AMENDING ICSID TO SAFEGUARD INDIGENOUS RIGHTS

DOLAN D. BORTNER*

ABSTRACT

Investor-state arbitration incentivizes the exploitation of Indigenous lands. Native communities are disempowered under international investment law and, given centuries of colonial oppression, often submit to mistreatment by multinational corporations. When they do, businesses profit. When they resist, prompting the state to expropriate foreign investments, arbitration reimburses the claimants, often in full. Existing proposals to safeguard Indigenous rights, which would redraft or reinterpret the investment treaties that give arbitration its substance, fail to account for the unwillingness of corporations and arbitrators to change the status quo. Modifying the procedural laws of ICSID, the largest arbitration institution, to bar expropriated claimants who have violated Indigenous rights would bypass this opposition and elevate Indigenous groups by raising the costs of abuse.

This Note begins by describing the nexus of colonial history and international investment law that disenfranchises Indigenous peoples. Then, in Part II.B, it analyzes ICSID case law and previous modifications to the Centre's Rules to argue that a human rights amendment is legally cognizable. It further contends that this modification is politically feasible, given mounting opposition from ICSID's member states and civil society to unethical arbitration outcomes. The Conclusion discusses the benefits and limitations of this proposal before exploring how it might serve as a steppingstone to the greater empowerment of Indigenous communities under international investment law.

---

* Stanford Law School, J.D. Candidate, 2022; Brown University, A.B., 2017. The author is grateful to Professor Deborah Hensler for her instruction and suggestions on the earlier drafts of this Note. He would also like to thank the editors of the *Georgetown Journal of International Law* for their comments and consideration as well as his wife and family for their constant support. This Note is dedicated to the Aymara, Quechua, and Standing Rock Sioux peoples and all who strive for self-determination in their ancestral homes.

I. INTRODUCTION

Recent improvements in the treatment of Indigenous communities under international law do not yet empower them to defend their rights from infringement by the global economy. On the one hand,

modern international law has grown to become "one of [I]ndigenous peoples' principal weapons against mistreatment flowing from colonial legacies."[1] Perhaps most vividly, the 2007 U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP) vests these communities with ample authority over the practice of their traditions and customs,[2] non-removal from ancestral territories,[3] and the development of their lands and resources.[4] Nevertheless, the global reaffirmation of Indigenous rights has occurred in parallel with the emergence of multinational corporations as forceful actors on the world stage "and increasingly so in [I]ndigenous spaces."[5] Whatever rights Indigenous groups might hold in the abstract, their capacity to enforce them is hindered by the gulf between their resources and those of the businesses that mine near or under their ancestral homes. As rising energy demand and dwindling supply push the extractive industry ever closer to Indigenous lands, these communities lack viable tools in their fight for self-preservation.

The past several decades have witnessed an explosion in the market for natural resources. In 1980, the global economy extracted 40 billion tons

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

2. G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples, art. 11, ¶ 1 (Sept. 13, 2007) [hereinafter UNDRIP].

3. *Id.* art. 10.

4. *Id.* art. 32, ¶ 1. These provisions, unprecedented in the post-colonial era, have begun to be incorporated even by countries that originally opposed the Declaration. UNDRIP was adopted by the U.N. General Assembly with a vote of 143 countries in favor, 11 abstaining, and 4 opposed. Among the naysayers were Canada and the United States. Press Release, General Assembly, General Assembly Adopts Declaration on Rights of Indigenous Peoples; "Major Step Forward" Towards Human Rights for All, Says President, U.N. Press Release GA/10612 (Sept. 13, 2007). Yet, in the years since the Declaration's adoption, both countries have come to endorse it. Roxanne T. Ornelas, *Implementing the Policy of the U.N. Declaration on the Rights of Indigenous Peoples*, 5 INT'L INDIGENOUS POL'Y J. 1, 2 (2014). On March 5, 2013, the U.S. Department of the Interior announced an "Action Plan to Implement the Memorandum of Understanding (MOU) Regarding Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites." *Id.* at 14. Evincing much the same principle of Indigenous control over sacred lands as Articles 11, 12, and 32 of UNDRIP, the Department recognizes the "essential" quality of "tribal input" in the management and protection of their ancestral lands. *Id.* Going even further, in February 2018, the Government of Canada proclaimed its "support [for] the implementation" of UNDRIP. *Overview of a Recognition and Implementation of Indigenous Rights Framework*, CROWN-INDIGENOUS REL. & N. AFF. CAN., https://www.rcaanc-cirnac.gc.ca/eng/1536350959665/1539959903708 (last visited May 5, 2020). In this same declaration, the Government pledged itself to create a legal framework to ensure that the state "recognizes, respects and implements Indigenous rights, including inherent and treaty rights, and provides mechanisms to support self-determination." *Id.*

5. *The Double Life*, *supra* note 1, at 1755.

of minerals, ores, fossil fuels, and biomass.[6] As of January 2020, this figure had surpassed 100 billion tons,[7] an increase of 150%. Asian development—namely that of China and India[8]—is at the center of this growing demand. To be sure, the West retains an outsized share of energy consumption. The United States alone accounts for almost 16% of the global total.[9] However, from 24% of worldwide energy consumption in 1990,[10] Asia's demand has nearly doubled to 41% as of 2018.[11] This appetite has not been fed by local sources. 60% of China's oil is imported, as is 75% of India's supply.[12] Japan and South Korea source nearly all their oil, natural gas, and coal from abroad.[13] The rapid pace of resource consumption and importation shows no signs of slowing in the short term. At the global level, energy demand is expected to rise by 50% in the next ten years.[14]

The modern energy market is at loggerheads with Indigenous land use, a conflict that will only worsen in the future. Ancestral lands form a "core part" of Indigenous identity and spirituality.[15] As Nepali leader Stella Tamang observes, many Indigenous groups "can only achieve their spiritual place on the planet by going to a certain location."[16] Beyond the religious significance that Indigenous peoples attribute to the land, many depend on it for their survival. Of the estimated 370

6. FRIENDS OF THE EARTH, OVERCONSUMPTION?: OUR USE OF THE WORLD'S NATURAL RESOURCES 10 (2009), https://cdn.friendsoftheearth.uk/sites/default/files/downloads/overconsumption.pdf.

7. *Our World Is Now Only 8.6% Circular*, CIRCLE ECON. (Jan. 21, 2020), https://www.circle-economy.com/news/our-world-is-now-only-8-6-circular.

8. *The Double Life*, *supra* note 1, at 1756; *see also Asia's Growing Hunger for Energy: U.S. Policy and Supply Opportunities, Hearing Before the Subcomm. on Asia & the Pacific of the H. Comm. on Foreign Affairs*, 114th Cong. 9 (2016) [hereinafter *Hunger for Energy*] (statement of Mikkal E. Herberg, Senior Advisor, National Bureau of Asian Research) ("Asia is quite literally the ground zero for global energy demand growth. The region's energy needs will rise enormously over the next 25 years.").

9. Enerdata reports that over 14 billion tons of oil equivalent (TOE) were consumed worldwide in 2018. The United States used 2.3 million TOE, or 15.68% of the total. *Global Statistical Yearbook 2019*, ENERDATA (July 4, 2019), https://yearbook.enerdata.net/.

10. *Id.*

11. *Id.*

12. *Hunger for Energy*, *supra* note 8, at 10.

13. *Id.*

14. NAT'L INTELLIGENCE COUNCIL REPORT, NATURAL RESOURCES IN 2020, 2030, AND 2040: IMPLICATIONS FOR THE UNITED STATES iii (2013), https://www.dni.gov/files/documents/NICR%202013-05%20US%20Nat%20Resources%202020,%202030%202040.pdf.

15. The Secretariat of the United Nations Permanent Forum on Indigenous Issues, *Indigenous Peoples, Land, and Natural Resources: An Overview*, *in* INDIGENOUS PEOPLES 116, 117 (Diane Andrews Henningfeld ed., 2009) [hereinafter Permanent Forum].

16. *Id.*

million Indigenous persons around the world,[17] 60 million rely "almost entirely" on the ability to hunt and forage in their traditional forests.[18] According to Victoria Tauli-Corpuz, Chairperson of the U.N. Permanent Forum on Indigenous Issues, "the majority of the world's remaining natural resources ... are found within [I]ndigenous peoples' territories."[19] With energy demand outstripping traditional sources, the extractive industry has turned its eyes to Indigenous lands.[20]

The deepening tension between Indigenous communities and extraction is somewhat ironic, considering that it coincides with the private sector's embrace of corporate social responsibility (CSR) in recent decades. The World Business Council for Sustainable Development defines CSR as a business's commitment "to behave ethically and contribute to economic development while improving the quality of life of its workers ... as well as the local community and society at large."[21] This philosophy traces its roots to the 1992 Earth Summit in Rio de Janeiro.[22] Agenda 21, the Summit's action plan, calls on corporations to engage as "full participants"[23] in pursuing the objectives of sustainable development and the empowerment of Indigenous and other marginalized peoples.[24]

In the years since the Earth Summit, CSR has become a fixture of corporate policy in and outside of the mining business (albeit not entirely for altruistic reasons).[25] Industry advocates may now point to a panoply of efforts that corporations have undertaken to support human rights. Responding to concerns over corruption among the governments of resource-exporting countries, extractive companies and their home states

17. Valentina Vadi, *Heritage, Power, and Destiny: The Protection of Indigenous Heritage in International Investment Law and Arbitration*, 50 GEO. WASH. INT'L L. REV. 725, 726 (2018).

18. Permanent Forum, *supra* note 15, at 121.

19. *Id.* at 120.

20. Vadi, *supra* note 17, at 836.

21. Michael J. Watts, *Righteous Oil?: Human Rights, the Oil Complex, and Corporate Social Responsibility*, 30 ANN. REV. ENV'T RES. 373, 393 (2005).

22. *Id.* at 394.

23. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, ¶ 30.1, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. III), annex II (Aug. 12, 1992).

24. *Id.* ¶ 3.5(c), (Vol. I), annex I.

25. Michael J. Watts attributes industry acceptance of CSR, particularly among extractive companies, to Royal Dutch Shell's demonstration of the capacity of the doctrine to diffuse "public relations disasters." Watts, *supra* note 21, at 394. He refers specifically to the Brent Spar oil disposal incident and the murder of Nigerian activist Ken Saro-Wiwa (an opponent of multinational petroleum companies, particularly Shell), both of which occurred in 1995. *Id.*

organized the Extractive Industries Transparency Initiative (EITI).[26] As of EITI's Third Plenary Conference in 2006, its member states must submit to an independent audit of all payments and revenue that they receive from oil and gas companies at least once every two years.[27] The International Association of Oil and Gas Producers (IOGP) likewise advocates for greater accountability within the industry. Its partners include the Arctic Council,[28] an intergovernmental organization dedicated to advancing the interests of Indigenous peoples living in the Arctic.[29] A recent IOGP report outlines a framework for extractive companies to minimize their adverse effects on Indigenous peoples, encompassing such considerations as whether "the project will occur in an area endemic to medicinal plants of cultural importance."[30]

The private sector's newfound social conscience has not repaired its relations with Indigenous communities. In recent decades, the number of extractive projects frustrated or terminated by local resistance has *increased*.[31] Examples include the Standing Rock Sioux Tribe's protests over the construction of the Dakota Access Pipeline (DAPL)[32] and the 2003 environmental degradation suit that Ecuadorian Indigenous groups brought against Chevron-Texaco.[33] Indigenous opposition compelled the Army Corps of Engineers to halt DAPL in 2016.[34] Chevron

26. Lisa J. Laplante & Suzanne A. Spears, *Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector*, 11 YALE HUM. RTS. & DEV. L.J. 69, 81 (2008).

27. Carola Kantz, Precious Stones, Black Gold and the Extractive Industries: Accounting for the Institutional Design of Multi-Stakeholder Initiatives (2008) (Ph.D. dissertation, London School of Economics) (manuscript at 210), https://core.ac.uk/reader/46519090.

28. Lyazzat Sarybekova & James G. Parker, New OGP Good Practice Guide: Environmental Management in Arctic Oil and Gas Operations, at 6 (Oct. 15, 2013) ("[I]OGP maintains formal and informal links with the Arctic Council and its Working Groups.").

29. *About the Article Council*, ARCTIC COUNCIL, https://arctic-council.org/about/ (last visited Oct. 20, 2021).

30. INT'L ASS'N OIL & GAS PRODUCERS, HEALTH IMPACT ASSESSMENT: A GUIDE FOR THE OIL AND GAS INDUSTRY 36 (2016), https://www.cnlopb.ca/wp-content/uploads/regassess/heimas.pdf.

31. Laplante & Spears, *supra* note 26, at 83.

32. Nathan Rott & Eyder Peralta, *In Victory for Protestors, Army Halts Construction of Dakota Pipeline*, NPR.ORG (Dec. 4, 2016), https://www.npr.org/sections/thetwo-way/2016/12/04/504354503/army-corps-denies-easement-for-dakota-access-pipeline-says-tribal-organization.

33. *Texaco/Chevron Lawsuits (re Ecuador)*, BUS. & HUM. RTS. RES. CTR., https://www.business-humanrights.org/en/latest-news/texacochevron-lawsuits-re-ecuador-1/ (last visited Oct. 19, 2021) [hereinafter *Texaco/Chevron Lawsuits*].

34. Rott & Peralta, *supra* note 32. The Trump Administration subsequently reversed the order to cease construction. However, lawsuits remain ongoing. Jeff Brady, *Two Years After Standing Rock Protests, Tensions Remain but Oil Business Booms*, NPR.ORG (Nov. 29, 2018), https://www.npr.org/2018/11/29/671701019/2-years-after-standing-rock-protests-north-dakota-oil-business-is-booming.

prevailed, but not before spending fifteen years in litigation and tens of millions of dollars in legal fees.[35]

Lisa Laplante and Suzanne Spears attribute CSR's lackluster record to its practitioners' penchant for focusing only on "flashpoint" issues that are the most damaging to a company's reputation (such as corruption and armed conflict), instead of the "underlying root causes of community opposition."[36] Yet, even superficial remedies are not a given. CSR has failed to quell the industry's tension with Indigenous peoples in part because companies often fail to do anything at all. Ethical codes in the oil sector vary in strength but tend to be weakest in reporting and enforcement.[37] At best, businesses pledge themselves to voluntary programs that lack any means of punishing those who deviate from their protocol.

EITI is illustrative. The sole constraint that it places on corporate actors is that they report the payments they make to host governments.[38] Yet, for the first several years of its existence, the organization lacked any monitoring mechanism at all.[39] Even now, reporting standards differ among member states, with many suggesting that EITI's member firms "sing its praises only because they can ensure it stays toothless."[40] The initiative subsists on carrots, its only stick being to remove noncompliant parties from membership.[41] Nor is it alone in this respect. A survey of voluntary codes conducted by the Organization for Economic Cooperation and Development in 2000 found that less than 10% provided for independent external monitoring, 40% failed to mention monitoring, and 60% had no penalties for noncompliance.[42]

In light of the extractive industry's reticence to even report its expenditures, voluntary initiatives to invest in local communities have been

35. Before August 2016, when a U.S. federal court invalidated the Ecuadorian Supreme Court's 2012 ruling, Chevron had been held liable for $9.5 billion in damages. *Texaco/Chevron Lawsuits*, *supra* note 33.

36. Laplante & Spears, *supra* note 26, at 83.

37. Watts, *supra* note 21, at 394.

38. *Frequently Asked Questions (FAQ)*, EITI, https://guide.eiti.org/FAQ (last visited June 6, 2021) ("Companies report payments to government (taxes, royalties, etc.) and the government reports what it has received.").

