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Bridging the Private-Public Divide in Investor-State Arbitration: Can Retrofitting *Amicus Curiae* Improve How Tribunals Consider Human Rights Issues?

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ABSTRACT

Investor-State Dispute Settlement ('ISDS') arbitration is undergoing a legitimacy crisis, with more states denouncing investment agreements than signing onto them. A major cause of this crisis is the increasing public critique of ISDS as a process that systemically excludes public and human rights considerations. In response to this exclusion, rightsholders who are consistently excluded from ISDS have increasingly filed third-party submissions to ISDS tribunals in the hopes that these submissions will force tribunals to consider their perspectives. This is a growing trend, especially amongst Indigenous peoples in remote or resource-rich areas of Latin America, Africa, and elsewhere because their input is often excluded from the dominant public rhetoric argued by the state in ISDS arbitration. This article seeks to address whether such third-party submissions, often called '*amici curiae*', can provide an effective remedy for rightsholders through comparing how *amici curiae* could fulfil the criteria outlined in the United Nations Guiding Principles on Business and Human Rights ('UNGPs'). It finds that *amici curiae* are currently too unpredictable to ensure an equitable remedy for rightsholders. However, if arbitral centres were to reform the *amicus curiae* application process and allow for greater transparency, the unique ability of *amici curiae* to link public and private interests in ISDS could make them a viable option for rightsholders to have their rights recognised in ISDS proceedings.

Keywords: investor-state arbitration, amicus curiae, human rights law, United Nations Guiding Principles on Business and Human Rights, remedies

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I. INTRODUCTION

Investor-State Dispute Settlement ('ISDS') arbitrations have long been considered to involve two parties: the investor and the state. This systemically leads tribunals to overlook the concerns of non-disputing parties, like Indigenous communities and other rightsholders. However, over the past two decades, rightsholders have increasingly written arguments to ISDS tribunals through non-disputing party submissions, often called '*amici curiae*', to address this gap in tribunals' considerations.[1] The watershed moment for these *amici curiae* came in 2001 when the tribunal in *Methanex Corporation v United States of America* accepted written submissions from non-disputing parties under the United Nations Commission on International Trade Law ('UNCITRAL') Arbitration Rules.[2] These Rules did not grant the tribunal any explicit jurisdiction to accept *amici curiae*. Still, the tribunal inferred this power as part of its broad procedural power granted by article 15(1) of the UNCITRAL Rules and used it to allow the two non-disputing parties to make written submissions.[3] However, the tribunal found that this procedural power did not allow it to grant the third parties any substantive rights, like the right to access documents produced in the arbitration or to attend the oral hearing.[4]

A decade and half later, the mixed success of *amici curiae* in ISDS proceedings continued in *Bear Creek Mining Corporation v Republic of Peru*. This case illustrates both the need for these submissions and the obstacles that non-disputing parties face in submitting them. In that case, the state had issued a mining concession without properly consulting the Indigenous communities.[5] A local civil society organisation submitted an *amicus curiae* brief to the ISDS tribunal explaining the defects in the investor's consultation and the impact on Indigenous rights, such as the company's failure to translate relevant information into the local language and the company's efforts to divide affected communities through unequal compensation.[6] In the final award, a dissenting arbitrator used the human rights arguments in the *amicus curiae* brief to reduce the investor's award.[7] This dissent demonstrates that *amici curiae* can give legitimacy to rightsholders' grievances. Still, the majority of the tribunal rejected the *amicus curiae*'s arguments. Because *amici curiae* are inherently discretionary, the majority did not have to grapple fully with the public law arguments raised in the *amicus* brief.

Despite increasing recognition of the role of *amici curiae* in bringing a human rights lens to ISDS,[8] there is a lack of research that focuses on whether *amici curiae* can form an

[1] Wei-Chung Lin, 'Safeguarding the Environment? The Effectiveness of *Amicus Curiae* Submissions in Investor-State Arbitration' (2017) 19 International Community Law Review 270, 275.

[2] *Methanex Corporation v United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae' (15 January 2001).

[3] ibid [47].

[4] ibid [30], [47].

[5] *Bear Creek Mining Corporation v Republic of Perú*, ICSID Case No ARB/14/21, Award (30 November 2017) ('*Bear Creek* Award') [409].

[6] See for example *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/21, Procedural Order No 5 (21 July 2016) ('PO5'); Nicolás M Perrone, 'Investment Treaty Law and Matters of Recognition: Locating the Concerns of Local Communities' (2023) 24 The Journal of World Investment & Trade 437, 451–52.

[7] *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/21, Partial Dissenting Opinion of Professor Philippe Sands QC (12 September 2017) ('Sands QC Dissent') [37].

[8] Nicolette Butler, 'Non-Disputing Party Participation in ICSID Disputes: *Faux Amici*?' (2019) 66 Netherlands International Law Review 143, 172.

effective remedy for rightsholders.[9] This article helps to assess the possible barriers and opportunities that *amici curiae* provide by comparing them to the criteria for effective remedies under the United Nations Guiding Principles on Business and Human Rights ('UNGPs').

Section II details the need for tools to incorporate public considerations, such as human rights, including Indigenous rights, into investor-state arbitrations. It specifies how the private interests of investors have become artificially detached from their public context. Section III brings this divide into focus through discussing how the division between public and private considerations in ISDS disproportionately affects Indigenous communities that live near resource extraction projects.

Section IV outlines the UNGPs criteria for an effective remedy in the context of *amici curiae* and Section V compares the UNGPs criteria to *amici curiae*, revealing that the privatised model in ISDS restricts transparency, predictability, and accessibility for *amici curiae*, preventing them from becoming effective remedies. Finally, Section VI offers methods of retrofitting *amici curiae* to enhance the state's and investor's awareness of rightsholders' views. Consequently, *amici curiae* could form part of UNGPs-compliant remedies if arbitral centres and international investment agreements ('IIAs') undertook short- and medium-term revisions to their procedures that increased the effectiveness of *amici curiae* for rightsholders.

II. (DIS)INTEGRATION OF PUBLIC AND PRIVATE LAW IN ISDS

Despite its private-law framing,[10] ISDS derives from a state-centric system that balances the political interests of home states against private rights in the host state. In other words, home states can maintain their public policies in areas that affect their jurisdiction, like foreign affairs and investment regulations, while simultaneously representing individual investor's private, financial interests. Although awards often ignore these competing interests, reforms to ISDS and new IIAs are beginning to incorporate human rights and environmental considerations, as is discussed in this section. *Amici curiae* form part of this increasing trend to recognise the public interests at stake.

A. CONCEPTUALISING PUBLIC AND PRIVATE INTERACTIONS IN ISDS

ISDS began by recognising the joint interests in the public and private spheres. The origins of investor-state disputes are found in states taking on private legal cases to defend economic rights abroad.[11] This form of dispute settlement was famously demonstrated in the Great Britain and Costa Rica arbitration of 1923, which included claims from Aguilar-Amory

[9] See Valentine Olusola Kumuji, 'Access to Remedy for Indigenous Right Holders in Relation to Investment-Related Human Rights Abuses – A Critical Search for an Effective Legal Framework' (PhD thesis, University of East Anglia 2022).

[10] Eloïse Obadia, 'Extension of Proceedings Beyond the Original Parties: Non-Disputing Party Participation in Investment Arbitration' (2007) 22 ICSID Review – Foreign Investment Law Journal 349, 351.

[11] Wasiq Dar and Gautam Mohanty, 'NGOs as *Amicus* in Investor-State Arbitration: Addressing Public Interest and Human Rights Issues' in Justine Bendel and Yusra Suedi (eds), *Public Interest Litigation in International Law* (Routledge 2023) 233; Alessandra Arcuri and Francesco Montanaro, 'Justice for All? Protecting the Public Interest in Investment Treaties' (2018) 59 Boston College Law Review 2791, 2804; Lin (n 1) 273.

and Royal Bank of Canada against Costa Rica.[12] The British investors claimed that Costa Rica's de facto Government, run by Federico Tinoco Granados, expropriated their property by unilaterally terminating a contract with them. Because the investors did not have the right to take direct action against the Tinoco Government in an arbitration, Great Britain represented its investors' claims. At the time, Great Britain had not recognised the Tinoco Government.[13] However, as part of its argument in the arbitration, Great Britain admitted that the Tinoco Government exerted control over the investment property, effectively treating the Tinoco administration as the government.[14] In this sense, by representing private nationals' interests, Great Britain had to balance incongruent stances towards the Tinoco Government. This balancing between public foreign affairs policy and private financial interests meant that states taking on investment claims had to consider how this representation would risk their ability to maintain established public policies, like the stance towards a de facto government.

