The role of civil society in investment treaty arbitration : status and prospects

El Hosseny, F.F.

PART I: THE FUNCTION AND MODALITIES OF CIVIL SOCIETY PARTICIPATION BEFORE INVESTOR-STATE TRIBUNALS

Introductory remarks

The contemporary international framework on foreign investment protection is primarily contained in relatively recent international investment agreements (IIAs) as well as bilateral investment treaties (BITs).[101] States have entered into over 3,000 such treaties to date and have, as a result, effectively created a foreign investment 'regime'.[102] These treaties set forth principles and standards on foreign investment promotion and protection. They also systematically allow disputes between investors from contracting home-states and contracting host states to be referred to arbitration as a peaceful, non-politicized, means for dispute settlement.[103] In the wake of an ever-increasingly globalized economy,[104] states appreciated the necessity to create such a dispute settlement

[101] Although the '[r]ules of law on foreign investment can be traced back to the early days of colonization and European domination'. See N. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties in an Interdependent World* (1995), at 161. See also P. Muchlinski, 'The Changing Face of Transnational Business Governance: Private Corporate Law Liability and Accountability of Transnational Groups in a Post-Financial Crisis World', (2011) 18:2 Indiana Journal of Global Legal Studies 665, at 666. See also most notably J. Stiglitz, *Making globalisation work* (2006), and M. Sornarajah, *supra* note 8, at 335. In addition, it is worthy to note that BITs are often construed as 'Free Trade Agreements' (FTAs).

[102] There were over 900 IIAs and BITs at the start of the 1990s. UNCTAD 2014 figures indicate that there are now 2,784 BITs and 340 IIAs. See UNCTAD Investment Policy Hub, available at: http://investmentpolicyhub.unctad.org/IIA (last accessed 06 October 2014). See also M. Sornarajah, *supra* note 8, at 337, A. Van Duzer, *infra* note 171, at 688. See also United States-Australia Free Trade Agreement, entered into force on January 1, 2005, available at: http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta (last accessed 06 October 2014).

[103] The first award to be rendered in such disputes only dates back to 1990. See Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka (ICSID Case No. ARB/87/3), *Final award of 27 June 1990*. On the peaceful settlement of disputes, see J. Merrils, *International Dispute Settlement* (1998), at 285; J. Crawford, *supra* note 74, at 183; C. Brower and S. Blanchard, *supra* note 8, at 696. Also, Article 33 of the UN Charter provides that 'the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice'; see United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI. The pacific settlement of international disputes is also the primary mandate of the Permanent Court of Arbitration ('PCA'), which deals with both inter-state as well as investor-state disputes; see the founding conventions of the PCA, the 1899 and 1907 The Hague Conventions for the Pacific Settlement of International Disputes, *infra* note 1132.

[104] Globalization as a phenomenon intrinsically relates to the generally systematic and exponential increase in foreign investment flows worldwide. Braun argues that 'foreign direct investment is one of, if not the, most important force driving economic globalization' and that 'globalization has given rise to a uniquely structured regulatory framework in international law that governs foreign direct investment'. In this regard, the author cites the 18-fold increase in foreign direct investment flows between 1980 and 2005 when it reached $10.1 trillion.

mechanism as a tool to scrutinize host state conduct vis-à-vis foreign investors.[105] This was seen as instrumental in attracting foreign investment, which is in turn widely recognized as a powerful catalyst for development. [106] Through investor-state arbitration, states have effectively bestowed upon foreign investors the right to access international justice – a peculiar development in international law that mirrors the enhanced access of individuals before international human rights jurisdictions.[107] Over the past quarter of a century, foreign investors have regularly resorted to investor-state arbitration to allege violations of their internationally protected rights and seek damages for the resulting losses they have incurred.

Now from a procedural standpoint, IIAs or BITs often refer to the UNCITRAL Arbitration Rules or ICSID Arbitration Rules for the initiation and conduct of arbitration proceedings.[108] These rules had been primarily inspired by the model of international commercial arbitration whereby two disputing parties appoint an arbitral tribunal to *consensually* and *privately* settle their dispute. [109] Under this model, investment transactions were deemed as 'relationships of a commercial nature'.[110] Yet, this private dispute settlement model has faced destabilizing pressures from third parties. In *certain*

See T. Rudolf Braun, 'Globalization: The Driving Force in International Investment Law', in M. Waibel et al. (eds), *The Backlash against Investment Arbitration*, at 492, 502.

[105] See B. Kingsbury and S. Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law', (2009) NYU School of Law, Public Law Research Paper No. 09-46. See also A. Von Bogdandy and I. Venzke, *infra* note 162, at 69, 72; C. Brower and S. Blanchard, *supra* note 8, at 697.

[106] *Supra* note 8.

[107] F. Francioni, *infra* note 847, at 731; J. Paulsson, *Denial of justice in international law* (2005), at 28, 55; and P. Dumberry, *infra* note 221, at 112.

[108] That said, there are various other procedural regimes that could potentially govern treaty-based investor-state arbitration under the rules of the Arbitration Institute of the Stockholm Chamber of Commerce, or the International Chamber of Commerce's International Court of Arbitration, for instance. See Article 26, Energy Charter Treaty, *infra* note 606. For further commentary, see T. Ishikawa, 'Third Party Participation in Investment Treaty Arbitration', (2010) 59 International and Comparative Law Quarterly 373, at 373.

[109] The UNCITRAL Model Law on International Commercial Arbitration captures the essence of this model and provides a reference for domestic legislation. UNCITRAL Model Law on International Commercial Arbitration, 24 ILM 1302 (1985), available at: http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf (last accessed 06 October 2014) (the 'UNCITRAL Model Law').

[110] Article 1(1), *ibid*; M. Majlessi, *A Balancing Act: A Framework For Participation of Non- State Actors in the World Trade Organization* (2008), at 13. Separately, international commercial matters are for instance well-reflected in most of UNIDROIT's instruments. UNIDROIT was established in 1926 under the umbrella of the League of Nations. It is concerned with the harmonization of private and in particular commercial law by formulating uniform law instruments, principles and rules. Those include the: UNIDROIT Convention on Agency in the International Sale of Goods, 22 ILM 249 (1983); UNIDROIT 2010 Principles of International Commercial Contracts, available at: http://www.unidroit.org/overview-principles-2010 (last accessed 06 October 2014); UNIDROIT Convention on International Factoring, 27 ILM 943 (1988); or UNIDROIT Convention on International Financial Leasing, 2321 UNTS 195; 27 ILM 931 (1988).

instances, investor-state tribunals received, and accepted, petitions by civil society actors to participate in proceedings, as *amici curiae* or third-party intervenors, where investors' claims closely related to the 'public interest'.[111]

Against this background, Part I aims at fleshing out the underlying considerations to the acceptance, and ensuing regulation, of civil society's procedural role in investor-state disputes as *amicus curiae*. There is a need to first understand the nature of such disputes and the extent to which they could potentially affect the public interest (**Section 1**). This sets the context to the gradual acceptance and regulation of civil society's role as *amicus curiae* from a procedural standpoint, which in turn led to the formalization of that role under UNCITRAL and ICSID arbitration rules, guidelines by NAFTA bodies, as well as provisions under newly signed BITs (**Section 2**). The rules on, and regulation of, *amicus curiae* participation are complemented by extensive analysis by investor-state tribunals on the matter (**Section 3**). A more substantive approach is then warranted in order to grasp the rationale behind civil society's participation. Here, there is a need to identify the environmental protection, human rights, and other public policy arguments raised by civil society in investor-state disputes, as well as – more fundamentally – their relevance to the latter (**Section 4**). Part I concludes with an appraisal of civil society's role as an *amicus curiae* on both the procedural and substantive levels (**Section 5**). This will ultimately set the stage for a consideration of whether there is a basis to explore the enhancement of the *amicus curiae* role under Part III.

1. Identifying the 'public interest' in an investor-state arbitration context

Detractors of investor-state dispute settlement say it curtails states' ability to 'regulate in the public interest'.[112] Proponents claim that 'the posited conflict between the current system of foreign investment protection and the public interest is largely

[111] Methanex Corporation v. United States, *infra* note 428, at para 49.
[112] E. Warren, 'The Trans-Pacific Partnership clause everyone should oppose', Washington Post, 25 February 2015, available at: http://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html (last accessed 1 March 2015).

illusory'.[113] The 'public interest' seems to lie at the heart of the debate over the legitimacy of investor-state dispute settlement, even more so in light of the ongoing negotiations between the EU and the United States over the Trans-Atlantic Trade and Investment Partnership (TTIP).[114] Civil society primarily seeks to intervene in public interest-related investor-state arbitrations. So this raises the need to answer the following preliminary, yet pivotal, question: what exactly is the 'public interest' identified by the *Methanex* tribunal?

In this light, a closer look at the 'public interest' aspect of investor-state disputes is merited (**Section 1.1**), the regulatory framework defining state responsibility towards foreign investors and obligations of the latter (**Section 1.2**), as well as detailed examples of some of the earlier investor-state disputes that have touched upon public interest issues and where incidentally civil society was not involved (**Section 1.3**). This is finally followed by a discussion on the criticism triggered by investor-state tribunals' decisions in these disputes (**Section 1.4**).[115]

The purpose of this section is not to set out an exhaustive survey of foreign investors' rights under the international law on foreign investment, nor to argue on the existence of potential *quid pro quo* obligations towards host states' populations. Rather, it attempts to illustrate the peculiarity of investor-state arbitration in light of the need to secure foreign investment protection on one hand, and uphold the public interest on the other. Again, this sets the context to the rationale behind the gradual acceptance of civil society's role in investor-state arbitration as opposed to international commercial arbitration where it is *a priori* viewed as irrelevant.[116]

[113] C. Brower and S. Blanchard, *supra* note 8, at 720.
[114] On the TTIP, see European Commission Concept Paper, Cecilia Malmström, *supra* note 17.
[115] It is worthy to note here that the investor-state disputes mentioned in this section have for the most part been adjudicated over a decade ago, and therefore, they may not necessarily reflect the current state of the international law on foreign investment. However, understanding the criticism made at the time in respect of these disputes should effectively contextualize, and set the background to, the subsequent acceptance of civil society's role as *amicus curiae* in investor-state arbitration.
[116] See Part I – Section 2.

1.1 A structural stress test: 'public interest' pressure on foreign investors' rights and host states' obligations

The notion of the 'public interest' in an international foreign investment law context mirrors to a substantial extent the notion of 'non-trade concerns' used in the WTO context, i.e. it is a catch-all term that encapsulates many heterogeneous concerns and affects many actors.[117] These 'non-trade concerns' comprise interests were hitherto confined to the state's domestic realm. However, they increasingly transcend it and are becoming global concerns not only involving states and inter-state organizations, but also other stakeholders and actors including multinationals and civil society.[118] This is a phenomenon that may be equally viewed through the prism of economic interests such as world trade, foreign investment, financial and capital markets regulation, as well as non-trade interests such as environmental protection,[119] sustainable development[120] or human rights.[121]

There is a broad spectrum through which the public interest could be identified in investor-state arbitration. If such spectrum were to be visually conceptualized, the base

[117] In a WTO context, 'non-trade concerns' include issues which lie beyond the trade and economic spheres that WTO policy-making, rules, and dispute settlement have had ramifications upon, and include public health and environmental issues amongst others. See Part II I – Section 3.2.2.

[118] L. Logister, 'Global Governance and Civil Society. Some Reflections on NGO Legitimacy', (2007) 03:2 Journal of Global Ethics 165, at 166-167; V. Gowlland-Debbas, 'An Emerging International Public Policy?', in U. Fastenrath, et al. (eds.), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (2011), at 244, 247; W. Benedek, *infra* note 661, at 203.

[119] The Aarhus Convention recognizes 'the importance of the respective roles that individual citizens, non-governmental organizations and the private sector can play in environmental protection'. See Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, entered into force 30 October 2011, 2161 UNTS 447; 38 ILM 517 (1999) (the 'Aarhus Convention').

[120] Sustainable development translates into the imperative of securing 'the needs of the present without compromising the ability of future generations to meet their own needs'. It necessarily requires the avail of those responsible for economic development. Indeed, the Brundtland Report defines sustainable development as 'a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development; and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations'. See UN World Commission on Environment and Development, *Our Common Future*, A/42/427/1987, at para 15 (Chapter 2) ('the Brundtland Report'). See also R. Klager, *infra* note 1252, at 197; see also *infra* note 661.

[121] Article 18(3) of the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society states that: 'Individuals, groups, institutions and non-governmental organizations also have an important role and a responsibility in contributing, as appropriate, to the promotion of the right of everyone to a social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights and other human rights instruments can be fully realized'. See UN General Assembly, UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, resolution adopted by the General Assembly dated 8 March 1999, A/RES/53/144, available at: http://www.refworld.org/docid/3b00f54c14.html (last accessed 27 February 2014). See also J. Letnar Černič, *infra* note 695, at 327.

line on the one end would demonstrate that the *public* may have an *interest* in a dispute settlement process whereby host states, acting exclusively as *respondents*, could pay potentially substantial damages from taxpayer funds to foreign investors, including most notably multinational corporations,[122] acting exclusively as *claimants*.[123]

The median would reflect a dispute settlement process that deals with substantive issues that (i) transcend, or '*extend far beyond*' – to use the *Methanex* tribunal's terms – the mere adjudication of host states' responsibility vis-à-vis foreign investors; and (ii) could affect the validity of host states' measures enacted in the *public's* 'broader' *interest*.[124] The alleged breach could be the result of measures by any host state organs, such as provinces or municipalities[125] or courts.[126] These measures in question are *public*

---

[122] 'Multinational corporations' are often referred to as 'transnational corporations', most notably in the UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights. See UN Sub-Commission on the Promotion and Protection of Human Rights, Economic, Social and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, 26 August 2003, E/CN.4/Sub.2/2003/12/Rev.2, available at: http://www.refworld.org/docid/403f46ec4.html (last accessed 26 February 2014) (the 'UN Norms on the Responsibilities of Transnational Corporations'). See also J. Letnar Černič, *infra* note 695, at 308. On the definition of 'multinationals', see Article I.4, OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing, available at: http://dx.doi.org/10.1787/9789264115415-en (last accessed 06 October 2014) (the 'OECD Guidelines'). See Article 6, ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted 16 November 1977 (revised in 2000), available at: http://www.ilo.org/dyn/normlex/en/f?p=1000:61:0 (last accessed 06 October 2014) (the 'ILO Tripartite Declaration').

[123] Foreign investors acting as claimants, whether corporate entities or individuals, should qualify as having (i) engaged in an investment activity within the territory of the state-recipient of the foreign investment, i.e. the 'host state', and (ii) suffered damages that were caused by a breach of the latter's international responsibilities and obligations with respect to foreign investment promotion and protection. Furthermore, Sornarajah defines foreign investment as the transfer of tangible or intangible assets from one state to another for the purpose of their use in that state to generate wealth under the total or partial control of the owner of the assets. See M. Sornarajah, *infra* note 221, at 8. It is worthy to note here, however, that there is no consensus on the definition of 'investment activity', and that the primary source for determining the scope of such activity should be the relevant investment treaty. See also J. Maupin, *supra* note 48, at 13.

[124] Ibid., at para 49 (our emphasis).

[125] On the applicability of international investment law standards to local governments and municipalities, see Metalclad Corporation v. Mexico, *infra* note 273, at para 73. In this case the tribunal noted that a reference to a state or province includes locals governments of that state or province in accordance with Article 201(2) of NAFTA. It also stressed that this approach is in line with principles of customary international law. Indeed, the ILC Articles provide that the conduct of 'an organ of a state, of a territorial government entity or of an entity empowered to exercise elements of the Governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law' (citing Article 10 of the 1975 ILC Articles on the Responsibility of States for Internationally Wrongful Acts). This was also in line with the position of the United States, which made a written submission to the *Metalclad* tribunal pursuant to Article 1128 of NAFTA to that effect. See also Article 4(1) of the 2001 ILC Articles on the Responsibility of States for Internationally Wrongful Acts, *infra* note 833.

[126] See the analysis of the *Loewen* case below – Loewen v. United States, *infra* note 1346. See also articles 4, 5, 8 and 11 of the 2001 ILC Articles on the Responsibility of States for Internationally Wrongful Acts, *infra* note 833. See also L. Schicho, 'Attribution and State Entities: Diverging Approaches in Investment Arbitration', (2011) 12:2 The Journal of World Investment & Trade: Law, Economics, Politics 283.

both in their nature and their goal. The *public* aspect could be viewed as a reference to those citizens of the host state to whom these measures were intended to benefit, making them interested in their implementation and, more fundamentally, their validity.[127]

The zenith on the other end would depict a dispute settlement process that closely relates to environmental protection, public health, human rights or other public policy issues that would not only concern the *public's* 'broader' *interest*, but also affect the *direct interests* of certain communities or groups that are third parties to the arbitration, including most notably – for the purposes of this research – civil society and those it purports to represent.[128]

Not *all* investor-state arbitrations are related to public interest issues in the same degree. In many cases, the *public's interest* in an investor-state arbitration may be quite minimal.[129] Moreover, not *all* investor-state arbitrations that are in fact public interest-related closely involve environmental protection, public health, human rights or other public policy issues that could potentially affect the *direct interests* of certain communities or groups who are third parties to arbitration proceedings.[130]

This is clearly reflected in the case-law. Looking at previous investor-state arbitrations, one could note that public interest-related investor-state arbitrations have touched upon a panoply of issues as varied as, *inter alia*,[131] natural reserves for fauna and flora,[132] import/export or transport of hazardous or toxic chemical substances,[133] sale of

[127] See generally, E. De Brabandere, *supra* note 852. See also the Aarhus Convention, which defines the 'public' as 'one or more natural or legal persons, and…their associations, organizations or groups'; and the 'public concerned' as the: 'public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, *non-governmental organizations promoting environmental protection…shall be deemed to have an interest*'. See Articles 2(4) and 2(5) of the Aarhus Convention, *supra* note 119 (our emphasis).

[128] Public health, environmental protection and human rights are often referred to as incidental 'community interests' to investor-state arbitrations. See C. Schreuer and U. Kriebaum, *infra* note 617, at 1081.

[129] To quote the *Methanex* tribunal, 'there are of course disputes involving States which are of no greater general public importance than a dispute between private persons'. See Methanex Corporation v. United States, *infra* note 428, at para 49.

[130] UNCTAD made a conclusion to the same effect by stating that not in *all*, but in '*many* cases foreign investors have used ISDS claims to challenge measures adopted by States in the public interest (for example, policies to promote social equity, foster environmental protection or protect public health)'. See UNCTAD Report, *infra* note 210, at 3 (our emphasis). Two subsequently discussed cases also reflect this contention, see Loewen v. United States, *infra* note 1346; and Mondev International Ltd v. United States of America, *infra* note 1325.

