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

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4. The peculiar case of third party intervention

Although not accessible to civil society, there is a need to understand third party intervention as a procedural modality under municipal as well as international law prior to discussing civil society petitions for third party intervention in the *UPS v. Canada* and

¹⁰⁶⁶ J.M. Pasqualucci, , *supra* note 914, at 215; *The Mayagna (Sumo) Awas Tingni Community v. Republic of Nicaragua*, Judgment of 31 August 2001, Inter-American Court of Human Rights (series C) No. 79 (2001), para. 29-62.

¹⁰⁶⁷ *Ibid.*, at 75.

¹⁰⁶⁸ Rules of Procedure of the African Commission on Human and Peoples' Rights, Article 99(16), available at: http://www.achpr.org/files/instruments/rules-of-procedure-2010/rules_of_procedure_2010_en.pdf.

¹⁰⁶⁹ *CEMIRIDE and MRG on behalf of EWC v. Kenya* case, *supra* note 608, at 31.

Aguas del Tunari v. Bolivia cases in Part III¹⁰⁷⁰ where both petitions were premised on the ‘direct interests’ at stake.¹⁰⁷¹

4.1 Third party intervention before *common law* courts

Third party intervention is extensively regulated under common law. As previously pointed out, in the UK, the term ‘third party intervention’ generally refers to the *amicus curiae* procedure.¹⁰⁷² A notion similar to ‘intervention of right’ – as it is called in US federal civil procedure law – does however exist under English law.¹⁰⁷³ Having said that, intervention in public interest litigation, as known under US law, is far from similar under English law and jurisprudence, where such cases primarily involve to a lesser degree the *amicus* procedure.¹⁰⁷⁴ Canadian law on the other hand is more similar to US law where both its rules¹⁰⁷⁵ and practice¹⁰⁷⁶ clearly distinguish between the *amicus*

¹⁰⁷⁰ See Part III – Section 1.3.1.

¹⁰⁷¹ *UPS v Canada*, *infra* note 1241, para 22 and *Aguas del Tunari, S.A. v. The Republic of Bolivia*, *supra* 716, at para 2.

¹⁰⁷² This is also the case of the ECHR, which refers to the *amicus curiae* procedure as ‘Third Party Intervention’. As previously suggested, the term should not be confused with how third party intervention is conceptualized under the present research. See ECHR, *supra* note 844, Article 36. See also Introduction.

¹⁰⁷³ English courts have the power to ‘try two or more claims on the same occasion’ by virtue of Article 3.1 (2)(h) of the Civil Procedure Rules (CPR). In addition, Article 19.1 CPR indicates that any number of claimants or defendants may be joined as parties to a claim. It states that: ‘(2) The court may order a person to be added as a new party if – (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or (b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue.’ See Civil Procedure Rules, entry into force 13 November 2013, available at: <http://www.justice.gov.uk/courts/procedure-rules/civil/rules> (last accessed 06 October 2014). For a closer analysis, see also A. Zuckerman, *infra* note 1090, at 441.

¹⁰⁷⁴ E. Metcalfe, ‘JUSTICE Report: To Assist the Court: Third Party Interventions in the UK’, dated 26 October 2009, available at: <http://www.justice.org.uk/resources.php/32/to-assist-the-court> (last accessed 06 October 2014), at 7-8. JUSTICE is UK-based civil society organization dedicated to ‘advancing the access to justice, human rights, and the rule of law’.

¹⁰⁷⁵ Rule 55 of the Rules of the Supreme Court of Canada provides that: ‘Any person interested in an application for leave to appeal, an appeal or a reference may make a motion for intervention to a judge.’ The requirements and regulating criteria are provided further below under Rule 57, which provides that: ‘(1) The affidavit in support of a motion for intervention shall identify the person interested in the proceeding and describe that person’s interest in the proceeding, including any prejudice that the person interested in the proceeding would suffer if the intervention were denied. (2) A motion for intervention shall (a) identify the position the person interested in the proceeding intends to take with respect to the questions on which they propose to intervene; and (b) set out the submissions to be advanced by the person interested in the proceeding with respect to the questions on which they propose to intervene, their relevance to the proceeding and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties.’. As mentioned previously, the *amicus curiae* procedure is on the other hand regulated under Rule 92. See Rules of the Supreme Court of Canada, *supra* note 970 (our emphasis), and the Ontario Rules of Civil Proceedings, *infra* note 1254. See also E. Metcalfe, *supra* note 1074, at 42-43.

¹⁰⁷⁶ In the landmark *Reference re Secession of Quebec* case, the Supreme Court of Canada accepted (and addressed the arguments of) both *amicus curiae* submissions and third party interventions. The latter were namely made by indigenous nations and groups such as Kitigan Zibi Anishinabeg, the Grand Council of the

and third party intervention procedures – as manifestly reflected in the judicial reviews of the already mentioned NAFTA awards of *Metalclad v. Mexico* and *S.D. Myers v. Canada*. In the first case, both the Attorney Generals of Canada and Quebec acted as third party intervenors in support of Mexico.¹⁰⁷⁷ While in the second case, Mexico acted as a third party intervenor in support of Canada and the Canadian Alliance on Trade and Environment submitted an *amicus curiae* brief.¹⁰⁷⁸ Interestingly, in the judicial review of *S.D. Myers v. Canada*, the Federal Court rejected the Canadian Alliance on Trade and Environment's request to act as third party intervenor.¹⁰⁷⁹ The Alliance's petition for appeal was also dismissed by the Federal Court of Appeal, which found that the Alliance's intervention would be underlying to 'jurisprudential' issues.¹⁰⁸⁰ The Alliance was nevertheless allowed to submit an *amicus curiae* brief as previously mentioned.

As is the case with the *amicus* procedure, this section focuses on US law due to the extensive body of rules and case-law that regulate the procedure of third party intervention.¹⁰⁸¹

4.1.1 Applicable procedural rules – A look at the US model

Intervention is a relatively recent development in federal civil procedure.¹⁰⁸² It runs counter to the typical common law conception of private law litigation which is

Crees, the Makivik Corporation, but also other civil society groups such as the Minority Advocacy and Rights Council and the Committee of Canadian Women on the Constitution; whereas the former were made by a group of jurists including an eminent Quebec lawyer in the name of Anre Jolicoeur. See Reference re Secession of Quebec, [1998] 2 S.C.R. 217. See also B. Ryder, 'A Court in Need and a Friend Indeed: An analysis of the Arguments of the Amicus Curiae in the Quebec Secession Reference', (1998) 10 Forum Constitutionnel 01.

¹⁰⁷⁷ United Mexican States v. Metalclad Corporation, *supra* note 314.

¹⁰⁷⁸ Canada (Attorney General) v. S.D. Myers Inc., *supra* note 320.