39. Kantz, *supra* note 27, at 210.

40. *Extracting Oil, Burying Data: Energy Companies Are Fighting Efforts to Reveal Payments to Governments*, THE ECONOMIST (Feb. 25, 2012), https://www.economist.com/international/2012/02/25/extracting-oil-burying-data.

41. Kantz, *supra* note 27, at 209 ("[T]he EITI has not as yet been able to create peer pressure to comply with the requirements or to undertake validation.").

42. Org. for Econ. Cooperation & Dev. [OECD], *Codes of Corporate Conduct: An Expanded Review of Their Content*, at 35, TD/TC/WP(99)56/FINAL (June 9, 2000), http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TD/TC/WP(99)56/FINAL&docLanguage=En.

all the more unavailing. Michael J. Watts, a professor of development studies, describes community relations on the ground as a "deeply fraught" arena, in which companies "often only pay lip service to local communities, offer irregular and minimal payments for the use of tribal and other lands, use systems of compensation that are variable and unsystematic at best, and permit shallow community participation."[43] To the extent that benefits flow to these groups, they pool in the hands of chiefs and elites—"often equally unaccountable"—without trickling down to the general public.[44] Notwithstanding the extractive industry's high-minded rhetoric, its engagement with Indigenous groups continues to bear scant resemblance to collaboration.

Compounding corporate willingness to exploit these communities, policymakers who prioritize growth over the protection of cultural entitlements have allowed economic development to lay waste to Indigenous rights.[45] Although municipal law recognizes 90% of Indigenous territory in the Amazon, nearly 25% of tribal entitlements have been given over to the extractive industry.[46] Over 40% of Indonesia's Indigenous lands have been sold to timber companies, with the rest on their way to becoming commercial plantations.[47] Many more acres across the globe are expropriated under the guise of creating national parks[48] or effectively ceded to transnational corporations when governments subject Indigenous communities to endless claims proceedings.[49] Though international law exhibits a newfound recognition of Indigenous peoples, the breakneck pace of global economic growth is depriving them of their land. The livelihoods, lifestyles, and lives of millions depend on determining *how Indigenous rights may be safeguarded against the extractive industry.*

II. Argument

In the following Note, I examine the possibility of transforming international investment law to protect the Indigenous communities that it

43. Watts, *supra* note 21, at 390–91.

44. *Id.* at 391.

45. Valentina S. Vadi, *When Cultures Collide: Foreign Direct Investment, Natural Resources, and Indigenous Heritage in International Investment Law*, 42 Colum. Hum. Rts. L. Rev. 797, 799 (2011).

46. *Study: Indigenous Territories Protect Amazon Forest Carbon, But Aren't Immune to Degradation*, Woods Hole Rsch Ctr. (Jan. 27, 2020), https://www.woodwellclimate.org/study-indigenous-territories-protect-amazon-carbon-but-arent-immune-to-degradation-and-disturbance/#.

47. *See* Permanent Forum, *supra* note 15, at 121.

48. *Id.*

49. The Aymara people of Bolivia had filed over 143,000 square miles worth of land claims by 2005. However, more than a year later, less than 15% of these claims had been granted. *See id.* at 119.

has imperiled. Part I describes the structural forces that motivate the exploitation of Indigenous lands and undercut the ability of these communities to resist. Part II evaluates the solutions of previous authors. It then proposes amending the jurisdiction of the largest institution for investor-state arbitration, the International Centre for Settlement of Investment Disputes (ICSID), in order to deny a remedy to investors that violate human rights. The Conclusion discusses the benefits and limitations of this approach and considers future strategies for advancing Indigenous interests.

A. *International Investment Law Facilitates and Encourages the Extractive Industry's Exploitation of Indigenous Communities*

Rational corporate actors have no reason to respect the rights of Indigenous peoples inhabiting the lands in which they operate. If a business's actions become too egregious for the locals to tolerate, they might riot and cause the state to seize the investment. Yet, these communities do not invariably protest the infringement of their rights. When they submit, the company takes more than it would have under a regime of Indigenous consent, earning a windfall. When they rise up and provoke a state response, international investment arbitration offers the company a full refund for its lost property. These awards tend to be enormous, which disincentivizes states from challenging corporate actors in the first place. Indigenous peoples are often unable to fend off encroachment themselves because they wield even less power than their state governments. International investment law thus incentivizes corporate excess while undermining Indigenous and host-state resistance.

1. An Overview of International Investment Law: The Case of *Bear Creek Mining Corp. v. Republic of Perú*

The bedrock of international investment law is the bilateral investment treaty (BIT). By signing a BIT, two states pledge "fair and equitable treatment" to one another's investors, thereby trading a measure of their sovereignty over intra-territorial business for access to foreign capital.[50] BITs emerged in response to the practice of developing economies invoking the "Calvo doctrine" to nationalize foreign investments during the mid-twentieth-century.[51] Often attributed to Argentine jurist

50. Patrick Dumberry, *Are BITs Representing the "New" Customary International Law in International Investment Law?*, 28 PA. ST. INT'L L. REV. 675, 679 (2010).

51. Michael Ewing-Chow, *Thesis, Antithesis, and Synthesis: Investor Protection in BITs, WTO and FTAs*, 30 U.N.S.W. L.J. 548, 548 (2007).

Carlos Calvo, this reasoning justified expropriation by the host state on the theory that domestic law provides the proper standard of protection for international capital.[52] Decades later, these countries became more interested in foreign funds as a means of economic growth,[53] but investors demanded assurance that they would not again be made to part with their assets.[54] BITs were thus a condition that the Global North placed on the capital that it sent to the Global South. Nevertheless, they have since proliferated among nearly all states. At present, there are around 2,300 BITs in force[55] between more than 150 countries.[56]

Despite their numerosity, BITs exhibit a "striking . . . uniformity" in the degree to which they empower investors against the state.[57] As international investment law has evolved, more recent treaties have grown increasingly sophisticated.[58] Yet, the "vast majority"[59] provide for the equal treatment of foreign and domestic investors, compensation should the host state nationalize an investment, and the right of aggrieved investors to bring arbitration actions against the host state in an extraterritorial tribunal.[60] Under most BITs, the duties of host states are not merely negative. They must take affirmative precautions to ensure that the investor enjoys "favourable investment conditions and the observance of [its] legitimate commercial expectations."[61] Foreign corporations may "take it for granted" that the state will neutralize

52. *Id.* at 548 n.4.

53. Christopher M. Ryan, *Meeting Expectations: Assessing the Long-Term Legitimacy and Stability of International Investment Law*, 29 U. PA. J. INT'L L. 725, 730 (2008).

54. Ewing-Chow, *supra* note 51, at 548.

55. *International Investment Agreements Navigator*, U.N. CONF. ON TRADE & DEV., https://investmentpolicy.unctad.org/international-investment-agreements (last visited May 17, 2021).

56. *The Basics of Bilateral Investment Treaties*, SIDLEY, https://www.sidley.com/en/global/services/global-arbitration-trade-and-advocacy/investment-treaty-arbitration/sub-pages/the-basics-of-bilateral-investment-treaties/ (last visited May 17, 2021).

57. *See* Ryan, *supra* note 53, at 732.

58. As Patrick Dumberry observes:

> The 10-pages older BIT entered into by Canada with Poland and Hungary in 1990-1991 simply cannot be compared to the much more comprehensive 104-pages BIT Canada concluded 15 years later with Peru. Similarly, recent BITs entered into by Germany cannot be compared with earlier ones providing only for State-to-State dispute resolution mechanism (such as the BIT entered into with Malaysia in 1960).

Dumberry, *supra* note 50, at 683.

59. Ryan, *supra* note 53, at 732.

60. Dumberry, *supra* note 50, at 670.

61. Peter Muchlinski, *"Caveat Investor"?: The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard*, 55 INT'L & COMP. L.Q. 527, 531 (2006).

threats that could deprive them of the benefit of the bargain.[62] If a host government does not shoulder this responsibility, it may be forced to cover the investor's losses. The jurisdiction of most tribunals extends only to the investor's claims.[63] Thus, host states possess no comparable authority to initiate arbitration if foreign investors violate their domestic laws.[64]

Bear Creek Mining Corp. v. Republic of Perú illustrates the authority that extractive companies wield under international investment law and the powerlessness of states to counter them, even when Indigenous rights are in jeopardy. Bear Creek, the claimant, was a Canadian mining company that sought to mine silver in the Puno region of Perú.[65] The site at which it discovered silver fell within the Aymara-Lupaca Reserve Area, near the country's border with Bolivia.[66] The Peruvian government prohibited mining within the Reserve because it was home to endangered flora and fauna as well as the Aymara Indigenous peoples, whose subsistence lifestyle depends on the land.[67] Furthermore, under Peruvian law, foreign companies were prohibited from mining in the border regions absent a declaration of "public necessity."[68] Leveraging its financial sway, Bear Creek persuaded the state to excise the mining site from the Reserve and stipulate to the required public necessity.[69]

Bear Creek still faced the challenge of securing the consent of those who owned or occupied the land in question.[70] Prior to a project's commencement, Peruvian law demanded that companies consult with all communities to be affected by the operation.[71] Further obligations applied in this case, because the relevant communities were Indigenous.

---

62. Bear Creek Mining Corp. v. Republic of Perú, ICSID Case No. ARB/14/21, Award, ¶ 412 (Nov. 30, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw9381.pdf.

63. Patrick Dumberry & Gabrielle Dumas-Aubin, *When and How Allegations of Human Rights Violations Can Be Raised in Investor-State Arbitration*, 13 J. WORLD INV. & TRADE 349, 358 (2012).

64. *Id.*

65. George K. Foster, *Investor-Community Conflicts in Investor-State Dispute Settlement: Rethinking "Reasonable Expectations" and Expecting More from Investors*, AM. U. L. REV. 105, 129–30 (2019).

66. *Id.*

67. Bear Creek Mining Corp. v. Republic of Perú, ICSID Case No. ARB/14/21, Brief for Non-Disputing Party Written Submission of DHUMA & Dr. Carlos Lopez, 3-4, (May 9, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7517.pdf.

68. Bear Creek Mining Corp. v. Republic of Perú, ICSID Case No. ARB/14/21, Award, ¶ 124 (Nov. 30, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw9381.pdf.

69. Foster, *supra* note 65, at 130.

70. *Bear Creek*, ICSID Case No. ARB/14/21, Award, ¶ 259.

71. Bear Creek Mining Corp. v. Republic of Perú, ICSID Case No. ARB/14/21, Witness Statement of Felipe A. Ramírez Delpino, ¶¶ 12-13 (Oct. 6, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4472.pdf.

Perú requires developers to negotiate with Indigenous peoples with an eye toward forming agreements that "safeguard their traditional rights and customs" and confer "the benefits and compensatory measures that [belong] to them."[72] These terms derive from International Labour Organization (ILO) Convention 169, a multilateral treaty that compels governments to "develop … co-ordinated and systematic action to protect the rights of [Indigenous] peoples"[73] and to which Perú is a signatory.[74]

As amici curiae to the case later indicated, the Aymara view their land and mountains as deities and feared that the mine would injure these sacred entities.[75] Others worried that the project would divert too much water away from their families and herds or pollute the local supply with chemical runoff.[76] Despite Indigenous concerns and the requirement that it consult with all communities implicated, Bear Creek limited its efforts to only those living nearest to the mine.[77] The company promised nothing to families who happened to reside outside the immediate vicinity, even though the operation nonetheless posed a risk to their sacred lands and the environment on which they depended.[78] Some of the landowners whose assent was needed for the project to commence rejected Bear Creek's offer.[79] Nevertheless, mining began.

Demonstrations erupted and turned violent, "paralyz[ing] all the southern area of Puno."[80] Notwithstanding this unrest, Bear Creek later claimed that the Peruvian government had assured it that its concessions were secure.[81] Yet, as protests continued to gain traction, the state

72. Aprueban el Reglamento de Participación Ciudadana en el Subsector Minero, Decreto Supremo No. 028-2008-EM [Approving the Regulation of Citizen Participation in the Mining Subsector, Supreme Decree No. 028-2008-EM], art. 4, https://www.senace.gob.pe/wp-content/uploads/2016/10/NAS-4-6-05-DS-028-2008-EM.pdf, *translated in* Foster, *supra* note 65, at 131 n.184.

73. International Labour Organization, Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, art. 2, ¶ 1, June 27, 1989, 28 I.L.M. 1382, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169.

74. Foster, *supra* note 65, at 131.

75. Bear Creek Mining Corp. v. Republic of Perú, ICSID Case No. ARB/14/21, Brief for Non-Disputing Party Written Submission of DHUMA & Dr. Carlos Lopez at 7-8, (May 9, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7517.pdf.

76. *Id.*

77. Bear Creek Mining Corp. v. Republic of Perú, ICSID Case No. ARB/14/21, Award, ¶ 261 (Nov. 30, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw9381.pdf.

78. Bear Creek Mining Corp. v. Republic of Perú, ICSID Case No. ARB/14/21, Partial Dissenting Opinion, ¶¶ 21, 35 (Sept. 12, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw10107.pdf.

79. *Id.* ¶ 22.

80. *Bear Creek*, ICSID Case No. ARB/14/21, Brief for Non-Disputing Party Written Submission of DHUMA & Dr. Carlos Lopez at 8-11.

81. *Bear Creek*, ICSID Case No. ARB/14/21, Award, ¶ 176.

grew less able to refuse local demands.[82] Ultimately, Perú revoked the declaration of public necessity and, with it, Bear Creek's license to operate in the area.[83] After a sojourn in Peruvian court, Bear Creek brought an arbitration action pursuant to the Canada-Perú Free Trade Agreement.[84] The company argued that Peruvian law simply required mining companies to consult with local communities, not to obtain their consent.[85] Thus, Perú's revocation of the concessions violated the fair and equitable treatment clause of the pertinent BIT.[86] Perú retorted that the free, prior, and informed consent of those in whose lands a company seeks to operate is always a precondition under Peruvian law but that the mandate weighed even more heavily in this case, given the implication of ILO Convention 169.[87]

In line with the arguments of Perú and the amici, the tribunal suggested that the claimant had not taken "appropriate and necessary steps to engage all of the . . . local communities."[88] Its failure to do so may have "contributed significantly to the nature and extent of the opposition that followed."[89] Nevertheless, Indigenous rights were inapposite to the arbitration because "ILO Convention 169 imposes direct obligations only on States."[90] The company had no parallel requirements.[91] Perú's declaration of a public necessity afforded Bear Creek the "distinct, reasonable expectation" that it would be able to proceed with its operations; hence, the revocation of this grant constituted expropriation.[92] Though Bear Creek trampled on Indigenous rights, it had no reason to respect them under international investment law and thus prevailed in arbitration.