[131] The subsequently mentioned examples are not meant to exhaustively cover all public interest-related investor-state arbitrations as this would largely exceed the scope of this study.

[132] Santa Elena v. Costa Rica, *infra* note 245; Metalclad Corporation v. United Mexican States, *infra* note 257; Unglaube v. Republic of Costa Rica, (ICSID Case No. ARB/08/1, ARB/09/20), *Award of 16 May 2012*.

pesticides, [134] logging export controls, [135] water distribution to urban and rural communities, [136] electricity [137] or gas supply [138] concessions, operation of hazardous chemicals or industrial waste disposal sites,[139] rehabilitation of sacred indigenous sites affected by mining,[140] environmental degradation and damage related to petroleum[141] or mineral extraction, [142] affirmative action legislation, [143] municipal zoning, [144] environmental impact assessments, [145] postal services, [146] tax refunds on the export of cigarettes,[147] litigation settlements with tobacco companies,[148] packaging for cigarettes,[149]

[133] Methanex Corporation v. United States, *infra* note 428; Ethyl Corporation v. The Government of Canada, *Award on jurisdictions of 24 June 1998*; SD Myers v. The Government of Canada, *Final award of 30 December 2002*.
[134] Chemtura Corporation v. Government of Canada, *Award of 02 August 2010*.
[135] Pope & Talbot Inc. v. Government of Canada, *Interim Award of 26 June 2000*; Merrill & Ring Forestry L.P. v. Government of Canada, *Award of 31 May 2010*.
[136] Aguas del Tunari, S.A. v. The Republic of Bolivia, *infra* note 533; Sociedad General de Aguas de Barcelona v. The Argentine Republic, *infra* note 542; Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic, *infra* note 378; Azurix Corp. v. The Argentine Republic, *infra* note 658, and Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania, *infra* note 741.
[137] TECO Guatemala Holdings, LLC v. Republic of Guatemala (ICSID Case No. ARB/10/23).
[138] LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. The Republic of Argentina (ICSID Case No. ARB/02/1), *Decision on Liability of 3 October 2006*; and CMS Gas Transmission Company v. The Republic of Argentina (ICSID Case No. ARB/01/8).
[139] Metalclad Corporation v. United Mexican States, *infra* note 257; Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States (ICSID Case No. ARB (AF)/00/2), *Award of 29 May 2003*; Robert Azinian et. Al. v. The United Mexican States, *infra* note 1345; and Waste Management, Inc. v. United Mexican States (ICSID Case No. ARB(AF)/00/3), *Award of 30 April 2004*.
[140] Glamis Gold Ltd v. United States, *infra* note 496.
[141] *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23 ('Chevron and Texaco v. Ecuador'). See also Jota v. Texaco, Inc., 157 F. 3d 153 - Court of Appeals, 2nd Circuit 1998.
[142] Pac Rim Cayman LLC v. Republic of El Salvador (ICSID Case No. ARB/09/12).
[143] Piero Foresti, Laura de Carli and others v. Republic of South Africa, *infra* note 789.
[144] MTD Equity Sdn. Bhd. and MTD Chile SA v. Republic of Chile (ICSID Case No. ARB/01/7), *Award of 24 May 2004*.
[145] Emilio Agustín Maffezini v. The Kingdom of Spain, (ICSID Case No. ARB/97/7), *Award of 13 November 2000*; Vito G. Gallo v. Government of Canada, *infra* note 172; Bilcon of Delaware Inc. et al. v. Government of Canada, PCA Case No. 2009-04.
[146] United Parcel Service v. Canada , *infra* note 515.
[147] Marvin Roy Feldman Karpa v. United Mexican States (ICSID Case No. ARB(AF)/99/1), *Award of 16 December 2002*.
[148] Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, *Award of 12 January 2011*.
[149] Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay (ICSID Case No. ARB/10/7) ('Philip Morris v. Uruguay'); and Philip Morris Asia Limited v. The Commonwealth of Australia, PCA Case No. 2012-12.

airport terminal operations,[150] banking regulations and restrictions,[151] construction near UNESCO World Heritage sites, [152] or the phasing-out of nuclear energy.[153]

Only a *limited* number of the public interest-related investor-state arbitrations mentioned above were actually closely related to environmental protection, public health, human rights or other public policy issues that involved the *direct interests* of certain communities or groups who are third parties to arbitration proceedings. Some of these limited cases are also directly linked to a host state's duty to 'respect, protect, and fulfill' domestically and/or internationally-recognized human rights, including those of a particular community or group of their population. [154]

Yet, such disputes are important from both substantive and procedural perspectives. In addition to foreign investors and host states, these disputes could potentially involve a specific community or group that has been, or alleges to be, particularly affected by the activities or the arbitral claims of foreign investors. This therefore creates a tripartite dynamic that inexorably taints the 'unilateral' dimension of the investor-state dispute settlement process.[155] As previously mentioned, this process is quintessentially construed to solely determine host states' responsibility vis-à-vis foreign investors under international law. Investor-state tribunals have a strictly predefined jurisdictional mandate to decide on alleged violations of foreign investors' *rights* under IIAs and BITs – a *ratione materiae* barrier of prime importance. These instruments typically do not mention the 'direct interests' of *any other person*, let alone civil society's.

In such disputes, and in light of the multiplicity and complexity of the issues at stake, investor-state tribunals find themselves drawn into attempting to reach a comprehensive understanding of the underlying factual and legal issues in order to 'arrive

[150] ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary (ICSID Case No. ARB/03/16), *Award of 02 October 2006*.
[151] Saluka Investments BV v. Czech Republic, *infra* note 235.
[152] Parkerings-Compagniet AS v. Republic of Lithuania (ICSID Case No. ARB/05/8), *Award of 11 September 2007*; Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt (ICSID Case No. ARB/84/3), *Award of 1992*.
[153] Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany (ICSID Case No. ARB/09/6), *Award of 11 March 2011*.
[154] On states' obligation to 'protect, respect, and fulfil' socio-economic and cultural human rights, see as previously discussed A. Eide, *supra* note 669; and J. Letnar Černič, *supra* note 695, at 334.
[155] Treaty-based investor-state arbitration is described as 'unilateral' given that it exclusively positions foreign investors as claimants and host states as respondents. For further references on the 'unilateral' aspect of investor-state arbitration, see *infra* note 208.

at a correct decision'.[156] Civil society acted (or sought to act) as a representative of *directly affected* stakeholders by bringing forward positions that were construed as distinct vis-à-vis both disputing parties'. The purported aim of such action was to 'enlighten' investor-state tribunals of the issues at stake that precisely pertain to *directly affected* stakeholders who are third parties to the dispute.[157]

Not all commentators are convinced that there might be a 'public concern' that is triggered by the subject matter of a given investor-state dispute.[158] As mentioned, some claim that 'the posited conflict between the current system of foreign investment protection and the public interest is largely illusory'.[159] Some investor-state tribunals have, on the other hand, made axiomatic statements on the matter. In this respect, the description given by the *Sociedad General de Aguas de Barcelona, S.A. v. Argentina* tribunal is apposite:

> Those (water) systems provide basic public services to millions of people and as a result may raise a variety of complex public and international law questions, including human rights considerations.[160]

The tribunal noted that matters of public interest, particularly with regard to the legality of governmental measures and the responsibility of a state under international law, are at stake and common in 'virtually all cases of investment treaty arbitration under ICSID jurisdiction'.[161] Because host states act exclusively as respondents in such disputes, the *public* would therefore ultimately be concerned when foreign investors advancing claims based on *private* interests – and acting exclusively as claimants – contest host state conduct or measures related to the *interest* of the *public* under the premise of the violation of foreign investors' rights as protected under IIAs or BITs. Investor-state tribunals are thus viewed as international jurisdictions where *private* and *public* interests are balanced against each other.[162]

---

[156] Aguas Provinciales de Santa Fe S.A et. al. v. The Argentine Republic, *infra* note 555, at para. 23.
[157] The same rationale applies to the European Commission role as a potential third party intervenor in investor-state disputes, see E. Triantafilou, *supra* note 18. On third parties role in 'enlightening' tribunals, see also S. Charnovitz, *infra* note 1024, at 352.
[158] Y. Fortier and S. Drymer, *infra* note 323, at 473.
[159] C. Brower and S. Blanchard, *supra* note 8, at 720.
[160] Aguas Provinciales de Santa Fe S.A et. al. v. The Argentine Republic, *infra* note 555, at para. 18.
[161] Ibid., at para. 19.
[162] It is worthy to briefly note here that the review of governmental conduct has also led other commentators to identify investor-state arbitration as a 'Global Administrative Law' – whereby the accountability, and decisions,

Given that the notion of the 'public interest' is inherently broad, the facts and circumstances of each dispute are crucial in determining what exactly is, or is covered by, the 'public interest' at stake and, moreover, its relevance to either the foreign investors' claim or the host state's defense.[163] This was particularly reflected in *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary* where the tribunal stated that:

> In the Tribunal's opinion, a treaty requirement for 'public interest' requires some genuine interest of the public. If mere reference to 'public interest' can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met.[164]

As such, it is worthy to note once more that not *all* investor-state disputes are public interest-related disputes. Some for instance merely relate to, what is alleged to be, host state discriminatory conduct towards foreign investors and do not necessarily relate to a 'public interest' – as manifested in the subsequently discussed disputes of *Loewen v. United States* and *Mondev v. United States*.[165] Moreover, not *all* public interest-related investor-state disputes involve the *'direct' interests* of affected third parties; however, all of those who *do* involve the latter are intrinsically public interest-related investor-state disputes – an issue that will be further discussed in Part III.[166] Civil society solely sought to intervene, or actually intervened as *amicus curiae*, in a number of public interest-

---

of domestic regulatory bodies not only have ramifications of a global instead of a domestic nature, but are also subject to scrutiny and review by investor-state tribunals. Although far from widespread, this view ultimately sheds light on the relevance of the public interest at stake in investor-state arbitration. See, *inter alia*, A. Kulick, *infra* note 308, at 79; T. Ishikawa, *supra* note 108, at 376; and A. Von Bogdandy and I. Venzke, 'On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority', (2013) 26 Leiden Journal of International Law 49, at 58. As subsequently shown, the administrative law aspect had been in fact explicitly pointed out by civil society actors in order to argue for their participation as *amicus curiae* in the *Methanex* dispute; they asserted that the dispute raised issues of 'constitutional importance' whereby governmental authority to implement environmental regulations and private property rights had to be balanced. See Methanex Corporation v. United States, *infra* note 428, para 8. This view is far from consensual.

[163] J. W. Salacuse, *infra* note 196, at 320.

[164] ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, *supra* note 150. See also J. W. Salacuse, *infra* note 196, at 320-321.

[165] *Loewen* relates to allegations of violations of NAFTA obligations arising out of the decisions of Mississippi courts in the wake of a commercial dispute; while *Mondev* relates to alleged violations of NAFTA obligations due to the refusal by Massachusetts courts to enforce a judgement against a municipal body on the grounds of statutory immunity. See Loewen v. United States, *infra* note 1346; and Mondev International Ltd v. United States of America, *infra* note 1325.

[166] This point will be further elaborated as part of the analysis on the scope and regulation of a proposed third party intervenor role for civil society, and whether such role should be subject to third parties' *'direct' interests* in investor-state disputes. See Part III – Section 3.1.2.

related disputes and not all of them.[167] It raised arguments that generally aimed at upholding the public interest, particularly with respect to health, environmental protection, human rights or other public policy issues. These arguments will be the subject of further study subsequently.[168] It is key to shift at this stage to an analysis of the regulatory framework defining host state responsibility towards foreign investors and obligations of the latter – particularly in light of those public interest issues that are likely to arise, and be relevant to, investor-state disputes.

1.2 Lots of 'hard law' rights, few 'soft law' obligations: a look at the international framework on foreign investment protection

This section sheds light on the regulatory framework defining host state responsibility towards foreign investors. It aims to briefly identify foreign investors' rights and obligations. One fundamental caveat bears stressing – these rights and obligations of course raise highly complex, and rapidly evolving, legal questions for any investor-state tribunal to determine, and incidentally, for this research to thoroughly address. Again, the purpose here is not to provide a comprehensive study of the interplay between host state duty to uphold foreign investor rights on the one hand and address public interest issues on the other.[169] Rather, this section serves as a preliminary background to a detailed analysis of examples of some of the earlier investor-state tribunals' decisions dealing with the matter as part of the context to the gradual acceptance of civil society's participation in investor-state disputes – i.e., the main focus of the present study.

---

[167] Up to 2014, there were 13 cases including: Methanex Corporation v. United States, *infra* note 428; United Parcel Service v. Canada, *infra* note 515; Aguas del Tunari, S.A. v. The Republic of Bolivia, *infra* note 533; Sociedad General de Aguas de Barcelona v. The Argentine Republic, *infra* note 542; Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic, *infra* note 378; Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania, *infra* note 741; Glamis Gold Ltd v. United States, *infra* note 496; Chevron and Texaco v. Ecuador, *supra* note 141; Piero Foresti, Laura de Carli and others v. Republic of South Africa, *infra* note 789; Bernhard von Pezold and Others v. Republic of Zimbabwe, *infra* note 823; Merrill & Ring Forestry L.P. v. The Government of Canada, *supra* note 135; Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, *supra* note 148; and Pac Rim Cayman LLC v. Republic of El Salvador, *supra* note 142. See also L. Bastin, 'Amici Curiae in Investor-State Arbitration: Eight Recent Trends', (2014) 30:1 Kluwer Law International 126, at 141.

[168] See Part I – Section 4.

[169] See also Introduction – Section 1.

1.2.1 Foreign investors' rights

As previously mentioned, arbitration has been designated as a tool for the settlement of disputes over international investment rights and obligations.[170] These are contained in regional or multilateral investment treaties such as NAFTA or ASEAN, as well as over 3,000 BITs involving 180 countries – aimed at promoting and protecting cross-border investments from arbitrary and discriminatory treatment at the domestic level.[171] It is of fundamental importance to note that, as a general rule, these treaties solely set out international obligations on host states and bestow international rights upon foreign investors.[172] Foreign investors' rights include, *inter alia*, the right to non-discrimination, full protection and security, national treatment,[173] most-favored nation treatment,[174] fair and equitable treatment as well as prompt, adequate, and effective

[170] See for instance Article 824(1) 'Submission of a claim to arbitration' of the Canada-Peru Free Trade Agreement which provides that: '1. Except as provided in Annex 824.1, a disputing investor who meets the conditions precedent in Article 823 may submit the claim to arbitration under: a. the ICSID Convention, provided that both the disputing Party and the Party of the disputing investor are parties to the Convention; b. the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the disputing investor, but not both, is a party to the ICSID Convention; c. the UNCITRAL Arbitration Rules; or d. any other body of rules approved by the Commission as available for arbitrations under this Section.' See Canada-Peru Free Trade Agreement, entered into force 10 August 2009, available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/peru-toc-perou-tdm.aspx (last accessed 20 October 2013). Article 1120 'Submission of a claim to arbitration' of NAFTA as well as Article 33 'Submission of a claim' of the ASEAN Comprehensive Investment Treaty have substantially similar wordings. See North-American Free Trade Agreement, entered into force 01 January 1994, available at: https://www.nafta-sec-alena.org/Default.aspx?tabid=97&language=en-US (last accessed 20 October 2013); and Association of South East Asian Nations Comprehensive Investment Treaty, entered into force 26 February 2009, available at: http://www.unescap.org/tid/projects/tisiln-investagreement.pdf (last accessed 20 October 2013).

[171] UNCTAD Investment Policy Hub, *supra* note 102; see also M. Paparinskis, *infra* note 206.

[172] It is argued that such rights are subject to a '*quid pro quo*' principle, i.e. foreign investors gain international rights and protections under IIAs and BITs as a *quid pro quo* for a contribution to the economy of host states through the injection of foreign capital into their economies. In this respect, the tribunal in *Vito Gallo v. Canada* held that '…for investors to enjoy this additional right, there must be a *quid pro quo*: Given that the stated objective of investment treaties is to stimulate flows of private capital into the economies of contracting states, the claimant in any investment arbitration must prove that he or she is a protected foreign investor…'. See Vito G. Gallo v. Government of Canada, PCA Case No. 55798, *Award of 15 September 2011*, at 336. See also Professor Zachary Douglas' opinion to the effect that 'the notion of a *qui pro quo* between a foreign investor and the host state is the cornerstone for the system of investment treaty arbitration' in Z. Douglas, *The International Law of Investment Claims* (2012), at 335.

[173] For instance, Article 5(1) of the ASEAN Comprehensive Investment Treaty provides that: 'Each member State shall accord to investors of any other member State treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory…'. See ASEAN Comprehensive Investment Treaty, *supra* note 170.

[174] See for instance Article 804 of the Canada-Peru Free Trade Agreement provides that: '1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory'. See Canada-Peru Free Trade Agreement, *supra* note 170.

compensation in case of expropriation.[175] A comprehensive discussion over the definition and scope of these rights would largely exceed the purposes of this research. However, it is worthy to briefly elaborate on the right to (i) fair and equitable treatment and (ii) prompt, adequate, and effective compensation in case of expropriation. Violations to the fair and equitable treatment and claims for compensation as a result of expropriation, or measures 'tantamount' to expropriation, are systematically raised in disputes of interest to this research and, therefore, an understanding of these concepts, albeit succinct, is crucial in setting the background to the subject matter of those investor-state disputes in which civil society participates.[176]

i. Fair and equitable treatment

The fair and equitable treatment standard is 'the most frequently invoked standard in investment disputes … the majority of successful claims pursued in international arbitration are based on a violation [thereof]'.[177] It is articulated in a fairly similar manner in IIAs or BITs.[178] Although simply worded, the concrete meaning of fair and equitable treatment clauses remains vague, controversial and difficult to apply.[179] There is *a priori* no theory of precedent in investor-state arbitration,[180] although this has been put into

[175] Maupin asserts that '[w]hile there are minor differences in wording across treaties, most of them obligate states to do six basic things: provide fair and equitable treatment and full protection and security to the foreign investment; guarantee the free transferability of the investment and its associated returns; treat foreign investors at least as favorably as the State's own investors (national treatment) and the investors of any third state (most-favored national treatment); and not to expropriate the investment except for a public purpose, in accordance with due process, and against prompt, adequate and effective compensation – generally interpreted as requiring compensation at fair market value'. See J. Maupin, *supra* note 48, at 14.

[176] This section focuses on these two concepts given that protection against expropriation was historically the first objective of foreign investment protection, while fair and equitable treatment is described as 'one of the core concepts in international investment law'. See S. Schill, 'Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law', in S. Schill, (ed.) *International Investment Law and Comparative Public Law* (2010), at 152.

[177] R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2012), at 130.