These public law origins still underpin the foundations of modern investor-state dispute settlement proceedings. However, ISDS arbitration has been inserted into the international commercial arbitration framework.[15] This version of dispute resolution is not designed for the diversity of stakeholders within a state; rather, it is designed for purely private disputes. It fails to account for the public interest within investor-state proceedings that derives from the investment's impact on human rights, the control over public policy, and the distribution of public funds.[16]

Several authors have highlighted the dissonance between this highly privatised view of investor-state arbitration and the public interests at stake.[17] Lorenzo Cotula adequately captures these intersecting and sometimes conflicting interests in ISDS when he describes how '[c]ommon threads run through' public human rights and private investor rights, 'but different normative projects are at play'.[18] Like in the Tinoco case, the state's normative projects to support democracy may run contrary to those of the investor for property rights, yet they coexist within ISDS. By isolating the private elements within ISDS, these arbitrations sustain an asymmetrical framework with strong enforcement measures for private interests and no corresponding mechanism for public interests.[19] This effectively creates a hierarchy in international law.[20]

Moshe Hirsch proposes that the origin of this hierarchy is the *inter-partes* model in ISDS proceedings.[21] *Inter-partes* proceedings frame the dispute as being exclusively between two parties: the investor and the state.[22] This sets up a structure within investor-state

[12] *Tinoco Arbitration (GB v Costa Rica)* (1923) 1 RIAA 369. See also John H Currie and others, *International Law: Doctrine, Practice, and Theory* (2nd edn, Irwin Law Inc 2014) 226.
[13] Currie and others (n 12).
[14] ibid 227.
[15] Dar and Mohanty (n 11).
[16] ibid 233–34.
[17] See for example ibid 233; Lin (n 1) 271; Lorenzo Cotula, '(Dis)integration in Global Resource Governance: Extractivism, Human Rights, and Investment Treaties' (2020) 23 Journal of International Economic Law 431; Arcuri and Montanaro (n 11).
[18] Cotula (n 17) 442.
[19] Arcuri and Montanaro (n 11) 2807.
[20] John Linarelli, Margot E Salomon and Muthucumaraswamy Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (OUP 2018) 1.
[21] Moshe Hirsch, 'Social Movements, Reframing Investment Relations, and Enhancing the Application of Human Rights Norms in International Investment Law' (2021) 34 Leiden Journal of International Law 127.
[22] ibid 138.

arbitrations that obscures the multiplicity of views that are within the state and explains why private legal culture resists including public law considerations.[23] The idea of a private legal culture in ISDS arbitration is further explained by Alessandra Arcuri and Francesco Montanaro.[24] They argue that arbitrators tend to ignore public interests because they come from a predominantly Western, business background.[25] These ingrained individual epistemologies result in interpretations of international investment agreements that prioritise private interests.[26]

Nicolás M Perrone also noted that the tendency of tribunals to interpret human rights through an investment lens enables them to prioritise private interests.[27] For example, in *Bernhard von Pezold and Others v Republic of Zimbabwe*, the tribunal did not consider Indigenous land rights to be relevant to its decision when it rejected an *amicus* brief from those claiming the land where the investment in dispute was located.[28] However, when considering the investors' property rights, the tribunal included public international law considerations, like the International Convention on the Elimination of All Forms of Racial Discrimination.[29] In this sense, even though ISDS is not binding on third parties, its focus on enforcing private interests reinforces the narrative that financial interests outweigh human rights, environmental considerations, or other public law interests.

This narrative also defines the parameters of what the tribunal views as relevant.[30] Wasiq Dar and Gautam Mohanty critique ISDS arbitration for prioritising the role of investors over human rights.[31] They show that, even when IIAs explicitly include international law, tribunals only apply principles relating to investors rather than considering public international human rights laws.[32] Therefore, the pervasive perception of ISDS as isolated from public affairs restricts its deliberations.

As the preceding authors note, the reoccurring narrative in ISDS arbitration that private interests can be separated from their public context and given enforceable rights has a tangible impact on how a tribunal assesses its jurisdiction and the merits of the claim. In this context, evaluating *amici curiae* as a means to incorporate public considerations in ISDS supports establishing a more holistic model for adjudicating investor claims within ISDS arbitration.

B. PRIORITISATION OF PRIVATE INTERESTS IN ISDS ARCHITECTURE

The distancing between investors' rights and human rights has resulted in features within ISDS that grant investors additional privileges. The most obvious example of this is

[23] ibid 144.
[24] Arcuri and Montanaro (n 11) 2795.
[25] ibid 2796.
[26] Hirsch (n 21) 144.
[27] Nicolás M Perrone, 'Local Communities, Extractivism and International Investment Law: The Case of Five Colombian Communities' (2022) 19 Globalizations 837, 838.
[28] *Bernhard von Pezold and Others v Republic of Zimbabwe*, ICSID Case No ARB/10/15, Procedural Order No 2 (26 June 2012) ('*Pezold* PO2') [50]–[56], [62].
[29] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) UNGA Res 2106 (XX).
[30] Perrone, 'Local Communities, Extractivism and International Investment Law' (n 27).
[31] Dar and Mohanty (n 11).
[32] ibid 229–30.

that only investors are able to make claims and assert their rights against the state.[33] While states may launch counterclaims, these are on limited grounds in IIAs. This also means that local communities that are directly impacted by investments cannot launch any independent ISDS allegations relating to these investments.

Investor allegations against the state also result in large public expenses. This can be the case even where the state successfully defends itself against the claims and where the case is discontinued or settled. In 2021, investors claimed on average US $1.16 billion, and tribunals ordered states to pay an average of US $437 million plus costs.[34] These awards and the cost of arbitration can leave states at a loss even if they defeat the investors' allegations. For instance, in *Pac Rim Cayman LLC v Republic of El Salvador*, the investor claimed that the state violated its right when the state denied the company a mining concession.[35] Although the tribunal dismissed the claim, stating that the investor had no right to the mining concession, the state had already spent US $12 million on legal fees.[36] The investor was ordered to pay US $8 million of these fees plus interest;[37] however, this was still insufficient to cover the full legal expense and delayed the state's ability to make policy decisions based on a predictable budget. The exorbitant costs of defending against ISDS claims can mean that states limit regulations that would otherwise favour local communities. The budgetary restraints caused by ISDS claims limit a state's ability freely to regulate areas of public interest whether or not such actions would actually violate the state's investment commitments. This is often referred to as regulatory chill.[38]

ISDS further favours investors through the strong global enforcement of awards. The vast majority of known investor-state arbitrations take place under the ICSID Arbitration Rules.[39] The International Centre for Settlement of Investment Disputes ('ICSID') specifically mandates member states to enforce these awards, without exceptions for public policy grounds.[40] This offers significant advantages to ISDS proceedings over civil remedies or administrative proceedings, which are typically the only option for individuals affected by investment projects.[41]

Advocates of ISDS argue that the structure does not unfairly favour investors because investors' protections within IIAs simply act to counterbalance the advantage that a state receives by negotiating and drafting an IIA. Chen Yu describes how the ISDS system gives states

[33] Arcuri and Montanaro (n 11) 2799.
[34] Columbia Center on Sustainable Investment, 'Primer on International Investment Treaties and Investor-State Dispute Settlement' (*Columbia University*) <https://ccsi.columbia.edu/content/primer-international-investment-treaties-and-investor-state-dispute-settlement> accessed 2 October 2024.
[35] Dar and Mohanty (n 11) 242.
[36] Shin Imai, Leah Gardner and Sarah Weinberger, 'The "Canada Brand": Violence and Canadian Mining Companies in Latin America' (2017) Osgoode Legal Studies Research Paper No 17/2017, 14 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2886584> accessed 2 October 2024.
[37] Butler (n 8) 168.
[38] Penelope Simons and J Anthony VanDuzer, 'Using International Investment Agreements to Address Access to Justice for Victims of Human Rights Violations Associated with Transnational Resource Extraction' in Oonagh E Fitzgerald (ed), *Corporate Citizen: New Perspectives on the Globalized Rule of Law* (McGill-Queen's University Press 2020) 291; Yoram Z Haftel, Morr Link and Tomer Broude, 'Last Year's Model? Investment Arbitration, Negotiation, and the Gap Between Model BITs and IIAs' (2023) 26 Journal of International Economic Law 483, 485.
[39] ICSID Rules of Procedure for Arbitration Proceedings (April 2006) ('ICSID Arbitration Rules'); UNCTAD, *World Investment Report 2024: Investment Facilitation and Digital Government* (United Nations 2024) 73.
[40] See Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) ('ICSID Convention'), art 52(1).
[41] Simons and VanDuzer (n 38) 287–90.

an advantage over investors because only states can influence the interpretation of IIAs through subsequent practice and interpretive notes.[42] However, this treats states as fully independent actors without additional interests. In practice, academics have shown that investors have influence at both the negotiation phase and amendment phase of IIAs. Wolfgang Alschner and Dmitriy Skougarevskiy show that power asymmetries, calculated on the basis of gross domestic product ('GDP'), account for the ability of wealthier countries to create cohesive IIA networks, essentially becoming the rule setters for international investment arbitration in favour of their domestic interests,[43] namely securing their investors' capital.