2. Companies Ignore Indigenous Rights Because They Profit When Abused Communities Do Not Seize Their Investments, and Arbitration Reimburses Them When They Do

Incidents such as *Bear Creek*, in which multinational corporations vie with Indigenous peoples over their lands, are not the inevitable byproduct of

82. Foster, *supra* note 65, at 133.
83. *Bear Creek*, ICSID Case No. ARB/14/21, Award, ¶ 201.
84. Foster, *supra* note 65, at 133-34.
85. *Id.* at 131; *see also Bear Creek*, ICSID Case No. ARB/14/21, Award, ¶ 241.
86. *Bear Creek*, ICSID Case No. ARB/14/21, Award, ¶ 345.
87. *Id.* ¶¶ 258, 263.
88. *Id.* ¶ 406.
89. *Id.*
90. *Id.* ¶ 66.
91. *Id.*
92. *Id.* ¶ 376.

supply and demand. International investment law has incentivized the extractive industry to take what it can by insuring it—at the state's expense—against the repercussions of harming local communities. The argument that it is within a company's self-interest under international investment law to marginalize these communities is not without opposition. Society has shed some of its biases since Chief Justice Marshall delivered the canonical *Johnson v. M'Intosh* opinion, and the claim that Indigenous peoples dwell in the "state of nature" now reads as an anachronism.[93] Even the mining industry recognizes that Indigenous communities are not uniformly averse to development and can be business partners in the context of extractive projects.[94] As the *Bear Creek* tribunal noted, the source of Indigenous defiance was the claimant's uneven consultation efforts, in which some groups "were to be involved in (and would benefit from the Project), whereas others would not."[95]

Observing the potential for Indigenous communities to contribute value to and benefit from businesses operating in their lands, Laplante and Spears advance a "community consent model" of CSR.[96] The centerpiece of their proposal is the free, prior, and informed consent of the local peoples,[97] a notion also codified in UNDRIP.[98] Under this model, extractive companies would seek the approval of those in whose territory they hope to mine.[99] These communities would have veto power over the operation.[100] Laplante and Spears argue that companies would be incentivized to engage in such dialogue because "harmonious relations with a host community" extinguish the opposition that could derail a project and generate financial benefits for the firm.[101] They substantiate their claim by referencing a number of Indigenous protests

93. *See* 21 U.S. (8 Wheat.) 543, 571 (1823).

94. *See, e.g.*, Marilyn Scales, *Indigenous Communities, Cementation Benefit from Strong Partnerships*, CAN. MINING J. (Feb. 1, 2017), https://www.canadianminingjournal.com/featured-article/indigenous-communities-cementation-benefit-strong-partnerships/ ("Today, a successful project in the mining industry often relies on the support and active participation of an indigenous partner."); *"Their Spirits Are Here Now": Sharing Country and Culture*, RIO TINTO, https://www.riotinto.com/en/news/stories/indigenous-australians-spirits-here (last visited Sept. 1, 2021) (describing land use agreements and partnerships that Rio Tinto, a global mining company, has established with Indigenous Australians).

95. *Bear Creek*, ICSID Case No. ARB/14/21, Award, ¶ 155.

96. Laplante & Spears, *supra* note 26, at 84.

97. *Id.* at 71.

98. UNDRIP, *supra* note 2, art. 10.

99. Laplante & Spears, *supra* note 26, at 87.

100. *See id.*

101. *Id.* at 84.

catalyzed by failures of corporate confidence-building, which delayed or terminated the operations.[102]

Nevertheless, one wonders why the problem of excluding Indigenous voices from decision-making persists if, as Laplante and Spears maintain, it is already in the industry's financial interest to pursue their approval. In his Comment about the feasibility of imbuing BITs with humanitarian principles, Jeremy S. Goldstein notes that it is "illogical, and usually failure-inspiring" to suppose that something will not happen merely because it never has.[103] At the risk of stumbling into this fallacy, I argue that Laplante, Spears, and others[104] who contend that the relationship between extractive companies and Indigenous peoples may be simply reframed for the better without institutional change inflate both the industry's good graces and the degree to which local opposition impacts the bottom line. Extractive companies operating in the Global South have no rational basis for inviting Indigenous peoples to weigh in on their operations. They encounter a win-win situation, no matter if local communities protest their actions or stay silent.

To illustrate this unfortunate state of affairs, consider Bolivia and Perú. Each is among the three countries with the largest Indigenous populations in South America, both in absolute numbers and as a percentage of the national population.[105] Both have also witnessed some of the greatest increases in extractive activity in recent decades. Compared to the 90% global increase in mining between 1990 and 1997, investment in this sector ballooned by 400% in South America as a whole and by over 2,000% in Perú during the same period.[106] Perú and Bolivia are now two

102. *Id.* at 114.

103. Jeremy S. Goldstein, Note, *Bringing BITs Back from the Brink: Incorporating Progressive Treatment Provisions in International Investment Agreements to Maintain Policy Space for State Regulation of Human Rights*, 45 DENV. J. INT'L L. & POL'Y 365, 383 n.134 (2017).

104. *See, e.g.*, Dumberry & Dumas-Aubin, *supra* note 63, at 349-50 (proposing that BITs "in their present form" may be read in such a way as to allow arbitral tribunals to consider issues of human rights to a greater extent than they do now). To be fair, Dumberry and Dumas-Aubin recognize that more sweeping change would be necessary for human rights to occupy the position that they merit within substantive international investment law. Even so, one wonders how they propose ensuring that arbitrators incorporate the changes in treaty interpretation that they envision, which tribunals are doubtful to do without external prompting. *See infra* note 208 and accompanying text.

105. *Indigenous Peoples, Democracy, and Political Participation*, GEO. U. POL. DATABASE AM. (Oct. 13, 2006), http://pdba.georgetown.edu/IndigenousPeoples/demographics.html.

106. Emma McDonnell, *The Co-Constitution of Neoliberalism, Extractive Industries, and Indigeneity: Anti-Mining Protests in Puno, Peru*, 2 EXTRACTIVE INDUS. & SOC'Y 112, 114 (2015).

of the four largest mining economies on the continent.[107] Perhaps more vividly than anywhere else, these two countries illustrate the burgeoning tension between extraction and Indigenous rights.

a. Foreign Corporations Profit from Centuries of State Abuse That Have Silenced Indigenous Peruvians

Contrary to Laplante and Spears's contention that failure to secure Indigenous consent will "threaten[] the success of a project,"[108] abusive business tactics often do not provoke retaliation. As mentioned above, Perú has a significant Indigenous population: close to ten million, by some estimates,[109] against a national population of just over thirty-two million.[110] These individuals "have borne the brunt" of the explosion in extractive operations in Perú.[111] Over half of rural *campesino* communities have been impacted by mining concessions, ranging from lost livelihoods to the contamination of their drinking water.[112] As foreign corporations have set about razing these lands, the residents have not been consulted.[113] Beginning in the 1990s, the Peruvian government enacted a series of top-down measures to ensure "safe" conditions for international capital.[114] These included tax breaks for foreign companies and slashing the country's environmental regulations.[115] Official measures to court the extractive sector quickly proved unpopular. While 62% of the population endorsed these policies in 1992, support had fallen to 29% by 1999.[116]

Despite the undemocratic nature of its privatization, Perú has seldom been the site of public demonstrations. As María Elena García (a Quechua scholar) laments, the country's Indigenous movements have been described as "marginal," "largely nonexistent," and "a profound failure."[117] Anthropologist Marisol de la Cadena concurs, observing that "no [I]ndigenous social movement exists currently in Perú that rallies

107. *South America Countries*, THE DIGGINGS, https://thediggings.com/sa/countries (last visited May 5, 2020).

108. Laplante & Spears, *supra* note 26, at 46.

109. McDonnell, *supra* note 106, at 115.

110. *Population, Total—Peru*, WORLD BANK, https://data.worldbank.org/indicator/SP.POP.TOTL?locations=PE (last visited June 7, 2021).

111. McDonnell, *supra* note 106, at 114.

112. *See id.* at 114-15; Anthony Bebbington & Mark Williams, *Water and Mining Conflicts in Peru*, 28 MOUNTAIN RSCH. & DEV. 190, 190 (2008).

113. *See* McDonnell, *supra* note 106, at 114.

114. *Id.*

115. *Id.*

116. *Id.*

117. MARÍA ELENA GARCÍA, MAKING INDIGENOUS CITIZENS: IDENTITIES, EDUCATION, AND MULTICULTURAL DEVELOPMENT IN PERU 5 (2005).

around ethnic identities."[118] With the notable exception of *Bear Creek*, the Indigenous response to encroachment has been tepid. The silence of these communities in the face of state and corporate excess is a regrettably understandable response to ongoing abuse since the colonial era.[119] For more than 500 years, Indigenous Peruvians have been relegated to "the bottom of the class structure," where they subsist in "conditions of extreme poverty … [that] severely limit[] the full enjoyment of their human rights."[120] Their settlements are geographically distant from the capital and from one another.[121] Coupled with the "deeply ingrained racial prejudices" of the majority population, such isolation leaves Indigenous peoples vulnerable to violence.[122] Of the 70,000 who were killed during Perú's civil conflict of the early 2000s, 75% were Quechua-speaking Indigenous persons, 79% were rural residents, and 85% belonged to "the most impoverished [regions] with the largest Indigenous populations in the country."[123]

A confluence of geography, structural racism, and overt violence renders Perú's Indigenous communities "invisible and voiceless" in national politics.[124] These same impediments frustrate the possibility of coordinating grassroots activism amongst themselves or contacting their would-be advocates at the United Nations and other international organizations.[125] In view of the centuries of colonial discrimination preceding the latest round of foreign investment in Perú, foreign businesses are not the cause of Indigenous marginalization. However, in host countries that lack an active civil society, multinationals may do as they please without fear of protests catalyzing the loss of their investment.

b. Resistance to Corporate Excess Is Fruitless When Foreign Businesses Can Simply Demand Reimbursement from the State

When Indigenous communities do not accept the violation of their rights but instead take back their lands from the corporations that have

118. MARISOL DE LA CADENA, INDIGENOUS MESTIZOS: THE POLITICS OF RACE AND CULTURE IN CUZCO, PERU, 1919-1991 323 (2000).

119. Gerardo J. Munarriz, *Rhetoric and Reality: The World Bank Development Policies, Mining Corporations, and Indigenous Communities in Latin America*, 10 INT'L CMTY. L. REV. 431, 433 (2008); David C. Baluarte, Comment, *Balancing Indigenous Rights and a State's Right to Develop in Latin America: The Inter-American Rights Regime and ILO Convention 169*, 4 SUSTAINABLE DEV. L. & POL'Y 9, 9 (2004).

120. Munarriz, *supra* note 119, at 433.

121. *Id.*

122. *Id.*

123. *Id.* at 432.

124. *See id.* at 433.

125. *Id.*

harmed them, international investment arbitration offers claimant investors a full refund on the state's dollar. A far cry from Perú's quiescence, Bolivia has bristled with opposition to foreign investors, especially within its Indigenous communities. As in Perú, Indigenous Bolivians have been subjected to inhuman treatment for close to half a millennium.[126] Even after Bolivia's independence from Spain, its Indigenous citizens were disenfranchised from national politics.[127] Through a "qualified vote" clause in the Constitution of 1825, Bolivia's founders restricted suffrage to literate, property-owning men.[128] This policy persisted until 1952.[129] Unlike their Peruvian counterparts, however, Indigenous Bolivians have historically excelled at forming coalitions with one another and with other marginalized populations. In 1952, an alliance of miners' unions, peasant groups, and Indigenous peoples overthrew the state.[130] When the revolutionary government's development plan failed in the 1970s, Indigenous peoples again took to the streets, demanding official recognition of their economic and cultural needs.[131] The "[I]ndigenous-campesino unions" that emerged from this period have persisted to the present day.[132]

It is unsurprising, then, that at the end of the twentieth century, Indigenous Bolivians refused to be victimized by their leaders' economic agenda. Heading into the 2000s, Bolivia (like Perú) sought to attract foreign capital by privatizing its natural resources, including water.[133] By 2000, the water supply of Cochabamba—a city that had long suffered from poverty and inadequate access to drinking

126. *See* HERBERT KLEIN, A CONCISE HISTORY OF BOLIVIA xxi (2003) ("Bolivia is and has been since the 16th century a Spanish conquest . . . in which Indians were for many years an exploited class of workers.").

127. ROBERT J. ALEXANDER, THE BOLIVIAN NATIONAL REVOLUTION 18 (1958).

128. *Id.*

129. Maral Shoaei, MAS and the Indigenous People of Bolivia (Oct. 16, 2012) (unpublished master's thesis, University of South Florida) (manuscript at 18), https://scholarcommons.usf.edu/cgi/viewcontent.cgi?article=5597&context=etd.

130. *See* Alison Brysk & Natasha Bennett, *Voice in the Village: Indigenous Peoples Contest Globalization in Bolivia*, 18 BROWN J. WORLD AFF. 115, 119 (2012).

131. John L. Hammond, *Indigenous Community Justice in the Bolivian Constitution of 2009*, 33 HUM. RTS. Q. 649, 651 (2011).

132. Silvia Rivera Cusicanqui, *The Roots of Rebellion: Reclaiming the Nation*, N. AM. CONG. ON LATIN AM. (Sept. 25, 2007), https://nacla.org/article/roots-rebellion-ii-reclaiming-nation.

133. *See* McDonnell, *supra* note 106 ("Neoliberal restructuring in Peru has tailored state policies to engender a 'safe' investment environment that attracts foreign investors through maximizing the risk/reward ratios of mining investment."); *see also* HENRY VELTMEYER & JAMES F. PETRAS, THE NEW EXTRACTIVISM: A POST-NEOLIBERAL DEVELOPMENT MODEL OR IMPERIALISM OF THE TWENTY-FIRST CENTURY? 87 (2014).

water[134]—belonged to the U.S. multinational corporation Bechtel.[135] Leveraging its state-sanctioned monopoly, Bechtel struck Cochabamba with a marked hike in water prices.[136] Their access to basic sustenance imperiled, the city's Indigenous residents ignited months of street protests, "generating in the process a quasi-revolutionary situation that had the potential to launch a full-scale offensive against the ramparts of state power."[137] Unable to suppress this opposition, the Bolivian government was forced to revoke Bechtel's concession.[138]

Emboldened by their victory,[139] Bolivia's Indigenous activists coalesced behind Evo Morales, leader of the *Movimiento al Socialismo* (Movement Toward Socialism) party.[140] In October 2005, Morales was the first Indigenous Bolivian to be elected President.[141] Once in office, he championed the adoption of a new constitution to give the government greater authority over the country's natural resources.[142] Then, in May 2006, Morales announced that his government would require foreign corporations—whose investments in the Bolivian energy sector by then totaled nearly four billion dollars—to forfeit majority control to the state.[143]

The response of the foreign enterprises implicated by this new decree was swift. In 2008, Ashmore Energy International (AEI), a U.S. corporation, sued Bolivia at the Arbitral Institute of the Stockholm Chamber of Commerce.[144] AEI sought compensation for the Morales

134. Farouk Fahmi El-Hosseny, The Role of Civil Society in Investment Treaty Arbitration: Status and Prospects (May 26, 2016) (Ph.D. dissertation, Leiden University) (manuscript at 14 n.5), https://openaccess.leidenuniv.nl/bitstream/handle/1887/42075/Farouk%20El%20Hosseny_Phd%2010a%20ItemsNEW.pdf?sequence=23.

135. *Id.*

136. *Id.*

137. VELTMEYER & PETRAS, *supra* note 133.

138. Fahmi El-Hosseny, *supra* note 134, at 14.

139. From a financial standpoint, it is unclear how much of a victory this was. Bolivia settled with Aguas del Tunari, Bechtel's Bolivian subsidiary, for an undisclosed sum in 2002. *Aguas del Tunari v. Bolivia*, UNITED NATIONS CONF. ON TRADE & DEV. (Dec. 31, 2019), https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/74/aguas-del-tunari-v-bolivia.

140. Fahmi El-Hosseny, *supra* note 134, at 15.

141. Robert Albro, *Evo Morales's Chaotic Departure Won't Define His Legacy*, FOREIGN POL'Y (Nov. 22, 2018), https://foreignpolicy.com/2019/11/22/evo-morales-departure-bolivia-indigenous-legacy/.

142. Fernando Cabrera Diaz, *Pan American Energy Takes Bolivia to ICSID over Nationalization of Chaco Petroleum*, INV. TREATY NEWS (May 11, 2010), https://www.iisd.org/itn/2010/05/11/pan-american-energy-takes-bolivia-to-icsid-over-nationalization-of-chaco-petroleum/.