[178] R. Klager, *infra* note 1252, at 9, 13.

[179] The tribunal in *Saluka Investments B.V. v. Czech Republic* found that 'the "ordinary meaning" of the "fair and equitable treatment" standard can only be defined by terms of almost equal vagueness'. See Saluka Investments BV v. Czech Republic, *infra* note 235, at 297. See also R. Klager, *infra* note 1252, at 317, and J. W. Salacuse, *infra* note 196, at 228.

[180] International tribunals in general are not bound by precedent. However, the tribunal in *Saipem v. Bangladesh* articulated the importance of consistency in investor-state arbitration in the following terms: 'the Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of

question.[181] Therefore, the subjectivity inherent to the interpretation of both the terms 'fair' and 'equitable' fundamentally varies.[182] This may be exacerbated when the fair and equitable standard is deemed to reflect customary international law or is combined with other standards, such as in NAFTA's Chapter XI.[183]

As a standard of international law, fair and equitable treatment allows measuring the conformity of contested host state measures with international law, as opposed to domestic law.[184] It is a benchmark against which host state conduct is measured depending on the particular facts of each dispute, the evolutionary character of fair and equitable treatment, and the appreciation of the general situation of the host state.[185] Notions such as, *inter alia*, the legitimate expectations of foreign investors,[186] right to a

States and investors towards certainty of the rule of law'. See Saipem S.p.A v. People's Republic of Bangladesh (ICSID Case No. ARB/05/7), *Award of 30 June 2009*, at para 90.

[181] A. Von Bogdandy and I. Venzke, *infra* note 162, at 57, 71 also citing Saipem S.p.A. v. The People's Republic of Bangladesh, *supra* note 180, para. 90. Criticism has been raised in light of the inconsistencies of arbitral awards addressing the Argentinian financial crisis, see A. Martinez, 'Invoking State Defenses in Investment Treaty Arbitration', in M. Waibel et al. (eds), *The Backlash against Investment Arbitration*, at 326. See also Louis T. Wells, *infra* note 208.

[182] Ibid., at 228; J. Stone, *infra* note 188, at 83.

[183] Article 1105(1) of NAFTA states that: 'Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security'. See NAFTA, *supra* note 170. See R. Klager, *infra* note 1252, at 17; I. Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (2008), at 48; and J. Stone, *infra* note 188, at 81; R. Dolzer and C. Schreuer, *supra* note 177, at 136. On the linkages between the fair and equitable treatment and customary international law, see for instance the *Merril & Ring* tribunal's finding to the effect that 'a requirement that aliens be treated fairly and equitably in relation to business, trade and investment is the outcome of this changing reality and as such it has become sufficiently part of widespread and consistent practice so as to demonstrate that it is reflected today in customary international law as *opinio juris*. In the end, the name assigned to the standard does not really matter. What matters is that the standard protects against all such acts or behavior that might infringe a sense of fairness, equity and reasonableness. Of course, the concepts of fairness, equitableness and reasonableness cannot be defined precisely: they require to be applied to the facts of each case'. See Merrill & Ring Forestry L.P. v. Government of Canada, *supra* note 135, at para 210. See also M. Paparinskis, *infra* note 354, at 171 et seq.

[184] In the subsequently discussed case of *S.D. Myers Inc. v. Canada*, the tribunal emphasized that 'the minimum standard of treatment provision of the NAFTA is similar to clauses contained in BITs. The inclusion of a "minimum standard" provision is necessary to avoid what might otherwise be a gap. A government might treat an investor in a harsh, injurious and unjust manner, but do so in a way that is no different than the treatment inflicted on its own nationals. The "minimum standard" is a floor below which treatment of foreign investors must not fall, even if a government were not acting in a discriminatory manner'. See S.D. Myers Inc. v. Canada, *infra* note 277, at para 259. For a more elaborate discussion, see R. Dolzer and C. Schreuer, *supra* note 177, at 133.

[185] R. Klager, *infra* note 1252, at 122; S. Schill, *supra* note 176, at 182.

[186] A foreign investor's legitimate expectations refer to the risks and rewards of contemplated investments that have a crucial influence on a foreign investor's decision on whether or not to invest. It is thus understood that when a host state has created certain expectations through its laws and acts that have led a foreign investor to invest, it is considered unfair for the host state to take subsequent actions that fundamentally deny or frustrate those expectations. It is considered as an integral part of the fair and equitable standard. For instance, a tribunal describes it as including the 'promise of the administration on which the Claimants rely to assert a right that needs to be observed'. See PSEG Global, Inc. and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v.

fair trial and procedure (denial of justice),[187] non-arbitrariness,[188] and transparency[189] have been considered by investor-state tribunals as sub-elements of fair and equitable treatment.[190] The multiplicity of factors underlying to fair and equitable treatment therefore include:

> the obligation to act transparently and grant due process, to refrain from taking arbitrary or discriminatory measures, from exercising coercion or from frustrating the investor's reasonable expectations with respect to the legal framework affecting the investment.[191]

With that being said, the diversity, and even inconsistencies, in the application and interpretation of this standard bear witness to – what is often referred to as – 'fragmentation'.[192]

ii. Expropriation

Expropriation, whether direct or indirect, is 'the most severe form of interference with property'.[193] It is a rapidly evolving concept in international law.[194] As generally recognized in IIAs or BITs, it triggers the right for expropriated investors to prompt, adequate, as well as effective compensation. It entails the fulfillment of certain conditions

---

Republic of Turkey (ICSID Case No. ARB/02/5), *Award of 19 January 2007*, at 241. See also J. W. Salacuse, *supra* note 196, at 231, and I. Tudor, *supra* note 183, at 233.

[187] As will be further discussed in Part III, the *Mondev* tribunal delved into an analysis of the principle of access to justice, as enshrined under Article 6(1) of the ECHR, and whether it may fall under the fair and equitable treatment standard guaranteed under Article 1105 of NAFTA. See Mondev International Ltd v. United States of America, *infra* note 1325. See also Part III – Section 2.2.

[188] The ICJ described 'arbitrariness' in the following terms: '…by itself, and without more, unlawfulness cannot be said to amount to arbitrariness…To identify arbitrariness with mere unlawfulness would be to deprive it of any useful meaning in its own right. Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication…Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the Court in the Asylum case, when it spoke of 'arbitrary action' being 'substituted for the rule of law' (Asylum, Judgment, I.C.J. Reports 1950, p. 284). It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety'. See *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment of 20 July 1989, [1989] ICJ Rep. 15. See also J. Stone, 'Arbitrariness, the Fair and Equitable Treatment Standard, and the International Law of Investment', (2012) 25:1 Leiden Journal of International Law 77, at 85-88.

[189] On the link between the notion of transparency and the fair and equitable treatment standard, see for instance Metalclad Corporation v United Mexican States, *infra* note 257.

[190] R. Klager, *infra* note 1252, at 318; J. Stone, *supra* note 188, at 83. For an exhaustive survey of those sub-elements, see S. Schill, *supra* note 176, at 160 et seq.

[191] Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (ICSID Case No. ARB/03/29), *Award of 27 August* 2009, at para 176; see also Y. Banifatemi, 'Consistency in Investment Rules Interpretation', in R. Echandi and P. Sauvé (eds.), *Prospects in International Investment Law and Policy* (2013), at 211.

[192] R. Klager, *infra* note 1252, at 319; A. Kawharu, *infra* note 393, at 292; and see generally R. Lorz, *supra* note 74, at 482 et seq.

[193] R. Dolzer and C. Schreuer, *supra* note 177, at 98.

[194] See Methanex Corporation v. United States, *infra* note 642, at para 80.

in order to be lawful.[195] Host state expropriatory measures must necessarily be (a) for a public purpose, (b) not arbitrary or discriminatory, (c) done in accordance with the due process of law, and (d) accompanied by prompt, adequate, and effective compensation (the so-called 'Hull Rule').[196]

The 'public purpose' condition entails that the confiscation of a foreign investor's property must be underlying to some genuine public interest.[197] It is often a difficult task for investor-state tribunals to determine whether expropriatory measures were intended for a public purpose such as environmental protection for instance or, rather, for other discretionary or discriminatory purposes, e.g. 'to keep foreigners out of the economy'.[198] This concern is reflected for instance in the subsequently discussed cases of *S.D. Myers v. Canada* [199] and *Methanex v. United States*. [200] Determining the valuation of the compensation amount for the purposes of 'prompt, adequate, and effective compensation' can equally be challenging – as reflected by the *Santa Elena v. Costa Rica* case discussed below.[201] The payment of compensation necessarily requires a valuation of the loss incurred by foreign investors as a result of the expropriation.[202] From a more holistic perspective, it is argued that not only is compensation key to achieving justice in individual cases, but also serves 'the important goal of assuring respect for investment treaty rules and fostering investment regime effectiveness, ultimately preserving the

[195] For instance, Article 14(1) of the ASEAN Comprehensive Investment Treaty provides that: 'A member State shall not expropriate or nationalise a covered investment either directly or through measures equivalent to expropriation or nationalisation ("expropriation"), except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and (d) in accordance with due process of law…'. This is also in line with the wording of Article 1110 of NAFTA. See ASEAN Comprehensive Investment Treaty, *supra* note 170.

[196] Named after Cordell Hull, Secretary of States of the United States between 1933 and 1944. He devised the 'prompt, adequate, and effective compensation' formula in the wake of negotiations with Mexico over losses of American farmers that were incurred as a result of Mexican agrarian reforms during the 1920s. See J. W. Salacuse, *The Law of Investment Treaties* (2010), at 320; see also B. Simma, 'Foreign Investment Arbitration: A Place for Human Rights?', (2011) 60 International and Comparative Law Quarterly 573, at 589.

[197] Ibid., at 320.

[198] M. Sornarajah, *infra* note 221, at 111.

[199] S.D. Myers Inc. v. Canada, *infra* note 277, at para 162.

[200] In the latter, Methanex precisely alleged that 'local interests often try to use pseudo-environmental measures to disguise the more favourable treatment they seek vis-à-vis foreign competitors'. See Methanex Corporation v. United States, *infra* note 631, at 13.

[201] Santa Elena v. Costa Rica, *infra* note 245; see also J. W. Salacuse, *supra* note 196, at 323-328.

[202] This entails three elements: (i) a standard of compensation, (ii) a method for applying that standard, and (iii) the actual application of the chosen valuation method to the specific assets that have been expropriated. See J. W. Salacuse, *supra* note 196, at 323.

regime itself'.[203] Compensation therefore deters discretionary or abusive host state conduct and, more fundamentally, it contributes to the upholding of the international rule of law.[204]

1.2.2 Foreign investors' obligations

The international foreign investment legal framework has been often criticized for the lack of normative substance addressing public interest issues, including with regards to (i) the definitions of foreign investors' obligations towards host states and their populations, or (ii) exceptions legitimizing host state regulatory power.[205]

i. Foreign investors' obligations towards host states and their populations

To sketch the issue succinctly, IIAs or BITs rarely set out obligations which foreign investors are required to abide by when engaging in activities that could potentially affect the 'public interest' or host state populations.[206] Rather, such obligations are primarily incumbent upon host states under international law and, accordingly, states, through their executive, legislative, or judiciary powers, enact measures in their *public*'s *interest*, by for example exerting their duty to 'respect, protect, and fulfill' human rights.[207]

Foreign investors could in turn contest such hot state measures, as violations of IIAs or BITs, pursuant to, what some describe as, a 'unilateral' right to submit claims against states before privately constituted arbitral tribunals.[208] Indeed, foreign

[203] In the same vein, it is asserted that effectively obtaining compensation from treaty violators raises the costs of treaty violations and should therefore induce other potential violators to respect their bargains with foreign investors protected by investment treaties. See J. W. Salacuse, *supra* note 196, at 323.
[204] See J. Paulsson, *supra* note 107, at 233.
[205] Sere also Introduction – Section 1.
[206] Previous deliberations over Norway's model BIT were an example of exceptions in the pipeline that did not materialize. In the same vein, a civil society proposed model of a sustainable development BIT was never adopted by any state. See also M. Wells-Sheffer, 'Bilateral Investment Treaties: A Friend or Foe to Human Rights?', (2012) 39 Denver Journal of International Law 483, at 484. See also K. Von Moltke, 'A Model International Investment Agreement for the Promotion of Sustainable Development', IISD (November 2004), available at: www.iisd.org/pdf/2004/trade_model_inv.pdf (last accessed 06 October 2014). For an exhaustive survey, see M. Paparinskis, *Basic Documents on International Investment Protection* (2012).
[207] See generally J. Crawford, *supra* note 74, at 206-209; C. Schreuer and U. Kriebaum, *infra* note 617, at 1085.
[208] See Louis T. Wells, 'Backlash to Investment Arbitration: Three Causes', in M. Waibel et al. (eds), *The Backlash against Investment Arbitration*, at 343. See also W. Ben Hamida, *infra* note 1391, at 264-266. Brower and Blanchard attempted to dismiss criticism describing investor-state arbitration as 'unilateral' by pointing to a number of contract-based investor-state arbitrations where host states were able to submit counter-claims against foreign investors. See generally C. Brower and S. Blanchard, *supra* note 8.

investments could potentially affect, and be affected by, a tremendously broad spectrum of aspects concerning host states' and their populations' *interests* that could trigger the exercize of that 'unilateral' right. If upheld, violations of foreign investors' international treaty rights could lead to awards of substantial damages[209] that are, moreover, non-appealable and subject to strictly limited judicial scrutiny, either as part of set-aside or enforcement proceedings.[210] States chose to bestow upon foreign investors such a 'unilateral' right, primarily in order to promote and protect the flow of international investment and, as previously mentioned, contribute to their socio-economic development.[211]

The repeatedly expressed concern is the following – while foreign investors, including multinationals, benefit from a wide array of international treaty rights, they are not concomitantly compelled to international obligations towards host states or their populations.[212] Semi-formal legal arrangements govern foreign investors' wider obligations at the international level, i.e. through voluntary codes of conduct or other non-binding soft law initiatives and guidelines such as, *inter alia*, the 1977 ILO Tripartite Declaration,[213] the more recent UN Norms on the Responsibilities of Transnational Corporations,[214] or the UN-sponsored Global Compact.[215]

Equally, there is a widespread recognition that harm caused by foreign investors should be solely addressed by host states domestically (under municipal law).[216] States are in fact entitled to control foreign investments on the basis of their illegality under

---

[209] Although these cases were unrelated to the public interest issues of interest to this research, the shareholders of Yukos Oil OJSC filed claims against the Russian Federation of up to $114 billion dollars and an arbitral tribunal ultimately awarded them slightly half of this amount. See Hulley Enterprises Limited (Cyprus) v. The Russian Federation, PCA Case No. AA 226; Yukos Universal Limited (Isle of Man) v. The Russian Federation, PCA Case No. AA 227; Veteran Petroleum Limited (Cyprus) v. The Russian Federation, PCA Case No. AA 228.

[210] The description just provided captures the essence of the criticism of investor-state arbitration as noted by an UNCTAD Report from 2013. See UNCTAD Report, 'Reform of Investor-State Dispute Settlement: In Search of a Roadmap', IIA Issues Note No.2 (June 2013), available online at: http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf (last accessed 06 October 2014), at 8 (the 'UNCTAD 2013 Report'). See also J. Maupin, *supra* note 48, at 18.

[211] C. Brower and S. Blanchard, *supra* note 8, at 701-703.

[212] While pointing to the *soft* law character of corporate obligations at the international level, Crawford opines that 'at the domestic level, there has been no generalized development of a concept of corporate responsibility for violations of, or complicity in State violations of, international human rights law'; see J. Crawford, *supra* note 74, at 206-207.

[213] ILO Tripartite Declaration, *supra* note 122.

[214] UN Norms on the Responsibilities of Transnational Corporations, *supra* note 122.

[215] See UN Global Compact, *infra* note 661.

[216] See Part I – Section 1.2.2(ii) directly below.

municipal law.[217] In this respect, Brower and Blanchard confirm that 'investors are bound by the law of the host state and by their contractual obligations' and argue that:

> as sovereigns, host states have many tools at their disposal for responding to investor breaches, including civil and criminal penalties, legal actions for breach of contract in their own courts, and political pressure. The very nature of the relationship means that the foreign investor will typically have assets in the host state, guaranteeing enforcement leverage… By contrast, resort to treaty-based arbitration is often the sole lever available to an investor to enforce its rights if a host state treats it inequitably once the investor has expended substantial resources in the host state's territory. Given that the actual power imbalance inherent in this institutional arrangement so glaringly favors host states, the persistence of the asymmetry argument is baffling. One might just as well criticize the "asymmetry" of international human rights courts.[218]

Yet, the silence of the international foreign investment framework on foreign investors' obligations has led, it is argued, to the failure of (i) the inclusion of an investment chapter in the Uruguay Round leading to the establishment of the WTO in 1994;[219] and (ii) the OECD Multilateral Agreement on Investment (MAI) negotiations that ended in 1998.[220] The latter was essentially attributed to pressure from a wide array of civil society organizations.[221] Their message was simply 'no rights without responsibilities', i.e. they were against an international regulatory framework that grants

---

[217] In *Ioannis Kardassopoulos v. The Republic of Georgia*, the tribunal held that '"Protection of investments" under a BIT is obviously not without some limits. It does not extend, for instance, to an investor making an investment in breach of the local laws of the host State. A State thus retains a degree of control over foreign investments by denying BIT protection to those investments that do not comply with its laws. As noted by one scholar, "no State has taken its fervour for foreign investment to the extent of removing any controls on the flow of foreign investment into the host State"'. See Ioannis Kardassopoulos v. The Republic of Georgia, ICSID Case No. ARB/05/18, *Decision on jurisdiction of 6 July 2007*, at 182 citing M. Sornarajah, *The International Law on Foreign Investment* (2004), at 106. See also C. Schreuer, U. Kriebaum, *infra* note 617, at 1096.

[218] C. Brower and S. Blanchard, *supra* note 8, at 712-713.

[219] In a similar vein, attempts by the WTO to explore the potential for a multilateral investment instrument at the Singapore Ministerial Conference had also failed. See M. Sornarajah, *infra* note 221, at 67.

[220] Other reasons leading to the failure of the negotiations included France's withdrawal, having been unable to secure guarantees for cultural exceptions, as well as the deteriorating Asian and Russian financial crisis. See E. Kentin, 'Sustainable Development in International Investment Dispute Settlement: The ICSID and NAFTA Experience', in N. Shrijver, and F. Weiss (eds.), *International Law and Sustainable Development* (2004), at 315.

