking systemic reform or groups advocating the wider public interests there are limits to this as argued by *Bear Creek* when the Columbia Centre on Sustainable Investment (CCSI) sought to intervene:

Allowing such participation would lead to the absurd result that any institution with a general academic interest in investment law would have the right to intervene in virtually any investment treaty arbitration. Furthermore, political and systemic reform goals cannot constitute a significant interest in the specific arbitration between the Parties. This arbitration is not the appropriate forum for CCSI to further its agenda for systemic reform and should not serve as a platform for the advancement of a particular political or academic viewpoint.¹¹⁰

¹⁰⁹ The TTIP Draft of November 2015 also provides for a similar category in Article 23(1) Intervention by third parties: ‘The Tribunal shall permit any natural or legal person which can establish a direct and present interest in the result of the dispute (the intervener) to intervene as a third party. The intervention shall be limited to supporting, in whole or in part, the Award sought by one of the disputing parties’. The ICJ allows for interveners by states only in Article 62 ICJ Statute and Article 81 of the Rules of Procedure; Interveners have become part of landscape of judicial review in the UK courts. Lady Hale, ‘Who Guards the Guardians?’ (2014) 19:1 *Judicial Review* 1.

¹¹⁰ *Bear Creek Mining Corporation* on the CCSI submission as summarised in Procedural Order No 6, para 19. The Tribunal rejected the participation of CCSI.

Adopting the language of rights, which often receives short shrift by arbitration tribunals, may also set Indigenous groups up for failure given the absence of direct human rights obligations on businesses.

Alternative reforms, such as adopting a liberal reading of Rule 67 to facilitate the participation of Indigenous groups as NDPs could facilitate Indigenous participation but maintain existing power structures.¹¹¹

This article advocates for the creation of a new category of intervener giving third parties with a direct legal interest the right to intervene.¹¹² The proposal is underpinned by three insights drawn from David Kennedy's *A World of Struggle: How Power, Law and Expertise Shape Global Political Economy*. The first insight is that power is exercised through highly technical background rules and expertise which by its nature is unintelligible to those outside those expert communities but have significant real-world consequences. The second is that the *Von Pezold* decision epitomises a dynamic of exclusion concerned with maintaining the “purity of international investment law” insulated from other areas of law tacitly excluding human rights. Third, giving interveners the right to intervene would render the exclusion of human rights and Indigenous peoples’ rights visible. Opening the door to outsiders provides for disciplinary renewal through a greater plurality of actors and a “mingling” of international investment law, international human rights law and Indigenous law. Tribunals must publicly justify the inclusion or exclusion of arguments raised by third parties or risk undermining the legitimacy of the subject.

Building on this, I propose the following draft rule:

‘Third Party Intervener’

1. The tribunal shall invite any third party that can establish a direct interest of a legal nature distinct from the parties, which may be significantly affected by its decision, the right to intervene as a third-party intervener (‘intervener’) to address that interest by way of written submission without becoming party to the dispute.
2. If an application for permission to intervene is granted, the intervener will be supplied with copies of the pleadings or, in the event of a dispute redacted copies, agreed to by the parties or approved by the Tribunal, and shall be entitled to submit a written statement within the time-limits fixed by the Tribunal. The parties shall then have the opportunity to comment on any submissions by an intervener.

¹¹¹ *Philip Morris* Procedural Order No 3, para 25.

¹¹² This argument is also made by Farouk El-Hosseny (2018).

3. After consulting with both parties, the tribunal may permit an intervener to attend parts of the hearing and may invite the intervener to address any questions that it might have.
4. Any intervener that is given permission under this rule undertakes to observe the applicable rules on the confidentiality of arbitral pleadings and proceedings unless ordered otherwise and to comport itself in a manner that does not compromise the integrity of those proceedings, failing which such permission granted under paragraphs 2 and 3 may be revoked.
5. The tribunal shall, subject to paragraph 4, give due consideration to any relevant submission made by the intervener in its deliberations and in its Award, which shall state the reasons upon which it is based.

An intervener would not be afforded the same privileges as a party.¹¹³ However, unlike an *amicus* party, they would have the right to file a written submission to the tribunal rather than relying upon the discretion of the tribunal. The word “invite” covers third parties that the Tribunal has invited as well as third parties invited after having approached the Tribunal.

Unlike many amici, interveners possess legal interests that may conflict with either party and therefore may cause prejudice to either or both parties by their submissions. An intervener’s interest should therefore be something that is distinct from the interests of either party and should not merely replicate their submissions or act as ‘additional counsel for one of the parties’.¹¹⁴ One of the drawbacks of such a proposal is that it might prove a victim of its success if too many third parties made use of the device, thereby limiting its effectiveness.

It is also significant that third parties have often demanded to be heard as interveners.¹¹⁵ Indigenous peoples are such a group that would fall into the category of a third party intervener, for example in a situation where the investors have appropriated or had caused pollution to Indigenous lands.