143. *Id.*

144. Fernando Aguirre B., *Bolivia*, *in* LATIN AMERICAN INVESTMENT PROTECTIONS: COMPARATIVE PERSPECTIVES ON LAWS, TREATIES, AND DISPUTES FOR INVESTORS, STATES, AND COUNSEL 53, 73 (Johnathan C. Hamilton & Omar E. Garcia eds., 2012).

government's nationalization of the Transredes oil pipeline, in which the company had held a 25% interest.[145] Within two months, Bolivia settled the dispute for $121 million.[146] In April 2010, Bolivia was again sued for expropriation, this time by the Anglo-Argentinean firm Pan American Energy (PAE).[147] The previous year, the Morales government had seized PAE's subsidiary, Chaco Petroleum Company.[148] Once more, Bolivia settled, paying $357 million.[149]

Since 2002, Bolivia has been a respondent in thirteen international investment arbitrations.[150] Many of these arose from Morales's expropriations and, as such, can be seen as an indirect response to Indigenous activism. Several more actions were brought after the Bolivian government nationalized the assets of foreign businesses that had mistreated Indigenous communities. *Aguas del Tunari* is illustrative. Irrespective of what public policies may have undergirded the actions at issue in these arbitrations, Bolivia has lost or settled all thirteen of them.[151] By 2010, Bolivia had forfeited $733 million in arbitration awards and settlements, representing more than a quarter of its annual budget.[152] Albeit somewhat less successful in arbitration than other respondents, Bolivia's experience is no aberration. Close to 60% of investment disputes in 2017 were decided in the investor's favor.[153] In 2019, about 23% ended in settlement.[154] For each arbitration, respondent states can expect to pay over five million dollars in legal fees[155] and, if they lose, to be liable for an average of $522 million in damages.[156] It often costs around $500 million to open a mine and separation plant.[157] Most of the time, then, the worst

145. *Id.*

146. *AEI v. Bolivia*, UNITED NATIONS CONF. ON TRADE & DEV. (Dec. 31, 2019), https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/295/aei-v-bolivia.

147. Cabrera Diaz, *supra* note 142.

148. *Id.*

149. *Pan American v. Bolivia*, UNITED NATIONS CONF. ON TRADE & DEV. (Dec. 31, 2019), https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/385/pan-american-v-bolivia.

150. Four additional arbitrations are ongoing. *Plurinational State of Bolivia*, UNITED NATIONS CONF. ON TRADE & DEV. (Dec. 31, 2019), https://investmentpolicy.unctad.org/investment-dispute-settlement/country/24/bolivia-plurinational-state-of.

151. *Id.*

152. Tim R. Samples, *Winning and Losing in Investor-State Dispute Settlement*, 56 AM. BUS. L.J. 115, 167 (2019).

153. *Id.* at 150.

154. *Id.*

155. *Id.* at 151.

156. *Id.* at 150.

157. *See Opening New Mines: The Process of Mining REEs* [Rare Earth Elements] *and Other Strategic Elements*, MASS. INST. TECH. MISSION 2016, https://web.mit.edu/12.000/www/m2016/finalwebsite/solutions/newmines.html (last visited May 6, 2020).

a corporation will face for violating Indigenous rights is total compensation for its investment.

3. The Risk of Arbitration Keeps States from Defending Indigenous Communities, Which Are Often Too Marginalized to Advocate for Themselves

Investor-state arbitration thus incentivizes corporate excess, while the threat of crippling sanctions impedes states from protecting their Indigenous citizens.[158] In the Global South, where the vast majority of Indigenous peoples live,[159] the risk of legal action looms large.[160] These states struggle to afford the high-powered counsel that their corporate adversaries enjoy[161] and to pay the routine nine-figure settlements and awards.[162] The specter of financial ruin tends to cow governments into submission. For instance, the Indonesian Ministry of Forestry reversed its ban on mining in protected forests within six months of receiving threats of arbitration from a group of foreign-owned mining companies.[163]

Even if a state is willing to jeopardize its economic security, as discussed above, most BITs limit its ability to raise a claim (or even a counterclaim) in arbitration.[164] Host states might in theory defend against allegations of expropriation by arguing that claimants have violated the human rights of their citizens.[165] Yet, *Bear Creek* and *Aguas del Tunari* attest to how ineffective such defenses usually are. As Karl-Heinz Böckstiegel (the President of the *Bear Creek* tribunal[166]) observes, public policy "does not seem to be a major obstacle" to the ability of extractive corporations to secure redress through arbitration.[167]

---

158. Vadi, *supra* note 45, at 831 ("[T]he mere possibility of a dispute with a powerful investor can exert a chilling effect on government decisions to regulate in the public interest.").

159. *See* Gillette Hall & Ariel Gandolfo, *Poverty and Exclusion Among Indigenous Peoples: The Global Evidence*, WORLD BANK: WORLD BANK BLOGS (Aug. 9, 2016), https://blogs.worldbank.org/voices/poverty-and-exclusion-among-indigenous-peoples-global-evidence (finding that less than 1% of Indigenous peoples live in the United States and Canada, with the remainder inhabiting Latin America, Africa, the Middle East, China, and South and Southeast Asia).

160. Vadi, *supra* note 45, at 832.

161. *See* Samples, *supra* note 152, at 123.

162. *Id.* at 150.

163. Vadi, *supra* note 45, at 832.

164. Dumberry & Dumas-Aubin, *supra* note 63.

165. *See id.* at 361, 366-67.

166. Bear Creek Mining Corp. v. Republic of Perú, ICSID Case No. ARB/14/21, Award, ¶ 278 (Nov. 30, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw9381.pdf.

167. *See* Karl-Heinz Böckstiegel, Public Policy as a Limit to Arbitration and Its Enforcement, Address at the International Bar Association International Arbitration Day Celebration (Feb. 1,

States often do not care enough about Indigenous groups to regulate on their behalf in the first place. The examples of Perú and Bolivia are a testament to the extent to which Indigenous abuse (particularly in Latin America) originates at home, not abroad.[168] However, the power structures that victimize Indigenous communities do not exist in a vacuum. Latin American elites rely on the financial support of investors from North America (and the United States in particular).[169] David C. Baluarte, a professor of human rights law, notes that contemporary marginalization has largely "occurred in the name of development: expansive industrialization projects that overtake [I]ndigenous lands and decimate cultures."[170] The U.N. Permanent Forum on Indigenous Issues concurs, observing that "in many cases, States and their officials have favored corporate interests to the detriment of Indigenous peoples' interests."[171]

Unlike a century ago, economic growth no longer serves purely to reinforce the interests of European and *mestizo* elites.[172] The developing countries in which most Indigenous peoples reside are characterized by widespread poverty.[173] Governments in these countries can credibly claim job creation as "both [their] right and . . . responsibility."[174] In Latin America, states often consider the exploitation of their natural resources (and the Indigenous lands in which these are often found) as "their only escape from poverty."[175] They prioritize the collective good over the needs of the relative few.[176]

2008) (manuscript at 3), https://www.arbitration-icca.org/media/4/44543421599110/media012277202358270bckstiegel_public_policy. . .iba_unconfererence_2008.pdf.

168. Munarriz, *supra* note 119, at 437 (attributing the marginalization of Indigenous communities to "centuries of authoritarian exercise of power" and "the emergence of powerful landlord elites" who perpetuate the inequality of the "Spanish and Portuguese conquest").

169. *Id.* at 438.

170. Baluarte, *supra* note 119.

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

172. Munarriz, *supra* note 119, at 438.

173. Baluarte, *supra* note 119.

174. *Id.*

175. *Id.*

176. Watts casts this Faustian bargain in less sympathetic terms. Standard practice in the extractive industry, with its veneer of CSR, allows states to "absolve themselves and to impose expectations (infrastructural development, community outreach) on companies that should be in part or whole their own responsibility." Watts, *supra* note 21, at 387. These companies in turn can claim to be apolitical or ignorant of the actions of their subsidiaries with respect to human rights. *Id.* In Watts's view, the narrative of development and national security thus shrouds "the entire operations of all the parties . . . [in] secrecy." *Id.* at 388. Yet, whether state action is

International investment arbitration exacerbates the alienation of Indigenous peoples. These communities have long been denied the ability to advocate for themselves on the world stage. For centuries, "[i]nternational law knew no other legal subjects than the state . . . and had no room for Indigenous peoples."[177] The field has since broadened its statist focus, as evidenced by the ascendance of the transnational corporation as a legal actor on the world stage.[178] Unlike the private sector, however, Indigenous communities have yet to secure a seat at the table of international investment law. As discussed above, their ability to mobilize is stymied by poverty and alienation from legal and political power.[179] They are rarely privy to the initial negotiations between their governments and the extractive industry and lack the opportunity to voice their thoughts.[180]

Even when abuse ignites Indigenous activism, the venues in which they can present their claims are limited. Indigenous peoples have even less recourse than the state to bring their grievances before an arbitral panel. They can only hope that the government will espouse their arguments for them.[181] While investors enjoy immediate access to arbitration, Indigenous communities do not benefit from a direct route to the transnational courts.[182] They can only litigate before regional human rights bodies and the relevant U.N. tribunals after exhausting all local remedies.[183] International investment law bars Indigenous peoples from its chambers and sanctions host governments for opposing foreign investors. The nonconsensual exploitation of ancestral lands thus persists unabated.

B. *Amending Arbitration Institutions Is a More Promising Route to Preventing Indigenous Exploitation than Current BIT-Oriented Solutions*

Previous scholarship has proffered numerous strategies for raising the profile of Indigenous communities under international investment

motivated by utilitarian aims or greed, the result is the same: Indigenous rights are subordinated to extraction.

177. Erika-Irene Daes, *Indigenous Peoples' Rights to Their Natural Resources*, *in* THE DIVERSITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF PROFESSOR KALLIOPI K. KOUFA 363, 377 (Aristotle Constantinides & Nikos Zaikos eds., 2009).

178. *The Double Life*, *supra* note 1.

179. *See* Laplante & Spears, *supra* note 26, at 77.

180. *Id.*

181. Vadi, *supra* note 17, at 765.

182. *Id.*

183. *Id.*

law. These may be roughly grouped into two categories[184]: treaty drafting (and redrafting), and treaty interpretation. The former fails to factor in that multinational enterprises have no incentive to upend an economic structure that benefits them and are insulated from external pressures to change. The latter would merely have arbitrators consider Indigenous rights at their discretion, which represents little improvement over the current situation. Notwithstanding their limitations, below, I summarize the existing solutions to the asymmetry of power within international investment law before offering my own: the modification of ICSID.

1. Scholars Propose Drafting New BITs or Reinterpreting Existing Ones

Perhaps the most intuitive way to rectify inequality between the parties to (and those affected by) an investment treaty, the retooling or replacement of these treaties is a popular approach. Given the circumscribed jurisdiction of most arbitral tribunals, Stephan W. Schill and Vladislav Djanic propose "new generations of [international investment agreements]" that offer "[r]oom for the consideration of non-economic community interests."[185] They contend that "[t]his process is already under way," noting that some newer BITs include "community interests" in their preambles, refer in their substantive portions to stakeholders other than investors, and provide "exceptions, carveouts, . . . [and] special regimes for certain areas of government activity."[186] Even more ambitiously, Ibironke T. Odumosu-Ayanu advocates for broadening the scope of investment contracts beyond investors and host states and formally including "local communities with close ties to projects" among the parties.[187] To better preserve the rights of groups affected by development, Odumosu-Ayanu conceives of "direct interaction among relevant stakeholders, not only at dispute settlement phases, but in project design and execution."[188] In this respect, her proposal parallels Laplante and Spears's notion of free, prior, and informed consent.[189] As discussed

184. Vadi's treaty and judicially driven approaches map onto my treaty drafting and interpretation categories, respectively. *See id.* at 769.

185. Stephan W. Schill & Vladislav Djanic, International Investment Law and Community Interests, Address at the Mandela Institute Fifth Biennial Global Conference (July 7-9, 2016) (manuscript at 14), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2799500&download=yes.

186. *Id.* at 15.

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

188. *Id.* at 512.

189. *See* Laplante & Spears, *supra* note 26, at 71.

above, their model entails Indigenous participation in "setting the terms and conditions" of a project as well as "all phases of mining and post-mining operations."[190] Although somewhat more skeptical of the feasibility of treaty modification, Valentina S. Vadi likewise endorses "expressly accommodat[ing] Indigenous peoples' entitlements in the text of future [BITs] or when renegotiating existing ones."[191]

It goes without saying that elevating Indigenous groups to parity with investors in the text of a BIT, or merely bulking up the host state's public policy defense, would be a large deviation from current practice and come at the expense of corporate power. Extractive companies profit when Indigenous communities do not protest their exploitation, break even when their excesses generate retaliation, and only stand to lose by altering the treaties that have afforded them this privileged position. Nor can one expect the impetus for change to come from weak host states or further disempowered Indigenous communities.

Even if the spark for treaty renegotiation were to somehow ignite, it would still be impossible to achieve sweeping human rights protections via a piecemeal process of modifying BITs. Vadi admits that altering international investment treaties is "more evolutionary than revolutionary" in its time frame,[192] while Schill and Djanic acquiesce that "it is unrealistic to expect that treaty drafting can solve the conflict between [the extractive industry] and other community interests on its own."[193] As noted above, international investment law consists of a patchwork of over 2,300 treaties,[194] "most of which . . . do not contain explicit references to competing community interests."[195] One strains to imagine how long it would take to rework any meaningful portion of these. Furthermore, most BITs carry sunset clauses, by which their terms can live on for many years beyond the time that they lapse.[196] For example, Article 12(3) of the South Korea-Latvia BIT states that the treaty "shall remain in force for a further period of twenty (20) years from the date of the termination."[197] What are Indigenous groups facing the annihilation of their way of life to do in the meantime? Justice delayed is justice denied; hence, a timelier approach must be found.

---

190. *Id.* at 87.

191. Vadi, *supra* note 17, at 769.

192. *Id.* at 729.

193. *See* Schill & Djanic, *supra* note 185, at 16.

194. *International Investment Agreements Navigator*, *supra* note 55.

195. Schill & Djanic, *supra* note 185, at 16.

196. *Id.*

197. Agreement for the Promotion and Reciprocal Protection of Investments, Lat.-S. Kor., Oct. 23, 1996, https://m.likumi.lv/doc.php?id=213154.

Treaty interpretation purports to be such an approach, because it rests on the claim that BITs "in their present form" offer Indigenous communities recourse against corporations that have violated their rights.[198] Recognizing that international investment treaties "belong to international law," Vadi maintains that arbitral tribunals "can and should interpret" the former in harmony with the latter.[199] As support for this proposition, she invokes the Vienna Convention on the Law of Treaties (VCLT), which holds that arbitrators may take human rights into account when weighing investors' claims.[200] Patrick Dumberry and Gabrielle Dumas-Aubin share the conviction that human rights "are undoubtedly part of the 'big picture' that needs to be assessed by any tribunal."[201] In their view, the doctrine of "clean hands" should bar any investor who has engaged in "unacceptable behaviour" from receiving compensation for resultant expropriation by the state.[202] Albeit not yet a *jus cogens*[203] norm, this principle has "never been rejected" by the International Court of Justice, has been referenced by several international tribunals and, as such, "is a source of law that can be applied by [arbitrators] in accordance with Article 38(1)(c) of the ICJ Statute."[204] Existing BITs, these authors contend, empower arbitrators to withhold the impunity that motivates corporate excess. Tribunals need only to use the authority that they have been given.

Therein lies the problem: Nothing *requires* arbitrators to consider human rights when deciding a case, and they may have incentives not to do so. As Schill and Djanic observe, even under the terms of the VCLT, "the tribunal is only required to *'take into account'* these concerns

198. *See* Dumberry & Dumas-Aubin, *supra* note 63, at 350.