[221] It is argued that the failure of the MAI negotiations reflects the lack of consensus on the principles of the rules on foreign investment protection. Furthermore, Sornarajah points to the fact that 'the making of investment codes is that they emphasize protection of multinational corporations without at the same time taking into account the environmental degradation and the human rights abuses of which they are capable'. Sornarajah cites the example of the tragic disaster at Bhopal, India in 1984 which involved Union Carbide – a major American industrial chemicals multinational. See M. Sornarajah, *The International Law on Foreign Investment* (2010), at 68. See also S. Picciotto, 'Rights, Responsibilities and Regulation of International Business', (2004) 42 Columbia Journal of Transnational Law 131, at 137, 138; P. Dumberry, 'L'entreprise, sujet de droit international? Retour sur la question à la lumière des développements récents du droit international des investissements', *Revue générale de droit international* (2004), at 114.

foreign investors rights without defining their potential obligations towards host states or their populations.[222]

ii. Legitimacy of host state public interest regulatory measures

If foreign investors do not generally have obligations towards host states or their populations under IIAs or BITs, then it is argued that – conversely – legitimate host state measures aimed at positively asserting public interest issues, such as those relating to the protection of the environment or public health for example, should be deemed as such and not be characterized by investor-state tribunals as resulting in violations of foreign investors' rights.[223]

However, the validity of host state regulatory conduct is typically emphasized in general terms under IIAs or BITs – although this has changed in recent years. Under NAFTA for instance, which dates back to 1994, the promotion of sustainable development by NAFTA parties is set as one of the treaty's objectives in its preamble.[224] Also, NAFTA parties simultaneously entered into agreements on environmental (NAAEC) and labour cooperation (NAALC).[225] Pursuant to the NAAEC, NAFTA parties (i) aim to 'foster the protection and improvement of the environment' and 'promote sustainable development' and (ii) reaffirm both their duty and right to effectively enforce their environmental laws and regulations through appropriate governmental action.[226] In addition, the imperative of environmental protection is explicitly included under Chapter XI which pertains to investment promotion and protection. Article 1114 of NAFTA Chapter XI on 'Environmental Measures' indeed provides that:

---

[222] Incidentally, it is worthy to note here that the opposition towards the MAI not only fits within the larger picture of anti-globalisation movements echoed at WTO conferences, but was also a revelation of the new role civil society organizations intended to play in the area of international investment. See M. Sornarajah, *supra* note 221, at 68.

[223] See generally M. Sornarajah, *supra* note 8 and *supra* note 221.

[224] It is worthy to note here that, as a result of growing criticisms with respect to the adverse environmental impacts of its funded projects, the World Bank has a adopted a similar approach by considering sustainable developments as part of its core mandate. See V. Gowlland-Debbas, *supra* note 118, at 247.

[225] North American Agreement on Labor Cooperation, entered into force 01 January 1994, 32 I.L.M. 1499 (1993), available at: http://new.naalc.org/naalc/naalc-full-text.htm (last accessed 06 October 2014) (the 'NAALC').

[226] See Article 1(a) and (b). Article 5 states that 'With the aim of achieving high levels of environmental protection and compliance with its environmental laws and regulations, each Party shall effectively enforce its environmental laws and regulations through appropriate governmental action, subject to Article 37, such as: …(j) initiating, in a timely manner, judicial, quasi-judicial or administrative proceedings to seek appropriate sanctions or remedies for violations of its environmental laws and regulations'. See North American Agreement on Environmental Cooperation, entered into force 01 January 1994, 32 ILM 1482 (1993), available at: http://www.cec.org/Page.asp?PageID=1226&SiteNodeID=567 (last accessed 06 October 2014) ('NAAEC').

> Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns… [227]

Article 1114 also recognizes that it is 'inappropriate to encourage investment by relaxing domestic health, safety or environmental measures'.[228] Against this background, it seems clear that NAFTA explicitly affords state-parties to the Agreement the right to regulate the environment[229] which, along with the side agreement on labor cooperation – the NAALC, might be considered as indications by NAFTA parties of their willingness to take into account the legitimacy of public interest regulatory measures.[230]

Yet, whether relating to environmental, labour or other public interest matters, the exact scope of host state regulatory measures' legitimacy is not typically defined *in concreto* under IIAs, including NAFTA, or BITs.[231] More specifically, it is not clear whether legitimate public interest regulatory measures may be deemed as valid to the extent of excepting the right of foreign investors to compensation as a result, for instance, of alleged violations to the fair and equitable treatment standard and foreign investors' legitimate expectations. In other words, despite the legitimacy of their purpose, public interest regulatory measures may still lead to violations of foreign investors' rights and,

---

[227] See Article 1114. Also Chapter XI further provides under Article 1101(4) that: 'Nothing in this Chapter shall be construed to prevent a Party from providing a service or performing a function such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care, in a manner that is not inconsistent with this Chapter'. See NAFTA, *supra* note 170.

[228] The application of Article 1114 on 'Environmental Measures' was in fact relevant within the context of the *Metalclad v. Mexico* case, see section 1.3.1 below; Metalclad Corporation v United Mexican States, *infra* note 273.

[229] NAFTA also contains a clear-cut over-arching exception rule similar to GATT Article XX(b), however, it is understood not to be applicable to Chapter XI obligations relating to NAFTA investments. Article 2101 'General Exceptions' of NAFTA states that: 'For purposes of: (a) Part Two (Trade in Goods), except to the extent that a provision of that Part applies to services or investment, and (b) Part Three (Technical Barriers to Trade), except to the extent that a provision of that Part applies to services, GATT Article XX and its interpretative notes, or any equivalent provision of a successor agreement to which all Parties are party, are incorporated into and made part of this Agreement. The Parties understand that the measures referred to in *GATT Article XX(b) include environmental measures necessary to protect human, animal or plant life or health, and that GATT Article XX(g) applies to measures relating to the conservation of living and non-living exhaustible natural resources*….'. See NAFTA, *supra* note 170 (our emphasis). See also Canada (Attorney General) v. S.D. Myers Inc., *infra* note 324, at para 47; and Article XX(b) of the GATT, *infra* note 1031.

[230] C. Brower II, 'NAFTA's Investment Chapter: Initial Thoughts about Second-Generation Rights', in F. Beverigde (ed.), *Globalization and International Investment* (2005), at 384.

[231] See A. Martinez, *supra* note 181, at 335; J. Maupin, *supra* note 48, at 53. A clear exception includes various BITs signed by New Zealand and South Africa which specifically set out caveats for regulatory measures aimed at indigenous peoples' as well as minority empowerment. However, such BIT provisions are rare. See J. Levine, *infra* note 758, at 123-124; M. Wells-Sheffer, *supra* note 206, at 503; C. Olivet and P. Eberhardt, *infra* note 1470, at 73.

in turn, the payment of substantial damages to foreign investors by host states – as reflected by the analysis of some of the earlier case law below.[232] Host state responsibility in this regard will of course depend on investor-state tribunals' assessment of the facts and circumstances of each case in light of the applicable law and, more fundamentally, their willingness to take into account public interest considerations.[233] A number of investor-state tribunals have accepted a host state defence to foreign investors' claims based on the legitimate use of sovereign power – including most notably the subsequently discussed *Methanex v. United States*.[234] These tribunals essentially found that host states would not be liable towards foreign investors as a result of non-discriminatory, *bona fide*, regulatory measures of general application that are aimed at addressing legitimate public interest concerns.[235] The exact scope of host state defense in that respect is in fact subject to numerous debates and 'wide open' to interpretation, which again makes the facts and circumstances of each case highly determinative factors as to whether or not a host state exercised its regulatory powers legitimately.[236] What is interesting to emphasize here is that investor-state tribunals' recognition of the legitimate use of sovereign power is considered by some as a recent development, and as a positive

[232] See Part I – Section 1.3. This is also manifestly reflected by the Argentine financial crisis arbitrations, which in fact are still on-going. Some of the most emblematic (and contested cases) include: CMS Gas Transmission Company v. The Republic of Argentina, *supra* note 138; Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic (ICSID Case No. ARB/01/3), and Sempra Energy International v. The Argentine Republic (ICSID Case No. ARB/02/16). For a global discussion of the Argentine arbitrations, see generally H. Samra, 'Five Years Later: The CMS Award Placed in the Context of the Argentine Financial Crisis and the ICSID Arbitration Boom', (2007) 38 Miami Inter-American Law Review 667; see also V. Prislan, *supra* note 82, at 451.
[233] Investor-state tribunals have articulated this assessment *in concreto*. For instance, in *Saluka Investments BV v. Czech Republic*, the tribunal noted that 'in order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well'. In the same vein, the tribunal in *El Paso Energy International Company v. The Argentine Republic* held for instance that 'legitimate expectations cannot be solely the subjective expectations of the investor, but have to correspond to the objective expectations than can be deduced from the circumstances and with due regard to the rights of the State. In other words, a balance should be established between the legitimate expectation of the foreign investor to make a fair return on its investment and the right of the host State to regulate its economy in the public interest'. The tribunal in also emphasized that 'legitimate expectations are more than the investor's subjective expectations. Their recognition is the result of a balancing operation of the different interests at stake, taking into account all circumstances, including the political and socioeconomic conditions prevailing in the host State'. See Saluka Investments BV v. Czech Republic, *infra* note 235, at 305; El Paso Energy International Company v. The Argentine Republic (ICSID Case No. ARB/03/15), *Award of 31 October 2011*, at 358; and Toto Construzioni Generali S.P.A. v. Republic of Lebanon (ICSID Case No. ARB/07/12), *Award of 7 June 2012*, at 165 respectively.
[234] *Ibid*. See also Methanex Corporation v. United States, *infra* note 428; A. Martinez, *supra* note 181, at 335.
[235] A. Martinez, *infra* note 181, at 333 citing Saluka Investments BV v. Czech Republic, *Partial Award of 17th March 2006*, PCA IIC 210 (2006); Parkerings-Compagniet AS v. Republic of Lithuania, *supra* note 152; and Methanex Corporation v. United States, *infra* note 428.
[236] A. Martinez, *supra* note 181, at 333.

move by investor-state tribunals to address the widespread 'backlash' against investor-state arbitration.[237]

Separately, it is also argued that, faced with the risk of engaging in international arbitration, and therefore potentially facing liability towards foreign investors, host states may be reluctant to adequately and effectively regulate public policy concerns such as public health, labour, and environmental concerns through measures that may deemed as restrictive on foreign investment.[238] It is thus asserted that even if host states were to successfully dismiss foreign investors' claims over such measures, the duration and expense of arbitrations might cause a 'regulatory chill' in the future, in the sense that such host states might self-censor or limit the possible measures aimed at positively asserting public interest concerns.[239] In the same vein, it is argued that host states, as avid seekers of foreign investments, parties to an intricate number of IIAs or BITs, and potential respondents to underlying investor-state disputes, become intricately tied to a certain set of conduct primarily aimed at promoting and protecting foreign investments.[240] Numerous host states would be accordingly left with little room to assert for example 'the right to a clean environment as a human right and as a norm incorporating higher values' – to quote Sornarajah – at the expense of foreign investment promotion and protection. [241]

In sum, the debate over the legitimacy and validity of host state measures affecting foreign investors' international treaty rights is well-reflected in the case law examined directly below whereby the international responsibility of host states, and millions of dollars in ensuing damages, was at stake notwithstanding – what was alleged as – the legitimate and public interest purpose of contested measures.

---

[237] *Ibid*., at 337; J. Maupin, *supra* note 48, at 10.
[238] S. Karamanian, *supra* note 388, at 424.
[239] It is worthy to note that investor-state tribunals have recently recognized 'regulatory chill' as a concern. In *Bilcon v. Canada*, a mining-related claim which raised various socio-environmental issues, the dissenting arbitrator found that 'a chill will be imposed on [Canadian] environmental review panels which will be concerned not to give too much weight to socio-economic considerations or other considerations of the human environment in case the result is a claim for damages under NAFTA Chapter 11'. See for instsance Bilcon of Delaware Inc. et al. v. Government of Canada, *Dissenting Opinion of Prof. Donald McRae of 10 March 2015*, at paras 48, 51. See also B. Simma, *supra* note 196, at 580.
[240] M. Sornarajah, *infra* note 221, at 109-110.
[241] Ibid.

1.3 Earlier examples of public interest issues raised in investor-state disputes

Some of the earlier investor-state disputes illustrate the interplay between upholding foreign investors' international treaty rights and the legitimacy and validity of public interest measures.[242] Below is a look at a number of cases where the latter were arguably significant, in particular where the issue of environmental protection was raised. It is worthy to note as well that there were no participating civil society organizations in these cases, i.e. as *amici curiae*, given that most of these claims were filed prior to the formal acceptance of the *amicus curiae* procedure. In fact, it is precisely for this reason that these cases require a closer look. They constituted a key prelude to the acceptance of civil society's participation in investor-state arbitration. There are numerous additional investor-state disputes where public interest issues were pivotal and could have been relevant to the analysis engaged in directly below. Some of these disputes will be dealt with in a separate section given that various civil society actors were involved. These cases are more relevant to this research's subsequent procedural analysis.[243]

As previously mentioned, although not necessarily exhaustive and representative of the current state of the international law on foreign investment, the aim in discussing some of the earlier case law below is to illustrate the peculiarity of the public interest issues at stake in investor-state arbitration. This serves the purpose of emphasizing a clear difference vis-à-vis international commercial arbitration, which will be dealt with in the subsequent section.[244]

1.3.1 Sea turtle protection, an exception to property rights? – *Santa Elena v. Costa Rica*

The *Santa Elena* case [245] is an example where the issue of environmental protection was central to the dispute. It opposed *Compañía del Desarrollo de Santa Elena*[246] and Costa Rica. The dispute arose out of the expropriation of the claimant's

[242] Louis T. Wells, *supra* note 208.
[243] See Part I – Section 3.
[244] See Part I – Section 1.5.
[245] Compañía del Desarrollo de Santa Elena, SA v Republic of Costa Rica (ICSID Case No. ARB/96/1), *Award of 17 February 2000* ('Santa Elena v. Costa Rica').
[246] A Costa Rican corporation owned by a majority of American shareholders.

property – known as Santa Elena.[247] The Santa Elena property was acquired by the claimant in 1970 and was meant for touristic and residential development, however, it was expropriated for conservationist objectives in 1978 as it bordered the Santa Rosa natural reserve and contained 'flora and fauna of great scientific, recreational, educational, and tourism value, as well as beaches that are especially important as spawning grounds for sea turtles'.[248] Costa Rica had been in fact engaged in efforts to list the Guanacaste region, including the Santa Elena property, as a UNESCO World Heritage Site due to its 'biological and geological significance'.[249] The claimant did not contest the expropriation *in se*, however, it objected to the compensation amount – making it the most relevant issue to be determined by the tribunal.[250] The claimant sought a compensation amount calculated on the basis of the current fair market value of the Santa Elena property as opposed to its value in 1978.[251] Costa Rica, on the other hand, argued the opposite, that under international law, the claimants were solely entitled to compensation on the basis of the fair market value of the property in 1978.[252]

The tribunal agreed with Costa Rica's position. However, it granted the claimant compounded interest in contrast to nominal interest, thereby significantly increasing the compensation amount payable by Costa Rica.[253] More fundamentally for the purposes of this research, the tribunal explicitly asserted that Costa Rica had a duty to pay compensation even in cases of lawful expropriations pursuant to both Costa Rican law and international law.[254] It then stressed that the fact that the Santa Elena property was taken for environmental reasons *does not* affect either the nature or the measure of the compensation to be paid to foreign investors. According to the tribunal, expropriatory

[247] Following various lengthy legal proceedings in front of Costa Rican courts, the Compañía del Desarrollo de Santa Elena submitted an ICSID claim against Costa Rica pursuant to the ICSID Convention – which was ratified by both the US and Costa Rica.
[248] The property consists of 30 kilometers of coastline on the Pacific ocean and comprises rivers, springs, valleys, mountains, and forests. See Ibid., at para 15, 18.
[249] Ibid., at para 46.
[250] The property was acquired in 1970 for the sum of $395,000. The compensation amount proposed by Costa Rica in 1978 was $1,900,000. However, the claimants sought at that time an amount of $6,400,000. Other appraisals and valuations followed, however, the parties had failed to agree on an amount. Ibid., at para 20, 34
[251] $41,200,000 with interest and other amounts. Ibid., at para 29.
[252] In the same vein, it argued that if the tribunal adheres to a valuation of the compensation amount based on the current fair market value, as requested by the claimant, it should take into account the existing environmental legislation that would significantly restrict, if not outright prohibit, the commercial development of Santa Elena. See Ibid., at para 35.
[253] Costa Rica was ultimately ordered to pay $16,000,000. Ibid., at para 106.
[254] Ibid., at para 68.

environmental measures are no different than any other expropriatory measures that a state may take in order to implement its policies '*no matter how laudable and beneficial to society as a whole*'.[255] The tribunal thus found that where property is expropriated, even for environmental purposes, whether on the basis of a host state's domestic or international obligations, the host state's obligation to pay compensation remains.[256]

1.3.2 Cactus reserves and hazardous chemical waste – *Metalclad v. Mexico*

Metalclad v. Mexico[257] is a case that is often cited as a leading example of the inter-play between environmental protection and the international law on foreign investment. Metalclad[258] had fully acquired a Mexican company with the aim to develop and operate the latter's hazardous waste transfer station and landfill in the area of Guadalcazar located in the Mexican federal state of San Luis de Potosi (SLP).[259] Although Metalclad claimed to have obtained all the necessary environmental approvals, the Guadalcazar municipality had ordered the cessation of all building activities due to Metalclad's failure to obtain a municipal permit.[260] The landfill site was later blocked by demonstrators, which according to Metalclad were allegedly assisted by state troopers and prevented the company from opening the site.[261] Adverse measures, from

[255] Ibid., at para 72 (our emphasis).
[256] Having said that, as previously mentioned, the parties had agreed that the dispute solely revolved around the amount of compensation that was effectively due to the claimant. The tribunal's decision, including this last point, shall be revisited in the discussion over the criticism of investor-state tribunals' decisions. Part II – Section 1.4.
[257] Metalclad Corporation v. United Mexican States (ICSID Case No. ARB(AF)/97/1), *Award of 30 August 2000* ('Metalclad v. Mexico').
[258] Metalclad is an American waste disposal company incorporated in the state of Delaware.
[259] The acquisition was implemented through its wholly owned Mexican subsidiary – Ecosistemas Nacionales S.A. de C.V. – Confinamiento Tecnico de Residuos Industriales S.A. de C.V. (COTERIN) in 1993. Metalclad Corporation v United Mexican States, *supra* note 257, at para 47-48.
[260] The development and operation of the station were formally authorized, and approved, by the federal government and consistently confirmed at various stages whether formally by the grant of licenses or through representation by federal officials starting in 1990. The National Ecological Institute (INE), an independent sub-agency of the federal Secretariat of the Mexican Environment, National Resources, and Fishing (SEMARNAP), had also approved the project and granted COTERIN a license to commence construction by 1993, as well as subsequent extensions and approvals in mid-1994 and in 1995. The latest approval was an agreement (a *Convenio*) entered into in November 1995 where the Mexican Federal Attorney's Office for the Protection of the Environment (PROFEPA), an independent sub agency of SEMARNAP, along with INE, agreed with Metalclad to essentially allow the operation of the landfill contingent upon Metalclad's commitment to remedy 'certain deficiencies', which were identified during an audit carried out by the two agencies, within the first three years of operation. Metalclad alleged that it was not required to seek a municipal permit based on representation from Mexican federal government officials, but ultimately decided to apply for whilst resuming construction.
[261] By December 1995, the Guadalcazar municipality denied Metalclad's request for a construction permit citing two earlier similar decisions issued to COTERIN in 1991 and 1992. Ibid., at para 50.