¹⁰⁷⁹ The Federal Court judge noted that: 'I am not satisfied that the moving parties can bring to the Court a point of view with respect to these issues which will, in any material way, be different from that of the parties. The essence of the judicial review application is the correct interpretation of the NAFTA. The proposed intervenors do not have any particular or unique expertise in interpreting international treaty obligations that would assist the Court beyond that which is offered by counsel for Canada, the United States, Mexico, the respondent and the members of the Arbitral Tribunal itself. The social policy concerns of the moving parties, including Canada's trade policy, would not assist in the determination of the legal issues which arise under the Government's application for judicial review'. See Attorney General of Canada, and S.D. Myers, inc., 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 21. See also Y. Fortier and S. Drymer, *supra* note 323, at 476.

¹⁰⁸⁰ Ibid.

¹⁰⁸¹ Perhaps the extent of third party intervention (as well as *amici curiae*) in US litigation is well-reflected by a critical UK standpoint as echoed in Harlow's remarks: 'Using the deceptive metaphor of the courtroom as a political surrogate, campaigning groups are gaining entry to the legal process [which] is transmuting into a freeway and, unless we are much more careful, it could degenerate, as has notably occurred in America into a free-for-all'. See C. Harlow, *infra* note 1083, at 17.

described as ‘adversarial’ or ‘bipolar’,¹⁰⁸³ and where litigation typically consists of two persons asserting directly opposed interests.¹⁰⁸⁴ In the same vein, it is also recognized under common law that in essence litigating parties should not be ‘disturbed’ by non-disputing third parties:

the fundamental principle underlying legal procedure is that parties to a controversy shall have the right to litigate the same free from the interference of strangers.¹⁰⁸⁵

The reasons for permitting intervention are more compatible with public law litigation than with private law one and, therefore, intervention should be viewed more liberally in public law contexts.¹⁰⁸⁶ As extensively discussed previously, a similar argument is raised in relation to investor-state disputes. Detractors of broader third party involvement, i.e. whether through the *amicus curiae* or otherwise, pointedly ground their position on the consensual and private nature of international commercial arbitration; whereas proponents call for a need to distinguish between investor-state disputes that are public interest-related and those that are more akin to international commercial arbitration.¹⁰⁸⁷

Subject to limitations that may be imposed by courts, intervention typically takes the form of the right to present written arguments, oral arguments, evidence, and the right to tender issues, seek redress, compensation, as well as other remedies.¹⁰⁸⁸ Disputing parties may therefore be subjected to unexpected burdens, including additional costs and

¹⁰⁸² It is argued, however, that the practice originated long before its formal codification under federal procedural rules. Indeed, Krislov traces the practice of intervention back to a 1812 case – *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch.) 116 (1812), where the US Attorney General was allowed to intervene. See M. Harris, ‘Intervention of Right in Judicial Proceedings to Review Informal Federal Rulemakings’, (2012) 40 *Hofstra Law Review* 879, at 880, and S. Krislov, *supra* note 971, at 698.

¹⁰⁸³ C. Harlow, ‘Public Law and Popular Justice’, (2002) 65 *The Modern Law Review* 01, at 1-2, 13. Taking a UK standpoint, Harlow generally argues that intervention is used as a complementary activity political campaigning by pressure and interest groups, and that ultimately, this model runs counter the fundamental essence of a common law judicial process – where access should be limited to only those who can show legal interests.

¹⁰⁸⁴ R. Field et al., *Civil Procedure: Materials for a Basic Course* (2007), at 984 citing E. Jones’ commentary on the Superior Court’s refusal to grant the National Association for the Advancement of Colored People’s request to intervene in *University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733 (1978). See E. Jones, ‘Litigation Without Representation: The Need for Intervention to Affirm Affirmative Action’, (1979) 14 *Harvard Civil Rights-Civil Liberties Law Review* 31.

¹⁰⁸⁵ See *Consolidated Liquor Corp. v. Scotello & Nizzi*, 21 N.M. 485, 155 Pac. 1089, 1093 (1916), at paras 494-95, cited in S. Krislov, *supra* note 971, at 696.

¹⁰⁸⁶ *Ibid.*, at 985 citing E. Jones.

¹⁰⁸⁷ See the discussion in Part I – Section 1.5.2.

¹⁰⁸⁸ G. Hazard et al., *supra* note 977, at 771.

delays to proceedings. As is the case with the *amicus curiae* procedure, it is argued that intervention often expands the information available to a court in its search for an equitable adjudication of the merits. This would justify expansive participation in the efforts to shape a suitable remedy. In this light, not only has the procedure been used by civil society actors such as civil rights advocates or environmental groups, but also lobbying groups and trade associations, state and federal government agencies.¹⁰⁸⁹

Under US law, a court may exercise its power to allow the addition of a party on the application of any disputing party or of the person who wishes to act as a third party on the basis of their *interest* in a particular dispute.¹⁰⁹⁰ Under federal law, this is covered by Article 24(a)(2) of the Federal Rules of Civil Procedure for the US District Courts on ‘intervention of right’. Considered as a codification of the prevalent court practice at the time, the US Supreme Court adopted Rule 24 in 1938 and essentially restricted intervention ‘when the applicant could demonstrate an interest in property in the custody of the Court’.¹⁰⁹¹ It was later expanded in 1966 in order to grant ‘an applicant the right to intervene in any action in which the applicant can show an interest that the outcome of the action might harm’.¹⁰⁹² In its current formulation, Rule 24(a)(2) states that:

On timely motion, the court must permit anyone to intervene who...claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its *interest*, unless existing parties adequately represent that interest.¹⁰⁹³

This provision then laid the foundation for American states to adopt similar provisions at the state level.¹⁰⁹⁴ The fundamental point to note here is that it is argued

¹⁰⁸⁹ E. Shaver, *infra* note 1098, at 1558, G. Hazard et al., *supra* note 977, at 771, and C. Tobias, *infra* 1204, at 317.

¹⁰⁹⁰ A. Zuckerman, *Civil Procedure* (2003), at 442.

¹⁰⁹¹ The Rule was later amended in 1946 to extend intervention to interest in property not in the custody of the Court. See E. Shaver, *infra* note 1098, at 1556.

¹⁰⁹² It is argued that the 1966 amendment was in response to the practice of lower federal courts of broadly construing the property interest requirement of the 1946 version of the Rule to permit more applicants to intervene. The 1966 amendment is still in force to this day. See E. Shaver, *infra* note 1098, at 1557, and M. Harris, *supra* note 1082, at 880.

¹⁰⁹³ See Federal Rules of Civil Procedure for the United States District Courts, as amended on 01 December 2013, available at: http://www.law.cornell.edu/rules/frcp/rule_24 (last accessed 06 October 2014) (our emphasis).

