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THE ARBITRATOR AND THE PROTECTION OF INDIGENOUS PEOPLES IN INTERNATIONAL ARBITRATION

Yasmine Gilbert Sastre

INTRODUCTION

The purpose of this article is to determine the capacity of arbitration to hear claims concerning indigenous peoples. It will present in a non-exhaustive way the possibilities for the arbitrator to hear claims aiming at protecting these populations.

Although they are less and less invisible in international institutions such as the United Nations ("UN") and reflections on their legal status and rights have been taking place for some years, it is not addressed how these indigenous peoples could assert their rights at the international level. The purpose of the discussion will be to explore the existing mechanisms – and their possible improvements – taking into consideration the rights and interests of indigenous peoples that may arise before and during international arbitration proceedings.

In mainstream academic circles, indigenous peoples are a relatively under-represented category of non-state actors.¹ Yet the world's indigenous population represents more than 5,000 peoples in 70 different countries.² According to European Union ("EU") data, they number more than 476 million people.³ Thus, indigenous peoples cannot be understood as a single, marginal entity, but as a range of different peoples, cultures and languages around the world. While there are tribal peoples living in isolation from the "Global Village",⁴ many indigenous peoples are integrated into the societies in which they live, and even participate in the phenomenon of globalization.⁵

Given the diversity of these peoples, the challenge has been to find a general and commonly accepted definition of the notion of "indigenous people", particularly in international law. In 1989, the International Labour Organization ("ILO") Convention did not provide a strict definition.⁶ However, it refers to two types of peoples: tribal peoples and indigenous peoples. Tribal peoples are distinguished from the rest of society by social, cultural and economic conditions governed, in whole or in part, by their own customs and traditions.⁷ The latter are

¹ S. Jamas Anaya, "Indigenous people and international law issues", *Multiple Visions of International Law's Future*, ASIL Proceedings, 1998, pp. 96-99.

² Guide to Convention No. 169 of the International Labour Organization, p.10, article 1.1.

³ Press Release, "International Day of the World's Indigenous People, August 9, 2022", Statement by High Representative Josep Borrell on behalf of the European Union, August 8, 2022.

⁴ Expression of Marshall McLuhan (in *Medium is the Message*, Penguin Book, 1967) designating the effect of globalization which makes the world a village with a standardization of cultures.

⁵ By way of illustration, we can mention the First Nations in Canada who operate oil and gas infrastructures, or the American Indian casinos in the United States (the Pequot tribe owns the largest casino in the world in Connecticut).

⁶ Indigenous and Tribal Peoples Convention (C-169), 1989 (« ILO convention »).

⁷ ILO Convention, article 1.1(a).

descended from populations that originated and lived in the region before it was colonized, and retain some or all of their own social, economic, cultural and political institutions.⁸

For these peoples to be recognized as indigenous (or tribal) peoples, the sense of indigenous or tribal belonging is a fundamental criterion.⁹ This idea was already present in 1986, in the report of José R. Martínez Cobo,¹⁰ who considered that, fundamentally, indigenous peoples must be defined in terms of how they perceive and understand themselves in relation to other groups, not in terms of how other groups perceive them,¹¹ and that it is obvious that indigenous peoples consider themselves different from the other groups that make up the society of the current nation-states of which they are now a part.¹²

These criteria make it possible to identify both objective and subjective elements of identification: it is possible to take into account historical continuity, territorial roots or distinct social, economic, cultural and political institutions, but also, under the subjective criterion, self-identification.¹³

The choice of the ILO Convention was to establish criteria for the implementation of rights and obligations, not to define the notion itself. This allows for greater flexibility and prevents the exclusion of some populations who are thus concerned and enjoy these rights and obligations. Indeed, a more – or too – precise definition would risk confining its application to a minority of indigenous peoples.

The Rio Convention on Environment and Development,¹⁴ and the Nagoya Protocol,¹⁵ also do not define the "indigenous and local communities" to which their provisions apply.¹⁶ Moreover, the self-identification of indigenous peoples adds a degree of complexity to their identification and to the implementation of the Protocol. The notion "indigenous and local communities" contained in the Nagoya Protocol, beyond being vague, forces upon the States party to this international convention a difficult exercise of identity definition, which could, in the worst case, leads to inaction.¹⁷ This is notably the case of France, which refuses to recognize group of peoples as indigenous communities, but speaks of a "community of inhabitants",¹⁸ and thus restricts the definition to a primitive vision of a tribal people living natural state.

The Rio convention and the Nagoya Protocol focus on what qualifies a people as indigenous and refer to international law for the definition of "people". First of all, it should be specified

⁸ *Ibid.* article 1.1(b).

⁹ *Ibid.*, article 1.2.

¹⁰ J.R. Martínez Cobo, "Étude du problème de la discrimination à l'encontre des populations autochtones", volume V, conclusions, proposition et recommandations, 1986 (E/CN.4/Sub.2/1986/7/Add.4).

¹¹ *Ibid.*, p. 31 ¶ 368.

¹² *Ibid.*, p. 31 ¶ 376.

¹³ These elements can be found in the Study on the Problem of Discrimination against Indigenous Peoples ; taken up by the Guide to the ILO Convention, pp.10-11; taken up by the United Nations Declaration on the Rights of Indigenous Peoples No. 61/295, resolution adopted by the General Assembly on 13 Sept. 2007, article 33.1.

¹⁴ United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992.

¹⁵ Nagoya Protocol on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization under the Convention on Biological Diversity, 2012.