Metalclad's standpoint, finally culminated in an ecological decree implemented by SLP's governor declaring a natural reserve for rare cactus encompassing the area of the landfill, thereby having the effect of permanently blocking its operation.[262]

Metalclad thus alleged that Mexico, through actions of the Guadalcazar municipality and the federal state of SLP, violated its NAFTA obligations including (i) Article 1105 which guarantees Metalclad's right to 'fair and equitable treatment and full protection and security'[263]; and (ii) Article 1110 on expropriation.[264] Mexico defended its conduct, and argued that Metalclad 'knew, or should have known', that the Guadalcazar municipal construction permit was required prior to the commencement of the operation of its site.[265] It is crucial to note here that Mexico *did not* base its defense on environmental aspects. Indeed, this would have seemed rather contradictory given that its environmental agencies approved the Metalclad project all along – notwithstanding the opposition of Guadalcazar's municipality and citizens.

The tribunal found that Metalclad's investment was not accorded fair and equitable treatment in accordance with Article 1105 of NAFTA, and that Mexico took a measure tantamount to expropriation in violation of Article 1110 of the same.[266] The tribunal upheld its position notwithstanding the fact that the municipal permit was denied as a result of the opposition of the local population and 'ecological concerns regarding the environmental effect and impact on the site and surrounding communities' – to quote the tribunal.[267] Indeed, in its analysis on environmental issues, the tribunal noted that the city of Guadalcazar was located within 70 kilometers of the hazardous waste site, with

[262] Ibid., at para 59.
[263] Article 1105 of NAFTA states that: '1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security…'. See NAFTA, *supra* note 170.
[264] See Article 1110 of NAFTA, *supra* note 232.
[265] Ibid., at para 41.
[266] It essentially based its arguments on the facts surrounding the measures taken by the Guadalcazar municipality coupled with the seemingly contradictory representations made by federal government officials. It considered that the absence of a clear rule as to the requirement or not of a municipal construction permit amounts to a failure on the part of Mexico to ensure the transparency required by NAFTA – which according to the tribunal is set as one of NAFTA's core objectives pursuant to Article 102(1). Ultimately, the tribunal ordered Mexico to pay $16,685,000.00 in damages to Metalclad. See Ibid., at para 88, 131.
[267] The tribunal considered that the rejection to grant Metalclad the municipal construction permit was 'improper', particularly in light of the fact that Metalclad was not notified of the municipality meeting where the permit application was discussed and rejected. In addition, Metalclad was not given any opportunity to participate in that process in order to adequately and effectively defend its interests in seeking a construction permit from the municipality. Ibid., at para 91-92, 97.

800 people living within 10 kilometers of it.[268] The tribunal found nonetheless that Mexico had effectively exercised its rights under Article 1114 of NAFTA discussed above.[269] The article in question affords NAFTA parties the right to ensure that investment activity is undertaken in a manner sensitive to environmental concerns. Mexico's environmental agencies had approved Metalclad's project on repeated occasions and this, according to the tribunal, indicated that the project 'was consistent with, and sensitive to, its environmental concerns'.[270] It is worthy to note here that there was no mention by the tribunal as to whether Guadalcazar community members were consulted as part of any stage of the environmental licensing approval process. Incidentally, Guadalcazar community members, or representative associations, did not participate in the proceedings before the *Metalclad* tribunal – an issue that will be further explored below.[271]

It is worthy to note as well that Mexico had requested the tribunal at a preliminary stage of the proceedings to issue an interim order of confidentiality pursuant to Article 1134 of NAFTA, partly due to a negative 'publicity campaign' carried out by Metalclad.[272] Whilst noting that 'one of the reasons for recourse to arbitration is to avoid publicity', the tribunal did not find that there was a general principle of confidentiality 'that would operate to prohibit public discussion of the arbitration proceedings by either party'.[273] It nonetheless recommended both parties to '*limit public discussion of the case to a minimum'*.[274] This last point shall be revisited as part of the discussion on the differences between international commercial arbitration and international investment arbitration in general, and the issues of confidentiality and transparency in particular.[275] It is worthy to finally note that the *Metalclad* award was later contested on the grounds of

[268] Ibid., at para 28.
[269] Article 1114, *supra* note 227.
[270] Ibid., at para 98.
[271] Part II – Section 1.4.
[272] Article 1134 of NAFTA states that: 'A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction…'. See NAFTA, *supra* note 227.
[273] Metalclad Corporation v. United Mexican States (ICSID Case No. ARB(AF)/97/1), *Decision on a Request by the Respondent for an Order Prohibiting the Claimant from Revealing Information of 27 October 1997*, para 2, 9-10 (our emphasis).
[274] *Ibid*.
[275] See Part I – Section 1.5.3.

excess of jurisdiction before a British Columbia court – an issue that will be revisited further below as well. [276]

1.3.3 Persistent organic pollutants as a test for protectionism – *SD Myers v. Canada*

The *S.D. Myers v. Canada* case[277] is an example that sheds light on the arguments that may be raised by foreign investors against host state environmental measures. S.D. Myers [278] sought to import PCB wastes [279] from Canada for the purposes of their processing and treatment as well as the recycling of decontaminated components in its facilities in Ohio.[280] As of 1990, Canadian legislation banned the export of PCB waste to all countries except the US, subject to the prior approval of the US Environmental Protection Agency.[281] Canada had temporarily allowed the export of PCB only to reverse its decision in 1995. The Canadian ministry of environment then issued successive orders banning the export of PCB waste.[282] S.D. Myers alleged that Canada's ban on the export of PCB wastes to the US in 1995 breached Canada's obligations under Chapter XI of NAFTA, in particular with respect to non-discrimination[283] and national treatment,[284] fair and equitable treatment, [285] performance requirements [286] and expropriation. [287] Canada

[276] Part I – Section 1.4.
[277] S.D. Myers Inc. v. Canada, *Partial award of 13 November 2000*.
[278] S.D. Myers Inc. is an Ohio corporation that processes and disposes of PCB waste.
[279] Polychlorinated biphenyls are toxic chemicals. They are dielectric and coolant fluids typically used in electric appliances. They are classified as persistent organic pollutants.
[280] S.D. Myers Inc. v. Canada, *supra* note 277, at para 91.
[281] Ibid., at para 100.
[282] Following various lobbying attempts, Canada had authorized S.D. Myers, as well as other US companies, to import Canadian PCB into the US for treatment pursuant to certain conditions, including most notably a prohibition on landfilling PCBs – a decision which was reversed a number times thereafter in 1997 for a total period of 5 months that ended as a result of an import ban imposed by the US Court of Appeals. Ibid., at para 126-128.
[283] The ban was according to S.D. Myers enacted in a discriminatory and unfair manner that constituted a denial of justice and a violation of good faith under international law, amounting to a violation of the fair and equitable treatment it is bound by under NAFTA. S.D. Myers further asserted that the Canadian ministry of environment orders effectively forced operators to dispose of PCB waste in Canada, which resulted in a performance requirement to accord preference to Canadian goods and services and to achieve a given level of domestic content in violation of Canada's NAFTA obligations. S.D. Myers Inc. v. Canada, *supra* note 277, at para 130, 135, and 140
[284] The Article provides that: '1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in *like circumstances*, to its own investors…'. See NAFTA Article 1102, *supra* note 170 (our emphasis).
[285] See Article 1105 of NAFTA, *supra* note 263.
[286] Article 1106 provides that: '1. No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory: (a) to export a

denied on the other hand that S.D. Myers was an 'investor' under NAFTA.[288] It argued that S.D. Myers' interpretation of Chapter XI would effectively lead to inconsistencies with its obligations under the Basel Convention,[289] which in any case should prevail over Chapter XI obligations.[290] It alleged that the export ban was in fact made because it believed that 'PCBs are a significant danger to health and the environment when exported without appropriate assurances of safe transportation and destruction'.[291]

The tribunal initiated its analysis by emphasizing that 'by the early 1970s PCBs had become recognised as highly toxic substances that harmed both human and animal health'.[292] The tribunal then noted that both Canada and the US had signed the Basel Convention, but only the former ratified it.[293] The Convention sets forth an obligation on signatories to ensure that hazardous wastes, including PCBs, are managed in an environmentally sound manner.[294] The tribunal thus concluded that Canada's position of not allowing the export or import of PCBs, and their treatment domestically, was in line

---

given level or percentage of goods or services; (b) to achieve a given level or percentage of domestic content; (c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory… 6. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in paragraph 1(b) or (c) or 3(a) or (b) shall be construed to prevent any Party from adopting or maintaining measures, including environmental measures: (a) necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; (b) *necessary to protect human, animal or plant life or health*; or (c) necessary for the conservation of living or non-living exhaustible natural resources.'. See NAFTA, *supra* note 170 (our emphasis).

[287] See Article 1110 of NAFTA, *supra* note 232.

[288] Denying that a claimant is an 'investor' is a jurisdictional defense commonly resorted to by host state in investor-state disputes. According to Canada, PCB export ban does not relate to any investments made by S.D. Myers in Canada; and therefore, the extent of S.D. Myers' arguments would amount to 'inflating the scope and application of Chapter XI out of all proportion'. Canada indeed considered that the dispute was akin to its obligations under Chapter XII on 'cross-border trade in services', rather than Chapter XI. Ibid., at para 145-148.

[289] See Basel Convention, *infra* note 295.

[290] Ibid., at para 150.

[291] Ibid., at para 152.

[292] It is worthy to mention that PCB production is now internationally banned under the Stockholm Convention on Persistent Organic Pollutants. See Ibid., at para 98. See also Annex A 'Elimination', Stockholm Convention on Persistent Organic Pollutants, entered into force 17 May 2004, 2256 UNTS 119; 40 ILM 532 (2001).

[293] The US only signed on 22 March 1990 the Basel Convention but has not ratified it to date; thus making it a non-party at the time of the relevant facts of the dispute. Canada on the other hand ratified the Convention on 28 August 1992.

[294] More particularly, it prohibits (i) the export and import of hazardous wastes from and to states that are not party to the Basel Convention, unless such movement is subject to bilateral, multilateral or regional agreements or arrangements whose provisions are not less stringent than those of the Basel Convention; requires (ii) appropriate measures to ensure the availability of adequate disposal facilities for the environmentally sound management of hazardous wastes that are located within it; and (iii) the transboundary movement of hazardous wastes be reduced to the minimum consistent with the environmentally sound and efficient management of such wastes and be conducted in a manner that will protect human health and the environment. See Ibid., at para 107 citing – respectively – Articles 4(5), 11, 4(2)(b), and 4(2)(d) of the Basel Convention.

with the Basel Convention.[295] In order to comply with the latter as well as the NAAEC,[296] the tribunal nevertheless stressed that Canada was required to choose a regulatory alternative that would be the least inconsistent with NAFTA,[297] a principle that is also recognized by the Rio Declaration.[298] The tribunal was of the opinion that the export ban was largely enacted as a protectionist measure aimed at protecting the Canadian waste treatment industry from foreign competition.[299] Having concluded that S.D. Myers may be considered as an 'investor',[300] and by referring to WTO case-law in order to interpret the expression 'in like circumstances' under Article 1102 on national treatment,[301] the tribunal found that S.D. Myers should have been afforded the same treatment as its Canadian competitors in the waste treatment industry.[302] Canada later filed an application with the Federal Court in Canada seeking the judicial review of the *S.D. Myers* tribunal's decision on the grounds of excess of jurisdiction and conflict with Canada's public policy – an issue that will be discussed directly below. [303]

---

[295] Ibid., at para 116. See also Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, entered into force 05 May 1992, 1673 UNTS 126; 28 ILM 657 (1989) (the 'Basel Convention').

[296] North American Agreement on Environmental Cooperation, *supra* note 226.

[297] The tribunal considered that 'a state can achieve its chosen level of environmental protection through a variety of equally effective and reasonable means, *it is obliged to adopt the alternative that is most consistent with open trade*. This corollary also is consistent with the language and the case law arising out of the WTO family of agreements'. Ibid., at para 215 (our emphasis).

[298] The Rio Declaration provides that: 'States have the right to establish high levels of environmental protection. They are not obliged to compromise their standards merely to satisfy the political or economic interests of other states; *states should avoid creating distortions to trade*; [and] environmental protection and economic development can and should be mutually supportive'. See Ibid., at para 247 (our emphasis). See also UNCED, Rio Declaration on Environment and Development, *supra* note 96.

[299] This view was reinforced by the fact that Canada had lifted in the export ban in 1997 in the interests of swifter elimination of PCB waste. Indeed, the tribunal noted that: 'Canada's policy was shaped to a very great extent by the desire and intent to protect and promote the market share of enterprises that would carry out the destruction of PCBs in Canada and that were owned by Canadian nationals. Other factors were considered, particularly at the bureaucratic level, but the protectionist intent of the lead minister in this matter was reflected in decision-making at every stage that led to the ban'. See Ibid., at para 162.

[300] The tribunal found that S.D. Myers may be deemed as an 'investor' in Canada given that it had incorporated an affiliate in Canada, to which it had lent funds, and intended to engage in a joint venture with it; and that ultimately, S.D. Myers' market share in Canada may be considered as an investment. See Ibid., at para 232.

[301] Article 1102 of NAFTA, *supra* note 170.

[302] This also led the tribunal to conclude that Canada breached its obligation of fair and equitable treatment under Article 1105 of NAFTA. However, the tribunal dismissed S.D. Myers' allegations in relation to performance requirements under Article 1116, given that the wording of which 'clearly does not apply' to the facts of the dispute. On the question of expropriation under Article 1110, the tribunal was of the opinion that – although rights other than property rights may be expropriated – expropriation entails the 'taking' by a host state authority of a foreign investor's property with a view to transferring ownership of that property to another person. According to the tribunal, this was arguably not S.D. Myers' case. See Ibid., at para 251, and 280-281.

[303] The tribunal ordered Canada to pay S.D. Myers $6,050,000 in damages excluding interest. See S.D. Myers Inc. v. Canada, *Second partial award of 21 October 2002*.

1.4 Adjudication *à sens unique*: Some of the earlier criticism of investor-state tribunals' awards

The *Santa Elena* award was criticized as having focused solely on the impact of regulatory measures as 'substantial deprivation of investment'.[304] The *Metalclad* tribunal may have, so it is argued, precisely contributed to a widely held perception that investor-state tribunals are international jurisdictions where private interests effectively 'trump' public ones.[305] In its *amicus* submission to the *Methanex* tribunal, the IISD asserted the *Metalclad* tribunal failed to consider 'environmental and sustainable development goals'.[306] In a similar vein, civil society groups criticized the *S.D. Myers* case.[307] Both the *S.D. Myers* and *Metalclad* awards were in fact contested by Canada and Mexico respectively on the basis of excess of jurisdiction in set-aside proceedings. Below is a more detailed analysis of these criticisms, as well as an emphasis on a fundamental point for the purposes of this research, i.e. the total absence of third party stakeholders.

1.4.1 Environmental protection as a 'substantial deprivation of investment': Formal and informal contestation of awards

The *S.D. Myers*, *Santa Elena* and *Metalclad* cases raised a myriad of complex international investment law questions. They have been criticized on various fronts, including with respect to the scope and application of the notions of fair and equitable treatment and expropriation.[308] Prior to exploring such criticism, it is worthy to recall the holistic function of investor-state tribunals.

Indeed, notwithstanding the 'serious controversies' surrounding some investor-state tribunals' decisions, investor-state tribunals are merely ensuring that host states abide by their international obligations towards foreign investors.[309] In the same vein, investor-state tribunals effectively ensure that host state domestic authorities act in

[304] B. Simma, *supra* note 196, at 589. More particularly in relation to *Metalclad*, see D. Schneiderman, *Constitutionalizng Economic Globalization: Investment Rules and Democracy's Promise* (2008), at 83-84, and S. Tully, *Corporations and International Lawmaking* (2007), at 58, 322.
[305] See B. Simma, *supra* note 196, at 579.
[306] Methanex Corporation v. United States, *infra* note 428, at para 6.
[307] H. Mann, *infra* note 655, at 4.
[308] For an extensive analysis, see A. Kulick, *Global Public Interest in International Investment Law* (2012), at 236, 239.
[309] See J. Paulsson, *supra* note 107, at 232-233.

compliance with international law, and are checked when undermining the international rule of law by acting on 'impulses' of host state sovereignty which might relate to the public's or the environment's benefit.[310] Paulsson poignantly argues that:

> If politicians of one country insist that international tribunals should have no power to rule on the legality of economic discrimination against foreigners because the protection of local business interests is essential, and coincides with the welfare of the local community, their posture may be practically undistinguishable from that of leaders in other countries who might insist that international tribunals should have no power to rule on the legality of the curtailment of civil rights because such restrictions reflect the local conception of the will of God, or a local cultural attachment to traditional authoritarian rule.[311]

The previous passage evidently echoes the need to protect foreign investors from adverse host state discretionary and discriminatory conduct. It fits within the larger debate over not only the international foreign investment framework, but also globalization as a whole, i.e. investor-state arbitration is – simply put – a tool of global governance as previously highlighted.[312]

The question as to whether investor-state tribunals were, or are in fact, adequately balancing foreign investors' rights and the public interest somewhat exceeds the scope of this research. It is worthy to note once more that the preceding investor-state disputes have been adjudicated well over a decade ago. Therefore, the awards in these arbitrations may not necessarily reflect the current state of the international law on foreign investment. The purpose here is to shed light on the criticism made at the time, as further detailed below, as it contextualizes, and sets the background to, the acceptance of civil society's role as an *amicus curiae* in similar disputes – an issue that will be further discussed in the subsequent section.[313]

i. Contested awards on the basis of excess of jurisdiction – the Metalclad case

The *Metalclad* case was contested by Mexico in a British Columbia court.[314] It sought the judicial review of the award, and was supported by submissions from both the

[310] Ibid., at 233.
[311] Ibid., at 233.
[312] See Introduction – Section 1.
[313] See Part I – Section 2.
[314] The seat of the *Metalclad* tribunal was Vancouver, British Columbia in Canada. Mexico lodged a request for judicial review of the arbitral award, which was accepted on the basis of the British Colombia International Commercial Arbitration Act – based itself on the UNCITRAL Model Law. Article 34(2)(a)(iv) of the law states that an arbitral award may be set aside if the applicant establishes that: 'the arbitral award deals with a dispute

Attorney Generals of Canada and Quebec as third party intervenors. Mexico and the intervenors essentially argued for a broad-scoped review of the *Metalclad* award in light of – what is argued as – the *Metalclad* tribunal's manifest errors in interpreting NAFTA provisions. Such review should, according to Mexico, be in line with the Supreme Court of Canada's standard of judicial review of Canadian administrative tribunals' decisions under the so-called 'pragmatic and functional approach'.[315]

The Supreme Court of British Columbia found that judicial review, as practiced under Canadian administrative law, cannot be applied to international commercial arbitrations for which judicial review is solely restricted to 'excess of jurisdiction' or, in other words, 'jurisdictional errors' in accordance with Article 34 of the British Colombia International Commercial Arbitration Act.[316] Having said that, the British Columbia Supreme Court found that the *Metalclad* tribunal partially exceeded its jurisdiction by (i) stating that transparency was one of the objectives of NAFTA; (ii) deciding that Article 1105 of NAFTA on fair and equitable treatment and full protection and security included transparency obligations and made its decision in this regard accordingly; as well as (iii) resorting to the concept of transparency in determining whether or not Mexico expropriated Metalclad's investment in the meaning of Article 1110.[317] The Court therefore set aside parts of the arbitral award but not its entirety.[318]

More fundamentally for the purposes of this research, and in contrast to the *Metalclad* tribunal, the Court also noted that COTERIN, Metalclad's wholly owned

---

not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside'. See The United Mexican States v. Metalclad Corporation, 2001 BCSC 664 (02 May 2001), available at: http://italaw.com/documents/Metaclad-BCSCReview.pdf (last accessed 06 October 2014), at para 42, 50.