After an IIA is implemented, investors continue to play a role in how a state reacts and updates its IIAs. Another empirical study that examines when states are motivated to change their model Bilateral Investment Treaties ('BITs') found that this change is more likely to occur when the state negotiates with a country that has had extensive experience with ISDS claims and is eager to safeguard more regulatory space.[44] In this sense, the actions of investors within ISDS disputes can change whether a state moves to amend or change the interpretation of an IIA. Investors have further protection against amendments that negatively impact their interests because, when a state wants to amend a BIT, that state's power is also restricted by the Vienna Convention on the Law of Treaties;[45] it must follow the formalities within the IIA itself in order to amend it, which may include consent from all member states or specific waiting periods.[46] These restrictions on states' power would have been negotiated when the IIA was drafted and included stakeholders like investors.

Others argue that the outcomes within international investment arbitration do not support the conclusion that ISDS disadvantages states. They cite that the portion of ISDS awards favouring investors compared to states oscillates and is relatively equal (38 per cent of awards favour the state compared to 28 per cent in favour of the investor).[47] However, this excludes the numerous awards that are settled or discontinued for undisclosed costs, totalling 31 per cent of all known claims.[48] It further fails to account for the greater risk that developing countries face when challenged under ISDS, with 70 per cent of all claims being brought against developing countries in 2023.[49] Considering these results in the light of the structure of ISDS shows that prioritising investment interests is not a fluke but rather a design feature in ISDS.

C. THE GROWTH OF PUBLIC LAW CONSIDERATIONS WITHIN ISDS

Despite the private architecture of the system, tribunals and IIAs have increasingly recognised the public aspects of ISDS. Investor-state arbitration implicates public funds and

[42] Chen Yu, '*Amicus Curiae* Participation in ISDS: A Caution Against Political Intervention in Treaty Interpretation' (2020) 35 ICSID Review – Foreign Investment Law Journal 223.
[43] Wolfgang Alschner and Dmitriy Skougarevskiy, 'Mapping the Universe of International Investment Agreements' (2016) 19 Journal of International Economic Law 561.
[44] Haftel, Link and Broude (n 38).
[45] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.
[46] August Reinisch and Sara Mansour Fallah, 'Post-Termination Responsibility of States?—The Impact of Amendment/Modification, Suspension and Termination of Investment Treaties on (Vested) Rights of Investors' (2022) 37 ICSID Review – Foreign Investment Law Journal 101, 102–03.
[47] UNCTAD (n 39) 31.
[48] ibid.
[49] ibid 31–32.

rules directly on state actions. Some cases even interpret a state's laws and can discredit national judgments.[50]

Arbitral tribunals have started to accept that investor-state arbitration is not isolated from public international law.[51] Using the Vienna Convention on the Law of Treaties to interpret IIAs, tribunals have recognised their mandate to consider 'any relevant rules of international law applicable in the relations between the parties'.[52] Authorities, including the International Law Commission, consider that this provision endorses a systemic approach to international law.[53] This approach integrates the distinct bodies of international law and reads them as a cohesive whole.

An ISDS tribunal adopted this systemic approach in *South American Silver Ltd v Bolivia*. In that case, the investor, through numerous subsidiaries, held mining concessions constituting the Malku Khota Project in Potosí, Bolivia.[54] The Malku Khota Project is located in the traditional territories of five Indigenous communities in Northern Potosí that are organised into sub-central unions, called '*ayllus*': Takahuani, Sullka Jilatikani, Urinsaya, Jatun Urinsaya, and Samca.[55] These Indigenous communities are part of the Quechua and Aymara ethnic groups.[56] In 2010, the investor was forced to suspend operations after several of these communities issued resolutions against the mining project for its contamination of sacred sites and the division amongst community members that had been caused by the investor's unequal compensation and consultation.[57] Tensions mounted between the surrounding communities, the mining officials, and the police until June 2012 when clashes between the police and the groups opposing the mine resulted in the death of a Malku Khota community member, José Mamani.[58] This incident set off negotiations between the opposing groups and local governments that led to the national government revoking the mining concession from the investor. The investor soon filed and won an ISDS claim against the Bolivian Government for expropriation. However, Bolivia argued that the tribunal should reduce the damages it owed because the investor negatively impacted Indigenous peoples' rights to free, prior and informed consent ('FPIC').[59] The tribunal disagreed and found that FPIC was not recognised as customary international law and so the tribunal did not apply these rights in rendering its award on damages.[60] However, the tribunal acknowledged that treaty interpretation required systemic integration.[61] Thus, it accepted that international investment law is not isolated from international human rights; rather, bodies of international law work within a system that harmonises how these obligations interact.

[50] *Copper Mesa Mining Corporation v Republic of Ecuador*, PCA Case No 2012-2, Award (15 March 2016).
[51] *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No ARB/07/26, Award (8 December 2016); *Bear Creek* Award (n 5).
[52] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 ('VCLT') art 31(3)(c).
[53] See for example Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights?' (2011) 60 International & Comparative Law Quarterly 573, 584.
[54] *South American Silver Ltd (Bermuda) v The Plurinational State of Bolivia*, PCA Case No 2013-15, Award (22 November 2018) ('*South American Silver* Award') [87]–[89].
[55] *South American Silver Ltd v Plurinational State of Bolivia*, PCA Case No 2013-15, Objections to Jurisdiction, Admissibility and Counter-Memorial on the Merits (31 March 2015) ('Respondent Counter-Memorial') [67]–[69].
[56] ibid [34].
[57] *South American Silver* Award (n 54) [117].
[58] Respondent Counter-Memorial (n 55) [173].
[59] ibid [219].
[60] *South American Silver* Award (n 54) [217].
[61] ibid.

Today, some IIAs attempt to integrate private and public aspects in ISDS. However, these provisions remain vague, unenforceable, or ingrained in the same asymmetrical structure of ISDS that limits arbitration to considering private international law. For example, the Canada-Peru Free Trade Agreement ('FTA'), along with many other Canadian FTAs, includes a provision on corporate social responsibility. It tells states to 'encourage' investors to 'voluntarily incorporate' corporate social responsibility practices.[62] Although the provision seems to strengthen public considerations, it acts to reinforce the voluntary nature of business responsibilities towards human rights.[63]

India's Model BIT[64] and the Morrocco–Nigeria BIT[65] make significant headway in accounting for public interests in investment. India's Model BIT was spurred by the reaction of civil society against a particularly damaging investor-state arbitration where the investor did not have to comply with domestic law.[66] In reaction, the Model BIT states that '[i]nvestors and their [i]nvestments *shall* be subject to and comply' with the law in the host state, including minimum wages, environmental protections, and human rights.[67] Both BITs also maintain the states' right to regulate for legitimate objectives.[68] Such provisions are designed to mitigate regulatory chill from ISDS by reserving the state's right to regulate in areas that may cause indirect harm to the investor if this is justified for the greater good of the public.

However, the strong right to regulate contrasts sharply with vague obligations for corporate social responsibility. Both BITs say only that investors '*should strive*' either for 'high levels of socially responsible practices'[69] or to 'recognise the rights, traditions and customs of local communities and indigenous peoples'.[70] The use of 'should strive' instead of 'shall' does not set a benchmark for enforcement of these obligations. This signals weaker levels of enforcement for human rights than for other rights and perpetuates investment-first narratives.

Because of these weak enforcement measures for mandating corporate responsibility towards human rights, these IIAs do not address the core private structure of ISDS. They leave in place the asymmetrical ability to make claims, the long history of incentivising pro-investor policies, and the culture within arbitration that promotes market approaches. Still, recognition of public aspects in ISDS signals acceptance that investors' rights must be balanced against states' obligations to protect, respect, and remedy human rights.

[62] Free Trade Agreement between Canada and the Republic of Peru (adopted 29 May 2008, entered into force 1 August 2009) CAN TS 2009 No 15, art 810.

[63] Laurence Dubin, 'Corporate Social Responsibility Clauses in Investment Treaties' (*IISD*, 21 December 2018) <https://www.iisd.org/itn/en/2018/12/21/corporate-social-responsibility-clauses-in-investment-treaties-laurence-dubin/> accessed 3 October 2024.

[64] Model Text for the Indian Bilateral Investment Treaty (2016) ('India's Model BIT') <https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/wp-content/uploads/2016/06/Model-Text-for-the-Indian-Bilateral-Investment-Treaty.pdf> accessed 4 October 2024.

[65] Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (signed 3 December 2016) ('Morocco–Nigeria BIT').

[66] Prabhash Ranjan and Pushkar Anand, 'The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction' (2017) 38 Northwestern Journal of International Law & Business 1, 15.

[67] India's Model BIT (n 64) art 12.1.

[68] See Morocco–Nigeria BIT (n 65) art 23; Ranjan and Anand (n 66) 8.

[69] Morocco–Nigeria BIT (n 65) art 24 (emphasis added).

[70] India's Model BIT (n 64) art 12.2.