¹⁶ P-Y M. Yentcharé, "Partager les fruits de l'innovation avec les communautés autochtones ou locales : les 12 travaux d'hercule ?", *Revue internationale de droit économique*, n° 2016/1, pp. 114-117.

¹⁷ *Ibid.*, p. 116.

¹⁸ French Law n° 2016-1087, 8 August 2016 for the recovery of biodiversity, nature and landscapes, JOFR n°0184 du 9 août 2016, Sous-section 1 definitions; Article 412-4 3° of the French environmental code.

that a "people" can be defined as a group of persons living together in the same territory and united by cultural ties and political institutions or as a community of people united by their origin, their way of life, their language or their culture. In its article 1.3, the ILO Convention specifies that the notion of people "*shall not be construed as having any implications as regards the rights which may attach to the term under international law*". This means, on the one hand, that the rights attached to the concept of people under international law can be applied to indigenous peoples and, on the other hand, that this convention cannot modify existing rights in this area.

It must be emphasized here that the provisions of the ILO Convention are limited due to the low number of ratifications. Indeed, only 24 countries (with limited or no indigenous population) have ratified this Convention.¹⁹

The 2007 UN Declaration, a more extensive international instrument setting out minimum standards for the recognition, protection and promotion of indigenous peoples, remains a soft law standard. Indeed, it explicitly encourages the establishment of harmonious and cooperative relations between States and indigenous peoples. However at the time of its adoption, four countries voted against the Declaration: Australia, Canada, the United States and New Zealand,²⁰ all of which have a large indigenous community. Although it was supported by a majority, this declaration remains flexible in law, implying that only the commitment of States will allow its implementation. Thus, again on August 9, on the International Day of the World's Indigenous Peoples, the UN Secretary General called on States "*to implement the landmark United Nations Declaration on the Rights of Indigenous Peoples, and to promote Indigenous traditional knowledge for the benefit of all*".²¹

Therefore, while international instruments exist to set minimum standards and establish a universal framework to guarantee the rights of indigenous peoples, both as individuals and as a community, these conventions and declarations do not currently allow access to national or international jurisdictions.

It is in this context that arbitration appears as a mode of conflict resolution that can provide a solution to circumvent the rigidity of traditional national and international jurisdictions.

Arbitration is a dispute resolution procedure in which the dispute is submitted, by agreement between the parties, to an arbitral tribunal consisting of one or more arbitrators who render a binding decision. This method of dispute resolution is a private justice aimed at replacing public, national or international justice. Arbitration is subject to several guiding principles: consensualism, choice of arbitrators, neutrality, confidentiality (relativized by the introduction of the requirement of transparency) and the binding nature of decisions.²²

There is no international consensus on the definition of international arbitration. The term "international" is used to distinguish between arbitrations that are purely "national" or "domestic" and those that in some way transcend national boundaries and are therefore

¹⁹ Ratification of C169 – convention on indigenous and tribal peoples, 1989.

²⁰ United Nations website, Office of the High Commissioner for Human Rights ("OHCHR"), OHCHR and indigenous peoples.

²¹ "Indigenous women's work to preserve traditional knowledge celebrated on International Day", August 9, 2022.

²² C. Seraglini and J. Ortscheidt, *Droit de l'arbitrage interne et internationale*, 2^{ed} Ed., LGDJ, oct. 2019, pp. 18-31

"international" or "transnational".²³ National laws define international arbitration in different ways. In France, the arbitration must involve the interests of international trade for it to be international.²⁴ In Switzerland, it is necessary that at least one of the parties to the arbitration agreement had, at the time of the conclusion of the arbitration agreement, neither his domicile, nor his habitual residence, nor his seat in Switzerland.²⁵

International arbitration has also been the subject of international agreements and studies, each of which has defined the concept. Under the New York Convention, "foreign awards" are awards made in the territory of a State other than the State in which recognition and enforcement is sought – but it adds to this definition awards that are not considered domestic awards by the enforcing State.²⁶ Under the United Nations Commission on International Trade Law ("UNCITRAL") Model Law, international arbitration involves parties of different nationalities, or takes place in a country "foreign" to the parties, or involves an international dispute.²⁷ In other words, international arbitration is arbitration concerning a dispute with a foreign element.

For the purposes of the paper, a broad definition will be adopted that corresponds to that of the Model Law.

the majority of international arbitration is conducted before arbitration institutions.²⁸ The parties may designate arbitration rules that will organize the arbitration procedure.²⁹ Most arbitration institutions have their own arbitration rules, but may also apply other rules of law or equity chosen by the parties.³⁰

In addition, there are several forms of arbitration, and the ones that will be addressed in this discussion are international commercial arbitration and investment arbitration. International commercial arbitration refers to arbitrations in the context of international trade, even if a non-trading party is involved.³¹ Commercial arbitration should normally be available between an actor in international trade and a State engaged in international economic activities.³² However, in investment matters, investor-State disputes fall within the scope of investment arbitration, which, unlike commercial arbitration, derives directly from public international law.³³

In a dispute involving the interests of indigenous peoples, the arbitrator could take their interests into account. But could he do so without the agreement of the parties?

Could consensualism hinder the flexibility of arbitration in the overall context of the dispute? Could the interests of the indigenous peoples be taken into account by one of the parties during the proceedings? If so, would the arbitrator be required to take such interests into account?

²³ N. Blackaby, C. Partasides, and al., "Chapter 1. An Overview of International Arbitration", in Redfern and Hunter on International Arbitration (Sixth Ed.), Oxford University Press, 2015, p. 7.