[315] The 'pragmatic and functional approach' entails the scrutiny of contested administrative decisions under three standards of review: correctness, reasonableness *simpliciter* and patent unreasonableness. It has been since replaced by the Supreme Court by the 'standard of review analysis', which contains only two standards of judicial review: correctness and reasonableness. Ibid., at para 53-54. See also Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190, 2008 SCC 9; and D. Lemieux, 'Judicial Deference in Canadian Administrative Law: The Pragmatic And Functional Approach, Pushpanathan v. Canada', (1998) 54 Administrative Law Review 757.

[316] Ibid., at para 55.

[317] See Article 1105, *supra* note 263; and Article 1110, *supra* note 232. See also Ibid., at para 68-71, 79.

[318] Indeed, the Court did find that the Metalclad tribunal did not exceed its jurisdiction by concluding that the SLP Ecological Decree – designating the Metalclad area as a natural reserve for cactuses – amounted to an expropriation without compensation. The Court has accordingly limited the interest awared to Metalclad as of 20 September 1997, which is the date of issuance of the Decree, and not prior to that date. Thereby reducing the amount of damages from $15.6 million to $1.1 million. See Ibid., at para 105, 135.

subsidiary, had previously dumped 20,000 tons of toxic chemicals on the landfill site without treatment (allegedly causing water contamination and sickness amongst the local community), as well as allegations that Metalclad bribed Mexican federal officials, including its chief witness during arbitral proceedings.[319] Having said that, although key to understanding the Guadalcazar municipality's rejection of Metalclad's construction permit application, and the wider opposition to the Metalclad project amongst the local community, these facts were seemingly not decisive in the Court's legal analysis (nor the *Metalclad* tribunal for that matter).

ii. Contested awards on the basis of excess of jurisdiction – the S.D. Myers case

The outcome was substantially different in this instance. The *S.D. Myers* award was also contested in Canada but in front of the Federal Court pursuant to Article 34 of the Commercial Arbitration Code – a schedule to the Commercial Arbitration Act.[320] The judicial review in question covered the *S.D. Myers* decision with respect to Canada's violation of its national treatment and fair and equitable treatment obligations under NAFTA as well as the ensuing order to pay substantial damages to S.D. Myers.[321] At issue was not only the fact that the *S.D. Myers* tribunal exceeded its jurisdiction, according to Canada and Mexico, which acted as a third party intervenor, but also that its decision effectively contravened Canadian public policy.[322]

Civil society groups also submitted an *amicus* brief to the Federal Court.[323] Under the banner of the Canadian Alliance on Trade and Environment, the civil society groups involved were Sierra Club of Canada, the Canadian Labour Congress, the Polaris Institute

[319] Ibid., at para 5, 107. See also D. Schneiderman, *supra* note 304, at 82.
[320] Canada (Attorney General) v. S.D. Myers Inc. (F.C.), 2004 FC 38, [2004] 3 F.C.R. 368. See also Commercial Arbitration Act (R.S.C., 1985, c. 17 (2nd Supp.)). Article 34 of the Commercial Arbitration Code contains the same provisions as the British Colombia International Commercial Arbitration Act cited above. See *supra* note 314.
[321] Ibid., at para 3.
[322] Indeed, Article 34(2)(b)(ii) of the Commercial Arbitration Code states that: '(2) An arbitral award may be set aside by the court specified in Article 6 only if: (b) the court finds that…(ii) the award is in conflict with the public policy of Canada.' See Commercial Arbitration Act, *supra* note 320.
[323] These civil society groups initially sought to participate in the review proceedings as third party intervenors. Their petition was, however, dismissed by the Federal Court, and upheld by the Federal Court of Appeal. An application for leave to appeal to the Supreme Court of Canada was also denied. See Attorney General of Canada, and S.D. Myers, Irlc., and The Council of Canadians, The Sierra Club of Canada and Greenpeace, 2001 F.C.T. 317, *Reasons for Order of 11 April 2001*, para. 20. See also Y. Fortier and S. Drymer, 'Third-Party Intervention and Document Discovery', (2003) 4 The Journal of World Investment 473, at 477.

and the Council of Canadians. [324] The arguments contained in the brief particularly reflect some of the key issues raised in this research. The *amici* recognized that judicial review of arbitral awards should be restrictive with respect to *international commercial arbitrations*.[325] They argued, however, that NAFTA arbitrations *could not* be considered as such because they raise issues of 'broad public policy importance' making them public and not private disputes – as opposed to international commercial arbitrations.[326] More fundamentally, the *amici* questioned the *S.D. Myers* tribunal's 'one-dimensional' and 'trade-centred' approach as follows:

> the lack of sensitivity to environmental concerns revealed by this Tribunal is reminiscent of judicial attitudes that were rejected in Canada more than thirty years ago. The ecological imperatives facing our society have, as we know, grown considerably more acute in the intervening years. It will not be possible for us to meet these challenges, if both domestic and international environmental initiatives are to be subject to review *before tribunals that reveal a single minded preoccupation with trade policy objectives to the exclusion of all other societal goals.*[327]

In its decision, the Federal Court found that it is bound by a restrained standard of judicial review – as opposed to the 'pragmatic and functional approach' standard, then applicable under Canadian administrative law – with respect to decisions of international arbitration tribunals. According to the Court, this is necessary in order to maintain a 'system for predictability in the resolution of disputes and to preserve the autonomy of the arbitration forum selected by the parties' even in cases where the arbitral decision is based on an error of law or an erroneous finding of fact provided that the decision in question lays within the jurisdiction of the arbitral tribunal.[328] This position is in fact in

---

[324] Canada (Attorney General) v. S.D. Myers Inc., *Submissions of the Canadian Alliance on Trade and Environment of 16 January 2000*, available at: http://www.sierraclub.ca/national/programs/sustainable-economy/trade-environment/federal-petition-sd-myers.html (last accessed 06 October 2014). The Council of Canadians sought to intervene as a third party, or alternatively as an *amicus curiae*, in the case of United Parcel Service v Canada , *infra* note 515 – which will be further discussed below.

[325] Ibid., at para 2.

[326] The *amici* have accordingly requested the Federal Court to review the *S.D. Myers* tribunal's decision on the grounds that (i) it exceeded its jurisdiction by purporting to determine a claim that is not capable of being resolved by arbitration under Canadian law; (ii) it erred in its interpretation of Canada's obligations under the Basel Convention; (iii) its decision is contrary to Canadian public policy because it effectively penalizes Canada for prohibiting the export of PCBs, a highly toxic waste, to the US when at all material times the importation of PCB wastes was unlawful under US law; and (iv) it erred in its interpretation of Canada's NAFTA obligations, and failed to give effect to NAFTA provisions relating to sustainable development and environmental protection. Ibid., at para 5. This argument is for instance echoed by W. Burke-White, 'The Need for Public Law Standards of Review in Investor-State Arbitrations', in S. Schill, (ed.) *International Investment Law and Comparative Public Law* (2010), at 691.

[327] Ibid., at para 16 (our emphasis).

[328] Canada (Attorney General) v. S.D. Myers Inc., *supra* note 320, at para 39, 42.

line with the Supreme Court of British Columbia's in the judicial review of the *Metalclad* case.[329] The Court also found that public policy does not refer to a political position, in other words, to the validity of a ministerial order or measure; rather, it refers to 'fundamental notions and principles of justice'. The Court thus found that the *S.D. Myers* tribunal's decision did not breach fundamental notions and principles of justice so that the decision is not in conflict with Canadian public policy.[330] It finally emphasized that NAFTA's Chapter XI allows the protection of NAFTA investors against state protectionism or discrimination. It bestows the latter access to an independent dispute resolution process, which can be invoked against a NAFTA party allegedly favouring its own nationals. Against this backdrop, the *S.D. Myers* tribunal concluded that Canadian measures banning the exports of PCB was not intended for a legitimate environmental purpose; but rather for the protection of Canadian industries from U.S. competition – a finding that was within the scope of its jurisdiction under NAFTA's Chapter XI.[331] Canada's petition for judicial review was thus fully dismissed.

iii. Informally contested – the Santa Elena award, a precedent for environmental measures as a 'substantial deprivation of investment'

Although not contested on a jurisdictional basis, it is argued that the *Santa Elena* case demonstrates 'that investment treaties deter actions being taken against polluters as the treaties ensure that infringements of existing rights of investors are regarded as expropriations under the treaties'.[332]

The *Santa Elena* arbitration merely concerned the issue of quantum.[333] In other words, Costa Rica was not against compensating the claimant. Perhaps most of the critics

[329] Furthermore, it found that Canada failed to contest the jurisdiction of the *S.D. Myers* tribunal – an essential factor to the success of a judicial review for excess of jurisdiction by the Federal Court. United Mexican States v. Metalclad Corporation, *supra* note 314, at para 53-54.
[330] In this regard, the Federal Court found that the S.D. Myers tribunal's decision was not 'blatantly unreasonable', 'clearly irrational', 'totally lacking in reality', or 'a flagrant denial of justice'. See Ibid., at para 56.
[331] Ibid., at para 76.
[332] M. Sornarajah, *supra* note 221, at 225.
[333] The tribunal noted that 'this is, at the end of the day, a case of expropriation in which the fundamental issue before the Tribunal is the amount of compensation to be paid by Respondent, Costa Rica, to Claimant, CDSE. While a host of sub-issues were raised by the parties in the context of the written and oral procedures, both parties agree that such matters are relevant only insofar as they tend to affect this central issue. As mentioned above, *the Respondent's right to expropriate the Property is not in dispute*, nor (for the purposes of this Award) are matters such as the size or the boundaries of the Property. Thus, the sole issue in the present arbitration could

of the *Santa Elena* award were concerned with the tribunal's lack of interest in taking into account any environmental concerns, including the protection of a UNESCO World Heritage site, in its analysis on the investor's legitimate expectation as to the compensation amount.[334] The tribunal simply stressed that environmental measures should not be regarded any differently from other expropriatory measures – which all serve a public interest, without delving into any further analysis on the environmental concerns at issue.[335]

Critics argue that 'there is a definite clash here between the protection of the environment and the protection of foreign investment'.[336] In general, host states have a duty to protect the environment as well as human rights and in theory should be, so it is asserted, entitled to cancel an investment project or agreement, even after it has commenced, if it can be shown that the harm to the environment is irreversible or outweighs the benefits of the project.[337] According to Sornarajah, such measure would be based on:

> the sovereignty of the state which permits the state to protect its territory from environmental harm but also from the fact that, in modern international law, a state is a repository of the right to safeguard the environment in the interests of humankind. [338]

---

not be more simply stated: *What is the amount of compensation now owed to CDSE for the expropriation of the Property by Costa Rica?*'. See Santa Elena v. Costa Rica, *supra* note 245, at para 54-56 (our emphasis).

[334] I. Dubava, 'The Place of Sustainable Development in Investor-State Arbitration: Extending the Protected Interests' in V. Sancin (ed.), *International Environmental Law: Contemporary Concerns and Challenges* (2012), at 498.

[335] Santa Elena v. Costa Rica, *supra* note 245, at para 68-72. See also A. Kulick, *supra* note 308, at 236-237.

[336] M. Sornarajah, *supra* note 221, at 110. For a criticism of the *Santa Elena* award, see also V. Prislan, *supra* note 82.

[337] Judge Bruno Simma cites General Comment No. 14 to the ICESCR, which provides concrete illustrations to violations of the state's duty to protect through: 'the failure to regulate the activities of… corporations so as to prevent them from the violating the right to health of others; the failure to protect consumers and workers from practices detrimental to health, e.g., by employers and manufacturers of medicine or food; the failure to discourage production, marketing and consumption of tobacco, narcotics and other harmful substances;…and the failure to enact or enforce laws to prevent the pollution of water, air and soil by extractive and manufacturing industries'. The substantive right to a 'satisfactory, decent, healthy environment' might appear chimerical to some, but the concept is gaining momentum and is actually transcribed in international instruments such as the Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. See B. Simma, *supra* note 196, at 588, and UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, available at: http://www.refworld.org/docid/4538838d0.html (last accessed 17 December 2013). See also T. Meron, *infra* note 846, at 447.

[338] Sornarajah cites the case of *Murphyores Inc Pty Ltd* v *Commonwealth* (1976) 136 CLR 1; [1976] HCA 20 where Australia terminated a concession which had been given to two US corporations to mine sand on Fraser Island. An environmental impact study showed that the adverse effects of such sand-mining on the environment of the Great Barrier Reef were considerable. The Australian government refused to give customs clearance for the export of the minerals, thus in effect terminating the concession. The High Court of Australia – the highest

The writings of Sornarajah as well as other critics, including in fact civil society, echoed the need for tribunals to further clarify the interlinkages between the upholding of foreign investment protection standards on the one hand, such as the right to prompt, adequate, and effective compensation in the event of an expropriation, and environmental protection imperatives on the other, including the protection of UNESCO World Heritage sites such as the Guanacaste region – the focal point in the *Santa Elena* arbitration. Critics see host states such as Costa Rica as being 'punished' – through the payment of damages to foreign investors – by tribunals who adopt one-dimensional views. In sum, the perception is that investor-state tribunals are solely concerned with strictly commercial aspects, such as the determination of the fair market value of the *Santa Elena* property, in contexts where 'the substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties' – to use the wording of the *Methanex* tribunal.[339]

1.4.2 A legitimacy deficit: the absence of third party stakeholder representation

The absence of stakeholder representation is equally a source of criticism, i.e. the interests of affected third parties were not represented at the investor-state dispute level. The deficit in the participation of adversely affected stakeholders is in fact considered as part of an existing 'backlash' towards investor-state arbitration.[340] In particular, the *Metalclad* case presented the most relevant example of the need to secure such participation. Indeed, while Metalclad contested the fact that it was not consulted by the Guadalcazar municipality prior to the rejection of its construction permit application, was not afforded the right to be heard, and was therefore not treated fairly and equitably; the exact inverse could be potentially argued by Guadalcazar community members at the level of the *Metalclad* tribunal.

---

court in the Australian judicial system – upheld the validity of the conduct of the Australian government. The two corporations had spent large sums in setting up the project and the US government intervened diplomatically seeking a reversal of Australia's position. See M. Sornarajah, *infra* note 221, at 109-110.

[339] Methanex Corporation v. United States, *infra* note 428, at para 49 (our emphasis).

[340] See D. Vagts, 'Forward to the Backlash Against Investment Arbitration', in M. Waibel et al. (eds), *The Backlash against Investment Arbitration*; J. Maupin, *supra* note 48, at 10.

These were undoubtedly stakeholders to the dispute and could have had a myriad of potentially relevant arguments and issues to raise regarding the construction of the Metalclad hazardous waste landfill within their community. Stakeholders from Guadalcazar could have for instance put forward facts with respect to the widely reported sickness caused by the hazardous waste already dumped on the site, or additional environmental and scientific evidence or assessments on its potentially adverse effects (which would have contradicted both Metalclad and Mexico's findings).

Guadalcazar community members, their representatives from civil society groups or associations, have not sought to intervene in the arbitration. However, how could this have possibly occurred in the absence of a clearly established framework authorizing third party or *amicus curiae* interventions in investor-state disputes? Such a framework was indeed non-existent at the time of the rendering of the final award in the *Metalclad* case, i.e. in the year 2000. It is of equal importance to note that the confidentiality of proceedings acts as an effective barrier to any meaningful third party participation. People in Guadalcazar and Mexico might have been simply unaware of the existence of the arbitration while it was on-going.

Not only were stakeholders from Guadalcazar not given the right to raise arguments or issues at any point of the dispute, but also they did not seem to have been involved in the Mexican federal government's environmental license issuance process. In fact, the only forum where they seem to have had access is the Guadalcazar municipality meeting in which Metalclad was denied the right to a construction license for its hazardous waste landfill. This begs a central question concerning the role of host states in representing adversely affected citizens before investor-state tribunals. Should not the representation of wider concerns by affected citizens, i.e. third parties to investor-state disputes, be inherent to the functions and indeed purpose of the host state? More specifically, is Mexico not, as a sovereign state, the sole and rightful representative of its citizens' rights and interests internationally, including the rights and interests of the Guadalcazar community before an investor-state tribunal?

Again in this particular instance, it would have seemed difficult in a number of respects for Mexico to adequately represent the interests of the Guadalcazar community before the *Metalclad* tribunal. Firstly, although Mexico did defend its measures and

conduct, the Mexican federal government and its environmental agencies had approved the Metalclad project all along, whereas the Guadalcazar community vehemently opposed it. As previously mentioned, Mexico *did not* base its defense on environmental protection. It is against this backdrop that the *Metalclad* tribunal considered that Mexico could not have resorted to Article 1114 of NAFTA on 'Environmental Measures' given that Mexico's environmental agencies had approved Metalclad's project on repeated occasions. This indicated that the project 'was consistent with, and sensitive to, its environmental concerns'.[341] The Mexican federal government's interests in this particular instance were thus not congruent to those of the Guadalcazar community. This is a situation that is increasingly seen as typically akin to investor-state disputes whereby segments of host state populations oppose certain foreign investment projects; whereas host states approve and support them.[342] In any case, it would have been difficult for Mexico as a respondent to bring in witnesses from the community, as well as expertise supporting the community's arguments and concerns, as credible counter-arguments to those raised by Metalclad, particularly regarding the adverse environmental impacts of the project on local citizens – again because it had approved the project all along.