III. THE PRIVATE-PUBLIC CROSSROADS OF ISDS: INDIGENOUS PEOPLES AND EXTRACTIVE INDUSTRIES

Extractivism is typically understood as the system of exploiting raw materials, like mining, oil, or forestry.[71] Industries that operate in these spheres are overrepresented within the ISDS system, representing the largest share of ICSID proceedings (24 per cent).[72] Powerful national actors, who traditionally formed ISDS agreements, typically have interests that diverge from the local communities affected by extraction. [73] This leads to a state implementing contradictory policies at the local and international levels, where they may protect a local environment but breach obligations in an ISDS provision.[74] The state's divergent interests make extraction disputes a microcosm of the public-private tensions that arise in ISDS.

The combination of conflicting local policies and a high interest from extractive industries increases the risk both to and from long-term investments. The risk of extraction projects, like mining, is that they require long lead times until they start to make significant profits.[75] This makes investors especially reliant on ISDS guarantees to provide security for riskier investments.

At the same time, the risk from extraction projects is that they are linked to some of the worst human rights violations in the world.[76] One of the most infamous instances of human rights violations was when public officials in Nigeria conducted land grabbing in the 1990s on the Ogoni people's territory to provide the land to oil companies.[77] This forced eviction led to assaults, summary executions, and other human rights violations against the local community.[78] Structural legal inequalities mean that marginalised communities, especially Indigenous peoples, are particularly vulnerable to human rights violations.[79] Although the Indigenous peoples affected by resource extraction have diverse perspectives, Indigenous peoples generally have an especially close connection with the land and resources affected by these projects, often deriving their law, cosmology, and culture from land-based practices.[80] As many of these

[71] Hans-Jürgen Burchardt and Kristina Dietz, '(Neo-)Extractivism – A New Challenge for Development Theory from Latin America' (2014) 35 Third World Quarterly 468, 469.
[72] Perrone, 'Local Communities, Extractivism and International Investment Law' (n 27) 842.
[73] ibid 838; Cotula (n 17).
[74] Cotula (n 17) 447–48.
[75] Harrison Bontje and Don Duval, 'Critical Minerals Supply and Demand Challenges Mining Companies Face' (*EY*, 20 April 2022) <https://www.ey.com/en_ca/mining-metals/critical-minerals-supply-and-demand-challenges> accessed 3 October 2024.
[76] See for example Simons and VanDuzer (n 38); Indra de Soysa, Nicole Janz and Krishna Chaitanya Vadlamannati, 'US Multinationals and Human Rights: A Theoretical and Empirical Assessment of Extractive vs. Non-Extractive Sectors' (2019) UCD Working Papers in Law, Criminology & Socio-Legal Studies 9/2019, 8 <https://ssrn.com/abstract=3349247> accessed 3 October 2024.
[77] UN Committee on the Elimination of Racial Discrimination (67th Session) 'Consideration of Reports Submitted by States Parties under Article 9 of the Convention' (27 March 2007) UN Doc CERD/C/NGA/Co/18, para 19.
[78] UNHRC, 'Visit to Nigeria: Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context' (3 January 2020) UN Doc A/HRC/43/43/Add.1, para 66.
[79] See for example Claire Wright, 'Expanding Extractive Industries, Contracting Indigenous Rights? Gains, Setbacks, and Missed Opportunities in Latin America' in Alison Brysk and Michael Stohl (eds), *Contracting Human Rights: Crisis, Accountability, and Opportunity* (Edward Elgar Publishing 2018) 39; James Thuo Gathii, 'Incorporating the Third Party Beneficiary Principle in Natural Resource Contracts' (2014) 43 Georgia Journal of International & Comparative Law 93.
[80] John Borrows, *Canada's Indigenous Constitution* (University of Toronto Press 2010) 35.

projects take place on the traditional territories of Indigenous communities, it is especially important to consider how extraction projects may impact the rights of Indigenous peoples.

Yet, the negotiating history of IIAs has excluded Indigenous communities and those directly affected by investment projects.[81] This has maintained a distance between private investment interests and the public interests that are affected.[82] Although states' initial claims over resource extraction have been viewed as an exercise of assertion apart from colonial powers, the subsuming of local and Indigenous interests within states has rendered Indigenous perspectives invisible in ISDS negotiations.[83]

The *inter-partes* model in ISDS proceedings reinforces this 'invisibility' of Indigenous peoples because it fails to consider Indigenous peoples' rights to FPIC along with other rights to land and decision-making.[84] For example, the legitimate expectations of investors may be set by state officials without first consulting Indigenous communities.[85] The exclusive investor-state relationship effectively treats the investment area as *terra nullius* to be completely controlled by the state.[86]

Despite the private-public separation within the ISDS system, some arbitrations have started to acknowledge a tenuous obligation for businesses to respect Indigenous peoples' internationally recognised human rights.[87] In *Urbaser v The Argentine Republic*, the tribunal acknowledged that investors are no longer 'immune from becoming subjects of international law', but their obligations towards human rights depend on their activities' relationship to human rights.[88] At a minimum, this means that companies have an obligation not to engage in an activity that is 'aimed at the destruction of any of the rights and freedoms' set out in the Universal Declaration of Human Rights.[89]

Even with the progress that has been made in investor responsibility, ISDS proceedings still reinforce the state as the sole party responsible for upholding Indigenous peoples' rights to FPIC. In *Bear Creek Mining Corporation*, the investor consulted the Indigenous communities that would have been affected by a silver mine in their territory, but the investor excluded key information about the mine's long-term impacts and did not translate the information to Aymara, the local language.[90] The state also argued that the company divided the communities through supporting only certain individuals.[91] One of the arbitrators supported reducing damages owed to the company because this consultation failed to meet the requirements of FPIC, but the majority held that only the state had obligations under FPIC.[92]

[81] Nicolás M Perrone, 'Bridging the Gap between Foreign Investor Rights and Obligations: Towards Reimagining the International Law on Foreign Investment' (2022) 7 Business and Human Rights Journal 375, 390.
[82] ibid 393; Wright (n 79).
[83] See for example Perrone, 'Local Communities, Extractivism and International Investment Law' (n 27) 841; Nicolás M Perrone, *Investment Treaties and the Legal Imagination: How Foreign Investors Play by Their Own Rules* (OUP 2021) 173.
[84] Brenda L Gunn, 'International Investment Agreements and Indigenous Peoples' Rights' in John Borrows and Risa Schwartz (eds), *Indigenous Peoples and International Trade: Building Equitable and Inclusive International Trade and Investment Agreements* (CUP 2020) 195.
[85] Perrone, 'Local Communities, Extractivism and International Investment Law' (n 27) 847.
[86] ibid 847; Perrone, *Investment Treaties and the Legal Imagination* (n 83) 175.
[87] See for example *Urbaser* (n 51); *Bear Creek* Award (n 5); *South American Silver* Award (n 54).
[88] *Urbaser* (n 51) [1195].
[89] ibid [1196].
[90] Perrone, 'Investment Treaty Law' (n 6) 452.
[91] PO5 (n 6) [19]; ibid 451.
[92] Sands QC Dissent (n 7).

Because extractive investments typically affect Indigenous communities in disproportionate and unique ways, the failure to involve Indigenous communities in an *inter-partes* ISDS arbitration is particularly damaging. Local communities are unable to show how a particular investment contributes to, or deteriorates, their lived experiences in terms of a healthy environment, human rights, or social conditions. Even when a state raises their concerns, the state must frame these concerns as part of the state's own position. Thus, Indigenous peoples' rights remain largely invisible in ISDS proceedings.

IV. EFFECTIVE REMEDIES UNDER THE UNGPS

The UNGPs are considered to be an authoritative, soft law framework that governs states' duties and companies' responsibilities to prevent human rights violations caused by, or connected to, business activity.[93] They were designed as part of John Ruggie's mandate as the United Nations ('UN') Special Representative to the Secretary-General on the issue of human rights and transnational corporations and other business enterprises from 2005 to 2011.[94] Although the UNGPs are not binding laws, they are designed to reflect the current expectations that are directed towards both states and companies as regards their relationship with human rights.[95] They have been widely cited as a benchmark in business and human rights law and are used by international courts like the Inter-American Court of Human Rights.[96]

The UNGPs were meant to operationalise the three-pillar framework of 'Protect, Respect and Remedy',[97] which had been developed to unify corporate accountability efforts since the 2008 Resolution 8/7 from the UN Human Rights Council.[98] These three pillars represent the following: first, the state's duty to protect against human rights violations by third parties; second, corporate responsibility to respect human rights by acting with due diligence; and third, the need to create more effective remedies for those affected by human rights violations.[99]

A UNGPs-compliant remedy is flexible and rightsholders should have access to a 'bouquet of remedies', meaning a variety of options that are accessible for various needs.[100] Guiding Principle ('GP') 25 outlines that states have a positive duty to ensure that rightsholders have access to an effective remedy when their rights are violated.[101] Companies also have a role in creating and participating in effective remedies; companies must seek to prevent or mitigate human rights infringements through both due diligence to prevent human rights violations and effective remedies.[102] Remedies under the UNGPs do not have to be judicial