¹⁰⁹⁴ See for instance, Articles 387 and 388 of the California Code of Civil Procedure, which state that: ‘387. (a) Upon timely application, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by complaint, setting forth the grounds upon which the intervention rests, filed by leave of the court and served

that the formulation Rule 24(a)(2) – which dates back to the 1966 amendment – has been broadly and expansively construed to include intervention by non-disputing parties in public interest cases.¹⁰⁹⁵ Indeed, such an interpretation is seemingly in line with the intention of the Advisory Committee which drafted the Rule prior to its adoption in 1966.¹⁰⁹⁶

From a more technical standpoint, Rule 24(a)(2) contains four elements: (i) timeliness; (ii) the interest of the applicant must relate to the specific property or transaction at issue in the pending litigation or, in other words, an interest in the property or transaction on which the action is based; (iii) the applicant must face at least practical impairment of that interest, even if the applicant would not formally be bound by a judgment in a civil action to which it is not a party, or in other words, a threat that the movant's interest could be impaired by disposition of the action; and (iv) the conduct of the litigation by disputing parties must not vicariously protect the interest of the applicant or, in other words, a lack of adequate representation of the movant's interest by either of the disputing parties.¹⁰⁹⁷

upon the parties to the action or proceeding who have not appeared in the same manner as upon the commencement of an original action, and upon the attorneys of the parties who have appeared, or upon the party if he has appeared without an attorney, in the manner provided for service of summons or in the manner provided by Chapter 5 (commencing with Section 1010) Title 14 of Part 2. A party served with a complaint in intervention may within 30 days after service move, demur, or otherwise plead to the complaint in the same manner as to an original complaint. (b) If any provision of law confers an unconditional right to intervene or if the person seeking intervention claims an interest relating to the property to transaction which is the subject of the action and that person is so situated that the disposition of the action may as a practical matter impair or impede that person's ability to protect that interest, unless that person's interest is adequately represented by existing parties, the court shall, upon timely application, permit that person to intervene.

388. In an action brought by a party for relief of any nature other than solely for money damages where a pleading alleges facts or issues concerning alleged pollution or adverse environmental effects which could affect the public generally, the party filing the pleading shall furnish a copy to the Attorney General of the State of California. The copy shall be furnished by the party filing the pleading within 10 days after filing'. See California Code of Civil Procedure, available at: http://www.law.cornell.edu/wex/table_civil_procedure (last accessed 06 October 2014). See also, G. Hazard et al., *supra* note 977, at 728.

¹⁰⁹⁵ See P. Appel, 'Intervention in Public Law Litigation: The Environmental Paradigm', (2000) 78 Washington University Law Quarterly 215, at 215, and M. Harris, *supra* note 1082, at 893.

¹⁰⁹⁶ US law professor Carl Tobias notes that 'the Committee intended judges to apply the intervention device flexibly and pragmatically and evinced some cognizance of public law litigation and of intervention in it'. See C. Tobias, *infra* 1204, at 318.

¹⁰⁹⁷ Applications for adding parties must also be supported by evidence which shows the connection of the proposed party to the proceedings. Regarding timeliness, courts take into account the length of time that the applicant has had knowledge of the case, as well as when the applicant realized that the action would have some impact on its interests. See J. Oakley, and V. Amar, *American Civil Procedure: A Guide to Civil Adjudication in US Courts* (2009), at 151; E. Shaver, *infra* note 1098, at 1552; M. Harris, *supra* note 1082, at 892; P. Appel, *supra* note 1095, at 227.

4.1.2 A *sine qua non* condition: The existence of a ‘direct, significant, and legally protectable interest in an action to intervene’

It is worthy to delve into further details on the scope of points (i) and (iv) on interest and the lack of adequate representation, which are two key criteria that may be relevantly applied to other jurisdictions such as investor-state tribunals. Indeed, point (i) relating to interest is crucial. Typically, courts focus primarily on the adequacy of a potential intervenor’s interest in a given case.¹⁰⁹⁸ There are two types of interests that fall under Rule 24(a)(2). First, intervenors may wish to seek the protection of a property interest – and in such cases the requirement would be satisfied. Third parties have accordingly intervened on the basis of *in rem* as well as other monetary interests.¹⁰⁹⁹ Indeed prior to the 1966 amendment, intervention of right was generally resorted to in commercial, real or personal property disputes.¹¹⁰⁰ In other more complex cases, which have in practice included public interest-related cases, the potential intervenor would need to ‘show that the outcome of the action will harm [its] legal interests’.¹¹⁰¹ There is no guidance on the exact scope of such interest. Indeed, courts have not provided a precise definition of the notion of ‘interest’ under Rule 24(a)(2); rather, they have placed the burden on potential intervenors to demonstrate their interest in each particular case.¹¹⁰² For instance, in *Tribovich v. United Mine Workers*,¹¹⁰³ the Supreme Court allowed a union member to intervene of right in an action by the Secretary of Labor to set aside a union election.¹¹⁰⁴ In *Sagebrush Rebellion, Inc. v. Watt*,¹¹⁰⁵ the Appellate Court granted the Audubon Society – an NGO dedicated to wildlife protection – the right to intervene to defend an order by the Secretary of the Interior to set aside land in Idaho as a

¹⁰⁹⁸ E. Shaver, ‘Intervention in the Public Interest Under Rule 24(a)(2) of the Federal Rules of Civil Procedure’, (1988) 45 Washington and Lee Law Review 1549, at 1550.

¹⁰⁹⁹ R. Field et al., *supra* note 1084, at 982-983.

¹¹⁰⁰ G. Hazard et al., *supra* note 977, at 754.

¹¹⁰¹ See E. Shaver, *supra* note 1098, at 1551 and G. Hazard et al., *supra* note 977, at 770-771.

¹¹⁰² *Ibid.*, at 1569 referring to *Harris v. Pernsley*, 820 F.2d 592, (3d Cir. 1987), at para 596 (stating that 1966 version of Rule 24(a)(2) permits courts to settle intervention questions flexibly).

¹¹⁰³ 404 U.S. 528, 92 S. Ct. 630 (1972).

¹¹⁰⁴ The Court noted that the union member in question had filed the initial complaint to the Secretary against the election. It also stated that ‘the Rule is satisfied if the applicant shows that representation of his interest ‘may be’ inadequate; and the burden of making that showing should be treated as minimal’. As the Secretary must represent the public interest in free union elections as well as protect the rights of the union member, ‘the union member may have a valid complaint about the performance of ‘his lawyer’. *Ibid.*, at para 539. See also R. Field et al., *supra* note 1084, at, at 983.

¹¹⁰⁵ 713 F.2d 525 (9th Cir. 1983).

refuge for birds.¹¹⁰⁶ In *Bustop v. Superior Court*,¹¹⁰⁷ the California Court of Appeal overturned the denial of Bustop's – an association of Bustop of predominantly white parents – right to intervene in a case which concerned a desegregation plan proposed by the Board of Education of the City of Los Angeles that the association opposed.¹¹⁰⁸ In *Keith v. Daley*,¹¹⁰⁹ however, as was the case in some of the abortion-related decisions discussed in the *amicus curiae* analysis,¹¹¹⁰ the Appellate Court denied intervention requests by 'pro-life' anti-abortion civil society groups on the basis of the inadequacy of their interest.¹¹¹¹ The Court reiterated that an applicant '*must show a direct, significant, and legally protectable interest in an action to intervene*' and that the Coalition failed to meet the interest requirement of Rule 24(a)(2).¹¹¹² This position was also later confirmed by the Supreme Court in *Diamond v. Charles*, which was another case involving an intervention request by a 'pro-life' advocate.¹¹¹³

¹¹⁰⁶ The plaintiff, Sagebrush Rebellion, Inc., had initially lobbied against the bird sanctuary and then challenged a decision by the Secretary of the Interior creating a wildlife refuge for birds; whereas the Audubon Society had lobbied for the creation of the bird sanctuary. The Appellate Court held that the Audubon Society (i) had filed a timely motion to intervene; (ii) clearly had an interest in the action because the group had supported the Snake River Wildlife Refuge; and (iii) its interest would be harmed if the Court rules in favour of the plaintiff. See *Ibid.*, at paras 527-529. also E. Shaver, *supra* note 1098, at 1559-1561.