199. Vadi, *supra* note 17, at 776; *accord* Schill & Djanic, *supra* note 185, at 16 ("[A]s international treaties, IIAs [international investment agreements] should be interpreted by tribunals in consonance with the system they form part of. This is what the principle of 'systemic integration', which is enshrined in Art 31(3)(c) of the VCLT, demands.").

200. Vadi, *supra* note 17, at 758.

201. Dumberry & Dumas-Aubin, *supra* note 63, at 362.

202. *Id.*

203. *Jus cogens* norms are general principles of international law, such as prohibitions on crimes against humanity and genocide, that override treaty provisions whenever they are in conflict. *Jus Cogens*, CORNELL LEGAL INFO. INST., https://www.law.cornell.edu/wex/jus_cogens (last visited May 6, 2020); *see also* Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) ("[A] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.").

204. Dumberry & Dumas-Aubin, *supra* note 63, at 363-64; *see also* Muchlinski, *supra* note 61, at 536 (arguing that certain behavior of the corporate actor, including "undue influence" and "abuse of power on the part of an investor" may justify "even the outright termination of the investment," so long as "it is a proportionate response to the impugned act").

when interpreting a treaty."[205] Arbitrators are not bound to deem a claim inadmissible on grounds of human rights. Dissenting in *Bear Creek*, Arbitrator Professor Philippe Sands argued that the host state had "no option but to . . . protect the well-being of its citizens" after they erupted in protest over the claimant's failure to adequately consult them before mining their ancestral lands.[206] The majority did not dispute that the Aymara's human rights might have been violated but refused to find that corporations have a duty to respect those rights.[207]

Arbitrators may have personal reasons to find in favor of investors like Bear Creek. A study by Malcolm Langford et al. found that nearly half of all investor-state arbitrations since January 1, 2017 saw at least one arbitrator "double hatting": serving simultaneously as legal counsel in another action.[208] It is obvious how a system in which human rights are discretionary and money talks might yield perverse incentives for decision-makers. A tribe of a few dozen subsistence farmers likely cannot promise to hire an arbitrator as counsel in a future case, but a multinational corporation can. So long as the place of human rights in international investment arbitration depends on the will of the arbitrator, treaty interpretation cannot be relied on to serve Indigenous interests.

2. Amending ICSID Is an Attainable Route to Elevating Indigenous Rights in Arbitration

Bearing in mind the shortcomings of existing strategies, the ideal approach would combine the feasibility of treaty interpretation with the capacity of treaty drafting to create new law that protects Indigenous interests. Something more is needed than relying on arbitrators to voluntarily prioritize Indigenous rights or waiting for more than 150 state parties to overturn 2,300 treaties[209] against the opposition of some of the richest interest groups in the world. Scholarly attention has focused on modifying or reinterpreting BITs, given that they provide the legal grounding for investor-state arbitration. Yet, BITs are

205. Schill & Djanic, *supra* note 185, at 17 (emphasis added).

206. *See* Bear Creek Mining Corp. v. Republic of Perú, ICSID Case No. ARB/14/21, Partial Dissenting Opinion, ¶ 2 (Sept. 12, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw10107.pdf.

207. *See* Bear Creek Mining Corp. v. Republic of Perú, ICSID Case No. ARB/14/21, Award, ¶ 664, (Nov. 30, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw9381.pdf.

208. Malcolm Langford, Daniel Behn & Runar Lie, *The Ethics and Empirics of Double Hatting*, 6 ESIL REFLECTIONS (Eur. Soc'y of Int'l L., Florence, It.), July 24, 2017, at 4.

209. *See supra* notes 55-56 and accompanying text.

not the only aspect of international investment law that can be altered to yield far-reaching effects. Despite supplying the substantive law of investor-state dispute settlement (ISDS), BITs outsource procedure to arbitration institutions. Changing an institution's procedural rules to exclude the claims of culpable investors would preclude recovery under all BITs that have named it the administrator of arbitrations. Modifying ICSID, the preeminent arbitration institution, might thus represent the most promising route to promoting Indigenous rights under international investment law.

a. An Overview of ICSID

In the absence of a court to adjudicate disputes brought under a BIT,[210] state parties must designate which rules will govern the arbitration of investors' claims. The most popular options are ICSID and the United Nations Commission on International Trade Law (UNCITRAL).[211] The former leads by a significant margin. As of December 31, 2020, there have been 1,104 treaty-based investor-state arbitrations around the world.[212] ICSID hosted nearly 60% of them,[213] and UNCITRAL less than a third.[214]

What makes ICSID unique—and likely drives its large caseload—is the insulation that it offers disputants from the interference of domestic governments.[215] Beyond the language of a treaty's dispute-resolution clause and the arbitrators themselves, two other variables exert a large influence on the course of investor-state arbitration: the "place" or "seat" of the arbitration and its institution.[216] The place of the arbitration is a physical location chosen by the parties.[217] Traditionally, its

210. Efforts toward an international investment court, comparable to the ICJ in the criminal context, have thus far been unavailing. For an argument in favor of such a tribunal, see MAYA STEINITZ, THE CASE FOR AN INTERNATIONAL COURT OF CIVIL JUSTICE (2019).

211. Chiara Giorgetti, *Who Decides Who Decides in International Investment Arbitration?*, 35 U. PA. J. INT'L L. 431, 441 (2014).

212. *Investment Dispute Settlement Navigator*, U.N. CONF. ON TRADE & DEV.: INV. POL'Y HUB, https://investmentpolicy.unctad.org/investment-dispute-settlement?status=1000 (last visited Dec. 31, 2020).

213. This figure represents the aggregate of 589 ICSID cases and an additional 65 arbitrated under ICSID's Additional Facility. *Id.* The Additional Facility is an expanded set of rules designed to cover disputes that would otherwise fall outside the bounds of the ICSID Convention. *ICSID Additional Facility Rules*, WORLD BANK: ICSID, https://icsid.worldbank.org/resources/rules-and-regulations/additional-facility-rules/overview (last visited May 17, 2021). These include arbitrations between an ICSID member state and a non-member state (or a national of either). *Id.*

214. *Investment Dispute Settlement Navigator*, *supra* note 212.

215. MICHAEL MCILWRATH & JOHN SAVAGE, INTERNATIONAL ARBITRATION AND MEDIATION: A PRACTICAL GUIDE 21 (2009).

216. *Id.* at 20.

217. *Id.* at 21.

local laws dictate the procedural law of the dispute as well as which court will supervise—"or in some cases, interfere with and obstruct"—the proceedings.[218] When two states enter into a BIT, however, they can designate an arbitration institution whose procedures supplant those of the seat.[219] Even so, there remain critical gaps in the coverage of the institution's rules. These exceptions, known as "mandatory provisions," remain under the seat's control.[220] They stipulate what form the arbitration agreement must take, the tribunal's competence to determine its own jurisdiction, and the circumstances under which the state's courts may invalidate the award.[221] These holdouts of state power can undercut the feasibility of arbitration and the enforceability of any resulting award.[222]

By contrast, ICSID has no place of arbitration.[223] The Centre is the product of a multilateral treaty, the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.[224] Since its entry into force on October 14, 1966,[225] this document has come to count 163 signatory states.[226] Under the Convention, ICSID is "a self-contained system governed by its own . . . arbitration rules" and free from the meddling of host jurisdictions.[227] It offers claimants greater security by barricading the entry points through which other arbitration institutions allow domestic courts to pass.[228] This does not make it popular with national governments. Indeed, host states are "often hostile toward ICSID clauses," given the affront to sovereignty that they pose.[229] Nevertheless, Tod Allee and Clint Peinhardt find that a state's readiness to accept ICSID into its BITs increases with its degree

218. *Id.*

219. *See id.* at 25.

220. *Id.*

221. *Id.*

222. If the courts of the arbitral seat overturn an award, as they have the authority to do in most states, the prevailing claimant may have trouble enforcing its award in other national courts. *See id.* at 24-25. To be sure, there are jurisdictions—such as France—that recognize even awards that have been revoked by the courts of the arbitral seat. *Id.*

223. *Id.* at 23.

224. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

225. Georges R. Delaume, *ICSID Arbitration in Practice*, 2 INT'L TAX & BUS. LAW. 58, 58 (1984).

226. *Database of ICSID Member States*, WORLD BANK: ICSID, https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx (last visited May 17, 2021).

227. MCILWRATH & SAVAGE, *supra* note 215, at 23.

228. *See* Delaume, *supra* note 225, at 68.

229. Todd Allee & Clint Peinhardt, *Delegating Differences: Bilateral Investment Treaties and Bargaining over Dispute Resolution Provisions*, 54 INT'L STUD. Q. 1, 1 (2010).

of dependence on foreign capital and aid.[230] Much like BITs themselves historically did,[231] ICSID favors multinational corporations and so represents a condition that they place on the potential recipients of their investments.

b. Contrary to Critics, Denying Arbitration to Offending Claimants Is a Feasible Way to Safeguard Indigenous Communities

ICSID's exclusion of outside legal arbiters and widespread use drive its popularity with the private sector. Yet, these features are precisely what could make it a check on corporate dominance of the international investment regime. Under Article 26 of the Convention, BITs that designate ICSID as their administering institution deny claimants access to "any other remedy" beyond what the tribunal awards.[232] If ICSID were modified to exclude the claims of parties that lost their investments after harming the surrounding communities, those parties would be left with no recourse under the law.[233] Trouncing human rights would cease to be costless, and the financial incentives not to stoke local unrest would rise.

Critics of this position maintain that ICSID is all but immutable and, even if it could be altered, would have no authority to compel tribunals to hear human rights concerns. Goldstein observes, "Most scholars agree that mending [the Convention] is 'nearly impossible,' as it has not been changed since 1965 and has resisted other more spirited attacks on its severe rigidity."[234] Diana Marie Wick shares his skepticism, noting that amending the Convention requires complete consensus among the member states, a condition she deems "unlikely to the point of impossibility."[235] Further, she asserts, BITs are the substantive source of international investment law. Were ICSID to allow for the consideration

230. *Id.* at 20.

231. *See supra* notes 51-54 and accompanying text.

232. *See* Delaume, *supra* note 225, at 67.

233. ICSID lacks an appellate mechanism. *Post-Award Remedies*, WORLD BANK: ICSID, https://icsid.worldbank.org/en/Pages/process/Post-Award-Remedies-Convention-Arbitration.aspx (last visited May 17, 2021). A dissatisfied claimant may seek to have the award revised, but this entails the production of new facts that "could decisively affect that award." *Id.* Under a policy whereby the claims of human-rights violators exceed the tribunal's jurisdiction, the only hope of a claimant that had failed this criterion would be to advance new evidence that it did not, in fact, harm relevant stakeholders. A situation in which evidence substantiating this claim comes to light only after the conclusion of the original arbitration is difficult to envision.

234. Goldstein, *supra* note 103, at 383.

235. Diana Marie Wick, *The Counter-Productivity of ICSID Denunciation and Proposals for Change*, 11 J. INT'L BUS. & L. 239, 287–88 (2012).

of human rights, it would be tantamount to "invent[ing] new rules or law": an unjustifiable expansion beyond the Centre's procedural mandate.[236]

Compounding the difficulty of securing consensus, Aaron Cosbey notes that states often have aims that run contrary to humanitarianism. Writing two years before ICSID resolved to require the disclosure of a tribunal's reasoning and allow amicus briefs over party opposition,[237] Cosbey predicted that these amendments "would be a Herculean task."[238] Reasoning that "some governments ... worr[y] about the embarrassment of having their possible misbehaviour aired in full public view," he contended that many would find such proposals contrary to their interests and reject them.[239] Cosbey's critiques did not bear out in their original context. Yet, building on his logic, one could envision states that profit from Indigenous exploitation obstructing proposals to elevate the standing of these communities—especially if they entailed access to an international tribunal.

While the impediments that these authors note are valid, they are orthogonal to barring human-rights violators from arbitration. Altering the ICSID Convention might be untenable, but it is unnecessary to reshape the Centre's procedural rules. Arbitration institutions are powerless to replace BITs with their own substantive law. Thus, a proposal to include Indigenous peoples as parties to disputes that implicate their rights would exceed ICSID's authority.[240] However, an amendment that denies the claims of ill-doing investors would not overstep the bounds of the panel's jurisdiction. Moreover, while some states might oppose measures that empower Indigenous communities, all national governments—especially those of the developing states that so often stumble in investor-state arbitration—have an incentive to constrain ICSID's power. Limiting its jurisdiction would do precisely that.

c. Precedent Indicates that Barring Violators Is Not Too Drastic a Change to ICSID's Rules

ICSID's policies have been repeatedly altered since 1966 by skirting the Convention and instead modifying the Centre's Regulations and

236. *Id.* at 288.

237. *See infra* notes 250–57 and accompanying text.

238. Aaron Cosbey, *The Road to Hell?: Investor Protections in NAFTA's Chapter 11*, *in* INTERNATIONAL INVESTMENT FOR SUSTAINABLE DEVELOPMENT: BALANCING RIGHTS AND REWARDS 150, 168 (Lyuba Zarsky ed., 2004).

239. *Id.*

240. *See supra* Part II.B.1.

Rules.[241] Though often referred to collectively, the Rules consist of four bodies of policy that govern distinct subjects, from administrative functions to conciliation.[242] The provisions most relevant to dispute resolution are the Arbitration Rules. These dictate the procedures for constituting the tribunal,[243] the parties' presentation of their arguments,[244] and the panel's review of its jurisdiction to hear a dispute (*kompetenz-kompetenz*).[245] While unanimity is needed to modify the Convention, an amendment to the Regulations and Rules requires only a two-thirds vote of the Centre's Administrative Council.[246] The Council consists of one representative from each member state and serves as ICSID's governing body.[247] Historically, garnering the necessary votes from among these representatives has proven far from impossible. Formal amendments to the Arbitration Rules were made in 1970, 1975, 1984, 2003, and 2006.[248] A sixth round of changes has been ongoing since 2016.[249]

Modifying the Rules and Regulations can generate sweeping change in ICSID's arbitral practices. The 2006 amendments were particularly weighty,[250] in essence upending a cardinal virtue of arbitration: its privacy. Since the Middle Ages, businesses have favored this mode of dispute resolution for the ability that it offers to conduct their affairs outside of the public eye.[251] This rationale carried forward into the international commercial regime.[252] Confidentiality has been considered "the principal fundamental characteristic of international arbitration, upon which parties

241. *A Brief History of Amendment to the ICSID Rules and Regulations*, WORLD BANK, https://icsid.worldbank.org/news-and-events/speeches-articles/brief-history-amendment-icsid-rules-and-regulations (last visited Oct. 19, 2021) [hereinafter *A Brief History*].

242. Antonio R. Parra, *The New Amendments to the ICSID Regulations and Rules and Additional Facility Rules*, 3 LAW & PRAC. INT'L CTS. & TRIBUNALS 181, 181-82 (2004).

243. ICSID Convention, *supra* note 224, Arb. Rules, r. 1-12.

244. *Id.* Arb. Rules, r. 29-36.

245. *Id.* Arb. Rules, r. 41.

246. Aurélia Antonietti, *The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules*, 21 ICSID REV.-FOREIGN INV. L.J. 427, 428 (2006).

247. *Administrative Council*, WORLD BANK: ICSID, https://icsid.worldbank.org/en/Pages/about/Administrative-Council.aspx (last visited May 17, 2021).

248. *A Brief History*, *supra* note 241.

249. *Id.*

250. LUCY REED, JAN PAULSSON, & NIGEL BLACKABY, GUIDE TO ICSID ARBITRATION 11 (2004).

251. Deborah R. Hensler & Damira Khatam, *Re-Inventing Arbitration: How Expanding the Scope of Arbitration Is Re-Shaping Its Form and Blurring the Line Between Private and Public Adjudication*, 18 NEV. L.J. 381, 388, 400 (2018).