²⁴ Article 1504 French Civil Procedural Code ("CPC").

²⁵ Article 176, al 1 of the Federal Law on Private International Law.

²⁶ Article 1(1) the New York Convention on the Recognition and Enforcement of Awards, 1958 ("New York Convention").

²⁷ Article 1(3) UNCITRAL Model Law on International Commercial Arbitration, 1985, amended in 2006.

²⁸ *Ibid.*, p. 30, ¶ 19.

²⁹ French CPC, Articles 1508 and 1509.

³⁰ For example, the UNCITRAL Arbitration Rules.

³¹ C. Seraglini and J. Ortscheidt, *Droit de l'arbitrage interne et internationale*, 2^{ème} ed., LGDJ, oct. 2019, p. 45, ¶ 30.

³² *Ibid.*

³³ A. De Nanteuil, *Droit international de l'investissement*, 3^{ème} édition, Pedone, 2020, p. 57.

These questions are numerous and, more generally, they raise the question of whether international arbitration proceedings are able to protect the interests of indigenous peoples and whether the peoples themselves can assert their interests before an arbitral tribunal.

In order to address all of these issues, it is necessary to consider the extent to which arbitrators will be able to take into account the interests of indigenous peoples in international arbitration proceedings.

Two situations will be considered here. First, the arbitrator may receive a request from a party for the protection of indigenous peoples (1). Second, it is possible that the arbitral tribunal will be required to decide whether to involve an indigenous people in the arbitration (2).

I. JURISDICTION OVER CLAIMS BASED ON THE PROTECTION OF INDIGENOUS PEOPLES

The tribunal has the competence-competence, that is to say, it has the power to declare itself competent or not according to its interpretation of the arbitration agreement. It should consider the question of its jurisdiction not only at the beginning of the proceeding for direct claims made by the parties (1.1), but also during the proceeding if new claims emerge and in particular in case of amicus or intervention (1.2).

A. Direct requests for the protection of indigenous peoples

When faced with claims made by the parties, arbitrators must consider, among other things, whether they are dealing with an arbitrable matter. This question must be raised by the claims concerning human rights (1.1.1). Moreover, it is possible to ask whether human rights, and more particularly those aimed at protecting indigenous peoples, can be directly covered by the arbitration agreement (1.1.2). Finally, indigenous peoples could bring cases before the arbitrator on the basis of agreements made directly with companies, such as benefit-sharing agreements (1.1.3).

1. Competence to take into account human rights

Depending on the nature of the arbitration, the jurisdiction of the arbitral tribunal may derive from different instruments. It may be a contract – which is the majority of cases –, a treaty, a law, but also a behaviour or exchange designating arbitration as a means of dispute resolution. Whatever the form, the primary basis of arbitration is the consent of the parties.³⁴

Generally speaking, arbitrators have limited jurisdiction to determine whether or not a particular investment treaty clause has been complied with and have no jurisdiction to determine whether

³⁴ G. Born, *International commercial arbitration*, (3ème Ed.), 3rd edition, Kluwer Law International, 2021, pp. 251 ; Nigel Blackaby, Constantine Partasides, and al., *Redfern and Hunter on International Arbitration* (6ème Ed.), Oxford University Press, 2015, p. 71.

or not there has been a breach of the human rights obligations of states.³⁵ However, it has long been recognized that investment arbitration can take into account human rights,³⁶ particularly those of local populations.

If the clause does not refer to an arbitration rule providing for consideration of such rights, the only alternatives for consideration of a human rights claim are that (i) the contract or law provides for a human rights clause or (ii) a counterparty has violated human rights in the context of the negotiation, performance or termination of the contract (depending on the scope of the clause) and that this causes harm to the counterparty(-ies).

Another question that might arise is the arbitrability of human rights. Arbitrability is generally defined as the ability to arbitrate a case, issue or dispute. “*Arbitrability restricts party autonomy to resolve certain disputes by arbitration*”.³⁷ Today, it is possible to limit the notion of arbitrability to the objective arbitrability, i.e. to matters that can be submitted to arbitration and not the person who can be party to an arbitration.³⁸ In France, the only inarbitrable matters are the mandatory rules (“*Lois de police*”)– French or foreign.

According to French law, human rights, and more particularly the rights of local populations, fall within the scope of arbitration in the sense that they are not subject to a mandatory rule. More broadly, it is commonly accepted at the international level that human rights are part of arbitration matters and can be at the center of arbitration proceedings. This is demonstrated by the adoption of the Hague Rules on Business and Human Rights.

2. The mechanism of the Hague Convention

In 2019, the Hague Rules of Arbitration on Business and Human Rights were adopted.³⁹ These rules aim to establish a private system for resolving disputes related to human rights violations. It aims to overcome the dysfunction, corruption, political influence and incompetence of justice

³⁵ L.E. Perterson, “Droits humains et traités bilatéraux d’investissement, le rôle du droit relatif aux droits humains dans l’arbitrage des différends entre investisseurs et États”, *Droit et Démocratie*, Centre international des droits de la personne et du développement démocratique, 2009, p. 21.