¹¹⁰⁷ 69 Ca. App.3d 66, 137 Cal. Rptr. 793.

¹¹⁰⁸ The Court confirmed that Bustop, its members, and the persons whom it purports to represent do have an interest in the litigation. In addition, it noted that a reformulation by the trial court of the desegregation plan does not relate to the legal right of Bustop or any other group, but those do have an interest in one plan rather than another. See *Ibid.*, at paras 71-73. See also G. Hazard et al., *supra* note 977, at 765-769.

¹¹⁰⁹ 764 F.2d 1265 (7th Cir. 1985).

¹¹¹⁰ See for instance *National Organization for Women Inc. v. Scheidler*, *supra* note 987.

¹¹¹¹ The case concerned the constitutionality of a law enacted by the state of Illinois regulating abortions. Plaintiffs argued that it violated a woman's constitutional right of privacy and the doctors' right to practice medicine. The applicant intervenors (the 'Illinois Pro-Life Coalition') had initially lobbied the state of Illinois for the adoption of the law in question. See *Ibid.*, at paras 1267-1268. See also E. Shaver, *supra* note 1098, at 1562-1564.

¹¹¹² The Court provided two reasons. First, the Seventh Circuit held that the Coalition's lobbying efforts in favour of the abortion statute did not create a direct, legally protectable interest in the action. Second, the Seventh Circuit stated that the Coalition could not be a defendant in the action. Because the plaintiffs sought to prevent the State of Illinois from enforcing the allegedly unconstitutional statute, the Seventh Circuit stated that only officials of the State of Illinois charged with enforcing the statute could be defendants in the action. Because the Coalition could not enforce the statute, the Seventh Circuit held, the Coalition could not be a defendant in the action and had no interest in the action sufficient to meet the requirements of Rule 24(a)(2). See *Ibid.*, at para 1269. See also E. Shaver, *supra* note 1098, at 1563 (our emphasis).

¹¹¹³ In *Diamond v. Charles*, Dr Diamond initially sought to intervene on the ground that 'his interest as a conscientious objector to the practice of abortion, as well as his status as a father of a teenage girl, could be impacted by an outcome in the case'. The Supreme Court found that Dr Diamond lacked a 'significantly protectable interest', which calls for a direct and concrete interest that is accorded some degree of legal protection. In the same vein, it noted that the Article III of the Constitution standing requirement is necessary for intervenors to continue litigation on appeal if the original party has discontinued litigating. See *Diamond v. Charles*, 476 U.S. 54 (1986), at paras 74-76. See also M. Harris, *supra* note 1082, at 896.

In sum, it is argued that more recent jurisprudential developments indicate that the interest requirement is now ‘a fairly lenient one’.¹¹¹⁴ Courts tend to engage in an analysis that takes into account the circumstances and practical effects on the prospective intervenors (and whether those justify their participation) rather than a rigid or technical one of the requirements above.

Point (iv) on the other hand implies a requirement on the intervenor to establish that the disputing parties cannot adequately represent its interests. This may be done by showing that the parties’ interest are not identical to the intervenor’s, or are in conflict with the latter’s, or the parties ‘do not have the incentive to prosecute the action vigorously’.¹¹¹⁵ In requests for interventions in cases involving government agencies, some courts have in the past rejected such requests on the basis of the presumption that the government would be capable of representing ‘the interests of all its citizens’.¹¹¹⁶ In a similar vein, some courts – as well as commentators – have argued that intervenors were required to establish independent standing as per the case or controversy requirement under Article III of the US Constitution,¹¹¹⁷ or in other words to demonstrate an independent cause of action. This would thereby have the effect of significantly restricting the intervention of right practice.¹¹¹⁸

¹¹¹⁴ This position is reflected in the landmark case of *United States v. Reserve Mining Co.*, where the Court of Appeals stressed that: ‘the ‘interest’ requirement in the context of this environmental case, should be viewed as an inclusionary rather than exclusionary device’. See *United States v. Reserve Mining Co.*, 56 F.R.D. 408 (D. Minn. 1972), at para 413. See also P. Appel, *supra* note 1095, at 227, and R. Field et al., *supra* note 1084, at, at 983 and M. Harris, *supra* note 1082, at 897.

¹¹¹⁵ See E. Shaver, *supra* note 1098, at 1554 referring to *F.W. Woolworth Co. v. Miscellaneous Warehousemen's Union*, 629 F.2d (7th Cir. 1980), at para 1204, as well as other Appellate Court decisions.

¹¹¹⁶ Appel argues however that: ‘More courts now recognize that outsiders might have interests that a government would overlook or fail to emphasize’. See P. Appel, *supra* note 1095, at 274, and M. Harris, *supra* note 1082, at 898.

¹¹¹⁷ Article III, Section 2, Clause 1 states that: ‘1: The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State; between Citizens of different States, --between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects’. See US Constitution, *supra* note 981.

¹¹¹⁸ Under US law, the test for individual standing contains three elements: (i) the plaintiff must have suffered an injury which must be ‘concrete and particularized’ or actual or imminent and not ‘conjectural’ or ‘hypothetical’; (ii) the injury must be ‘fairly traceable to the challenged action of the defendant’; and (iii) it must be likely and not speculative that the relief will prevent or redress the injury. See E. Shaver, *supra* note 1098, at 1553 referring to *Wade v. Goldschmidt*, 673 F.2d 182 (7th Cir. 1982), at para 185, as well as other Appellate Court decisions. See also G. Hazard et al., *supra* note 977, at 727-728, M. Harris, *supra* note 1082, at 899 citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), at para 560. See also *Diamond v. Charles*, *supra* note 1113, on the

In general, it is broadly recognized that intervention enhances a court's ability to receive useful information and to, accordingly, structure appropriate remedies. It has also precluded injury to 'absentees'. As is the case with the *amicus curiae* procedure, it has been argued, however, that courts should take into account the burden caused by intervention on the disputing parties in terms of additional costs and delays, as well as on the efficiency of the judicial system.¹¹¹⁹ Commentators have thus pointed to the necessity for courts to balance the (i) protection of third parties' interest, (ii) original disputing parties' interest in controlling the litigation, and (iii) accuracy and efficiency of proceedings.¹¹²⁰ A narrow interpretation of the interest requirement is often the method for courts to restrict interventions in cases that could have caused unfair burdens onto disputing parties.¹¹²¹

4.2 A function unavailable to civil society: third party intervention as practiced before international jurisdictions

State third party intervention is set forth under a wide variety of international treaties¹¹²² such as the ECHR, as previously mentioned,¹¹²³ the United Nations Convention on the Law of the Sea,¹¹²⁴ or the WTO DSU¹¹²⁵ where intervention is

Article III of the Constitution standing requirement in appeals by intervenors; P. Appel, *supra* note 1095, at 269-270.