Such parties would have more privileges than an *amicus* in terms of access to the pleadings and might be allowed permission to attend hearings at the discretion of

¹¹³ The term intervener (in the US “intervenor”) has different meanings in the US and the UK. In the US an intervener is defined as ‘[s]omeone who voluntarily enters a pending lawsuit because of a personal stake in it.’ Bryan Garner, *Black’s Law Dictionary* 10th edn (Thomson West, 2014). Intervenors can either intervene as of right or by permission from the court and they become party to the proceedings (or in the case of permissive intervenors, the part of the proceedings which affects them). The equivalent of this in the UK is an “interested party” added by either of the parties or the judge. By contrast “third party interveners” in the UK do not become party to the case. I use the term “intervener” in the British sense of the word.

¹¹⁴ As per Lord Hoffmann in *E v The Chief Constable of the Royal Ulster Constabulary (North Ireland Human Rights Commission intervening)* [2009] 1 AC 536, 542.

¹¹⁵ Petition Martin Wagner, Director of Earthjustice *Aguas del Tunari SA v Republic of Bolivia*, para 2. Canadian Union of Postal Workers and the Canadian Council Petition 8 November 2000 in *United Parcel Service of America Inc v Canada* UNCITRAL (NAFTA) goes even further in asking to be made a party and in the alternative to intervene, <https://www.italaw.com/sites/default/files/case-documents/italaw8373.pdf> (accessed 10 October 2026).

the tribunal and the opportunity to respond to questions that the tribunal may wish to ask. This would allow for a constructive engagement with the intervener because of their interest, while avoiding such engagement being subject to party autonomy and would allow for limited questioning at the Hearing.

The Tribunal would be obliged to consider the *direct interests of a legal nature* raised by the intervener when it is relevant to the dispute both in their deliberations and in the drafting of their Award. This involves a duty to make a reasoned Award that considers these submissions where they are relevant and, if not, to state explicitly why the Tribunal does not consider the submissions to have any relevance.¹¹⁶ This seeks to avoid third-party intervention becoming a superficial device for the sake of appearances without actual engagement in the substance of relevant arguments.¹¹⁷

Finally, the category of intervener would be limited to third parties, suggesting a degree of independence from the parties both in terms of their identity and financial independence from the parties, so that the device cannot be used as a tool by either party to hijack the proceedings.

Interveners would also have to comport themselves in a manner that does not disrupt the proceedings or abuse the trust that they have been given in terms of access to documents or attendance of parts of the hearing, failing which such permission may be revoked. The duty of the Tribunal to consider the arguments raised in their third-party submission is also subject to the intervener conducting itself in an appropriate manner.

7 Conclusion

Investment arbitration is conducted with a 'view from the international plane' that is far removed in both physical and metaphorical terms from events on the ground.¹¹⁸ This makes it all the more important that the rules on third party submissions give sufficient agency to Indigenous groups and other local groups the ability to petition the tribunal.

This article has argued that the rules governing third party submissions were written with NGOs in mind. The case of *Border Timbers/von Pezold* illustrates how what was then Rule 37(2) was interpreted to silence third parties with legal interests for having too much of an interest. Requiring an apparent lack of independence or

¹¹⁶ *Philip Morris* case is one of the arbitration awards that goes the furthest in this regard.

¹¹⁷ James Harrison, 'Human Rights Arguments in *Amicus Curiae* Submissions: Promoting Social Justice?' In Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds.), *Human Rights in International Investment Law and Arbitration* (OUP, 2009) 396, 418.

¹¹⁸ Annelise Riles, 'The View From the International Plane: Perspective and Scale in the Architecture of Colonial International Law' (1995) 6:1 *Law and Critique* 39.

neutrality from third parties would effectively create a paradoxical situation of NGOs with no connection to a dispute being given a greater voice to speak *for* others than Indigenous groups themselves.

Some might argue that it is possible for Indigenous groups and other third parties with a legal interest to be accommodated within the existing rules if tribunals adopt a liberal approach and that therefore the problem is not with the ICSID Rules but with its interpretation of Rule 67(2) or the importation of additional criteria therein. However, in my view, when third party rights are affected, they should have the right to make written submissions. The ICSID Rules now recognizes states as a distinct category of *amici* but should go further in recognizing the legal interest of other third parties by creating a new category of Third Party Intervener. This bottom-up approach to reform will ensure that tribunals will continuously be confronted by a diverse range of third parties whose interests have been neglected or ignored.

NGOs occupy the position of interpreters, but they are also often motivated by a general interest of bringing about wider systemic reform and addressing a wider audience. The exclusion of human rights concerns casts light on entrenched biases in the law, thereby hastening demands for reform. However, in this clash between the specialised languages of international investment law and international human rights, there is a danger of the voices of Indigenous groups and their own conception of a dispute between a State and foreign investor being lost. As Upendra Baxi puts it: 'not all voices of suffering necessarily speak to the world of global human rights. They speak to us often in languages of *injustice* that may not be expressed and measured merely in terms of human rightlessness.'¹¹⁹ This is especially pertinent because neither the language of Indigenous rights, nor international investment law, adequately addresses investor misconduct.

The purpose of the device of a Third Party Intervener should also be to give a voice to the voiceless when a decision of the tribunal has decisive consequences for that particular group. The issue of Indigenous participation is a litmus test as to whether international investment law is hegemonic, exclusive, and intolerant of difference, or whether it is capable of tolerating a plurality of subaltern voices.

¹¹⁹ Upendra Baxi, *The Future of Human Rights* (OUP, 2006) 6. See also Riles (1995).