³⁶ See *Phoenix Action, Ltd. c. République Tchèque*, (ICSID case n° ARB/06/5), final award of April 15, 2009, ¶ 78 “*nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs*” ; *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. c. République d’Argentine*, decision on admissibility of July 30, 2010; *Tulip Real Estate and Development and Netherlands BV c. République de Turquie* (ICSID case n° ARB/11/28), Decision on annulment of December 30, 2015, ¶¶ 86–92 “*Provisions in human rights instruments dealing with the right to a fair trial and any judicial practice thereto are relevant to the interpretation of the concept of a fundamental rule of procedure as used in Article 52(1)(d) of the ICSID Convention*” (¶ 92) ; *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products SA (Switzerland) and Abal Hermanos SA (Uruguay) v Oriental République d’Uruguay*, (ICSID case n° ARB/10/7), award of July 8, 2016 (Philip Morris) ¶ 398 and ¶ 530 “*The FCTC is one of the international conventions to which Uruguay is a party guaranteeing the human rights to health; it is of particular relevance in the present case, being specifically concerned to regulate tobacco control*” (¶ 304) and “*the Tribunal concludes that the Challenged Measures were a valid exercise by Uruguay of its police powers for the protection of public health*” (¶ 307).

³⁷ W. Jo-Mei Ma and L. Boo, ‘Chapter 12: Autonomous Arbitrability? Whose Autonomy? Whose Arbitrability?’, in Franco Ferrari and Friedrich Jakob Rosenfeld (eds), *Autonomous Versus Domestic Concepts under the New York Convention*, International Arbitration Law Library, Volume 61, Kluwer Law International 2021) p. 299.

³⁸ J. El Ahdab, D. Mainguy, *Droit de l’arbitrage – Théorie et pratique*, LexisNexis, 2021, ¶ 260.

³⁹ The Hague Rules of Arbitration for Business and Human Rights, December 2019.

in some regions⁴⁰ and to enforce the principle of access to remedies⁴¹ and justice on all continents.

This Rule may apply if it is designated by the parties to resolve their dispute.⁴² To determine the existence of this consent, the regulation does not set out the manner in which the consent is to be expressed, but specifies that it may be given before or after the dispute arises.⁴³

It is this consent that constitutes the major obstacle. Although it is mentioned in the preparatory works that "84% of corporations with more than \$10 billion in asset value have adopted a human rights policy".⁴⁴ This does not allow one to conclude directly that they consent to arbitration under the Hague Rules. It seems difficult to contract for a future human rights violation and provide for an arbitration agreement designating the settlement. Moreover, once the dispute has arisen, the victim may not have the power to negotiate arbitration, especially if he or she is in a country that does not effectively protect his or her rights. Also, the fact that the consent of the parties is required does not meet the objective of better access to justice. Indeed, it is sufficient for the opposing party to refuse to have recourse to arbitration in order to escape the procedure.

However, in the case of human rights violations, an "MNE ["Multi-national enterprise"] *may prefer to mediate or arbitrate to dispose of the matter*".⁴⁵ Indeed, in the presence of human rights violations, the victims, as well as NGOs, have already been able to set up large media campaigns to denounce these violations. An emblematic example is that of the collapse of the Rana Plaza where textile employees work. The brand Nike has been particularly criticized for the working conditions of the employees manufacturing its products. Thus, the recourse to arbitration proposed by the regulation makes it possible to frame a mode of dispute resolution allowing the victims to obtain compensation for the damages suffered and the companies to repair these damages without being the object of a media campaign.

Another issue that limits the application of the Rules is the cost of international arbitration. In order to balance the costs, the Rules provides for an allocation of the costs of the proceedings to the losing party.⁴⁶ This constitutes a rigidity that does not allow the particularity of the case to be taken into consideration. It might be considered fairer to allocate the costs between the parties in view of the conclusions submitted and the context of the case.⁴⁷

If there are doubts about the effectiveness of this mechanism, we must wait to see how it is put into practice and how the MNEs will use it.

⁴⁰ K. Duggal and R. Rangachari, "Business, Human rights, and International Arbitration: Family, Fiend, or Foe?" *Dispute resolution Journal*, Kluwer Law International, vol. 75, issue 3, p.110.

⁴¹ *Guiding Principles on Business and Human Rights*, 27-35.

⁴² *The Hague Rules of Arbitration for Business and Human Rights*, December 2019, article 1.

⁴³ *Ibid.*, introductory note, p.3.

⁴⁴ C. Cronstedt, J. Eijbouts and R. C. Thompson, *International business and human rights* (proposal), 13 Feb. 2017, p. 13.

⁴⁵ *Ibid.*, pp. 15-16.

⁴⁶ *The Hague Rules of Arbitration for Business and Human Rights*, décembre 2019, article 53.

⁴⁷ K. Duggal and R. Rangachari, "Business, Human rights, and International Arbitration: Family, Fiend, or Foe?" *Dispute resolution Journal*, Kluwer Law International, vol. 75, issue 3, p. 117.

In order to include human rights in international arbitration, it would be necessary to think up a system that takes into account the imbalance between the victim of the human rights violation and the company responsible for this violation.

As things stand, if arbitrators are confronted with arguments based on human rights violations in commercial arbitration, they will have to refer to the scope of the arbitration clause and the contractual clauses. If these are broad and allow for human rights compliance, then they will be able to take this into account. If not, they can only decide issues that fall within the scope of the clause, and the party arguing human rights will have to go to the relevant state and/or regional courts.

3. The benefit-sharing agreement, new tool for the protection of local populations

Benefit-sharing agreements are agreements between an economic operator and a state and/or local community, with the aim of organizing the exploitation and/or distribution of the benefits of the exploitation of local and indigenous lands and resources. They are characterized by the exchange of local know-how and benefits derived from the exploitation of the lands and resources of territories inhabited by local and/or indigenous populations. These agreements aim to regulate activities that exploit the land while limiting the environmental impact and protecting local communities. They are part of the effort to achieve sustainable development and create new ways of production in line with contemporary environmental and social issues.