[93] Simons and VanDuzer (n 38) 287.
[94] UNHRC, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie' (21 March 2011) UN Doc A/HRC/17/31 ('UNGPs').
[95] ibid.
[96] Núria Reguart-Segarra, 'Business, Indigenous Peoples' Rights and Security in the Case Law of the Inter-American Court of Human Rights' (2019) 4 Business and Human Rights Journal 109, 113.
[97] UNGPs (n 94) para 9.
[98] ibid para 5.
[99] ibid para 6.
[100] Note by the Secretary-General, 'Human Rights and Transnational Corporations and Other Business Enterprises' (2017) UN Doc A/72/162, para 38.
[101] UNGPs (n 94) GP 25.
[102] See for example Note by the Secretary-General (n 100) para 14; Mariëtte van Huijstee and Joseph Wilde-Ramsing, 'Remedy Is the Reason: Non-Judicial Grievance Mechanisms and Access to Remedy' in Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business* (Edward Elgar Publishing 2020) 471.

remedies; rather, non-judicial mechanisms can address areas where judicial remedies would be impractical.[103] Examples of state-driven public remedies can include judicial remedies or administrative remedies, like National Contact Points for Responsible Business Conduct, which serve to promote human rights due diligence, and the OECD Guidelines for Multinational Enterprises.[104] Corporate remedies, often considered private remedies, normally refer to internal grievance mechanisms. Many remedies also straddle both the public and private spheres, where states and corporations cooperate to provide some type of hybrid remedy, like 'certification program[s]' for decent labour conditions.[105]

Hybrid remedies can cause a particular challenge because power dynamics are often deeply ingrained in the remedy's structure. For example, some authors critique state-investor remedies because they can lead to corporate capture of the remedy.[106] Others recognise that non-state actors are necessary to regulate transnational spaces that are not clearly within a given state's jurisdiction and argue that hybrid mechanisms can be effective where there are synergies between the private and public sector, strong oversight, and consistency.[107]

The dynamics of hybrid remedies are an especially important feature in *amici curiae* because both parties in an ISDS dispute have an equal say as to whether to admit an *amicus* into a proceeding. The levelling out between states and private parties means that the incentives at stake for both the investor and the state can drastically impact the effectiveness of the *amicus* submission. For example, incentivising investors and states to support *amici curiae* could strengthen coordination and predictability within *amicus curiae* submissions, allowing for greater remedial flexibility. However, misalignment in incentives between the state and investor could leave rightsholders uncertain of whether their perspective will be included within an investor-state arbitration. Framing *amici curiae* in the debate that already exists around hybrid remedies allows for a deeper understanding of the contextual dynamics at play and their impact on the criteria detailed in the UNGPs.

By understanding *amicus curiae* as a hybrid between state and corporate action, its compliance with the UNGPs for becoming an effective remedy can be evaluated by comparing it to the general criteria set out as a minimum standard in GP 31.[108] The states and private actors share responsibility to uphold the inter-dependent criteria of GP 31 procedurally and substantively.[109] The components most relevant for evaluating *amici curiae* as remedies are the following:

[103] See for example Note by the Secretary-General (n 100) para 16; Liliana Lizarazo-Rodríguez, 'The UN "Guiding Principles on Business and Human Rights": Methodological Challenges to Assessing the Third Pillar: Access to Effective Remedy' (2018) 36 Nordic Journal of Human Rights 353, 362.

[104] OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (OECD Publishing 2023) 56.

[105] Justine Nolan, 'Closing Gaps in the Chain: Regulating Respect for Human Rights in Global Supply Chains and the Role of Multi-Stakeholder Initiatives' in Daniel Brinks and others (eds), *Power, Participation, and Private Regulatory Initiatives: Human Rights under Supply Chain Capitalism* (University of Pennsylvania Press 2021) 49.

[106] See for example Lise Smit and others, 'Human Rights Due Diligence in Global Supply Chains: Evidence of Corporate Practices to Inform a Legal Standard' (2021) 25 The International Journal of Human Rights 945; Galit A Sarfaty, 'Shining Light on Global Supply Chains' (2015) 56 Harvard International Law Journal 419, 435–36.

[107] Nolan (n 105) 47–48.

[108] UNGPs (n 94) GP 31.

[109] See for example Note by the Secretary-General (n 100) para 14; van Huijstee and Wilde-Ramsing (n 102) 482; Stefan Zagelmeyer, 'PRC 9: Non-Judicial Grievance Mechanisms' in Barnali Choudhury (ed), *The UN Guiding Principles on Business and Human Rights: A Commentary* (Edward Elgar Publishing 2023) para 40.06.

Legitimacy: This concept includes the ideas of accountability and rightsholders' trust in the mechanism.[110] Corporate remedies should contribute to the greater societal goals that should come from effective remedies and may include guarantees of non-repetition or public apologies.[111] Rightsholders' trust in a remedy generally derives from its perceived independence and impartiality.[112] The remedy will garner more trust from working with rightsholders on continued improvement and ensuring fairness.[113]

Accessibility: This criterion mandates that the remedy be affordable to the rightsholders, timely, and communicated to rightsholders in their own language.[114] It also substantively mandates that remedies be adequate, meaning that the remedies account for rightsholders' needs.[115] It includes considerations like timing, compensation quality, form, and future needs.[116]

Predictability: Although this element typically focuses on procedures that are 'clear and known', it also includes substantive elements, like a predictable range of outcomes based on similar facts.[117]

Transparency: The right to information is a gateway right: it enables rightsholders to know about remedies and possible human rights violations on a macro scale.[118] It applies both to rightsholders that are directly affected and to civil society organisations that monitor human rights affected by business activity.[119]

Equity: Remedies that account for power imbalances with proactive state and company action are more likely to be equitable for rightsholders.[120] Thus, specific accommodations should be made for those who face particular obstacles to obtaining a remedy. For example, the Working Group on the issue of human rights and transnational corporations and other business enterprises highlighted that women, people in rural areas, and rightsholders who are racialised, have a disability, and/or lack economic means may face different obstacles to receiving an effective remedy and require additional consideration.[121]

Rights-Compliance: Remedies that focus on rights are built in dialogue with those affected by business activity.[122] This includes accounting for varied experiences and perspectives and prohibits states from victimising or criminalising rightsholders. States should take steps to protect individuals seeking remedies against business activity.[123]

[110] van Huijstee and Wilde-Ramsing (n 102) 482.
[111] Note by the Secretary-General (n 100) para 17.
[112] Anna Triponel, 'Guiding Principle 31: Effectiveness Criteria for Non-Judicial Grievance Mechanisms' in Barnali Choudhury (ed), *The UN Guiding Principles on Business and Human Rights: A Commentary* (Edward Elgar Publishing 2023) para 31.14.
[113] ibid para 31.12.
[114] van Huijstee and Wilde-Ramsing (n 102) 482.
[115] Note by the Secretary-General (n 100) para 33.
[116] ibid.
[117] UNGPs (n 94) GP 31(c).
[118] See for example Nicola Jägers, 'Access to Effective Remedy: The Role of Information' in Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business* (Edward Elgar Publishing 2020) 404; Triponel (n 112) paras 31.22–31.23.
[119] Triponel (n 112) paras 31.22–31.23.
[120] Note by the Secretary-General (n 100) para 23.
[121] ibid paras 23–31.
[122] ibid para 21.
[123] ibid para 20.

> Ultimately, whether a remedy is effective is judged from the perspective of an empowered rightsholder.[124]
>
> *Source of Continuous Learning and Dialogue*: Effective remedies lead to even more effective remedies if businesses facilitate and implement feedback from rightsholders about grievance mechanisms.[125] Businesses should engage rightsholders in open and safe dialogue to understand how to prevent and mitigate human rights infringements through their business activity or relationships.[126]

While these criteria are broadly supported, in the context of non-judicial remedies, some authors have found that the minimum criteria required in GP 31 are insufficient to assess a remedy's effectiveness accurately if they are isolated from the broader context.[127] Instead, these authors argue that a remedy's effectiveness also depends on addressing power imbalances in relationships, developing strategic relationship among stakeholders, providing sufficient resources, processing and verifying evidence, and engaging across local, national, and international levels.[128] A synthesis of nine studies on evaluating effective human rights remedies found that the key criterion impacting a remedy's effectiveness is the leverage that the proposed remedy has against the perpetrator of a human rights violation.[129] While GP 31 sets an important threshold for human rights remedies to meet, it does not fully develop the contextual elements that are more likely to make a remedy produce meaningful outcomes. The following analysis of *amici curiae* attempts to incorporate some of these contextual elements into the minimum criteria in GP 31.

V. Deficiencies in Making *Amicus Curiae* Remedies in ISDS

A comparison of *amici curiae* against the criteria in the UNGPs shows that they fail to meet the minimum standards for effective non-judicial remedies. Still, it is important to examine the roles that *amici curiae* currently fill and the barriers that currently block them from becoming part of the 'bouquet of remedies'. Overcoming these barriers through reform to the *amici curiae* process could help to mitigate exclusion in ISDS.