¹¹¹⁹ The Advisory Committee drafting Rule 24(a)(2) back in 1966 had also emphasized the necessity to ensure the conduct of efficient proceedings by subjecting intervention to any appropriate conditions or requirements. See P. Appel, *supra* note 1095, at 216, 256; and E. Shaver, *supra* note 1098, at 1571.

¹¹²⁰ M. Harris, *supra* note 1082, at 881.

¹¹²¹ J. Scro, 'Removing the Roadblock to Intervention of Right: Wilderness Society v. U.S. Forest Service and the Ninth Circuit's Decision to Abandon Its Federal Defendant Rule', (2012) 53 Boston College Law Review 237, at 240.

¹¹²² For an exhaustive survey, see A. Zimmermann, *supra* note 55, at para 2.

¹¹²³ See *supra* note 64.

¹¹²⁴ Articles 31 and 32 of the Statute to ITLOS provide that: 'Article 31 - "Request to intervene" (1). Should a State Party consider that it *has an interest of a legal nature* which may be affected by the decision in any dispute, it may submit a request to the Tribunal to be permitted to intervene. (2). It shall be for the Tribunal to decide upon this request. (3). If a request to intervene is granted, the decision of the Tribunal in respect of the dispute shall be binding upon the intervening State Party in so far as it relates to matters in respect of which that State Party intervened.

Article 32 - "Right to intervene in cases of interpretation or application" (1). Whenever the interpretation or application of this Convention is in question, the Registrar shall notify all States Parties forthwith. (2). Whenever pursuant to Article 21 or 22 of this Annex the interpretation or application of an international agreement is in question, the Registrar shall notify all the parties to the agreement. (3). Every party referred to in paragraphs 1 and 2 has the right to intervene in the proceedings; if it uses this right, the interpretation given by the judgment will be equally binding upon it'. See Annex VI, Statute Of The International Tribunal For The Law Of The Sea, United Nations Convention on the Law of the Sea, *supra* note 85 (our emphasis).

premised on a ‘*legal interest*’ or a ‘*substantial interest*’. For the purposes of this research, and in light of the previous analysis, it is most relevant to focus at this stage on the existence of the procedure at the ICJ and under various BITs.

The ICJ provides an extensive and authoritative body of jurisprudence on the question of third state intervention. A detailed look at the Court’s decisions, and judges’ dissenting opinions, on what constitutes, or should constitute, a ‘legal interest’ that would justify third state intervention largely exceeds the scope of this research. This section rather aims to identify third state intervention as a modality available under international law. In a similar vein, looking at a number of BITs sheds light on the possibility and modality of this procedure in an investor-state dispute context. Thereafter, a look at the rules governing third party intervention under the rules of international commercial arbitration is merited given that, as previously mentioned, these rules provide the basis for the arbitration rules of investor-state arbitration.¹¹²⁶

4.2.1 States as third party intervenors before the ICJ on the basis of an ‘*interest of a legal nature*’

Under its contentious proceedings, the ICJ may allow states that were not initial parties to pending proceedings to intervene as a ‘third state’. The *Asylum case* was the first instance in which a third state was allowed to intervene in on-going proceedings.¹¹²⁷ In this case, Cuba’s application for intervention concerned the interpretation of the Havana Convention, to which Cuba is a contracting party.¹¹²⁸ The ICJ accepted Cuba’s application pursuant to Article 63 of the ICJ Statute.¹¹²⁹

¹¹²⁵ Article 10 of the DSU provides that: ‘1. The interests of the parties to a dispute and those of other members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process. 2. Any member having a *substantial interest* in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a “third party”) shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report. 3. Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel. 4. If a third party considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any covered agreement, that member may have recourse to normal dispute settlement procedures under this Understanding. Such a dispute shall be referred to the original panel wherever possible’. See WTO DSU, *supra* note 998 (our emphasis).

¹¹²⁶ See Part I – Section 1.5.

¹¹²⁷ *Asylum Case (Colombia v. Peru)*, *supra* note 855.

¹¹²⁸ Convention on Asylum, entered into force 21 May 1929, OAS Official Records, OEA/Ser.X/I. Treaty Series 34.

¹¹²⁹ *Asylum Case (Colombia v. Peru)*, *supra* note 855, at 77.

The ICJ Statute sets forth two types of third state intervention.¹¹³⁰ The first type of intervention is premised on a third state's '*legal interest*' in on-going proceedings pursuant to article 62 of the ICJ Statute and is often referred to as 'discretionary intervention'.¹¹³¹ By contrast, the second type of intervention is premised on a third state's right, in its quality as a contracting party to a treaty, to intervene in on-going proceedings where the interpretation of that treaty is at issue pursuant to article 63 of the ICJ Statute. This is often referred to as 'intervention of right'.¹¹³² Despite the fact that this procedure is not open to non-state actors, discretionary intervention remains relevant to the present research because it reflects an interesting aspect of third party intervention from a procedural standpoint, i.e. third states may intervene at the ICJ in on-going proceedings as 'non-parties' pursuant to Article 62 of the ICJ Statute.¹¹³³ This section will focus on this form of 'discretionary intervention' pursuant to Article 62.

By way of context, it is important to note that any ICJ judgment is in principle only binding between the parties to the respective case, i.e. this is the limited effect of *res iudicata* of a given judgment pursuant to Article 59 of the ICJ Statute.¹¹³⁴ Therefore, any judgment is a *res inter alios acta* for third states.¹¹³⁵ The rationale behind third state intervention could be viewed as a recognition of the fact that, notwithstanding this limited *res iudicata* effect *ratione personae*, judgments could still at least exercise *de facto* an influence as to the position of third states. In addition, allowing third states to intervene attempts to avoid repetitive litigation and, eventually, contradictory determinations made in different cases.¹¹³⁶

¹¹³⁰ S. Rosenne, *Intervention in the International Court of Justice* (1993), at 12-13.

¹¹³¹ See *infra* note 1138.

¹¹³² Article 63 is specific to contracting parties to the same treaty: '(1) Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith. (2) *Every state so notified has the right to intervene in the proceedings*; but if it uses this right, the construction given by the judgment will be equally binding upon it'. ICJ Statute, *supra* note 94 (our emphasis). According to Zimmermann, Article 63 of the ICJ Statute could be traced back to Article 56 of The Hague Convention for the Pacific Settlement of International Disputes of 1899, entered into force 4 September 1900 (187 CTS 410); and Article 84 of The Hague Convention for the Pacific Settlement of International Disputes of 1907, entered into force 26 January 1910 (36 Stat. 2199, 1 Bevens 577, 205 Consol. T.S. 233). See A. Zimmermann, *supra* note 55, at 1.