At the international level, the content of these contracts stands at the intersection of three fundamental principles of public international law: (i) free, prior, and informed consent, (ii) fair and equitable sharing of the benefit, and (iii) the right to live in a healthy environment.

If the content of benefit-sharing agreements today seems to be related to these three fundamental principles of public international law, it was originally born out of the voluntary practice of companies, in particular their internal commitments linked to concerns for the protection of the environment and human rights - which now come under the heading of corporate social responsibility ("CSR") and the duty to care. With the upcoming rigidification of CSR standards, whether at the national level (as in France with the Vigilance Act), the regional level (with the draft European directive) or the international level (with the UN discussions on a binding instrument for companies in terms of human rights), companies could be obliged to conclude agreements with the populations located in the territory they wish to exploit. As a result of these developments, benefit-sharing agreements will become mandatory instruments so as to meet the new concerns of legislators.

Following on from these current developments, it is expected that within a few years we will see litigation arising from contracts such as benefit-sharing agreements. The question of the relevance of arbitration will remain to be considered, but these contracts, like any other, may include an arbitration clause. In this way, the arbitrator will have to take indigenous peoples into account and rules on related issues.

B. Counterclaims

In commercial arbitration, counterclaims are fully admissible because there are mutual duties between the parties to the arbitration agreement, which usually derives from a contract. They are usually made at the time of the response to the Request for Arbitration and may be limited depending on the arbitration rules and the law applicable to the proceedings.⁴⁸

Counterclaims are also admitted in investment arbitration. It is not normal to allow treaty claims in an arbitration based on a Bilateral Investment Treaty (“BIT”), since the obligations contained in that instrument are effective only between States. Counterclaims may be more easily admitted when the dispute is based on a contract, since it involves, by definition, reciprocal rights and obligations of the parties.⁴⁹ Although reference may be made to obligations as to the lawfulness of the investment, the BIT sets out obligations to the State and not to the investor.

In the context of ICSID, the *Urbaser*⁵⁰ award marks an important step forward in the consideration of human rights and more particularly the rights of local populations. Two points should be emphasized: (i) for the first time, an arbitral tribunal has recognized its jurisdiction to hear a counterclaim by a State in an arbitration based on a BIT, and (ii) the tribunal has retained its jurisdiction to hear allegations of human rights violations.

In the *Urbaser* case, the investor filed a claim for arbitration against Argentina. The State filed a counterclaim based on allegations of human rights abuses by the investor against the Argentine population (violation of the right to water). The arbitrators considered that the arbitration clause in the BIT was sufficiently broad to include human rights in its scope.⁵¹ The arbitrators therefore recognized their jurisdiction to hear the counterclaim based on the violation of the rights of local populations.

Thus, it is clear from this case that arbitrators have the power to assess whether international norms may underlie their jurisdiction and thus to interpret the framework of the instrument underpinning their jurisdiction more broadly to take human rights into account if it so permits. This assessment is unique and may vary depending on the composition of the arbitral tribunal and the context of the case.

In any event, arbitrators may accept that they have jurisdiction to hear claims based on human rights violations. A wide range of possibilities is thus offered to arbitrators, allowing them to consider issues that go beyond the simple treaty relationship. Finally, the respect of

⁴⁸ J. El Ahdab, D. Mainguy, *Droit de l’arbitrage – Théorie and pratique*, LexisNexis, 2021, ¶¶ 1089 - 1090.

⁴⁹ I. Fadlallah, C. Leben, E. Teynier, L. Ahtouk-Spivak, W. Ben Hamida, J. Cazala, C. Crepet Daigremont, M. Frappier, A. De Nanteuil, B. Poulain, “Investissement internationaux et arbitrage”, *Cahier de l’arbitrage*, n°4, p. 619.

⁵⁰ e.g. Article 23(1) of the UNCITRAL Arbitration Rules provides that the arbitral tribunal has the power to rule on its own jurisdiction, including any objection to the existence or validity of the arbitration agreement; and Article 6(9) of the ICC Arbitration Rules states that, unless otherwise agreed, the arbitral tribunal shall not cease to have jurisdiction by reason of a claim that the contract is non-existent or invalid, if it upholds the validity of the arbitration agreement. The arbitral tribunal retains jurisdiction to determine the respective rights of the parties and to decide their claims even if the contract itself is non-existent or void.

⁵¹ F. G. Santacroce, “The applicability of Human Rights Law in International Investment Disputes”, *ICSID Review – Foreign Investment Law Journal*, Oxford University Press, 2019, p.140.

human rights has already been expressly required by some BITs.⁵² It remains to be seen how the arbitrators will deal with these issues in the future.

II. JURISDICTION OVER REQUESTS FOR LOCAL PEOPLE TO INTERVENE IN THE PROCEEDING

A. Amicus curiae

The amicus curiae is a procedural tool that will be defined (2.1.1), before studying its implementation for the benefit of indigenous peoples (2.1.2).