252. Amanda L. Norris & Katrina E. Metzidakis, *Public Protests, Private Contracts: Confidentiality in ICSID Arbitration and the Cochabamba Water War*, 15 HARV. NEGOT. L. REV. 31, 43 (2010).

'place the highest value.'"[253] Yet, the amended Rule 48 requires ICSID to publish the legal reasoning behind a tribunal's holding.[254] For the sake of the parties' confidentiality, the draft version of this Rule had suggested distributing only the "legal conclusions" of a case.[255] Nevertheless, the Administrative Council voted to broaden this recommendation, lifting the veil on the disputants' arguments and the underlying facts alike.[256] Further diminishing ICSID's insulation from non-parties, Rule 37 was amended to enable the tribunal to accept amicus briefs, despite the opposition of either party.[257]

Beyond their transformation of one of arbitration's core tenets, the 2006 amendments are noteworthy for demonstrating the willingness of member states to contravene investors' wishes. Since the dawn of BITs, claimants had been free to resolve their disputes—even those that implicated issues of great importance to citizens of a host state—beyond the reach of public scrutiny. Now, they would no longer be able to discretely hoist billion-dollar awards from host countries, all because the Administrative Council had decided that it would be so. Enough member states defied the interests of their richest constituents to make public a dispute resolution system whose hallmark is its privacy. It stands to reason that they could agree to deem certain claims inadmissible.

d. Adding a Human Rights Amendment Enjoys Ample Support in ICSID Case Law

Creating an ICSID that bars human-rights violators' claims may require nothing more than the current Arbitration Rules and to memorialize ethical guidelines that numerous tribunals have already professed. Whether reviewing the claimant's conduct is an issue of substantive or procedural law, the current Rules empower the tribunal to consider both in examining its competence to hear a case: a review that several panels have found

253. *Id.* (quoting *Expert Report of Stephen Bond Esq (in* Esso/BHP v. Plowman*)*, 11 ARB. INT'L 273, 273 (1995)).

254. Mark Kantor, *Amendments to the ICSID Arbitration Rules Take Effect*, 8 ASIAN DISP. REV. 127, 129 (2006).

255. *Id.*

256. *See id.*

257. Fernando Dias Simões, *Myopic Amici?: The Participation of Non-Disputing Parties in ICSID Arbitration*, 42 N.C. J. INT'L L. 791, 802 (2017) (observing that, pursuant to the new Rule 37, "[t]he decision on whether to accept amicus curiae briefs cannot be vetoed by the parties" and instead "rests with the tribunal"). Amicus submissions were unheard of in investment arbitration before 2001 and, until the 2006 amendments, could be denied at the discretion of either disputant. Nicolette Butler, *Non-Disputing Party Participation in ICSID Disputes: Faux Amici?*, 66 NETH. INT'L L. REV. 143, 146 (2019).

it is duty-bound to conduct. In doing so, arbitrators do not legislate from the bench when looking beyond the BIT's text to verify that an investor's treatment of local stakeholders complies with bedrock principles of international law. Multiple panels have held that human rights must be part of the tribunal's jurisdictional review and that violations by a claimant may preclude recovery. An amendment conditioning admissibility on the claimant's rights record would not be a deviation from current practice. It would build on existing law and codify principles that undergird arbitration even now.

If the finding that a claimant has violated human rights is to serve as a bar to recovery, the panel must be able to review the admissibility of a case. Arbitration Rule 41 offers that power.[258] Among ICSID's original Regulations and Rules, Rule 41 has since its introduction enabled the tribunal to inquire "on its own initiative" and "at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence."[259] In 2006, a new subpart was added to the Rule, enabling the panel to dismiss cases that are "manifestly without legal merit."[260] Unlike the strictly procedural vetting performed by ICSID's Secretary-General,[261] the tribunal's "broader" authority thus extends to the substance of the claim.[262] If anything were to prevent panels from treating human rights as a check on arbitration, it would not be the breadth of issues—whether substantive or procedural—that they may consider at this preliminary stage.

The procedural-substantive divide *would* determine whether a prohibition on human-rights violators' claims is classified as a defect in the panel's jurisdiction or in the claim itself. However, as applied to a policy of reviewing claimants' conduct, this classification is an empty exercise. Procedural objections to the hearing of a case go to the panel's

258. ICSID Convention, *supra* note 224, Arb. Rules, r. 41.

259. *See* INT'L CTR. FOR SETTLEMENT INV. DISPS., ICSID REGULATIONS AND RULES 106 (1975). As the Arbitration Rules were not modified between their 1968 effective date and 1984, the above-cited copy of the Regulations and Rules reflects the original text of Rule 41. *See ICSID Convention Arbitration Rules*, WORLD BANK: ICSID, https://icsid.worldbank.org/resources/rules-and-regulations/convention/arbitration-rules (last visited May 17, 2021).

260. ICSID Convention, *supra* note 224, Arb. Rules, r. 41(5); Eric De Brabandere, *The ICSID Rule on Early Dismissal of Unmeritorious Investment Treaty Claims: Preserving the Integrity of ICSID Arbitration*, 9 MANCHESTER J. INT'L ECON. L. 23, 24 (2012) (providing Rule 41's date of modification).

261. Chester Brown & Sergio Puig, *The Power of ICSID Tribunals to Dismiss Proceedings Summarily: An Analysis of Rule 41(5) of the ICSID Arbitration Rules* 2 (Sydney L. Sch., Research Paper No. 11/33, 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1859446.

262. *Id.*

jurisdiction: its "capacity . . . to hear a dispute—*any* dispute—brought before it by the parties."[263] A claim's admissibility, meanwhile, "is often more closely connected to the merits."[264] "[T]he boundary between jurisdiction and admissibility" in international arbitration "is particularly fluid."[265] The ICSID Convention contains no "express differentiation between the two concepts," and many "tribunals see no need to distinguish between" them.[266] Rule 41's provision that both procedure and substance may be dealt with during the panel's preliminary review further dampens the need for line-drawing.[267] Hence, categorizing human rights as a condition on either jurisdiction or admissibility "is really not of great importance."[268]

Much more relevant is whether a rule mandating human-rights review would be a change in substantive or procedural law. In the latter case, a two-thirds vote of the Administrative Council could amend Rule 41 to require consideration of the claimant's conduct just as simply as it implemented dismissal on the merits in 2006.[269] Were this new requirement deemed a change in substantive law, however, it would become a treaty-drafting proposal, requiring the modification of several thousand BITs.[270] While the panel is free to dismiss on substantive grounds, it cannot invent new substance on which to do so.

Yet, human-rights review would represent not an invention but an affirmation. ICSID jurisprudence attests that some universal principles impliedly attach to every BIT and bar recovery when breached no less than explicit provisions.[271] In *Abaclat v. Argentine Republic*, the panel

263. Cameron A. Miles, *Corruption, Jurisdiction and Admissibility in International Investment Claims*, 3 J. INT'L DIS. SETTLEMENT 329, 334 (2012).

264. *Id.* at 352.

265. Michael Waibel, *Investment Arbitration: Jurisdiction and Admissibility* 3 (Univ. Cambridge Fac. L. Legal Stud. Rsch. Paper Series, Paper No. 9/2014, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2391789.

266. *Id.* at 6.

267. *Id.* at 7 ("It is very rare for there to be three phases to investment arbitrations, the first focusing on objections to jurisdiction, the second focusing on objections as to admissibility and the third focusing on the merits.").

268. *See* Ian A. Laird, *A Difference Without a Distinction?: An Examination of the Concepts of Admissibility and Jurisdiction in* Salini v. Jordan *and* Methanex v. USA, *in* INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 201, 222 (Todd Weiler ed., 2005).

269. *See supra* note 260 and accompanying text.

270. *See supra* Part II.B.1.

271. For example, Eric De Brabandere observes that "[t]he principles of 'good faith' and 'abuse of process' in assessing the submissions of investment treaty claims . . . are increasingly taking a prominent role" in ISDS. De Brabandere, *supra* note 260. In his view, Rule 41(5)'s provision for dismissal based on substantive defects in the claim "can be seen as a clear emanation of" these principles. *Id.*; *see also* Matthew T. Parish, Annalise K. Nelson & Charles B. Rosenberg,

endorsed the view that jurisdiction "cannot be considered to extend to investments done under circumstances breaching . . . good faith," a standard that concerns not only "procedural aspects" of the arbitration but also the "context and . . . way in which the investment was made."[272] Each of these elements may be "dealt with . . . [in an] examination of the Tribunal's jurisdiction."[273] While "good faith" resists precise definition,[274] it clearly encompasses claimants' misconduct.[275] Where, for example, a claimant has been granted an investment opportunity due to misstatements about its "history and experience" or the willingness of indispensable third parties to participate, such violations of good faith have foreclosed its award.[276] If telling lies in the course of an

Awarding Moral Damages to Respondent States in Investment Arbitration, 29 BERKELEY J. INT'L L. 225, 243 (2011) ("[I]t is reasonable to conclude that an implied term of the arbitration agreement is that the claimant will act with good faith and honesty in the course of any proceedings arising.").

272. Abaclat and Others v. Arg. Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶¶ 647-49 (Aug. 4, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0236.pdf. *Abaclat* refers to this latter variety of good faith as "material." *Id.* ¶ 648. Summarizing previous decisions, the *Abaclat* tribunal found that material and procedural good faith may serve either to preclude jurisdiction in the first instance or to deny claimant's award at the merits stage of arbitration. *Id.* ¶¶ 647-50 ("There are certainly good reasons in support for each of these approaches, and the choice of the appropriate approach will eventually depend on the circumstances of the case at stake.").

273. *Id.* ¶ 648; *see also* Eric De Brabandere, *'Good Faith', 'Abuse of Process' and the Initiation of Investment Treaty Claims*, 3 J. INT'L DISP. SETTLEMENT 609, 612 (2012) ("'[M]aterial good faith' and 'procedural good faith' may both operate at the jurisdictional level.").

274. Bruno Zeller & Richard Lightfoot, *Good Faith: An ICSID Convention Requirement?*, 8 VICTORIA U. L. & JUST. J. 17, 19 (2018) ("The real issue and hence the problem is that there is no uniform explanation of good faith, let alone definition.").

275. *See* Abby Cohen Smutny & Petr Polášek, *Unlawful or Bad Faith Conduct as a Bar to Claims in Investment Arbitration*, *in* A LIBER AMICORUM: THOMAS WÄLDE; LAW BEYOND CONVENTIONAL THOUGHT 277, 277 (Jacques Werner & Arif Hyder Ali eds., 2009) ("[C]laims have been dismissed in a number of recent cases in circumstances where the tribunal was persuaded that the claimant had acquired or established its investment in a manner that constituted abusive or bad faith conduct.").

276. *See* Inceysa Vallisoletana, S.L. v. Republic of El Sal., ICSID Case No. ARB/03/26, Award, ¶¶ 110, 234 (Aug. 2, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0424_0.pdf (denying the claim of a vehicle-emissions contractor whose grant had been procured by "false and incorrect financial information" and "in violation of the principle of good faith"). The same result was ordered in *Azinian v. United Mexican States*, where claimants' "unreasonably optimistic" representations about a key third party's participation in their waste-collection project "w[ere] unconscionable," justifying the host state's rescission. ICSID Case No. ARB(AF)/97/2, Award, ¶¶ 108-10 (Nov. 1, 1999), https://www.italaw.com/sites/default/files/case-documents/ita0057.pdf. While the *Azinian* tribunal did not call out good faith by name, I am not the first author to draw a parallel to *Inceysa*. *See, e.g.*, Jason Webb Yackee, Essay, *Investment Treaties and Investor Corruption: An Emerging Defense for Host States?*, 52 VA. J. INT'L L. 723, 737 n.73 (2012) ("*Azinian* . . . hints at *Inceysa*'s good faith principle.").

investment breaches ethical principles so as to justify expropriation by the host state, it is unclear why violating the terms of a grant from the state, leading to loss of life or environmental degradation, would not.

Beyond mere conjecture, several tribunals have argued that human rights, like good faith, are an implied term that demands examination during preliminary review. In *Phoenix Action, Ltd. v. Czech Republic*, an Israeli company asserted that the host state's ponderous investigation of its subsidiaries constituted denial of justice.[277] Though neither party raised the issue of human rights, the tribunal observed that "the ICSID Convention's jurisdictional requirements—as well as those of the BIT—cannot be read and interpreted in isolation from public international law."[278] According to the panel, "[N]obody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights."[279]

Similarly, in *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, the tribunal held that any act by the claimant that "raises or could have raised an international responsibility of the [host state]" must be analyzed "in order to determine whether the investor has claimed with clean hands."[280] Those who violate "international principles of good faith ... [or] the host State's law" will find ICSID's doors closed.[281] Citing *Phoenix*, the *Hamester* tribunal asserted that such principles "exist independently of specific language ... in the [relevant BIT]."[282] To be sure, Marcin Kałduński's recent review of ICSID decisions found no instance in which a tribunal refused to admit a claim due to the investor's alleged human-rights abuses.[283] Yet, as Kałduński and the above-mentioned panels observe, a tribunal is within its power to "invoke the principle of clean hands ... and hold that unacceptable conduct of the investor, consisting of a breach of human rights, must

277. Phoenix Action, Ltd. V. Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 44 (Apr. 15, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0668.pdf.

278. *Id.* ¶ 78; *see also* Methanex Corp. v. United States, Final Award on Jurisdiction and Merits, ¶ 24 (Aug. 3, 2005), https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf ("[T]he Tribunal agrees ... that as a matter of international constitutional law a tribunal has an independent duty to apply imperative principles of law or *jus cogens* and not to give effect to parties' choices of law that are inconsistent with such principles.").

279. *Phoenix Action, Ltd.*, ICSID Case No. ARB/06/5, Award, ¶ 78.

280. *See* ICSID Case No. ARB/07/24, Award, ¶ 317 (June 10, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0396.pdf.

281. *Id.* ¶ 123.

282. *Id.*

283. Marcin Kałduński, *Principle of Clean Hands and Protection of Human Rights in International Investment Arbitration*, 4 POLISH REV. INT'L & EUR. L. 69, 97 (2015).

be regarded as an insurmountable obstacle to the admissibility of the investor's claims."[284]

Consistent with these universal standards, inflicting harm on Indigenous stakeholders in violation of local law ought to preclude a claimant's award.[285] Partially dissenting in *Bear Creek*, Arbitrator Professor Sands contends that "ICSID [is not] an insurance policy against the failure of an inadequately prepared investor to obtain . . . [a social] license" from the community.[286] To the extent that a claimant's expropriation owes to "its own failures" of consensus-building, Professor Sands would deny recovery.[287] Mounting recognition of the clean-hands imperative by arbitrators such as Sands, the *Hamester* and *Phoenix Action* tribunals, and others offers support for making this implied rule explicit in an amendment to Rule 41.

Even if such a modification were adopted, however, it would offer only flimsy support for Indigenous rights unless reviewing claimants' conduct were made mandatory. An optional rule is a stopgap at best for the same reason as voluntary proposals to have arbitrators interpret BITs in line with international principles: failure to account for their incentives to prioritize investors' interests.[288] The current Rule 41 provides for permissive self-review of the panel's jurisdiction. Hence, mere discretion would need to be swapped out for compulsion to implement a human-rights restriction on arbitration.

Akin to rights review, the requirement that a tribunal evaluate its own jurisdiction appears to already be solidifying.[289] In *Mihaly International*

---

284. *Id.*

285. *See id.* at 85 ("[T]he disputed investment ha[s] to be in conformity with the host State laws and regulations.").