¹¹³³ S. Rosenne, *supra* note 1130, at 95.

¹¹³⁴ Article 59 states that: 'The decision of the Court has no binding force except between the parties and in respect of that particular case'. See ICJ Statute, *supra* note 94.

¹¹³⁵ A. Zimmermann, *supra* note 55, at para 4.

¹¹³⁶ *Ibid.*, at para 4.

Discretionary intervention at the ICJ pursuant to Article 62 of the ICJ Statute encompasses the participation of third states in on-going proceedings while not being either the applicant or the respondent.¹¹³⁷ Article 62 of the ICJ Statute provides that a ‘third state’ can intervene when its legal interests may be affected by the decision of the Court in said proceedings. It states that:

1. Should a state consider that it has an *interest of a legal nature which may be affected by the decision in the case*, it may submit a request to the Court to be permitted to intervene.
2. It shall be for the Court to decide upon this request.¹¹³⁸

Article 62 is further complemented by the Rules of the Court. According to Article 81 of the Rules, an application to intervene should set out the interest of a legal nature which the state applying to intervene considers may be affected by the decision in that case, the precise object of the intervention, as well as any basis of jurisdiction which is claimed to exist as between the third state applying to intervene and the state parties to the case.¹¹³⁹

Once its application for intervention is accepted, the Rules of the Court provide that an intervening third state (i) gains access to case materials, including pleadings and documents; (ii) becomes entitled to submit a written statement; and (iii) make oral observations on the subject matter of its intervention.¹¹⁴⁰ A third state thus secures the *right to be heard* and submit arguments, albeit only with regard to the subject matter of its intervention.¹¹⁴¹

As mentioned, it is generally understood that the ICJ may in addition allow third states to intervene either as a ‘party’ to pending proceedings.¹¹⁴² The ICJ has never

¹¹³⁷ Ibid., *supra* note 55, at para 2.

¹¹³⁸ ICJ Statute, *supra* note 94.

¹¹³⁹ Article 81, ICJ Rules of Court, *supra* note 852. However, if the third state’s intervention lacks the jurisdictional link, then it does not become a ‘party’ to the dispute and the respective judgment does not amount to *res iudicata*. See *Land, Island and Maritime Frontier Dispute Case (El Salvador/Honduras: Nicaragua Intervening)*, ICJ Rep 92 1990, where an ad hoc chamber of the ICJ found that Nicaragua might be allowed to intervene as a third state even without requiring such a jurisdictional link. See also *Land and Maritime Boundary between Cameroon and Nigeria Case (Cameroon v Nigeria)*, ICJ Rep 1029 1999. and *Sovereignty over Pulau Ligitan and Pulau Sipadan Case (Indonesia/Malaysia)*, ICJ Rep 575 2001 cited by A. Zimmermann, *supra* note 55, at paras 10, 13. See also S. Rosenne, *supra* note 1130, at 95, and B. Bonafe, *supra* note 1154, at 744.

¹¹⁴⁰ Article 85, ICJ Rules of Court, *supra* note 852.

¹¹⁴¹ A. Zimmermann, *supra* note 55, at para 13.

¹¹⁴² See B. Bonafe, *infra* note 1154, at 740 citing *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras)*, Application by Nicaragua for Permission to Intervene, Judgment of 13 September 1990, ICJ Reports 1990 p. 92, para. 99; and *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, Application by Malta for Permission to Intervene, Judgment of 14 April 1981 (Judge Oda, Separate Opinion), ICJ Reports 1981, p. 3, at para. 23.

granted a third state leave to intervene as a ‘party’ to pending proceedings, but it is generally understood that third state intervention as a ‘party’ entails equivalent procedural status and rights as that of the disputing states in the proceedings.¹¹⁴³ Judge Oda’s separate opinion in the decision on Malta’s application to intervene in the *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)* is often cited as a reference explaining the distinction between ‘party’ and ‘non-party’ intervention.¹¹⁴⁴ Firstly, Judge Oda explained some of the key characteristics of intervention as a ‘party’ in the following terms:

I believe it is arguable that a jurisdictional link between the intervening State and the original parties to the case would be required if the intervening State were to participate *as a full party*, and that, in such a case, the judgment of the Court would undoubtedly be binding upon the intervening State. Such a right of intervention is basically similar to that provided for in the municipal law of many States. *As a result of the participation of the third party as a full party in the principal case, the case will become a litigation among three parties.* Similarly, before the International Court of Justice, there may be cases in which the third State seeking intervention to secure its alleged right, which is involved in the very subject-matter of the original litigation, is linked with the original litigant States by its acceptance of the compulsory jurisdiction of the Court under the optional clause of the Statute or through a specific treaty or convention in force, or by special agreement with these two States.¹¹⁴⁵

Therefore, as previously mentioned, in the absence of a jurisdictional link, a third state intervenor cannot become a ‘full party’ in a pending case before the ICJ – confirming Judge Oda’s position.¹¹⁴⁶ That being said, Judge Oda went on to emphasize that, pursuant to Article 62 of the ICJ Statute, a third state may nevertheless intervene as a ‘non-party’ notwithstanding the absence of a jurisdictional link:

For instance, in the case of the sovereignty over an island, or the delimitation of a territorial boundary dividing two States, with a third party also being in a position to claim sovereignty over that island or the territory which may be delimited by this boundary, or in a case in which a claim to property is in dispute, an unreasonable result could be expected if a jurisdictional link were required for the intervention of the third State. If this link is deemed at all times indispensable for intervention, the concept of intervention in the International Court of Justice will inevitably atrophy. Accordingly, in my submission, *if the third State does not have a proper jurisdictional link with the original litigant States, it can nevertheless participate, but not as a party within the meaning of the term in municipal law.* The role to be played by the intervening State in such circumstances must be limited.¹¹⁴⁷

¹¹⁴³ See B. Bonafe, *infra* note 1154, at 740-741.

¹¹⁴⁴ See also S. Rosenne, *supra* note 1097, at 94-96.

¹¹⁴⁵ *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, *supra* note 1142 (our emphasis), at para 5.

¹¹⁴⁶ See *supra* note 1139.

¹¹⁴⁷ *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, *supra* note 1142 (our emphasis), at para 9.