1. The notion of amicus curiae

a. The theoretical practice of amicus

Amicus curiae is a Latin term meaning "friend of the court". The traditional role of the amicus curiae is to assist the court's decision making by allowing a third party to submit claims to the court. In this way, new arguments, perspectives and expertise will be brought to the court that would not have been available in the proceedings between the parties.⁵³ This practice is not specific to arbitration, it comes from the common law and is intended to remedy possible errors and inadequacies of procedure. International law has started to recognize this practice through the rules of the two criminal tribunals⁵⁴ and the ICC⁵⁵ – they recognize the amicus curiae ab initio, i.e., that the amicus application must be made at the beginning of the proceedings.⁵⁶

As opposed to proceedings before international courts, arbitration proceedings are based on consensualism, which raises questions as to the possibility of involving a third party in the proceedings. Indeed, as arbitration is based on the will of the parties, the parties must consent to the amicus curiae for it to take place. Since arbitration is not mandatory, the admission of a third party to the proceedings against the will of the parties could lead to the termination of the proceedings by the parties⁵⁷, or even to the annulment of the award if the proceedings continue despite the refusal of a party.⁵⁸

⁵² see TBI Nigeria-Maroc, 2016, article 18.2.

⁵³ Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal SA v Argentine Republic, ICSID Case No ARB/03/19, order in response to a request for transparency and amicus curiae of May 19 2005, ¶ 13.

⁵⁴ Article 75 Rules of evidence and procedure of the International Criminal Tribunal for the former Yugoslavia and for Rwanda.

⁵⁵ Article 103 of the Rules of Procedure and Evidence of the ICC.

⁵⁶ S. Menétrey, "L'amicus curiae, vers un principe commun de droit procédural ?", Dalloz, coll. Nouvelle bibliothèque de Thèses, 2010, p. 129.

⁵⁷ *Ibid.*, p.137, note 675.

⁵⁸ The New York Convention, like the French CPC, provides for the annulment of the award if the judge does not respect the limits of his mission.

In her course at the Hague Academy, Catherine Kessedjian insists on the fact that an amicus curiae cannot be a friend of one of the parties and thus a pseudo assistant to the court, even though it is not uncommon for the amicus to support the arguments of one or the other party.⁵⁹

In practice, amicus remains only a means of enlightening the court on a point of fact or law. However, this instrument has been used more and more to bring the interests and the voice of third parties, interested in the procedure.

b. The evolution of the practice

Amicus curiae is a relatively new phenomenon in investment arbitration. Indeed, it was in 2001, in the *Methanex c. USA* (NAFTA case), that the first amicus curiae application was accepted.⁶⁰ Subsequently, in 2006, amicus curiae was added to the ICSID arbitration rules in Article 37(2). Thus, after consulting with the parties, the tribunal may authorize a third party to submit a written request to the tribunal. This request must relate to the dispute and may not go beyond that context.⁶¹ A similar provision has been included in Article 41(3) of the ICSID Additional Facility Arbitration Rules.

The admission of the amicus submission is subject to three criteria, which are considered by the arbitrators at their discretion.⁶² First, it must be shown that the amicus is objectively helpful in resolving the dispute. Second, the amicus application must address a matter within the scope of the dispute. Finally, the objective quality of the person or institution requesting amicus must be taken into account.⁶³

In general, tribunals are quite reluctant to grant amicus submissions, particularly in environmental matters.⁶⁴ Moreover, even if the submission is accepted, the tribunal is not obliged to take it into account. This was the case in *Infinito Gold c. Costa Rica*, where despite the admission of the amicus brief on high environmental issues, the tribunal did not take it into account in the final decision.⁶⁵

Thus, while investment arbitration appears to offer a space for indigenous peoples' participation, it is necessary for arbitrators to see the value of such intervention and then take it into account in their decision.

2. Implementation for the benefit of indigenous peoples

An indigenous people could have an interest in intervening in an investment or inter-state arbitration, via the amicus curiae mechanism, in order to provide additional elements proving the impact of the investment on their living environment, the health of their population or the

⁵⁹ Kessedjian, C. 'Le Tiers Impartial and Indépendant En Droit International Juge, Arbitre, Médiateur, Conciliateur Cours Général de Droit International (Volume 403)'. In *Collected Courses of the Hague Academy of International Law*, ¶ 586.

⁶⁰ *Methanex Corporation c. United States of America*, CNUDCI, Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae' (15 January 2001).

⁶¹ Crina Baltag, 'The Role of Amici Curiae in Light of Recent Developments in Investment Treaty Arbitration: Legitimizing the System?', in Meg Kinnear and Campbell McLachlan (eds), *ICSID Review - Foreign Investment Law Journal*, (© The Author(s); Oxford University Press 2020, Volume 35 Issue 2) pp. 279-310.

⁶² See, *Resolute Forest Products Inc c. Canada*, PCA No 2016-13, Procedural Order n°6, 29 June 2017.

⁶³ A. De Nanteuil, *Droit international de l'investissement*, ed. 3, A. Pedone, 2020, pp. 294-295.

⁶⁴ See, *Chevron corporation and Texaco petroleum company c. Equateur*, CPA n°2009-23, ordonnance de procédure n°8 du 18 avril 2011.

⁶⁵ *Infinito Gold Ltd. c. Costa Rica*, n°ARB/14/5, decision on jurisdiction, December 4 2017.

economic prejudices suffered. It would then be possible for them to file an amicus curiae brief, whether in the context of an investment arbitration or an inter-state arbitration. For this to happen, the tribunal would have to judge this intervention as important for the proper conduct of the proceedings.