In sum, it is questioned whether host states may be in a position, or may be even interested, in putting forward defenses to foreign investors' claims based on environmental protection or human rights arguments.[343] This may be due to tactical considerations,[344] a desire not to exacerbate the arbitration,[345] or out of reluctance to be perceived as unfavorable to foreign investors by raising such exceptions to the conduct of

[341] Metalclad Corporation v. United Mexican States, *supra* note 257, at para 98.
[342] In considering whether host states could be potentially espouse the claims of adversely affected segments of their populations against foreign investors, Francioni notes that hosts-states may often not be interested in bringing environmental and human rights concerns to bear on the arbitration process, particularly given that host states authorize such investments often against the wishes of these segments of their populations. See F. Francioni, *infra* note 847, at 738. See also the case of Aguas del Tunari, S.A. v. The Republic of Bolivia, *infra* note 533.
[343] This is reflected by the existing case law. See Part I – Section 4. See also C. Schreuer, U. Kriebaum, *infra* note 617, at 1091.
[344] Such as focusing on jurisdictional exceptions to foreign investors' claims. See also T. Ishikawa, *supra* note 108, at 393.
[345] Shelton points out that in international proceedings in general 'a state may feel that raising certain sensitive issues, such as human rights, will exacerbate the dispute between the parties or be counterproductive to the improvement sought'. See D. Shelton, 'The Participation of Nongovernmental Organizations in International Judicial Proceedings' (1994), 88:4 The American Journal of International Law 611, at 615. See also F. Francioni, *infra* note 847, at 738.

the latter's activities.[346] In fact, in the particular case of *Metalclad*, Mexico was concerned by a negative 'publicity campaign' carried out by Metalclad and requested the tribunal to issue a confidentiality order as previously mentioned.[347] Other deterring factors may include lack of resources or difficulty in gathering evidence, which could be more relevant to foreign investors' claims against least-developed host states.[348]

As will be shown directly below, the absence of third party stakeholder representation is in fact symptomatic of the impact of international commercial arbitration rules on investor-state disputes.

1.5 Impact of the international commercial arbitration model on investor-state arbitration and civil society's role

This section starts by looking into the historical background of investor-state arbitration and the reasons behind the relevance of international commercial arbitration rules thereto. It then fleshes out some of the key differences between the two, which essentially translate into the absence of public interest issues in international commercial arbitration and the need for transparency in investor-state arbitration.

1.5.1 The decline of diplomatic protection and other virtues of the international commercial arbitration model

Arbitration is a powerful alternative to diplomatic protection. Ibrahim Shihata, an Egyptian lawyer and former Secretary-General of ICSID, asserted that the ICSID Convention:

> provide[s] developing countries with a response which, compared to the Calvo Doctrine, is both more adequate in the depoliticization of disputes and more effective in the encouragement of foreign investment, without inviting the abuses of diplomatic protection.[349]

---

[346] A. Kawharu, *infra* note 393, at 283.
[347] Article 1134 of NAFTA states that: 'A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction'. See NAFTA, *supra* note 227, Metalclad Corporation v United Mexican States, *supra* note 273, para 2, 9-10.
[348] See for instance Biwater Gauff v. Tanzania, *infra* note 740. See also C. Schreuer, U. Kriebaum, *infra* note 617, at 1091.
[349] Quoted in S. Puig, *infra* note 1403, at 246; see also I. Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA', (1986) 01 ICSID Review 01, at 11.

With the creation of ICSID and the adoption of the UNCITRAL Arbitration Rules, a system was established with the aim of settling investor-state disputes under the same precepts that govern international commercial disputes – as further detailed below.

i. Diplomatic protection of foreign investors

Diplomatic protection, often coupled with 'gunboat diplomacy' has been historically resorted to as the principal means of securing international protection of individuals in general, and foreign investors in particular.[350] It is viewed in international law through the prism of state responsibility for injuries to aliens. An investor would seek the protection of its home state when it unsuccessfully seeks appropriate redress before host state domestic courts or administrative organs following violations of its rights. In turn, the home state would espouse the individual's claim and resort to diplomatic protection.[351] This has always been a 'sensitive' issue in international relations and is inherently associated with power dynamics of international politics.[352] Towards the early XXth century, eminent Argentinian jurist, Carlos Calvo, denounced diplomatic protection as a violation of sovereignty and judicial independence of host states.[353] Calvo's doctrine articulated an obligation on foreign investors to exhaust domestic remedies prior to resorting to diplomatic protection. Calvo also argued that by entering a host state, aliens – including most notably foreign investors – implicitly accept the risk of being treated like nationals.[354]

More specifically, diplomatic protection necessarily entails that (i) a host state breached an international obligation towards a national of another home state, and (ii) the

[350] C. Brower and S. Blanchard, *supra* note 8, at 697.
[351] Diplomatic protection implied that no individual right of access to justice would exist at the international level, since, once local remedies failed, diplomatic protection by the national state would 'transform' the individual claim into a state claim with the effect of almost nullifying the role of the individual in the international remedial process. See the PCIJ *Mavrommatis Palestine Concessions* case where the Court ruled that: 'by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right – its right to ensure in the person of its subjects, respect for the rules of international law'. See *Mavrommatis Palestine Concessions*, PCIJ Series A, n°2 (30 August 1924), at 12; F. Francioni, *infra* note 882, at 9.
[352] Indeed, the ICJ noted that 'diplomatic protection deals with a very sensitive area of international relations, since the interest of a foreign State in the protection of its nationals confronts the rights of the territorial sovereign'. See *Barcelona Traction case*, *infra* note 357, at para 37.
[353] P. Dumberry, *supra* note 221, at 112.
[354] For a more elabore discussion, see M. Paparinskis, *International Minimum Standard and International Law-Making* (2013), at 30; D. Shea, *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy* (1955), at 106-110.

home state may bring a claim in respect of such breach.[355] A home state thus espouses the individual claim of a foreign investor as its own – as reflected by, *inter alia*, the ICJ cases of *Mavrommatis*,[356] *Barcelona Traction*,[357] *ELSI*,[358] and the more recent *Diallo* case.[359] It is a 'fiction' that was particularly necessary at a time when foreign investors had 'no place, no rights in the international legal order'.[360]

In the *Barcelona Traction* case, Belgium sought reparations from Spain on the basis of damages incurred by Belgian nationals, who were shareholders in the Barcelona Traction Light and Power Company (a corporation incorporated in Canada),[361] as a result of various acts committed by organs of the Spanish state. These acts most notably included a denial of justice in bankruptcy proceedings before Spanish courts, which ultimately led to the transfer of the Company's control in favour of Spanish nationals.[362] The Belgian government made successive unsuccessful diplomatic representations to its Spanish counterpart, which also rejected proposals to settle the dispute through arbitration. Belgium then filed a claim against Spain before the ICJ. However, the ICJ found that international law authorizes the home state of the Company alone to make a claim against the breaching host state, i.e. Canada and Spain respectively.[363] It thus dismissed Belgium's claim because the alleged acts have not been taken in relation to any

---

[355] *Barcelona Traction case*, *infra* note 357, at para 35 citing *Reparation for injuries suffered in the service of the Nations*, Advisory Opinion, [1949] ICJ Rep 174, at 181-182.
[356] *Mavrommatis Palestine Concessions*, *supra* note 351.
[357] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* [1970] ('Barcelona Traction case').
[358] *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, *supra* note 188.
[359] The case concerned the violations of the rights of a Guinean citizen – Ahmadou Sadio Diallo – which included his arbitrary arrest and detention in the DRC. Guinea brought the case against the DRC before the ICJ and requested reparations and an apology from the latter. See *Case Concerning Ahmadou Sadio Diallo, (Guinea v. the Democratic Republic of the Congo)* [2007] ('*Diallo* case').
[360] In the commentaries to the Draft Articles on Diplomatic Protection, the ILC provided that 'in the early years of international law the individual had no place, no rights in the international legal order. Consequently if a national injured abroad was to be protected this could be done only by means of a fiction – that an injury to the national was an injury to the State itself. This fiction was, however, no more than a means to an end, the end being the protection of the rights of an injured national. Today the situation has changed dramatically. The individual is the subject of many primary rules of international law, both under custom and treaty, which protect him at home, against his own Government, and abroad, against foreign Governments … This protection is not limited to personal rights. Bilateral investment treaties confer rights and protection on both legal and natural persons in respect of their property rights. The individual has rights under international law but remedies are few'. See United Nations, Draft articles on Diplomatic Protection, 2006, available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf (last accessed 01 May 2015), at 24.
[361] The company was incorporated in Canada for the purposes of creating an electric power production and distribution system in Catalonia.
[362] *Barcelona Traction case*, *supra* note 357, at para 2, 15.
[363] Ibid., at para 88-96.

Belgian national but to the Company itself – which has both a personality and nationality that is entirely distinct of its shareholders.[364]

ii. Diplomatic protection: new challenges in a de-colonized and globalized world

Although it may be argued that the relevance of the Calvo Doctrine may have long elapsed, the dynamics of the Cold War, the appearance of newly-decolonized 'third-world' states, fueled further challenges to foreign investment protection. This coincided with increasing calls for a 'New International Economic Order', whereby decolonized states asserted their right to control foreign investment, including their right to expropriate or nationalize foreign property in order to fund their much-needed development – as reflected by the 1962 General Assembly resolution on 'Permanent Sovereignty over Natural Resources'[365] as well as the 1974 Charter of Economic Rights and Duties of States.[366] In fact, during the 1970s, there were more than 1,000 instances whereby developing host states nationalized foreign investors' assets.[367] Against this background, the pressing need to de-politicize international commercial relations in general, and foreign investment protection in particular, became more evident and the importance of IIAs and BITs, as well as the 'value of arbitration', as recognized by the UN General Assembly, gained more relevance as further discussed below.[368]

iii. The creation of ICSID and UNCITRAL arbitration

UNCITRAL was created in 1966 for the purposes of the modernization and harmonization of international trade law. It drafted a Model Law on International Commercial Arbitration in 1985. Indeed, the UN General Assembly had noted back then

---

[364] For further analysis on both cases, see M. Sornarajah, *supra* note 221, at 11.
[365] UN General Assembly, Permanent sovereignty over natural resources, 14 December 1962, A/RES/5217, available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/1803(XVII).
[366] See Article 2(a) of the CERDS, which provides that: 'Each State has the right: To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment'. UN General Assembly, Resolution 29/3281, 'Charter of Economic Rights and Duties of States', dated 12 December 1974, available at: http://www.un-documents.net/a29r3281.htm (last accessed 06 October 2014). See also S. Picciotto, *supra* note 221, at 136; J. Maupin, *supra* note 48, at 7; C. Brower and S. Blanchard, *supra* note 8, at 697.
[367] M. Wells-Sheffer, *supra* note 206, at 485.
[368] N. Rubens, *Opening the Investment Arbitration Process: At What Cost, for What Benefit?*, in C. Klausegger et al. (eds.), *Austrian Arbitration Yearbook* (2009), at 488. On the relevance of IIAs and BITs, see also S. Picciotto, *supra* note 221, at 136.

a number of fundamental points in relation to the Model Law's objectives, including a recognition of (i) 'the value of arbitration as a method of settling disputes arising in international commercial relations' and (ii) the contribution of the Model Law to the development of harmonious international economic relations.[369] The Model Law was to give a wide interpretation of the term 'commercial' – as per the provisions of Article 1(1) – to cover 'all relationships of a commercial nature' including investment transactions.[370] The recognition of the 'value of arbitration' had been initially stated with the adoption of the UNCITRAL Arbitration Rules back in 1976. In addition, the UN General Assembly had made a generalized recommendation for the use of the Rules in the settlement of disputes arising in 'the context of international commercial relations'.[371] Since then, the Rules have been used for the settlement of a broad range of disputes, including disputes between private commercial parties, investor-state disputes, as well as inter-state disputes. Arbitration under the UNCITRAL Arbitration Rules was thus meant to reduce the prospects of intervention by foreign investors' home-states and the historical role diplomacy played in the protection of foreign investment, i.e. *to essentially de-politicize the investment process*.[372]

A similar rationale applies to the creation of ICSID under the auspices of the World Bank earlier in 1965, which was to establish a neutral forum for both foreign investors and states to peacefully settle disputes without the intervention of the investor's

[369] UNCITRAL Model Law, *supra* note 109.

[370] The Law contains an explanatory footnote to the term 'commercial' which provides that it 'should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road'. See Ibid.

[371] UN General Assembly, Resolution 31/98, 'Arbitration Rules of the United Nations Commission on International Trade Law', dated 15 December 1976, available at: http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdfhttp://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/477/79/IMG/NR047779.pdf?OpenElement (last accessed 01 September 2013).

[372] The aim to reduce the role of diplomatic protection in relation to investment disputes is well-reflected in Article 34(3) of the ASEAN Investment Treaty, which partly states that: 'A member State shall not give diplomatic protection, or bring an international claim, in respect of a dispute which one of its investors and the other member State have consented to submit or have submitted to arbitration under this Section…'. See ASEAN Investment Treaty, *supra* note 173. See also Jan Paulsson, *supra* note 107, at 28, 55; and N. Blackaby and C. Richard, *infra* note 828, at 272.

home state.[373] ICSID Arbitration Rules are somewhat similar to other international commercial arbitration rules such as the UNCITRAL Arbitration Rules or the ICC Rules of Arbitration,[374] particularly in terms of their structure and key contents.[375] The procedural rules governing investor-state arbitration are based on the ones applicable for international commercial arbitration – initially construed for private parties to settle international commercial disputes.[376] Under the international commercial arbitration model, the private nature of proceedings meant that *solely* foreign investors on the one hand, to the exclusion of their home states, and host states on the other[377] would be involved in a dispute settlement process governed by an impartial tribunal, under a fair and efficient procedure, that renders a binding and non-appealable decision that would be subject to domestic judicial review in only a limited number of cases, covering mostly jurisdictional grounds.[378]

---

[373] An ICSID tribunal indeed noted that: 'One of the main objectives of the mechanisms instituted by the [ICSID] Convention was to put an end to international tension and crises, leading sometimes to the use of force, generated in the past by the diplomatic protection accorded to an investor by the State of which it was a national'. See Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo (ICSID Case No. ARB/98/7), *Award of the Tribunal of 01 September 2000*, para 15 ('Banro American v. Congo'). See also Article 27, ICSID Convention, *infra* note 379.

[374] International Chamber of Commerce, Rules of Arbitration (2012), available at: http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Rules-of-arbitration/Download-ICC-Rules-of-Arbitration/ICC-Rules-of-Arbitration-in-several-languages/ (last accessed 06 October 2014).

[375] T. Ishikawa, *supra* note 108, at 374. For an exhaustive survey of these rules, see generally G. Born, *infra* note 1173.

[376] Ibid., at 373.

[377] The *Banro American v. Congo* tribunal in fact emphasized that: 'once ICSID arbitration is available for settling a dispute related to a foreign private investment, diplomatic protection is excluded: the investor no longer has the right to seek diplomatic protection, and the investor's home State no longer has the right to grant the investor diplomatic protection'. See Banro American v. Congo, *supra* note 373, at para 15.

[378] Albeit ICSID arbitral decisions are final and non-subject to appeal, there exists nonetheless an annulment procedure under limited grounds pursuant to Article 52 of the ICSID Convention. Article 52(1) provides that: '(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.' Both the recourse to, and success of, this procedure were typically rare although there seems to be a recent reversal of the trend. See L. Johnson, 'Annulment of ICSID Awards: Recent Developments', IISD IV Annual Forum for Developing Country Investment Negotiators Background Papers (2010), available at: http://www.iisd.org/pdf/2011/dci_2010_annulment_icsid_awards.pdf (last accessed 02 May 2013). It is worthy to mention that one of the cases examined in the present study involves an annulment procedure submitted by Argentina, which argued that one of the arbitrators, Gabrielle Kaufmann-Kohler, lacked independence and impartiality due to the fact that she sits on the board of UBS, the largest shareholder in claimant Vivendi. See Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic (ICSID Case No. ARB/97/3), *Decision of 10 August 2010 on the Argentine Republic's Request for Annulment of the Award rendered on 20 August 2007*. See also T. Christakis, 'Quel remède à l'éclatement de la jurisprudence CIRDI sur les investissements en Argentine? La décision du comité ad hoc dans l'affaire CMS c. Argentine', Revue générale de droit international (2007), at 879.

As previously mentioned, NAFTA Chapter XI disputes are often governed by UNCITRAL Arbitration Rules – which were quintessentially construed for international commercial arbitration. The historic reason for this is that for quite some time only the US had ratified the ICSID Convention[379] among the NAFTA parties.[380]

Resorting to arbitration thus presents a number of key procedural advantages such as the confidentiality and private nature of the proceedings (as opposed to the public nature inherent to domestic tribunals), the finality of arbitral decision as well as their quasi-universal enforceability. Awards rendered pursuant to the UNCITRAL Arbitration Rules and the ICSID Arbitration Rules are enforced pursuant to the 1958 New York Convention (ratified by 156 states)[381] and the ICSID Convention (ratified by 159 states)[382] respectively.

It is in this light that investor-state arbitration provides foreign investors with a right of action that sanctions host state non-compliance, i.e. they have direct access to international jurisdictions that issue effectively enforceable decisions.[383] Indeed, the 'fiction' of diplomatic protection has become increasingly unnecessary – as poignantly stated by the tribunal in *Corn Products International Inc. v. Mexico*:

> However, there is no need to continue that fiction in a case in which the individual is vested with the right to bring claims of its own. In such a case there is no question of the investor claiming on behalf of the State. The State of nationality of the Claimant does not control the conduct of the case. No compensation which is recovered will be paid to the State. The individual may even

[379] See Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 U.N.T.S. 159, 4 I.L.M. 532 (entered into force 14 October 1966) ('ICSID Convention').
[380] The US had ratified the ICSID Convention on 10 June 1966. Canada only ratified it on 1 November 2013 and Mexico still has not. See ICSID, 'List of Contracting States and Other Signatories to the Convention', available at: https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English (last accessed 5 January 2015).
[381] U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 and Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, opened for signature March 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159. See also, New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards Website, available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last accessed 14 November 2013) (the 'New York Convention').
[382] See ICSID, 'List of Contracting States and Other Signatories to the Convention', available at: https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English (last accessed 5 January 2015).
[383] K. Supnik, 'Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law', (2009) 59 Duke Journal of International Law 343, at 347.

