



**MAX PLANCK INSTITUTE**  
FOR COMPARATIVE PUBLIC LAW  
AND INTERNATIONAL LAW

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***Third Party Participation by Indigenous Peoples in Investment Arbitration:  
Is Procedural Transparency Enough to Protect Cultural Heritage?***

**MPIL Agora**

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Enhancing transparency is touted as one of the responses to the ongoing criticism regarding the legitimacy of the investor-State dispute settlement system. Since investment disputes involve matters of public interest, granting public access to certain aspects of the arbitral proceedings ensures that members of the citizenry have the opportunity to be informed of the matters in dispute, as well as to be heard on these issues if the outcome of the arbitration potentially affects them. A palpable move towards increased transparency in investment arbitration has resulted in the revision of institutional arbitral rules, a set of rules devoted entirely to transparency, and even a convention.

Consequently, arbitral tribunals have become more receptive to utilizing mechanisms for third party participation, including open hearings and the acceptance of written submissions by *amici curiae*. Indigenous peoples have sought to avail of these participation mechanisms with limited success. Often at odds with foreign investors in extractive industries, indigenous groups have argued that mining activities in their ancestral lands have a detrimental impact on their heritage and way of life. Thus, these affected indigenous peoples assert an interest to participate in ongoing investment disputes. In the investment arbitration cases in recent years wherein indigenous groups sought to make written submissions as non-disputing parties, the response of tribunals can be described as lukewarm or even dismissive. Whether an increased transparency regime will eventually benefit indigenous peoples seeking to participate in these disputes is an issue worth examining.



**Rebecca E. Khan** focuses her doctoral research on transparency in investment treaty arbitration, an area of study to which she brings several years of practical knowledge. She previously worked as an attorney for the Philippine government; her extensive international litigation experience includes arbitrations before the International Court of Arbitration of the International Chamber of Commerce (ICC), and the World Bank's International Centre for Settlement of Investment Disputes (ICSID). She was part of the Philippine delegation to UNCITRAL during the drafting of the Rules on Transparency in Treaty-based Investor-State Arbitration. Rebecca was appointed by the Philippine Supreme Court to its drafting committee for the Rules of Court on Alternative Dispute Resolution. She has taught courses on Public International Law and International

Investment Law, and lectures frequently on the topic of international arbitration for various professional audiences. As a Fulbright scholar, she obtained her Master of Laws (LL.M.) in International and Comparative Law, with highest honors, from the George Washington University in Washington, DC, where she was also a recipient of the Buergethal Scholarship from the Law School.

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