286. Bear Creek Mining Corp. v. Republic of Perú, ICSID Case No. ARB/14/21, Partial Dissenting Opinion, ¶ 37 (Nov. 30, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw10107.pdf; *see also* Laplante & Spears, *supra* note 26, at 93-94 (asserting that a customary international norm of free, prior, and informed consent has begun to coalesce, given this principle's inclusion in UNDRIP, the International Covenant on Civil and Political Rights, and numerous other multilateral treaties).

287. *Bear Creek*, ICSID Case No. ARB/14/21, Partial Dissenting Opinion, ¶ 37. While not going so far as to eliminate the award, Arbitrator Professor Sands would have halved the claimant's recovery, finding that its part in stoking the local unrest that led to the expropriation of its investment "was significant and material" and "no less than th[at] of the government." *Id.* ¶ 38.

288. *See supra* Part II.B.1.

289. *See infra* notes 290-96; *see also* Garanti Koza LLP v. Turkm., ICSID Case No. ARB/11/20, Dissenting Opinion, ¶ 5 (July 3, 2013), https://www.italaw.com/sites/default/files/case-documents/italaw1541.pdf (asserting that "the principle of *compétence de la compétence* [*kompetenz-kompetenz*] requires an arbitral tribunal . . . to establish the extent and limits of its jurisdiction . . . and not to go beyond it"); CHRISTOPH H. SCHREUER, LORETTA MALINTOPPI, AUGUST REINISCH & ANTHONY SINCLAIR, THE ICSID CONVENTION: A COMMENTARY ¶ 50 (2d ed. 2009) (arguing that arbitrators "cannot rely on the parties' understanding" and must instead evaluate their competence to hear a claim "independently of the parties' consent"); Kathigamar V.S.K. Nathan,

Corp. v. Democratic Socialist Republic of Sri Lanka, the tribunal observed that "[a]s a preliminary matter, the question of the existence of jurisdiction . . . must be examined *proprio motu*."[290] Likewise, in *Standard Chartered Bank Ltd. v. Tanzania Electric Supply Co.*, the ad hoc committee evaluating the respondent's application for annulment determined that the previous tribunal had "correctly acknowledged its *duty* to examine its jurisdiction . . . regardless of whether the Parties had raised any objections on this matter."[291]

The tribunal in *Salini Costruttori S.p.A. v. Kingdom of Morocco* similarly attested to the necessity of verifying its own jurisdiction, albeit in response to a motion by the host state.[292] Recalling Article 25's stipulation that an investor-state dispute must "aris[e] directly out of an investment,"[293] the panel held that this "requirement must be respected as an objective condition of the jurisdiction of the Centre."[294] Setting aside the terms of Italy-Morocco BIT, the *Salini* tribunal looked to the ICSID Convention and case law to delineate the limits of its authority.[295] In prioritizing the terms of the Convention over the expectations of the state parties to the relevant treaty, *Salini* implicitly recognized an independent duty on the tribunal "to police ICSID's jurisdictional limits."[296]

Support for the tribunal's duty to examine its own competence, together with evidence that including human rights in that review would not require a shift in substantive law, provides the foundation for a mandatory policy of policing claimants' conduct. In its current form,

---

Submissions to the International Centre for Settlement of Investment Disputes in Breach of the Convention, 12 J. INT'L ARB. 27, 41 (1995) ("It is submitted that an international tribunal, including an ICSID tribunal, has powers to examine its own competence *ratione personae* and although it is not so expressed in the ICSID Convention, an ICSID tribunal *must* satisfy itself, if needs be *proprio motu*, regardless of consent, that the parties before it have *locus standi* under the Convention." (emphasis added)); *see also* Jason Rotstein, *Before Ending the Case: Disassembling Jurisdiction and Admissibility in* BG v. Argentina, 51 GEO. J. INT'L L. 82, 97 (2019) ("Jurisdiction is such an important issue that an arbitral tribunal has a near obligation to not pass over the issue and raise and resolve the issue on its own initiative, regardless of the pleadings.").

290. ICSID Case No. ARB/00/2, Award, ¶ 56 (Mar. 15, 2002), https://www.italaw.com/sites/default/files/case-documents/ita0532.pdf.

291. ICSID Case No. ARB/10/20, Annulment Proceeding, ¶ 215 (Aug. 22, 2018), https://www.italaw.com/sites/default/files/case-documents/italaw9910_0.pdf (emphasis added).

292. ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶¶ 50-52 (July 23, 2001), 42 I.L.M. 609, 622 (2003).

293. ICSID Convention, *supra* note 224, art. 25.

294. *Salini*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52.

295. *Id.* ¶¶ 50-52.

296. Perry S. Bechky, Salini*'s Nature: Arbitrators' Duty of Jurisdictional Policing*, 17 J.L. & PRAC. INT'L CTS. & TRIBUNALS 145, 145 (2018) ("Clearly, *Salini* imposes a duty on the tribunal . . .").

Rule 41 empowers the panel to scrutinize both procedure and the merits—and to dismiss claims found to be defective under either category. Multiple tribunals have held that international law, including human rights, is an implied term of any investment treaty and undermines the recovery of claimants with unclean hands. Far from the impossibility of BIT redrafting and the ineffectiveness of hoping for arbitrators to reinterpret the legal status quo, modifying ICSID's Arbitration Rules could represent an attainable bar to culprits' claims.

e. States Might Support the Amendment Because It Resonates with International Trade Law, Boosts State Power, and Reflects Public Demands

Legal possibility does not mean political reality. Yet, a proposal to institute human-rights review could garner the Administrative Council's support for several reasons. First, the vast majority of ICSID's member states recognize a similar policy of subordinating corporate interests to human rights in a parallel context to bilateral investment: international trade. Second, decreasing the Centre's jurisdiction would increase state power: an attractive prospect to the many governments among the Council's membership who criticize ISDS for infringing on state sovereignty. Finally, public outcry against unethical outcomes in arbitration has prompted ICSID's member states to alter the Rules before, indicating that the Council does not have a monopoly on change and may be swayed by scholarly and grassroots activism.

Underscoring the viability of barring offenders' claims from international arbitration, a comparable measure already exists under international commercial law. In Article XX of the General Agreement on Tariffs and Trade (GATT), the World Trade Organization (WTO) recognizes several General Exceptions to its policy of non-protectionism.[297] These carveouts empower states to regulate in the interest of public morals,[298] human, animal, or plant welfare,[299] and cultural heritage.[300] States may even act in "in a manner that amounts to discrimination" against foreign business, so long as their policies are not arbitrary or unjustifiable.[301]

Despite "[t]he traditional separation of trade and investment law," the two fields exhibit many commonalities, which make it conceivable

297. General Agreement on Tariffs and Trade, art. XX, *opened for signature* Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 194.

298. *Id.* art. XX(a).

299. *Id.* art. XX(b).

300. *Id.* art. XX(f).

301. *Id.* art. XX.

to "import[] GATT principles into ICSID."[302] Beyond their shared location under the umbrella of international commerce, each usually falls within the purview of a single government office.[303] Many business operations involve both trade and investment, and certain areas of one may be subsumed by the other.[304] Furthermore, a supermajority of ICSID's members also belong to the WTO (138 of 163, or 85%).[305] A proposal to enact a human-rights exception to ICSID's jurisdiction would thus be voted on by many of the same states that have already acceded to a similar caveat in similar circumstances.

Of course, empowering states to refuse others' imports is not the same as requiring a panel to deny a remedy to human-rights violators. The former adds to the power of national governments; the latter subtracts from that of the tribunal. Yet, both provisions yield analogous effects. Article XX insulates states from liability for protectionist policies that safeguard domestic stakeholders. By the same token, a modified Rule 41 would authorize states to protect local communities from mistreatment by investors without exposing themselves to claims of expropriation.

To be sure, Article XX could be said to operate *ex ante*, permitting states to prohibit imports before they are sent. By contrast, a restriction on the panel's jurisdiction necessarily postdates investor misconduct. A claimant in ISDS has presumably suffered greater financial loss than one who has not been permitted to sell in the first place. This distinction might seem to undermine inferences about the Arbitration Rules drawn from GATT. However, Article XX does not apply with any less force when aggrieved parties have come to rely on the business of the state that now refuses their imports. For example, a WTO panel found that France was justified to ban the importation of chrysotile, a form of asbestos, out of concern for its citizens' health and safety.[306] This measure was devastating to Canada, which produced more than two-thirds of France's chrysotile imports and for which the material was a nearly

302. Kate M. Supnik, Note, *Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law*, 59 DUKE L.J. 343, 365 (2009).

303. *Id.*

304. *Id.*

305. ICSID counts 163 member states, of which twenty-five do not belong to the WTO. *See Database of ICSID Member States*, *supra* note 226; *Members and Observers*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited May 16, 2021).

306. Panel Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶¶ 3.20, 8.222-8.223, WTO Doc. WT/DS135/R (adopted Sept. 18, 2000) [hereinafter Asbestos Panel Report].

$300 million industry.[307] Despite Canada's interest in the French market, "[i]n the light of France's public health objectives," the panel concluded that the prohibition "satisfie[d] the conditions of Article XX."[308] Surely eliminating an entire market[309] is no less damaging than seizing a mine. Since Article XX and a revised Rule 41 would have comparable effects in like contexts, the existence of the former supports the feasibility of the latter.

A human rights exception to arbitration would also advantage host states. Developed and developing countries alike resent investment arbitration and the constraints that it places on their sovereignty. Stephan W. Schill and Vladislav Djanic observe that states often perceive ISDS as a "threat[] to community interests [for] one-sidedly protecting foreign investors and undermining public policies that are to the benefit of the local population."[310] These concerns recently animated controversy around the Trans-Pacific Partnership (TPP). In a February 2015 article, Senator Elizabeth Warren lambasted the TPP for "allow[ing] foreign companies to challenge U.S. laws . . . without ever stepping foot in a U.S. court."[311] Antipathy for this proposal spanned the political spectrum. Within a year of his election, then-President Donald Trump withdrew the United States from the partnership.[312]

The anger that the TPP provoked brings to mind the fate of the Multilateral Agreement on Investment (MAI), a treaty proposed in

---

307. The WTO panel valued Canada's annual chrysolite production in 1997 at $225 million Canadian dollars. *Id.* ¶ 3.20. While the exact date of this valuation is unclear from the panel's report, assuming it were January 1 of that year (the date that the French prohibition took effect), Canada's chrysotile market would be worth the equivalent of $164.3 million U.S. dollars. *Online Currency Converter: Canadian Dollar (CAD) and United States Dollar (USD) Year 1997 Exchange Rate History*, FREE CURRENCY RATES, https://freecurrencyrates.com/en/exchange-rate-history/CAD-USD/1997/cbr (last visited Sept. 2, 2021) (indicating a conversion rate of $0.73 Canadian dollars for each U.S. dollar); Laurie Kazan Allen, Editorial, *WTO Upholds French Ban on Chrysotile*, 7 INT'L J. OCCUPATIONAL & ENV'T HEALTH 246, 246 (2001) (providing the effective date of the chrysolite ban). In today's currency, this amount translates to $275 million U.S. dollars. *Inflation Calculator*, FXTOP, https://fxtop.com/en/inflation-calculator.php?A=100&C1=USD&INDICE=USCPI31011913&DD1=31&MM1=03&YYYY1=1997&DD2=16&MM2=05&YYYY2=2021&btnOK=Compute+actual+value (last visited May 16, 2021).

308. Asbestos Panel Report, *supra* note 306, ¶ 8.222-8.223.

309. *Id.* ¶ 3.20 (observing that the ban "eliminated the French market for chrysotile").

310. Schill & Djanic, *supra* note 185, at 1.

311. Elizabeth Warren, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST (Feb. 25, 2015), https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html.

312. James McBride & Andrew Chatzky, *What Is the Trans-Pacific Partnership (TPP)?*, COUNCIL ON FOREIGN REL. (Jan. 4, 2019), https://www.cfr.org/backgrounder/what-trans-pacific-partnership-tpp.

1995 that would have replaced a large portion of BITs.[313] France eventually withdrew from the negotiations surrounding the MAI, justifying its decision in the same nationalist terms as Senator Warren.[314] Within months, the proposal was abandoned.[315] Despite the popularity of investor-state dispute resolution among the developed world's corporations, the same cannot be said of its governments.

Developing countries have lodged similar criticisms against investment arbitration. The President of Ecuador once claimed that ICSID "signifies colonialism, slavery with respect to transnationals, with respect to Washington, [and] with respect to the World Bank."[316] Bolivian President Evo Morales likewise decried "multinationals that resist the sovereign rulings of countries . . . and initiat[e] suits in international arbitration" when he exited ICSID in 2007.[317] Prohibiting the Centre from arbitrating cases that implicate human rights would increase state authority at the expense of often-maligned transnational corporations. Because such a proposal harmonizes the interests of Global North and South, it may well capture the necessary votes among the state parties.

Finally, modifying the Rules is not the exclusive domain of ICSID's member states. Although the Council has the final decision on whether to alter the Regulations and Rules, it is not the only catalyst of change. Leading up to both the 2006 and current amendment proceedings,[318] ICSID's Secretariat (the legal team responsible for the Centre's operations)[319] solicited proposals from states as well as businesses, arbitration experts, and civil society groups. Many of the non-state parties participating in the present round of submissions are members of the legal community or organizations with a stake in the practice of arbitration. Examples include Judge Charles N. Brower of the Iran-U.S. Claims Tribunal, law professor Susan D. Franck, and third-party litigation

313. Supnik, *supra* note 302, at 359-60.

314. *Id.* at 360 n.124 ("France and Canada, who 'feared an "Americanisation" of global media industries,' supported a cultural exception that would allow discriminatory action in the interest of preserving cultural heritage." (quoting Peter T. Muchlinski, *The Rise and Fall of the Multilateral Agreement on Investment: Where Now?*, 34 INT'L LAW. 1033, 1048 (2000))).

315. *Id.*

316. SUSAN FRANCK, ARBITRATION COSTS: MYTHS AND REALITIES IN INVESTMENT TREATY ARBITRATION 19 (2019).

317. *Bolivia Notifies World Bank of Withdrawal from ICSID, Pursues BIT Revisions*, BILATERALS.ORG, (May 9, 2007), https://www.bilaterals.org/?bolivia-notifies-world-bank-of&lang=fr.

318. Suggested Changes to the ICSID Rules and Regulations ¶ 3 (May 12, 2005), https://icsid.worldbank.org/sites/default/files/Suggested%20Changes%20to%20the%20ICSID%20Rules%20and%20Regulations.pdf; Kantor, *supra* note 254, at 127.

319. *Secretariat*, WORLD BANK, https://icsid.worldbank.org/en/Pages/about/Secretariat.aspx (last visited May 7, 2020).

funder Burford Capital.[320] Nothing prevents NGOs, individuals concerned about human rights, or Indigenous communities from submitting a revision. The Secretariat shares all proposals that it receives (no matter their origin) with ICSID's membership.[321]

Evincing the Council's receptivity to popular opinion, the Rules have been previously modified even when doing so contravened state interests. In *Aguas del Tunari*, Bolivian citizens and NGOs filed a petition requesting to intervene in the arbitration as parties or amici curiae.[322] The President of the Tribunal rebuffed their efforts, stating that he could not allow them to do so without the consent of the disputants.[323] This decision was "fiercely criticized" among academics.[324] Writing the year that *Aguas del Tunari* concluded, legal scholar Loukas Mistelis exhorted ICSID to allow the engagement of amici, contending that the open airing of investment arbitration is "not only justified by the participation of states, but . . . also expected by the public."[325] Motivated by the scorn that *Aguas del Tunari* incurred, subsequent tribunals began allowing the submission of amicus briefs, as in *Suez and Vivendi v. Argentina*.[326] This policy was later codified with the 2006 revisions. Within a year of *Aguas del Tunari*, public demonstrations had "led to the amendment of ICSID Rule 37."[327]

It is no exaggeration to call the present moment's social and environmental activism "unprecedented."[328] Modern consumers "want companies that see social good as a necessity, not just a marketing strategy."[329] They are increasingly joined by asset managers, such as BlackRock,

320. Rule Amendment Project—Member State and Public Comments on Working Paper of August 3, 2018, at 1 (Jan. 15, 2019) (working paper), https://icsid.worldbank.org/sites/default/files/amendments/Compendium_Comments_Rule_Amendment_3.15.19.pdf.