> advance a claim of which the State disapproves or base its case upon a proposition of law with which the State disagrees.[384]

Having said that, some of those procedural advantages that are underlying the international commercial arbitration model have been put into question, including most notably the confidentiality of proceedings – as will be further elaborated below.

1.5.2 Does civil society's role really matter?: the irrelevance of public interest issues under international commercial arbitrations

International commercial arbitration rules were initially tailored to govern disputes covering 'all relationships of a commercial nature' including investment transactions.[385] This definition thus covered investor-state disputes opposing foreign investors who had engaged in investment activities within the territory of a host state, and claimed to have suffered damages that were caused by a breach of the international responsibilities and obligations of the latter. As previously mentioned, this breach is often the result of regulatory measures that are generally enacted under the banner of the public interest.[386] Although international commercial arbitration rules have been used interchangeably in investor-state disputes as well as strictly commercial disputes amongst private parties, it is worthy to question how the subject matter dealt with in investor-state disputes compares to general international commercial disputes.

Following the *Methanex* award, international arbitrators, Yves Fortier and Stephen Drymer, articulated the difference between investor-state arbitration and international commercial arbitration in the following terms:

> *Investor-State arbitration*, whether conducted under bilateral investment treaties (BITS) or multilateral instruments, *invariably raises fundamental issues of public interest of a type typically foreign to international commercial arbitration*. Indeed, a purely private commercial dispute, in which the issues to be resolved concern exclusively the rights and obligations of the parties interest, bears little resemblance to a treaty arbitration, in which the compliance of domestic legislative or regulatory measures with norms of international law is at issue. *It is no surprise, then, that the traditional arbitral "model" developed in the context of international commercial arbitration is frequently acknowledged to be inappropriate in investor-State disputes*.[387]

---

[384] Corn Products International Inc. v. Mexico (ICSID Case No. ARB(AF)/04/01), *Decision on responsibility of 15 January 2008*, at para 173.
[385] UNCITRAL Model Law, *supra* note 109.
[386] See Part I – Section 1.4.
[387] Y. Fortier and S. Drymer, *supra* note 323, at 473 (our emphasis).

It is indeed hard to conceive that issues related to human rights, environmental protection, or the representation of indigenous groups or minorities for instance, would be raised in international commercial arbitration – in stark contrast to investor-state arbitration.[388] This precisely explains why the *amicus curiae* practice has not yet expanded to the realm of international commercial arbitration in the way it has in investor-state arbitration – a crucial point to note for the purposes of this research.[389]

As previously shown, public interest issues appear to be inherent to a significant number of investor-state disputes. The relevance of public interest issues in investor-state disputes stirs vigorous debates on the appropriateness of arbitration rules that were essentially inspired by the international commercial arbitration model. The question asked at the time was whether the procedural rules designed for the latter actually fit the former.[390] Investment arbitration entails the review of governmental conduct, while commercial arbitration is about settling private disputes. Both are thus fundamentally different from a substantive standpoint. The review of governmental conduct by an arbitral tribunal is a peculiar aspect akin to investor-state arbitration that transcends the realm of international commercial arbitration. In this light, transposing international commercial arbitration rules to public interest-related investor-state arbitrations is often described as a 'misappropriation of institutions'.[391]

It is argued on the other hand that if rules applicable in investor-state arbitration were modified towards a path far off from the international commercial arbitration model, i.e. towards greater third party involvement and openness or transparency of public interest-related proceedings, investor-state arbitration would become politicized and risk the loss of numerous procedural advantages it gained under the international commercial

[388] S. Karamanian, 'The Place of Human Rights in Investor-State Arbitration', (2013) 17 Lewis & Clark Law Review 423, at 424.
[389] T. Bevilacqua, 'Voluntary Intervention and Other Participation of Third Parties in Ongoing International Arbitrations: A Survey of the Current State of Play', (2007) 01:4 World Arbitration and Mediation Review 507, at 533.
[390] T. Ishikawa, *supra* note 108, at 377; C. Schreuer, U. Kriebaum, *infra* note 617, at 1097.
[391] See K. Moltke and H. Mann, 'Misappropriation of Institutions: Some Lessons from the Environmental Dimension of the NAFTA Investor-State Dispute Settlement Process', (2001) 01 International Environmental Agreements: Politics, Law and Economics 103.

arbitration model such as party autonomy.[392] It also might undermine the equality of arms. Indeed, numerous arbitration insiders and practitioners did not welcome greater third party involvement through the gradual acceptance of the *amicus curiae* procedure.[393]

The issue of confidentiality and transparency of arbitral proceedings, further explored directly below, captures the divergence between the two models and reflects the concerns raised against applying arbitration rules to both international commercial and investor-state disputes interchangeably, and lies at the heart of the tensions related to access of third parties to arbitration proceedings. It will be used as a general example to put the contentions raised here to the test.

1.5.3 Confidentiality and transparency issues as testaments of inadequate interchangeability

The issue of confidentiality and transparency in investor-state arbitration is controversial and divisive.[394] International commercial arbitral proceedings are typically held *in camera*, i.e. unlike domestic judicial jurisdictions, arbitral tribunals are in general not open to the public.[395] It is furthermore recognized that – what is perceived as – the 'closed and secret character' of investor-state arbitral proceedings is mainly the result of international commercial arbitration rules.[396] In a rather telling passage, Wälde criticizes the 'lifting of the confidentiality of the proceeding' in the following terms:

> A feature of modern investment arbitration, in particular under the NAFTA but also ICSID, has been the lifting of the traditional confidentiality of the proceeding. Not only the awards, but also the submissions of the parties and interim orders by the tribunal are published. Access is provided to the hearing itself. Third parties, essentially activist NGOs, are allowed to submit *amicus* briefs. All this is generally applauded by Western governments, NGOs and academics as a move towards greater transparency required by the public interest at stake in investment disputes. The supporters of such procedural reforms going significantly beyond the arbitration procedures referred to in

[392] N. Rubens, *supra* note 368, at 488. However, on the limitations of party autonomy, see M. Livingstone, 'Party Autonomy in International Commercial Arbitration: Popular Fallacy or Proven Fact?', (2008) 25:5 Journal of International Arbitration 529, at 532; T. Wälde, *supra* note 51, at 33.
[393] A. Kawharu, 'Participation of Nongovernmental Organizations in Investment Arbitration as Amici Curiae', in in M. Waibel et al. (eds), *The Backlash against Investment Arbitration*, at 281; J. Maupin, *supra* note 48, at 26.
[394] A. Asteriti, C. Tams, *infra* note 402, at 788.
[395] A. Van Duzer, *supra* note 171, at 685.
[396] E. De Brabandere, *infra* note 852, at 103; C. Schreuer, U. Kriebaum, *infra* note 617, at 1097.

> investment treaties have not been interested in an examination of how such instruments affect the equality of arms.[397]

As mentioned previously, the *Metalclad* tribunal indeed noted that 'one of the reasons for recourse to arbitration is to avoid publicity'. [398] The tribunal did not find, however, that there was a general principle of confidentiality 'that would operate to prohibit public discussion of the arbitration proceedings by either party' under the ICSID Additional Facility Rules. Further to a petition by Mexico, it nonetheless recommended both parties to '*limit public discussion of the case to a minimum*'. The *Metalclad* tribunal explicitly identified confidentiality as a commonly perceived advantage of international commercial arbitration by emphasizing that 'one of the reasons for recourse to arbitration is to avoid publicity'.[399] Accordingly, the wider public had no access to the proceedings or its documents. The privacy and confidentiality of proceedings are fundamental concepts of international commercial arbitration as trade and business aspects relating to the disputing parties' activities often require confidentiality and protection from wider public disclosure. In addition, it precluded the parties from facing any negative publicity that could be potentially linked to the dispute.

Having said that, the *Metalclad* case raised a myriad of polemical issues that directly affected Guadalcazar community members, i.e. those who vehemently opposed the construction and operation of Metalclad's hazardous chemical waste landfill within their community. Community members did not have the right to attend or have any access to the proceedings or any of its documents. In addition, the protection of the environment – a 'common concern of humanity' – was a focal point of the dispute.[400] Again, no potential attendance or access could have been granted to civil society actors who are concerned with environmental protection.[401] The confidentiality of proceedings

---

[397] T. Wälde, *supra* note 51, at 33. On the question of burden and prejudice to disputing parties, generally as included in the concept of 'equality of arms', see the criteria enacted by ICSID and UNCITRAL under Part I – Section 2.2.

[398] Metalclad Corporation v United Mexican States, *supra* note 273, at para 2, 9-10 (our emphasis).

[399] See Ibid. See also E. Kentin, 'Sustainable Development in International Investment Dispute Settlement: The ICSID and NAFTA Experience', in N. Shrijver, and F. Weiss (eds.), *International Law and Sustainable Development* (2004), at 322.

[400] D. Shelton, 'Common Concern of Humanity', (2009) 01 Iustum Aequum Salutare 33, at 34-35.

[401] The recognition of civil society as advocates of international environmental protection is reflected in the Aarhus Convention, which defines the 'public' as 'one or more natural or legal persons, and … their associations, organizations or groups'; and the 'public concerned' as the: 'public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, *non-governmental*

was effectively a barrier to any meaningful third party participation. People in Guadalcazar and Mexico might have been simply unaware of the existence of the arbitration while it was on-going. This seemed paradoxical since the three NAFTA parties, i.e. the United States, Canada, and Mexico, have transparent and open judicial proceedings where cases of public importance – similar to the *Metalclad* dispute – would not have been conducted in quasi-complete secrecy.[402]

In this light, it is not an uncommonly held view that opacity 'risks to kill investment arbitration' as the public will not tolerate 'unknown and unelected people to dispose of the destiny of nations in dark and secret rooms'.[403] States are well aware of this criticism. For instance, while arguing in favor of the acceptance of *amicus curiae* briefs, the US pointed out that NAFTA Chapter XI dispute resolution is increasingly perceived as being '*exclusionary and secretive*' – a significant statement by the US, which is the leading proponent of the North-American and global foreign investment protection regime.[404]

It is worthy to briefly note as well that in reaction to such criticism, NAFTA parties adopted measures aimed at increasing transparency and clarifying confidentiality measures. In 2001, the NAFTA Free Trade Commission (FTC) adopted the 'FTC Interpretive Note on Transparency', which provides that:

> Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and… nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal. [405]

The Note reflects the NAFTA parties' understanding that Chapter XI proceedings do not entail a general duty of confidentiality apart from the 'limited exceptions' set forth under relevant arbitration rules. The FTC also articulated exceptions that would impose

---

organizations promoting environmental protection … shall be deemed to have an interest'. See Articles 2(4) and 2(5) of the Aarhus Convention, *supra* note 119 (our emphasis).

[402] A. Van Duzer, *supra* note 171, at 695. Also, a study of US, English, French, German and Greek law suggests the same. See in A. Asteriti, C. Tams, 'Transparency and Representation in the Public Interest in Investment Treaty Arbitration' in S. Schill (ed.), *International Investment Law and Comparative Public Law* (2010), at 798.

[403] A. Moore, *supra* note 1040, at 266.

[404] Methanex Corporation v. United States, *infra* note 428, at para 22 (our emphasis). On the US role in promoting the investor-state 'regime', see J. Maupin, *supra* note 48, at 3.

[405] NAFTA Free Trade Commission, 'Notes of Interpretation of Certain NAFTA Provisions' (31 July 2011), available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx?lang=eng (last accessed 01 May 2013) (the 'FTC Interpretive Note on Transparency').

confidentiality under a number of conditions.[406] Although regarded as a positive measure, the FTC Interpretive Note on Transparency might be considered lacunary as it solely covers the publication of case documents and does not address the issue of access to hearings, for which it defers to the applicable arbitration rules.[407]

Greater transparency and openness towards the public of both proceedings and case materials has been also identified as a growing trend in BITs.[408] For instance, the Canada-Peru BIT provides that hearings shall be in principle open to the public but that portions of hearings may be held *in camera* if the protection of confidential information is required.[409] The BIT also confirms the publicity of all documents issued by, or submitted to, the tribunal 'unless the disputing parties otherwise agree, subject to the deletion of confidential information'.[410]

Both UNCITRAL and ICSID also amended their respective arbitration rules to the same effect. At the level of ICSID, its arbitration rules were amended in 2006 and contain, alongside rules on third party access which will be discussed in detail later, measures aimed at enhancing the transparency of arbitral proceedings. Article 32(2) states that:

> Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements.[411]

The amended version of Article 32(2) requires an objection from the parties to prevent access to hearings as opposed to a positive consent thereto.[412] This is in significant contrast with the previous wording of Article 32, which provided that a tribunal could

---

[406] '(ii) Each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of: a. confidential business information; b. information which is privileged or otherwise protected from disclosure under the Party's domestic law; and c. information which the Party must withhold pursuant to the relevant arbitral rules, as applied. (iii) The Parties reaffirm that disputing parties may disclose to other persons in connection with the arbitral proceedings such unredacted documents as they consider necessary for the preparation of their cases, but they shall ensure that those persons protect the confidential information in such documents.' See Ibid.

[407] A. Van Duzer, *supra* note 171, at 704.

[408] N. Blackaby and C. Richard, *infra* note 828, at 273.

[409] Article 835(1), Canada-Peru Free Trade Agreement, *supra* note 170.

[410] Ibid, Article 835(3).

[411] ICSID Arbitration Rules, entered into force 10 April 2006, available at: https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf (last accessed 20 November 2013).

[412] A. Van Duzer, *supra* note 171, at 706.

only act in this regard with the consent of both parties.[413] Effective as of April 2014, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration set the publicity of proceedings as the general over-arching rule as well, and confidentiality as the exception. Article 6 states that 'hearings for the presentation of evidence or for oral argument…shall be public'.[414] This is in stark contrast with the previous corresponding provision of the UNCITRAL Arbitration Rules, prior to their revision in 2010, which state that hearings 'shall be held *in camera* unless the parties agree otherwise'.[415]

In sum, the issue of transparency reflects a wider need for a clear distinction between international commercial arbitration and international investment arbitration. In the latter, the lack of inclusiveness of stakeholders, transparency, and publicity are ever more difficult to sustain; whereas in the former, confidentiality and non-disclosure are clear advantages to parties wary of protecting their business information and reputation.[416]

Investment treaty arbitration and international commercial arbitration show a substantive difference on the one hand, and a procedural similarity on the other.[417] This procedural similarity has been reduced with (i) the increasing recognition by arbitral tribunals for the necessity of a shift in procedure where the public interest is at stake; (ii) both ICSID and UNCITRAL amending existing, or adopting new, arbitration rules; (iii) NAFTA parties setting out new guidelines to increase third-party participation and transparency under Chapter XI disputes; and (iv) newly negotiated BITs adhering to

---

[413] The previous version of Article 32(2) of the ICSID Arbitration Rules stated that: 'The tribunal shall decide, with the consent of the parties, which other persons besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal may attend the hearings'.

[414] Article 6 continues to set out the exceptions to the rule by providing that: '(2) Where there is a need to protect confidential information or the integrity of the arbitral process pursuant to Article 7, the arbitral tribunal shall make arrangements to hold in private that part of the hearing requiring such protection. (3) The arbitral tribunal shall make logistical arrangements to facilitate the public access to hearings (including where appropriate by organizing attendance through video links or such other means as it deems appropriate). However, the arbitral tribunal may, after consultation with the disputing parties, decide to hold all or part of the hearings in private where this becomes necessary for logistical reasons, such as when the circumstances render any original arrangement for public access to a hearing infeasible'. See UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, effective on 01 April 2014, available at: http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/pre-release-UNCITRAL-Rules-on-Transparency.pdf (last accessed 20 November 2013) ('the UNCITRAL Rules on Transparency').

[415] See Article 25(4), UNCITRAL Arbitration Rules, *supra* note 371.

[416] D. Dimitrov and L. Shore, 'The Public Interest In Private Dispute Resolutions', in C. Klausegger et al. (eds.), *Austrian Arbitration Yearbook* (2009), at 163; A. Asteriti, C. Tams, *infra* note 402, at 790; J. Maupin, *supra* note 48, at 34.

[417] Ibid., at 377.

similar principles.[418] These developments indeed marked a clear paradigm shift, i.e. investor-state arbitration is thus increasingly perceived as distinct – both substantively and procedurally – from international commercial arbitration. This is reflected in more detail in the analysis of the case law directly below.

1.5.4 The gradual shift towards the acceptance of civil society's participation in investor-state disputes: a *fait accompli*?

The disputes discussed hitherto were conducted in accordance with international commercial arbitration rules, i.e. confidentially and privately without any participation by third parties.[419] Since then, those concerned by the validity of public interest-related measures have sought to intervene as either third parties or *amici curiae* in order to raise factual and legal arguments in favour of the protection of the public interest, i.e. their interest, in disputes that are far from 'typical' commercial arbitrations that have 'a significant effect extending beyond the two Disputing Parties'.[420] In such disputes, host states are confined to answer to foreign investors' claims by raising legal counter-arguments and perspectives that are not necessarily the same as those that can be potentially raised by third party stakeholders.

Against this background, the role of civil society can be perceived as (i) that of an advocate to 'voice the concerns of the public' not only at the international sphere in general, but also before investor-state tribunals; and (ii) a balancing act to crucial arbitral awards that could trigger serious consequences for host states and, more fundamentally, their populations in cases where public-interest measures are challenged by foreign investors.[421] Having seen the limitations that bound Mexico in the *Metalclad* case, it appears that civil society actors could have brought forward additional information, perspectives, and arguments that are distinct from those made by Mexico and that could have potentially enabled the *Metalclad* tribunal to reach a less contested, more balanced

[418] See also A. Asteriti, C. Tams, *supra* note 402, at 793 et seq.
[419] C. Schreuer, U. Kriebaum, *infra* note 617, at 1097.
[420] Methanex Corporation v. United States, *infra* note 428, at para 17.
[421] A. Moore, *infra* note 1040, at 265. See also T. Ishikawa, *supra* note 108, at 376. On the shift of civil society's attention from the domestic to the international sphere, see S. Cummings, 'The Internationalization of Public Interest Law', (2008) 57 Duke Law Journal 891, at 907; C. Schreuer, U. Kriebaum, *infra* note 617, at 1097.

decision.[422] Again, host states, such as in Mexico in *Metalclad*, may not necessarily be in a position, or even interested, in putting forward the same arguments as third parties.[423]

In sum, earlier investor-state disputes such as *Metalclad* reflect the debate over host states' duty to uphold foreign investors' rights on the one hand, and positively assert public interest issues on the other. These disputes preceded, and indeed set the background to, the acceptance of civil society as *amicus curiae* – as will be further detailed directly below.