In Article 37(2) of the ICSID Arbitration Rules, there is no mention of the agreement of the parties to the proceeding, but only the discretionary decision of the arbitrators. The only limitation in their decision is that "the submission of the non-disputing party does not disrupt the proceeding or impose an undue burden on or unfairly prejudice either party, and that both parties are given an opportunity to comment on the non-disputing party's submission.

As mentioned above, arbitrators are reluctant to accept amicus curiae proceedings. The acceptance of an amicus curiae depends on the composition of the arbitral tribunal. In order for an amicus curiae application to succeed, the arbitrators must be open to the practice, but also the application must be of significant interest to them.

In addition, arbitrators could seek the consent of the parties to accept such a request, particularly outside the ICSID arbitration rules. This was the case in Methanex, where the tribunal sought the parties' consent to allow amicus applications.⁶⁶

Thus, the acceptance will, in part, depend on whether the arbitration is conducted under ICSID or under another framework. In the ICSID context, the issue will be to determine the sensitivity of the arbitrators to the amicus curiae procedure and to determine what they might consider to be of significant interest. This will only concern investor-State arbitrations. Outside of this framework, in addition to considering the same issues, it will be necessary for the parties to agree to the intervention of the indigenous people before amicus can proceed.

Therefore, the major challenge of amicus curiae for indigenous peoples is to be in front of a court that is sensitive to their interests. The arbitrator remains the main actor who allows the interests of indigenous peoples to be taken into consideration by accepting, or denying, their intervention in the proceedings. As a result, it may be in the interest of indigenous peoples to be in contact with a party, or even to be part of its procedural strategy, to ensure that the designated court is sympathetic to the filing of their amicus curiae submission.

Finally, the mechanism of amicus curiae only allows the interests of indigenous peoples to be truly taken into account if this request is accepted by the tribunal – and often also by the parties – and considered in the final deliberations. One can see that in recent years, the use of amicus curiae has been increasingly welcomed in the ICSID framework.⁶⁷ This suggests an optimistic evolution for the intervention of indigenous peoples. However, we will have to remain attentive to developments outside the ICSID framework.

⁶⁶ Case Methanex Corporation v United States of America, UNCITRAL, Letter from the Tribunal ("on amici") of April 6 2004 : *"I acknowledge safe receipt of the two letters dated 6th March 2004 from Methanex and the United States regarding their respective non-objection to and acceptance of the "amici" applications"*.

⁶⁷ Amendment of the ICSID rules of April 2006 with modification of article 37(2) including amicus curiae; Biwater Gauff (Tanzania) Limited c. United Republic of Tanzania (2008), n° ARB/05/22 (ICSID) ; Infinito Gold Ltd. c. Republic of Costa Rica (2016), n°ARB/14/5 (ICSID) ; United Utilities (Tallinn) B.C. and Aktiaselts Tallinna Vesi c. Republic of Estonia (2018), n°ARB/14/24 (ICSID); Sapec, S.A. c. Kingdom of Spain (2021), n°ARB/19/23 (ICSID) (partial admission of the application for intervention). Although two recent decisions have denied the amicus curiae request: Lion Mexico Consolidated L.P. c. United Mexican States (2017) n° ARB(AF)/15/2 (ICSID) and Alicia Grace and others c. United Mexican States (2019) n°UNCT/18/4.

In its contemporary evolution, although it may be questionable, *amicus curiae* is a mechanism for indigenous peoples to have their voices heard in arbitrations where they are not parties.

B. Third-party stakeholders

1. Mechanisms of the third-party intervention

A third-party intervention mechanism may be provided for in the arbitration agreement. It may also refer to arbitration rules⁶⁸ such as the UNCITRAL Arbitration Rules. The latter, even if it does not provide for the mechanism, authorizes it in its Article 17(5),⁶⁹ although it limits it to the request of one of the parties to the arbitration agreement. The third party joining the proceedings will then become a party to the arbitration.

The ICC Rules of Arbitration are also regularly referred to in arbitration agreements. These provide for the intervention of one or more third parties at the initiative of a party.⁷⁰ The third party may then bring claims against any other party to the arbitration. Finally, the LCIA rules also allow the arbitral tribunal to authorize the intervention of third parties in the proceedings,⁷¹ subject to the consent of the parties to the proceedings.

Apart from institutional arbitration, or if the arbitrator's rules remain unclear on the possibility, reference should be made to the national law applicable to the proceedings.⁷² As a rule, the parties do not mention in their arbitration agreement the law applicable to the proceedings. As Gary Born⁷³ points out, in the absence of an express choice, there are two possible methods of

⁶⁸ B. Hanotiau, “Chapter 4: Joinder of Parties and Joinder of Claims: Voluntary and Compelled Intervention of Third Parties, Cross-Claims and Consolidation”, in *Complex Arbitrations: Multi-party, Multi-contract, Multi-issue – A comparative Study* (Second Ed.), International Arbitration Law Library, Volume 14, Kluwer Law International, 2020, p. 315 : “*If the arbitration is institutional, one will have to look at the rules of the institution and determine if they say something in this respect*”.

⁶⁹ Article 17(5) UNCITRAL Arbitration Rules “*The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration*”.

⁷⁰ Article 7 ICC Rules of Arbitration effective January 1, 2021.

⁷¹ Article 22(x) LCIA Arbitration Rules effective October 1, 2020: the tribunal can « *allow one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented expressly to such joinder in writing following the Commencement Date or (if earlier) in the Arbitration Agreement; and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration* ».