321. *See id.* (noting that the paper includes "all comments received from States and public stakeholders until January 15, 2019"); *Public Input on the Rule Amendments*, WORLD BANK: ICSID, https://icsid.worldbank.org/amendments/public-input (last visited Oct. 20, 2021) (listing all public comments received on the amendment process to date).

322. Antonietti, *supra* note 246, at 433.

323. *Id.*

324. Butler, *supra* note 257, at 146.

325. Loukas A. Mistelis, *Confidentiality and Third Party Participation:* UPS v. Canada *and* Methanex Corporation v. United States, 21 ARB. INT'L 211, 224 (2014).

326. Butler, *supra* note 257, at 146-47.

327. *See id.* at 147.

328. Lara Birkes, Chief Sustainability Officer, Hewlett Packard Enterprise, Address at DS Virgin Racing Innovation Summit (July 14, 2017), https://community.hpe.com/t5/Advancing-Life-Work/Honesty-Over-Perfection-Navigating-the-Urgency-of-Climate-Change/ba-p/6971740#.YKHTKX1KjeR.

329. Lily Zheng, *We're Entering the Age of Corporate Social Justice*, HARV. BUS. REV. (June 15, 2020), https://hbr.org/2020/06/were-entering-the-age-of-corporate-social-justice.

Vanguard, and State Street, which together own 40% of corporate stock.[330] Noting that "[c]limate risk presents significant investment risk," BlackRock has warned that it will vote against the directors of portfolio companies that fail to "provide[] a credible plan to transition [their] business model to a low-carbon economy."[331] In this environment of heightened scrutiny on the private sector's ethical practices, international arbitration may soon face its moment of truth.[332] "Few issues in global economic governance have sparked more controversy or public backlash than … ISDS,"[333] with EU Trade Commissioner Cecilia Malmström recently declaring it "the most toxic acronym in Europe."[334] With the very existence of international arbitration under fire, willful blindness to the crimes of investors could soon become politically impossible for ICSID.

3. How Would a Human Rights Amendment Advance Indigenous Rights in Practice?

Were the jurisdiction of the tribunal narrowed to deny human rights violators the Centre's support, it would rebalance the structure of incentives that motivates extractive corporations to exploit Indigenous peoples. Crucially, this proposal would leave unchanged two aspects of

330. Jan Fichtner, Eelke Heemskerk & Javier Garcia-Bernardo, *These Three Firms Own Corporate America*, THE CONVERSATION (May 10, 2017), https://theconversation.com/these-three-firms-own-corporate-america-77072.

331. Jessica McDougall & Danielle Sugarman, *Climate Risk and the Transition to a Low-Carbon Economy*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 2, 2021), https://corpgov.law.harvard.edu/2021/03/02/climate-risk-and-the-transition-to-a-low-carbon-economy/.

332. Roxanne O'Connell & Donal Mac Fhearraigh, *The Climate Emergency Demands a New Approach to Investor-State Disputes*, OPEN SOC'Y FOUNDS.: VOICES (Apr. 13, 2021), https://www.opensocietyfoundations.org/voices/the-climate-emergency-demands-a-new-approach-to-investor-state-disputes (claiming that ISDS provisions neither "protect public interest, nor . . . promote equitable trade and investment" and advocating "for a new approach"); Tai-Heng Cheng, *The Political Backlash Against Investor-State Arbitration*, LAW.COM (Mar. 12, 2021), https://www.law.com/newyorklawjournal/2021/03/12/the-political-backlash-against-investor-state-arbitration/ ("In recent years, investor-state arbitration, or investor-state dispute settlement (ISDS), has faced intense political criticism."); Lauge N. Skovgaard Poulsen & Geoffrey Gertz, *Reforming the Investment Treaty Regime: A 'Backward-Looking' Approach*, BROOKINGS (Mar. 17, 2021), https://www.brookings.edu/research/reforming-the-investment-treaty-regime/; Somesh Dutta, *Will 'Investor-State Arbitration' Survive the COVID-19 Crisis?*, OPINIOJURIS (June 5, 2020), http://opiniojuris.org/2020/05/07/will-investor-state-arbitration-survive-the-covid-19-crisis/; Natalie Sauer, *UN Warned Corporate Courts Could Thwart Climate Efforts*, CLIMATE HOME NEWS (June 24, 2019), https://www.climatechangenews.com/2019/07/24/un-warned-corporate-courts-thwart-climate-efforts/.

333. Skovgaard Poulsen & Gertz, *supra* note 332.

334. Paul Ames, *ISDS: The Most Toxic Acronym in Europe*, POLITICO (Sept. 17, 2015), https://www.politico.eu/article/isds-the-most-toxic-acronym-in-europe/.

the dynamic between these communities, their national governments, and the private sector. Indigenous activism against corporate excess would likely persist, particularly since it has been on the rise in recent years.[335] Host states would continue to nationalize investments when compelled by local activists, as they have done in *Bear Creek*, *Aguas del Tunari*, and elsewhere. Far from the immediate access to arbitration that claimants have enjoyed until now, however, malfeasant investors would find the tribunal's doors locked.

From the moment that the tribunal has been constituted, the amended Rule 41 would compel arbitrators to inquire into the grounds for their jurisdiction.[336] Stipulated expressly in the rule's text would be the obligation that the tribunal determine whether the aggrieved party has claimed with "clean hands." A possible formulation for this condition would be to receive the consent of the communities in whose lands one seeks to operate before commencing a project and to behave in a manner that respects their rights throughout its duration.[337] In the face of so explicit a mandate, whether the tribunal cares enough for Indigenous communities to inquire into the claimant's treatment of them would be irrelevant. An arbitrator's failure to perform such an unambiguous task would demonstrate a "lack of reliability to exercise independent judgment," offering the host state grounds to pursue disqualification under Article 14(1) of the ICSID Convention.[338]

Aside from the possibility that the arbitrators might fail to perform their duties (which exists even now), the *proprio motu* nature of this new rule would render it unnecessary for host states to raise the issue of Indigenous abuse themselves. Although states often deny Indigenous peoples their basic rights and might be disinclined to advocate for them, their unwillingness would not impede the tribunal's consideration of Indigenous welfare. Nevertheless, the modified Rule 41 would offer host states ample incentives to present a defense of Indigenous rights and to disqualify arbitrators if they refused to examine this issue of their own accord. More often than not, respondents lose in investor-state arbitration and are made to pay out hundreds of millions of

335. *See supra* notes 31-34 and accompanying text.

336. I conceive of this *sua sponte* jurisdictional review as occurring in a manner similar to that of the U.S. federal courts. *See, e.g.*, Belleville Catering Co. v. Champaign Mkt. Place, LLC, 350 F.3d 691, 694 (7th Cir. 2003) (dismissing plaintiff's claim *sua sponte* after finding a defect in subject-matter jurisdiction).

337. *See* Laplante & Spears, *supra* note 26, at 84.

338. *Disqualification of Arbitrations—ICSID Convention Arbitration*, WORLD BANK: ICSID, https://icsid.worldbank.org/services/arbitration/convention/process/disqualification (last visited Oct. 20, 2021); ICSID Convention, *supra* note 224, art. 14, ¶ 1.

dollars to claimants.[339] However, under a modified Rule 41, a corporation's mistreatment of Indigenous communities would raise a wall to its recovery. It is difficult to imagine even the most racist national government choosing the annihilation of Indigenous rights for its own sake over a financial get-out-of-jail-free card. As word spreads that human rights violations are fatal to arbitration awards, states may become even *more* emboldened to seize the investments of offending corporations, then defend the expropriation on the grounds that the claimant violated Indigenous rights. The extractive industry's abuses would no longer be cost-free. With no remedy from ICSID, investors would find their options limited. They could forfeit their capital, plead with their home states to renegotiate the terms of the relevant BITs, or seek a more pliable arbitration institution.

The availability of other institutions that might not subject claimants to such strict human rights review may seem to undermine the utility of modifying ICSID.[340] Though a variety of institutions are available in theory, however, investors would often have nowhere but ICSID to turn. Beyond being the most popular arbitration institution among BITs, ICSID has been afforded sole jurisdiction in a large percentage of them. The highest rates of exclusivity are found among the richest countries (in which the multinational corporations cluster) as well as the poorest (home to most Indigenous peoples). Of the BITs that have been signed by the world's seven largest economies and provide for ICSID arbitrations, 54% do so as an exclusive remedy.[341] In states where

339. Samples, *supra* note 152, at 150–51.

340. The Centre is not the only arbitration institution, and many BITs that provide it with jurisdiction over investors' disputes include alternatives. For instance, the U.S. Model BIT, which serves as a template for the trade agreements that the United States enters into with other states, names ICSID, UNCITRAL, and "any other arbitration institution or . . . arbitration rules" as possibilities. 2012 U.S. Model Bilateral Investment Treaty, U.S. DEP'T STATE, art. 24, ¶ 3, https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.

341. *See* Todd Allee & Clint Peinhardt, *Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions*, HARV. DATAVERSE, https://doi.org/10.7910/DVN/5RZSHQ (last visited May 16, 2021) [hereinafter, Allee & Peinhardt, Data]. Allee and Peinhardt's sample consists of 1473 BITs drawn from the UNCTAD Investment Instruments Online Archive: "the primary entity that systematically collects and publishes the text of BITs." Allee & Peinhardt, *supra* note 229, at 15. Filtering their sample to include only treaties signed by the seven largest economies since 1966 (the year that ICSID came into force) yields 375 entries. Allee & Peinhardt, Data, *supra*; *see The Top 25 Economies in the World*, INVESTOPEDIA, https://www.investopedia.com/insights/worlds-top-economies/ (updated Dec. 24, 2020) (listing the United States, China, Japan, Germany, India, the United Kingdom, and France as the seven largest economies, in order, by nominal GDP); Delaume, *supra* note 225 (identifying the ICSID Convention's effective date). Of these, 278 allow for ICSID arbitrations, either exclusively or as one of two or more options. Allee & Peinhardt, Data, *supra*. Among these treaties, 151 (54%) specify ICSID alone. *Id.*

World Bank assistance represents at least 5% of annual GDP, 41% of BITs only name ICSID.[342] Changes to ICSID's Arbitration Rules apply to all treaties that have designated the Centre as a resource for dispute resolution—even to those that predate the revisions.[343] Investors seeking to bring arbitration under a BIT that endorses ICSID alone would thus be left without recourse.

Among the states that most readily represent each side of the conflict between Indigenous communities and extraction, nearly half of all treaties would hereafter subordinate investors' interests to human rights. If unwilling to abandon their investments, corporations would have no option but to pursue treaty renegotiation. This would provide a chance for Indigenous rights to be enshrined in BITs and other trade agreements, the substantive source of international investment law.[344]

III. Conclusion

Amending ICSID represents the most promising means of advancing Indigenous rights within international investment law. This approach achieves what proposals to redraft or reinterpret BITs cannot. Each of these prior solutions depends on the impetus of a party other than Indigenous communities or their national governments: multinational corporations and arbitrators, respectively. In both cases, but especially BIT redrafting, the entity with the greatest power to catalyze change will oppose any deviation from the status quo. In an arbitral regime

---

Since Allee and Peinhardt collected their data, around 800 additional BITs have come into force across the globe. *See International Investment Agreements Navigator*, *supra* note 55. Yet, their sample continues to be used in more recent research into international investment. *See, e.g.*, Fangjin Ye, *The Impact of Bilateral Investment Treaties (BITs) on Collective Labor Rights in Developing Countries*, 15 Rev. Int'l Orgs. 899, 908 (2020) (measuring the number of BITs "in which ICSID is an available option" based on Allee and Peinhardt's sample); Benjamin A. T. Graham, Noel P. Johnston & Allison F. Kingsley, *Even Constrained Governments Take: The Domestic Politics of Transfer and Expropriation Risk*, 62 J. Conflict Resol. 1784, 1803-04 (2017) (examining the relationship between a country's likelihood of violating the property rights of investors and the number of BITs that it has signed, with Allee and Peinhardt's sample providing the latter measurement).

342. Countries that rely on assistance from the World Bank for at least 5% of their GDP have signed 510 of the BITs in Allee and Peinhardt's sample. Allee & Peinhardt, Data, *supra* note 341. Of these, 464 provide for either ICSID exclusively or in combination with one or more other arbitration institutions, and 189 (41%) stipulate ICSID alone. *Id.*

343. *See* John Anthony VanDuzer, Penelope Simons & Graham Mayeda, Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators 440 n. 132 (2013).

344. *See supra* notes 185-91 and accompanying text. To be sure, the barriers to Indigenous communities' self-advocacy within domestic politics might impede their ability to participate in redrafting negotiations as they have in the past.

where trouncing human rights bars claimants' compensation, however, businesses may start to consult Indigenous groups to stave off protests. The threat of losing millions of dollars might spur the extractive industry to welcome Indigenous peoples to share in its decision-making and profits. Visions of oil and mining companies that defer to the free, prior, and informed consent of Indigenous communities are farfetched without a reason for these businesses to change course. An ICSID that punishes their failure to do so would provide such an incentive.

Still, the pursuit of Indigenous rights under international investment law should not end with Rule 41's revision. For one, the amended Rule would be most relevant once a dispute arises. Where extractive operations are involved, this would often be after Indigenous communities have been injured. Although the new Rule 41 would motivate multinational enterprises to avoid harming these groups, there would likely remain outliers such as Perú in which activism is limited, allowing expropriation to remain lucrative. Prophylactic measures are necessary to compel businesses to respect Indigenous peoples in situations where ex post sanctions are unavailing.

More fundamentally, while amending ICSID would offer a procedural safeguard to Indigenous rights, it would not vindicate them. As noted above, ICSID cannot change the substantive rules of international investment law—and is thus powerless to afford Indigenous communities direct representation in arbitration.[345] Citing anthropological research, Laplante and Spears note that agency is the primary concern of Indigenous groups facing the exploitation of their ancestral lands. More than a cut of the profits to be had from mining, these communities desire "visible, tangible forms of recognition" from the industry.[346] Shutting out human rights violators punishes corporate excess and would pressure businesses to enter into economic relationships with Indigenous groups. In this way, Native communities might benefit more from extractive projects than they have until now. Nevertheless, they would receive neither recognition nor compensation for their suffering so long as ISDS admits only corporate claims.

BIT redrafting is a superior approach to promoting the economic health, long-term safety, and dignity of Indigenous communities. New treaties could formally situate Indigenous groups as parties to agreements that impact their lands, affording them the self-determination that they seek. Amending ICSID would set the preconditions for such renegotiation, something that no existing proposal can achieve. A

345. *See supra* note 240 and accompanying text.

346. Laplante & Spears, *supra* note 26, at 78.

modified ICSID that makes corporate excess cost prohibitive would force multinational enterprises to the bargaining table, creating the opportunity for Indigenous participation in international investment law. Indigenous assent that prescribes the terms of extraction and precedes its commencement must remain the objective. But modifying ICSID is an unparalleled first step.