In this light, third state intervention as a ‘non-party’ entails less procedural rights, such as the impossibility to nominate a judge *ad hoc*.¹¹⁴⁸ A third state seeking to intervene as a ‘non-party’ to pending proceedings does not need to establish that its *rights* may be affected, it does need to establish *ius standi*.¹¹⁴⁹ The third state solely needs to establish that it has an *interest* of a legal nature that may be affected pursuant to Article 62 of the Statute. In deciding on Costa Rica’s application to intervene in the *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, the ICJ found that applicant third states must show a legal interest that is based on law and is ‘real and concrete’:

Article 62 requires the interest relied upon by the State seeking to intervene to be of a legal nature, in the sense that *this interest has to be the object of a real and concrete claim of that State*, based on law, as opposed to a claim of a purely political, economic or strategic nature. But this is not just any kind of interest of a legal nature; it must in addition be possible for it to be affected, in its content and scope, by the Court’s future decision in the main proceedings.¹¹⁵⁰

A ‘real and concrete’ interest is thus underlying to a legal norm. The third state must therefore assert that it has specific, legally protected interests that may be impinged on by a decision rendered, without at the same time introducing a new dispute with the main disputing parties.¹¹⁵¹ This ‘legal interest’ fundamentally differs from a ‘general interest’ that is not likely to be affected by the Court’s judgement, e.g. an interest or a ‘mere preoccupation’ of a third state in the general legal rules and principles likely to be applied by the ICJ – a potentially common concern for numerous states that is widely understood as excluded from the scope of Article 62 of the Statute.¹¹⁵² This does not exclude, however, that a third state’s legal interest may be related to the reasoning of the Court.¹¹⁵³

¹¹⁴⁸ A. Zimmermann, *supra* note 55, at para 13.

¹¹⁴⁹ *Ibid.*, at 741 citing *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application for Permission to Intervene, Judgment of 4 May 2011, I.C.J. Reports 2011, p. 348, at para 23-26. See also *Barcelona Traction case*, *supra* note 357, at para 46 on the question of *ius standi*.

¹¹⁵⁰ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *supra* note 1149, at para 26 (our emphasis).

¹¹⁵¹ A. Zimmermann, *supra* note 55, at para 9.

¹¹⁵² See B. Bonafe, *infra* note 1154, at 742, 755 citing also *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *supra* note 1142, at para 76. See also A. Zimmermann, *supra* note 55, at para 9.

¹¹⁵³ In this regard, a third state may opt to intervene if it aims to prevent the formation of a precedent that could be contrary to its own specific claims. However, such third state ‘must explain with adequate specificity how particular reasoning or interpretation of identified treaties by the Court might affect its claim’. See the ICJ’s rejection of the Philippines application to intervene in *Sovereignty over Pulau Ligitan and Pulau Sipadan Case*, *supra* note 1139, at para 60. See also P. Palchetti, ‘Opening the ICJ to Third States: Intervention and Beyond’, (2002) 6 Max Planck Yearbook of United Nations Law 139, at 156-158.

The ICJ has placed a heavy burden of proof on applicant third states to demonstrate the existence of a ‘real and concrete’ interest closely linked to pending proceedings. The second prong of Article 62, which states that ‘it shall be for the Court to decide upon this request’, effectively gives the ICJ wide discretion in deciding on the matter, and indeed third state intervention has only been granted in a limited number of cases.¹¹⁵⁴ Yet, although the ICJ’s approach has been considered as restrictive, the acceptance of such applications heavily depends on the facts and circumstances of each case.¹¹⁵⁵ Having said that, criticism remains. In his dissenting opinion on the dismissal of Costa Rica’s application to intervene pursuant to Article 62 in the *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judge Al-Khaswaneh noted that:

This language is plainly liberal. The word “affected” is not qualified by a requirement that the effect be of a serious or irreversible nature. The word “interest” is likewise not qualified by any expression that suggests that the interest be a crucial or even an important one for the requesting State, *all that is needed is that the interest be of a legal nature and not of a political, economic, strategic, or other non-legal nature*. Finally the word “may” is also permissive. There is no need that the interest “must” or “shall” or is “likely to be” affected by the Court’s decision... Notwithstanding this liberal language, *the record of Article 62 over the past 90 years or so since its inception must be judged to be dismal*.¹¹⁵⁶

It is worthy to concede that a comprehensive discussion on third state intervention at the ICJ in general, or what defines a ‘legal interest’ in particular, largely exceeds the scope of this research.¹¹⁵⁷ More fundamentally for the purposes of this research, the ICJ’s practice shows that a possibility exists, under international law, for a third party intervention procedure on the basis of ‘non-party’ intervention, i.e. third party intervenors do not become disputing parties. This could turn out to be a crucial model for investor-state tribunals considering whether to recognize civil society as third party intervenors – as will be further discussed below.¹¹⁵⁸ As will be shown, both civil society petitioners and investor-state tribunals dealt with the issue of third party intervention as a question of ‘party’ intervention as is referred to at the ICJ, or in other words, third party ‘standing’ as is more commonly referred to under municipal law.

¹¹⁵⁴ For an exhaustive survey, see B. Bonafe, ‘Interests of a Legal Nature Justifying Intervention before the ICJ’, (2012) 25 *Leiden Journal of International Law* 739, at 739.

¹¹⁵⁵ *Ibid.*, at 756.

¹¹⁵⁶ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *supra* note 1149, Dissenting Opinion of Judge Al-Khaswaneh, at para 5 (our emphasis).

¹¹⁵⁷ For a comprehensive analysis on the issue, see generally S. Rosenne, *supra* note 1130.

¹¹⁵⁸ See Part III – Section 3.

4.2.2 Not ‘friends’, nor litigants: Contracting parties to IIAs or BITs as third party intervenors

Some IIAs and BITs provide similar possibilities as the third state intervention procedure set forth pursuant to Article 63 of the ICJ Statute.¹¹⁵⁹ This is not anomalous given that, generally, when the object of a given dispute pending before an international court or tribunal is the interpretation of a multilateral treaty, third states which are also parties to that treaty are normally granted the right to intervene.¹¹⁶⁰ The US Model BIT provides the possibility for a non-disputing Party may, *ipso facto*, make oral and written submissions to investor-state tribunals regarding the interpretation of a given BIT.¹¹⁶¹ The previously discussed United States-Peru BIT reflects such procedure *in concreto*:

A Party that is not a disputing Party, on delivery of a written notice to the disputing Parties, *shall be entitled to attend all hearings, to make written and oral submissions to the panel, and to receive written submissions of the disputing Parties...*¹¹⁶²

The ability to attend all hearings, make both written and oral submissions, receive written submissions from disputing parties, which entail a full access to their pleadings as well as case materials, capture *the essence* of the third party intervention role in an investor-state arbitration context – a fundamental point to note for the purposes of this research in general, and the subsequent discussion in Part III in particular.

Separately, the role described above is articulated in a more expansive manner than the previously discussed role available to NAFTA parties under Article 1128.¹¹⁶³ As shown throughout this research, NAFTA case-law shows a consistent practice of intervention by NAFTA-contracting states as ‘non-disputing parties’ to make submissions on a question of interpretation of NAFTA in accordance with Article 1128.¹¹⁶⁴

¹¹⁵⁹ For instance, Article 832 provides that: ‘1. On written notice to the disputing parties, the non-disputing Party may make submissions to a Tribunal on a question of interpretation of this Agreement. 2. The non-disputing Party shall have the right to attend any hearings held under this Section, whether or not it makes submissions to the Tribunal’. See Canada-Peru Free Trade Agreement, *supra* note 170.