⁷² B. Hanotiau, “Chapter 4: Joinder of Parties and Joinder of Claims: Voluntary and Compelled Intervention of Third Parties, Cross-Claims and Consolidation”, in *Complex Arbitrations: Multi-party, Multi-contract, Multi-issue – A comparative Study* (Second Ed.), International Arbitration Law Library, Volume 14, Kluwer Law International, 2020, pp. 315-316 : “*If the relevant institutional rule providing for the possibility of intervention of a third party is ambiguous, it belongs to the arbitral tribunal to interpret it*”.

⁷³ Gary B. Born, *International Commercial Arbitration* (3th édition), Kluwer Law International, 2021, Chapitre 18 : Consolidation, Joinder and Intervention in International Arbitration, p. 2768.

determining the law applicable to the proceedings: the law governing the arbitration agreement or the law of the seat of the arbitration.⁷⁴

2. Difficulties of application to local populations

A first difficulty may arise if the arbitration clause or rules do not provide for third party intervention because most national laws do not provide for the intervention of third parties in the proceedings.⁷⁵ However, practice does not generally differ from laws providing for the intervention mechanism. The majority approach is that intervention can be ordered by an arbitral tribunal or institution only if the parties have consented to it – either expressly or implicitly.⁷⁶ This is in line with the approach of the New York Convention,⁷⁷ and the principle of consensualism and procedural autonomy of the parties in their arbitration.⁷⁸

Thus, the intervention mechanism must be provided for in the arbitration agreement or in the arbitration rules or in the law applicable to the proceedings in order to be implemented, or the parties and the third-party intervener must have agreed to it during the proceedings. If the procedural rules allow for the intervention of third parties without giving further details, it will be up to the arbitral tribunal to interpret this possibility.⁷⁹

If the request for a third party to intervene in the proceedings is made after the court has been constituted, this may pose problems of equality between the parties. This equality between the parties in the constitution of the court can, moreover, be a matter of public policy – for example in France.⁸⁰

It should be remembered that contrary to the *amicus curiae* procedure, the third party intervening in the proceedings is considered a new party. He will not be a simple provider of elements for the benefit of the court. Third party intervention creates a new situation and that is why arbitrators and arbitration rules are stricter about accepting intervention. Thus, to what extent could the indigenous people intervene in the arbitration to assert their interests?

When the arbitration clause or the contract does not mention the possibility for a third party to intervene in the proceedings, it will be necessary to look at whether an arbitration rule is designated and, if not, whether the law does not provide for the procedure. If the answer is negative, it will not be possible to request an intervention without the prior consent of the parties. Furthermore, in the case of an application for intervention by an indigenous people, the

⁷⁴ See also G. Born, “Chapter 4: Choice of Law Governing International Arbitration Agreements”, in *International Commercial Arbitration* (Third Ed.), 3rd ed., Kluwer Law International, 2021, pp. 507 – 674.

⁷⁵ C’est notamment le cas pour la législation française, suisse, italienne, américaine ou japonaise.

⁷⁶ Gary B. Born, *International Commercial Arbitration* (3th édition), Kluwer Law International, 2021, Chapitre 18 : Consolidation, Joinder and Intervention in International Arbitration, p. 2763.

⁷⁷ In case of intervention in the absence of a provision in the arbitration agreement, the award made may be set aside under Article V(1)(d) of the New York Convention. However, if the parties have agreed to this a posteriori, it will not be possible to set aside the award on this basis.

⁷⁸ C. Seraglini and J. Ortscheidt, *Droit de l’arbitrage interne et internationale*, 2^{ed} Ed., LGDJ, oct. 2019, pp. 18-31.

⁷⁹ B. Hanotiau, “Chapter 4: Joinder of Parties and Joinder of Claims: Voluntary and Compelled Intervention of Third Parties, Cross-Claims and Consolidation”, in *Complex Arbitrations: Multi-party, Multi-contract, Multi-issue – A comparative Study* (Second Ed.), *International Arbitration Law Library*, Volume 14, Kluwer Law International, 2020, pp. 315-316.

⁸⁰ Decision Dutco, Cour de Cassation, Chambre civile 1, 7 jan. 1992, 89-18.708 89-18.726 ; Decision Vidatel, CA Paris, 26 jan. 2021, n° 19/10666.

application for intervention is not made at the initiative of a party and the UNCITRAL, ICC and LCIA arbitration rules do not allow such a procedure, unless the parties agree. The intervention of a third party is not a right, as it is for the *amicus curiae*. The granting of the request will therefore depend on the consent of the parties to the arbitration.

However, in an arbitration under Swiss law or under the arbitration rules of the Hong Kong International Arbitration Centre (HKIAC), it is possible for a third party to request an intervention,⁸¹ without having obtained the consent of the parties.

It should also be noted that such an intervention represents quite significant costs, particularly for small players in international trade or for an indigenous people. Thus, it will not always be advisable to apply to an arbitral tribunal, rather than to the often less expensive national courts.

The voluntary involvement of an indigenous people in commercial arbitration appears to prejudice, with the exception of arbitration under Swiss law or under the HKIAC Rules of Arbitration, the consent of the parties to the arbitration and the ability of the indigenous people to pay their own costs of litigation and representation. Under the ICC Rules, it will be necessary for the indigenous people to be a party to the arbitration agreement, which still seems to compromise the chances of an application to intervene being successful.

The intervention of indigenous peoples will only be granted at the discretion of the parties and the arbitrator if the rules governing the proceedings do not provide for it.

⁸¹ Art.4(2) Swiss Rules of International Arbitration; Art.27(6) HKIAC Arbitration Rules.