A. The Impact of *Amici Curiae* on Legitimacy

Amici curiae have the potential not only to enhance the legitimacy of ISDS proceedings but also to push arbitral outcomes to recognise a greater societal goal.[130] *Amici curiae* bring in perspectives from the wider community on facts and law that are not offered by the disputing parties.[131] Given the disincentives for states to bring up human rights violations

[124] ibid para 22.
[125] Zagelmeyer (n 109) para 40.17.
[126] Triponel (n 112) paras 31.28–31.30.
[127] May Miller-Dawkins, Kate Macdonald and Shelley Marshall, 'Beyond Effectiveness Criteria: The Possibilities and Limits of Transnational Non-Judicial Redress Mechanisms' (Corporate Accountability Research 2016) 7 <https://ssrn.com/abstract=2865356> accessed 3 October 2024.
[128] ibid 6–7.
[129] van Huijstee and Wilde-Ramsing (n 102).
[130] Cotula (n 17) 448–49.
[131] Dar and Mohanty (n 11) 235.

during ISDS arbitration,[132] *amici curiae* play an important role in highlighting the impact of investments on rightsholders. In the first ICSID case that accepted an *amicus curiae*, *Vivendi v Argentina*,[133] the tribunal stated that *amici curiae* 'have the potential to improve public acceptance of the international arbitral process'.[134] Elaborating on this sentiment, the tribunal in *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* found that the submitted *amicus* brief helped to raise the concerns within the wider community in Tanzania that the ISDS impacted.[135] Indeed, the ICSID Arbitration Rules for accepting *amici curiae* acknowledge that their acceptance is based on the public interests at stake in the proceeding.[136] The recognition by ISDS tribunals of the human rights arguments submitted by *amici curiae* means that rightsholders have some representation within ISDS without being subsumed in the state. This shift in accepting the role of *amici curiae* in ISDS arbitration signals greater acceptance of the dynamic public interests at stake in ISDS proceedings.[137]

B. LIMITED *AMICUS CURIAE* ACCESSIBILITY

The legitimacy of *amici* submissions as a remedy is limited because its accessibility is restricted. The majority of *amici curiae* in ISDS proceedings are submitted by large NGOs or Western intergovernmental institutions.[138] *Amici* submissions are required to be written along technical guidelines, often specified by the tribunal or in the IIA.[139] They are further required to be submitted in the language of the proceedings, which could be highly impractical for rightsholders to access.[140] The diversity in perspectives that *amici curiae* purport to offer to tribunals is limited to only those organisations that are able to gain the technical assistance to form legal arguments that fit into an international investment law framework.

Further, it is rare for *amici curiae* to lead directly to adequate remedies. The remedies mentioned in the UNGPs for corporate accountability, like compensation, apologies, and guarantees of non-repetition, are outside of the scope of remedies that arbitral tribunals can provide to an *amicus curiae*. Still, the impact of *amici curiae* on ISDS awards can lead to indirect remedies through the state winning on counterclaims or reducing investors' damages, or bringing more awareness of human rights claims to both the state and the investor. One study that looks at ICSID awards from 2005 until 2018 found that, out of the 16 cases that had received *amici curiae* applications, 11 had accepted these submissions.[141] Seven of these awards made explicit reference to these *amici curiae* in their final awards and gave reasons to

[132] Perrone, 'Local Communities, Extractivism and International Investment Law' (n 27) 841.
[133] *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic*, ICSID Case No ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae* (19 May 2005).
[134] Lukas Brunner, 'Can Amicus Curiae Lead Investor-State Arbitration Out of Its Legitimacy Crisis and Towards More Efficient Dispute Resolution?' (*Kluwer Arbitration Blog*, 15 July 2022) <https://arbitrationblog.kluwerarbitration.com/2022/07/15/can-amicus-curiae-lead-investor-state-arbitration-out-of-its-legitimacy-crisis-and-towards-more-efficient-dispute-resolution/> accessed 3 October 2024.
[135] Dar and Mohanty (n 11) 236; *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No ARB/05/22, Petition for *Amicus Curiae* Status (27 November 2006) 7.
[136] ICSID Arbitration Rules (n 39) r 37(2).
[137] Lin (n 1) 227; Butler (n 8) 146.
[138] Butler (n 8) 149.
[139] See for example *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/21, Procedural Order No 6 (21 July 2016) ('PO6'), citing annex 836.1.
[140] ICSID Arbitration Rules (n 39) r 22.
[141] Butler (n 8).

agree or disagree with the submissions.[142] While the study is too small a sample size to extrapolate to general patterns, it shows that, even though tribunals are not required to make explicit reference to *amici curiae*, they will frequently account for *amici curiae* in their decisions. Even where *amici curiae* are not explicitly mentioned in the tribunal's decision, they can help to inform investors of the human rights impact and thus to form the basis of continual learning. Including opinions from non-disputing parties shifts the narratives within ISDS from prioritising investment, to narratives that recognise the human rights implications involved.

C. UNPREDICTABLE CRITERIA FOR ADMITTING *AMICI CURIAE*

Amici curiae applicants must meet shifting criteria for tribunals to accept their submissions. Historically, tribunals considered *amici curiae* as a procedural question that the disputing parties would have full control over.[143] However, ISDS arbitration rules have begun to make *amici curiae* more predictable through identifying criteria for accepting these submissions. For example, rule 37(2) of the ICSID Arbitration Rules, in place since 2006, explicitly allows tribunals to accept submissions from non-disputing parties that are 'within the scope of the dispute' and 'would assist the [t]ribunal' on questions of law or fact.[144] The tribunal will also consider whether the non-disputing party has significant interest in the dispute and will ensure that the submission does not unduly burden the parties or prejudice one of the parties.[145] Other arbitral rules have similar provisions, and admitting *amici curiae* generally depends on the fairness to the parties and legitimacy of the *amicus curiae*'s interest.[146]

Still, *amici curiae* are inherently discretionary, and tribunals have varied interpretations of the criteria in different arbitration rules.[147] In fact, the non-exhaustive nature of rule 37 of the ICSID Arbitration Rules encourages this broad tribunal discretion.[148] Tribunals may also give different weight to the criteria that could make it more difficult for rightsholders to submit an *amicus curiae*. For example, when deciding whether to admit two *amici curiae* applications, the tribunal in *Bear Creek Mining Corporation* indicated that the determinative factor for admission was whether the *amici* would assist the tribunal.[149] However, one commentator noted that the real deciding factor was the closeness of the relationship between the *amicus curiae* and the local area affected by the investment.[150] This was reflected in the tribunal's ultimate decision to accept the *amicus* application from the local non-government organisation while rejecting a specialised NGO in sustainable investment from the United States.[151] Relying on the question of whether an *amicus* applicant was directly impacted by investment activities, which is not listed in the ICSID Arbitration Rules, could lead to tribunals accepting fewer *amici curiae* even when they have legitimate interests in the dispute. Considering that the minimum requirements for UNGPs-compliant remedies, like transparency,

[142] ibid 151–52.
[143] *Aguas del Tunari, SA v Republic of Bolivia*, ICSID Case No ARB/02/3, Letter by David D Caron to J Martin Wagner (29 January 2003).
[144] ICSID Arbitration Rules (n 39) r 37(2).
[145] ibid.
[146] Dar and Mohanty (n 11) 237.
[147] Ranjan and Anand (n 66) 4.
[148] Obadia (n 10) 368.
[149] PO6 (n 139) [38].
[150] Butler (n 8) 163.
[151] See *Bear Creek* Award (n 5).

often apply to NGOs and civil society organisations, this limit may restrict the ability of *amici curiae* to address systemic concerns.

D. UNPREDICTABLE JURISDICTION FOR *AMICI CURIAE*

A major barrier to determining whether to admit *amici curiae* depends on how the tribunal defines its jurisdiction. Where *amici curiae* focus on human rights concerns, the issues are often adjacent to the financial claims identified in the IIA. Because tribunals have no inherent jurisdiction, the jurisdictional provisions in IIAs determine whether a tribunal considers human rights concerns.[152]

Most IIAs will include international law as a source of law for the tribunal. However, some tribunals have taken a 'parochial' interpretation of international law to rely only on international investment law, not international public law.[153] Other tribunals have found that such provisions naturally include both international investment law and international human rights law and have based portions of their decisions on human rights treaties.[154] The systemic approach to interpreting IIAs, which is growing in acceptance, is more widely accepted when the jurisdictional provision of IIAs includes a broader range of areas.[155]

Even still, arbitral tribunals do not include all human rights in their jurisdiction even if they take on a systemic interpretation of international law. The tribunal in *von Pezold* decided not to permit the *amicus curiae* submission from a European human rights organisation and four Indigenous communities in Zimbabwe.[156] The ISDS proceedings originated from Zimbabwe's constitutional reform and its Fast Track Land Reform Programme, which together aimed at redistributing the land that was given during the colonial period to white commercial farmers.[157] The reform allowed compensation to the farmers from the colonial power only for improvements on the property.[158] The *amicus curiae* dealt primarily with international human rights law and the impact of commercial farms on Indigenous peoples' connection to their ancestral lands.[159] In rejecting the application, the tribunal stated that the BITs did not incorporate the 'universe of international law' and did not reference international instruments that protected Indigenous peoples' identities.[160] Thus, these considerations were outside the scope of the tribunal's jurisdiction. Interestingly, the tribunal, in its final award, explicitly referenced international human rights law and the prohibition against racial discrimination when it awarded US $1 million in moral damages to the investor who had claimed that Zimbabwe's land reform discriminated on the basis of race.[161] In other words, the tribunal included human

[152] Dar and Mohanty (n 11) 235.
[153] ibid 229.
[154] See for example *Hesham Talaat M Al-Warraq v Republic of Indonesia*, UNCITRAL, Final Award (15 December 2014) [521]; *Técnicas Medioambientales Tecmed, SA v The United Mexican States*, ICSID Case No ARB (AF)/00/2, Award (29 May 2003) [116]; Dar and Mohanty (n 11) 232.
[155] Dar and Mohanty (n 11) 230; *Urbaser* (n 51).
[156] *Pezold* PO2 (n 28).
[157] See generally Thomas Leary, 'Non-Disputing Parties and Human Rights in Investor-State Arbitration: *Bernhard von Pezold and Others v Republic of Zimbabwe*, ICSID Case No ARB/10/15, Final Award, 28 July 2015' (2017) 18 Journal of World Investment & Trade 1062.
[158] Ntina Tzouvala, 'Invested in Whiteness: Zimbabwe, the *von Pezold* Arbitration, and the Question of Race in International Law' (2022) 2 Journal of Law and Political Economy 226, 229.
[159] *Pezold* PO2 (n 28) [21].
[160] Leary (n 157) 1071; ibid [57].
[161] Leary (n 157) 1070; Tzouvala (n 158) 230.

rights law when faced with a matter involving racial discrimination, but excluded human rights law when considering the interests of Indigenous peoples. This shows the highly unpredictable and discretionary nature of ISDS tribunals.

E. LACK OF TRANSPARENCY FOR *AMICI CURIAE*

Parties to ISDS proceedings have equal access to all communication and progress in the arbitral proceedings, subject only to urgent interim orders. However, *amici curiae* applicants are not parties and are thus not necessarily privy to the progress, the precise arguments of the parties, or the issues raised in the dispute. In *Pac Rim Cayman LLC*, the tribunal dismissed the *amicus curiae* submission from a local organisation that focused on international human rights and environmental law.[162] In its reasons, the tribunal stated that it was inappropriate to address the *amicus curiae*'s argument in part because the *amicus* was not privy to the confidential information that had emerged in later stages of the proceedings.[163] Because the parties had blocked access to pivotal information, the *amicus curiae* failed to convince the tribunal meaningfully to consider human rights in the dispute.

However, with greater acceptance of the state's duty of transparency,[164] more arbitral rules are emphasising transparency in ISDS proceedings.[165] The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration[166] outline how to increase transparency in ISDS proceedings. The current UNCITRAL Working Group III on ISDS Reform has proposed that these rules are, by default, incorporated into ISDS proceedings.[167] Several IIAs already incorporate the UNCITRAL Transparency Rules.[168] ICSID has also presumptively mandated that arbitral awards are published, subject to party redaction for confidential information.[169] This headway towards greater transparency has the potential to give *amici curiae* the ability to gauge the parties' arguments and to ensure that they bring a nuanced perspective on the issues raised.[170]

F. LACK OF EQUITY AND RIGHTS-CENTRIC APPROACHES

Furthermore, *amici curiae* are not framed as a human rights-centric remedy. Instead, they must conform to international investment law to assist the tribunal in matters within the

[162] *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No ARB/09/12, Submission of *Amicus Curiae* Brief by the Center for International Environmental Law (20 May 2011).
[163] *Pac Rim Cayman LLC v The Republic of El Salvador*, ICSID Case No ARB/09/12, Award (14 October 2016) [3.30].
[164] Jägers (n 118).
[165] Arcuri and Montanaro (n 11) 2793.
[166] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014) UN Doc A/RES/69/116 ('UNCITRAL Transparency Rules').
[167] UNCITRAL Working Group III on ISDS Reform, 'Compilation of IIA Provisions and Arbitration Rules Related to Procedural and Cross-Cutting Issues' (*UNCITRAL*) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/compilation_of_iia_provisions_and_arbitration_rules_related_to_procedural_and_crioss-cutting_issues_1.pdf> accessed 4 October 2024.
[168] See for example Comprehensive Economic and Trade Agreement ('CETA') between Canada, of the one part, and the European Union and its Member States, of the other part (signed 30 October 2016, provisionally entered into force 21 September 2017), art 8.36; Comprehensive and Progressive Agreement for Trans-Pacific Partnership ('CPTPP') (signed 8 March 2018, entered into force 30 December 2018), art 28.13.
[169] ICSID Arbitration Rules (n 39) r 62.
[170] Dar and Mohanty (n 11) 247.

scope of the dispute. Consequently, they exclude public perspectives on whether to include *amici curiae*. Indigenous or ancestral laws play no role in determining whether an *amicus* submission is accepted, and cultural frameworks and laws discussed within *amici curiae* must fit into international or Western legal concepts.

That said, several well-known remedies do not have the sole purpose of providing remedies for human rights violations. The National Contact Points under the OECD Guidelines for Multinational Enterprises in Canada and Denmark specifically avoid stating that their purpose is to provide a remedy.[171] Thus, *amici curiae* are not required to have the sole focus of providing a remedy; however, remedial measures should be possible either directly or indirectly from their submissions.

This lack of a rights-centric approach means that the rules of procedural fairness do not apply to *amici curiae*. A core tenet of international arbitration is equality between the parties, a violation of which can result in an unenforceable award.[172] However, equitable treatment applies only to parties, not to *amici curiae*. *Amici* normally have length and subject-matter restrictions on their written submissions and do not have the right to oral hearings.[173] These provisions ensure that *amici curiae* are not unduly burdensome on the parties;[174] however, they contribute to how ISDS sidelines the human rights concerns in the dispute and instead prioritises the commercial interests.[175] Thus, by their design, *amici curiae* are ill-suited to provide a UNGPs-compliant remedy. While they change the narrative in ISDS arbitrations, from one in which human rights concerns are largely irrelevant, to one in which human rights are a core feature of ISDS proceedings, the limits placed on *amici curiae* still reinforce a narrative that prioritises investment interests over human rights.

VI. RETROFITTING *AMICUS CURIAE* TO ENHANCE EFFECTIVENESS

Reforms of *amicus curiae* would likely maintain the basic structure of ISDS, including the divisions between private and public international law, but could also help to increase human rights considerations within ISDS. Understanding where *amici curiae* fail to fulfil the UNGPs effective remedy criteria allows for proposals to modify the process and content of *amici curiae* to bring them closer to the minimum criteria. This section proposes that arbitral centres and any states drafting IIAs should promote *amicus curiae* submissions from a broader range of applicants, increase transparency for *amicus curiae* applicants, and normalise interpretations of tribunals' jurisdiction that include public international law.

A. PROACTIVELY PROMOTING *AMICUS CURIAE* ACCESSIBILITY

Currently, the rightsholders that are affected by investment face practical barriers to having tribunals consider their views. These barriers vary depending on the community, but include language barriers, legal and technical expertise, and the location of the proceedings.[176]

[171] van Huijstee and Wilde-Ramsing (n 102) 478–79.
[172] See for example Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3, art V; ICSID Arbitration Rules (n 39) r 52(1).
[173] Kunuji (n 9) 42.
[174] ICSID Arbitration Rules (n 39) r 37(2).
[175] Simons and VanDuzer (n 38) 281.
[176] Triponel (n 112) para 31.17.

GP 25 outlines that a fundamental principle for effective remedies is that the state takes appropriate steps to ensure access to a remedy.[177] Thus, states should take on a more proactive role in providing the necessary tools for rightsholders to write and submit *amici curiae*. The Commentary for GP 31 further details that these proactive steps include facilitating public awareness, increasing access to information and financial resources, and connecting expert resources to the community.[178]

Given that the host state is party to the ISDS dispute, these funding initiatives must be carefully tailored so as to avoid infringing on the independence of *amici curiae*.[179] One option is for IIAs to contemplate joint Home and Host state mechanisms to fund *amici curiae*. For example, upon signing an agreement that includes an ISDS clause, states could agree to create a joint fund for rightsholders to prepare and submit *amici curiae*. The fund would require applicants to meet objective criteria with sufficient flexibility to allow rightsholders to receive funding without dependence on the state and to avoid accusations of bias in their submissions.

Similar multi-sourced funding has been implemented to support dispute settlement procedures internationally. For example, the Roundtable on Sustainable Palm Oil collects money from annual membership fees and contributes them to a trust fund that supports those who use its Dispute Settlement Facility for mediation.[180] Parties that wish to use the Facility but lack the funds to participate may submit a request to the Secretariat to cover the costs of experts or mediators.[181] Implementing a joint or multilateral system like this to fund *amici curiae* in ISDS would help states to fulfil their obligation to create accessible remedies.

A parallel can also be drawn here to the procedures in some domestic courts for mandatory joinder of necessary parties to civil proceedings. For example, in several Canadian jurisdictions, parties to a civil proceeding must include parties that 'are likely to be affected or prejudiced by the order being sought'.[182] If the party is necessary to the proceeding because their interests are affected in this way, and such participation causes them undue burden, the court may award compensation for their attendance.[183] Sharing the financial burden of those whose opinions are needed for the fair adjudication of a dispute is part of making a hearing more efficient by including all views at once instead of splitting them into multiple actions. Thus, although some may argue that *amici curiae* slow the ISDS arbitration process, including the necessary perspectives from the start will help the tribunal get a full understanding of the dispute and could lead to a more effective arbitration.

[177] UNGPs (n 94) GP 25.
[178] ibid GP 31.
[179] Obadia (n 10) 368.
[180] Columbia Center on Sustainable Investment, 'Innovative Financing Solutions: For Community Support in the Context of Land Investments' (March 2019) 20 <https://ccsi.columbia.edu/sites/default/files/content/docs/publications/CCSI-Innovative-Financing-report-Mar-2019.pdf> accessed 3 October 2024.
[181] 'RSPO Complaints System' (*Roundtable on Sustainable Palm Oil*) <https://rspo.org/who-we-are/complaints/dispute-settlement-facility/> accessed 3 October 2024.
[182] *Abrahamovitz v Berens*, 2018 ONCA 252 [44], citing Molloy J in *Ontario Federation of Anglers and Hunters v Ontario (Minister of Natural Resources and Forestry)*, 2015 ONSC 7969 [10]–[11]. See also Manitoba, *Court of King's Bench Rules*, MR 553/88 ('MN Civ Pro'), r 5.03(1).
[183] See for example *Ontario Rules of Civil Procedure*, RRO 1990, Reg 194, r 5.05(c); *Rules of Court of New Brunswick*, NB Reg 82–73, r 5.05(c); MN Civ Pro, r 5.05(c).

B. PREDICTABLE CRITERIA FOR ADMITTING *AMICUS CURIAE*

The rules of arbitral centres that elaborate on the criteria for admitting *amici curiae* have helped to increase the number of *amici curiae* in recent years.[184] Still, not all rules provide these criteria and the interpretations of tribunals can vary. To compensate, arbitral centres should mandate that tribunals publish their reasons for rejecting an *amicus* submission.[185] Although, as mentioned previously, it is common practice for tribunals to publish reasons for accepting or denying *amici curiae*,[186] creating an explicit requirement for published reasoning would allow all parties and *amici* applicants to understand the scope of the *amicus* submissions' acceptance and limits. If the *amicus* submission is rejected, reasons would ensure that applicants can better anticipate whether they could make a viable submission and would build persuasive reasoning for future tribunals.[187]

Additionally, arbitral centres could issue interpretive notes that outline a principled approach to the criteria for admitting *amici curiae*. For example, general principles could list specific factors that would make a submission more likely to assist a tribunal. This would encourage arbitrators to focus on harmonising criteria for admitting *amici curiae* and allow non-disputing parties a greater ability to gauge when to participate as *amici curiae* in an ISDS dispute.

C. PREDICTABLE JURISDICTION

As part of the measures to make *amici curiae* more predictable, states implementing IIAs should provide more guidance on how arbitral tribunals define their jurisdiction.[188] Treaties outlining their jurisdiction must provide enough flexibility to include considerations submitted by *amici curiae*. Given the perception in ISDS of separate private and public international law spheres, IIAs should proactively promote tribunals to consider human rights laws.

In *Urbaser*, the tribunal found that the applicable law included international human rights law because article X(5) in the applicable BIT specified that the tribunal shall decide the dispute based on the BIT *and* other treaties between the parties and the general principles of international law.[189] To render this clause effective, the tribunal found that it must be able to decide disputes based on international human rights law where the core issue in the investment dispute was directly related to these rights.[190] To ensure that interpretations like this are possible, IIAs should specify that the applicable law to the disputes includes human rights law.

Still, interpretations like *Urbaser* are rare despite the reforms to IIAs noted in Section II of this article. Authors like Alschner conclude that even new IIAs that include broader regulatory freedom for the state are interpreted in the light of old ISDS arbitration and apply

[184] Obadia (n 10) 370.
[185] Butler (n 8) 170–71.
[186] ibid.
[187] ibid.
[188] Dar and Mohanty (n 11) 245.
[189] *Urbaser* (n 51) [548].
[190] ibid [1180]–[1181].

the same limiting patterns.[191] Alschner proposes that ISDS tribunals begin to interpret both old and new IIAs in the light of subsequent agreements and practice to fill gaps and update obligations.[192] Implementing such a practice would take a multilateral effort and buy in from a panoply of stakeholders. But, ultimately, such efforts would help both to maintain the relevance of ISDS to modern issues by analysing the full public and private scope of disputes and to create more predictability for rightsholders seeking to voice their concerns in this arena.

D. INCREASING TRANSPARENCY

Access to information can make *amici curiae* more effective for both the rightsholders and the arbitral tribunal's decision process. Because transparency allows rightsholders to become aware of human rights violations that may otherwise be obscured (for example, upstream pollution or bribery that undermines self-determination), increasing what documents are publicly available would give rightsholders an opportunity to make more informed submissions. For tribunals, releasing key documents ensures that *amici curiae* provide a different perspective from the disputing parties and frame their argument within the scope of the dispute.[193]

While current arbitration rules are expanding transparency requirements, states should capitalise on this momentum and enhance their disclosure commitments. The UNGPs allow states to mandate companies to disclose information 'where appropriate'.[194] Although 'appropriateness' is vague, the purpose of the UNGPs supports that it includes information related to business activities that pose a significant impact on human rights.[195] While a hard line approach to disclosing information could ignore possible legitimate reasons for company confidentiality, such as competitive advantages, IIAs could begin to mandate disclosure of key arguments and facts in order to gain access to the tribunal process.[196] Where confidential information is key to understanding the parties' arguments, the tribunal may ask parties to release a redacted version or to summarise their arguments for the *amicus curiae*.[197]

These reforms to *amici curiae* submissions are the first building blocks to bringing *amici* closer to an effective remedy under the UNGPs. ISDS proceedings would help to make *amici curiae* more effective in forming one possible remedy required for those negatively affected by international investment.

VII. CONCLUSION

ISDS is not isolated from international human rights law; rather, *amici curiae* can shed light on its long-ignored public aspects. *Amici curiae*, in this sense, can form a bridge between the private and public law considerations in ISDS. These submissions should not just assist the tribunal but, because of states' human rights obligations, they should also help rightsholders achieve effective redress for investor violations of human rights. Reforming the *amici curiae*

[191] Wolfgang Alschner, *Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes* (OUP 2022) 39.
[192] ibid 232.
[193] Obadia (n 10) 373.
[194] UNGPs (n 94) GP 3; Jägers (n 118) 406.
[195] Jägers (n 118) 406.
[196] Dar and Mohanty (n 11) 247.
[197] Obadia (n 10) 373.

process is especially important for Indigenous communities affected by extraction projects to allow ISDS tribunals properly to consider Indigenous perspectives apart from the state that claims to represent them.

This article has proposed various reforms to make *amici curiae* more accessible, predictable, and transparent for rightsholders. In the context of UNCITRAL's Working Group III on ISDS Reform, these proposals can increase the legitimacy of ISDS to make it a more inclusive system. These reforms aim to mitigate the imbalance of power that silences Indigenous and marginalised voices in ISDS. Still, they are meant to be short-term solutions that can be implemented relatively quickly in arbitration rules. They do not replace the need for long-term solutions that are built from Indigenous and rightsholders' perspectives to create a more inclusive system of dispute resolution.[198]

The division between investment and human rights within ISDS arbitration can seem too ingrained to change. However, those advocating for greater respect for human rights by the business community will remember the enormous impact that non-governmental organisations and civil society had on stopping the Transatlantic Trade and Investment Partnership Agreement.[199] This agreement would have re-ingrained ISDS as the go-to system for investor protection in Europe. Thousands of opposition-led events across Europe led to a massive overhaul of the proposed ISDS agreement, effectively reversing the typical power imbalance seen in IIAs.[200] While the upheaval did not ultimately conclude with a revised or inclusive version of ISDS arbitration, it allowed for greater exploration of what a potential investment protection scheme could look like beyond older generation IIAs through proposals like the 'Investment Court'. This on-going initiative hopes to create a new version of investor protection that would bring it away from private arbitral centres and into a more publicly visible court-like system.[201] Fully developing initiatives like this may take many more years, but creative reforms from all levels are what is necessary to lead eventually to more inclusive and context-sensitive ISDS processes.

[198] Arcuri and Montanaro (n 11) 2807–08.
[199] See European Commission, 'Transatlantic Trade and Investment Partnership (TTIP) – Documents' (*European Commission*) <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/united-states/eu-negotiating-texts-ttip_en> accessed 6 October 2024.
[200] Hirsch (n 21) 138.
[201] ibid 148.