¹¹⁶⁰ A. Zimmermann, *supra* note 55, at para 14.

¹¹⁶¹ Article 28(2), US Model BIT, *supra* note 498.

¹¹⁶² Article 21.11, United States-Peru BIT, *supra* note 505 (our emphasis).

¹¹⁶³ Article 1128 of NAFTA states that: ‘On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement’. See Article 1128 of NAFTA, *supra* note 442.

¹¹⁶⁴ In *Bilcon*, the US intervened pursuant to NAFTA Article 1128. Its submission states that ‘The United States of America hereby makes this submission pursuant to Article 1128 of the North American Free

The United States-Peru BIT provides that state-parties ‘*shall be entitled*’ to act as third party intervenors. The BIT thus bestows non-disputing state parties, i.e. either Peru or the United States, the *right* to act as third party intervenors. The articulation of such entitlement, or right, is starkly different from the previously discussed provision of the same BIT on *amicus curiae* submissions, which states that investor-state tribunals ‘*may consider*’ such submissions only if those are of assistance to them.¹¹⁶⁵ A substantially similar construction also exists under Article 36 of the ECHR as previously mentioned.¹¹⁶⁶

As is the case with the ICJ, despite the fact that the third party intervention procedure available to IIA or BIT-parties only, and not to non-state actors, it remains nonetheless relevant in demonstrating the procedural differences between third party intervention on the one hand, and *amicus curiae* participation on the other. Specifically, the US Model BIT shows what does each procedure entail in terms of participation modalities and thus clearly sheds light on the expansiveness of third party intervention as opposed to *amicus curiae* participation – an issue that will be revisited in further detail below.¹¹⁶⁷

4.2.3 ‘Joinders’ or ‘intervenors’? – Third parties in international commercial arbitration

As previously discussed, under US law, third party intervention is applicable in both commercial and public interest litigation. At the ICJ, third states may intervene as non-parties in pending proceedings. The question here is whether third party intervention may be applicable within international arbitration proceedings to persons other than IIA or BIT-parties. There is therefore a need to look here at relevant international commercial arbitration rules governing third party intervention.

i. Background

Trade Agreement (“NAFTA”), which authorizes non-disputing Parties to make submissions to a Tribunal on a question of interpretation of the NAFTA’. See *Bilcon of Delaware Inc. et al. v. Government of Canada, Submission of the United States of America dated 14 July 2008*, para 1.

¹¹⁶⁵ Article 21.10, United States-Peru BIT, *supra* note 505.

¹¹⁶⁶ See *supra* note 64.

¹¹⁶⁷ See Part III – Section 1.1.

In a commercial arbitration context, third party intervention in on-going arbitrations may arise in a number of circumstances. The most common involves insurers or guarantors acting as intervenors (or joinders) as well as sub-contractors or other parties involved in complex construction projects.¹¹⁶⁸ There is a subtle difference between third party intervention and joinder in an international commercial arbitration context. The joinder of a third party is necessarily subject to the application of one of the disputing parties to allow a third party to be joined as a disputing party to an on-going arbitration; whereas third party intervention is the result of the sole initiative of the third party in question and may be supported by one of the disputing parties. This last scenario appears to be quite rare in practice, particularly in cases where the respondent and claimant have not consented to the intervention.¹¹⁶⁹ In any event, and notwithstanding the often inconsistent and confusing use of the terminology, the third party becomes an additional disputing party in both cases – again, in an international commercial arbitration context. It is precisely for this reason that the arbitral tribunal in the *UPS v. Canada* case, which was constituted under NAFTA Chapter XI and conducted in accordance with the UNCITRAL Arbitration Rules, dismissed a request by the Council of Canadians and the Canadian Union of Postal Workers to intervene as ‘parties to the dispute’ given that both Canada and UPS had not consented to their joinder.¹¹⁷⁰ Indeed, it is generally understood that absent unanimous consent, third party intervention (or joinder) would run counter the private and consensual nature of commercial arbitration.¹¹⁷¹

Against this backdrop, several institutional arbitration rules do not explicitly address third party joinder, including most notably ICSID, and the American Arbitration

¹¹⁶⁸ See Permanent Court of Arbitration (ed.), *Multiple Party Actions in International Arbitration* (2008), at 218; and J. Paulsson and G. Petrochilos, *infra* note 1193, at 73; and K. Kim and J. Mitchenson, ‘Voluntary Third-Party Intervention in International Arbitration for Construction Disputes: A Contextual Approach to Jurisdictional Issues’, (2013) 30:4 *Journal of International Arbitration* 407, at 409-410.

¹¹⁶⁹ In its discussions on revising the UNCITRAL Arbitration Rules, the Working Group received input from the LCIA. The latter informed the UNCITRAL Secretariat that applications for joinder (pursuant to Article 22.1(h) of the LCIA Arbitration Rules – discussed below) were made in under ten cases since that provision was introduced in the Rules in 1998, and that those applications have rarely been successful. See UNCITRAL, Working Group II (Arbitration and Conciliation) – ‘Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules’, 47th session, *infra* 1186, at, para 8. See also T. Bevilacqua, ‘Voluntary Intervention and Other Participation of Third Parties in On-going International Arbitrations: A Survey of the Current State of Play’, (2007) 01(4) *World Arbitration and Mediation Review* 507, at 507-508; K. Kim and J. Mitchenson, *supra* note 1168, 413.

¹¹⁷⁰ *UPS v Canada*, *supra* note 517, para 39.

¹¹⁷¹ Bevilacqua states that ‘[t]he most obvious explanation why, absent unanimous consent, the intervention of third parties in commercial arbitration is not very common is that “it militates against the private and contractual nature of arbitration”’. See T. Bevilacqua, *supra* note 1168, at 508 [footnote omitted].

Association (AAA).¹¹⁷² Arbitral laws may be important in such cases as in the event of disagreement amongst disputing parties, and the absence of an express contractual provision or arbitration rule covering the issue, the admissibility of third-party intervention could be resolved in accordance with the applicable municipal law.¹¹⁷³ In fact, third party intervention is for instance contemplated under Dutch and Belgian arbitration laws.¹¹⁷⁴ The LCIA, Swiss Rules of International Arbitration, Singapore International Arbitration Center (SIAC), and the newly amended UNCITRAL Rules are relevant examples – as discussed below.

ii. *Article 22.1(h) of the LCIA Arbitration Rules*

The LCIA Arbitration Rules allow third party joinder.¹¹⁷⁵ Article 22.1(h) provides that:

Unless the parties at any time agree otherwise in writing, the Arbitral Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a reasonable opportunity to state their views... (h) to allow, only upon the application of a party, one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented thereto in writing, and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration.¹¹⁷⁶

¹¹⁷² Ibid., at 507. Gary Born specifies that '[h]istorically, most institutional rules did not provide for consolidation, intervention, or joinder. That was true, for example, of the 1976 UNCITRAL Rules, as well as the ICC, LCIA, AAA, VIAC, SCC and other institutional rules'. See G. Born, *infra* note 1173, at 2596. See also AAA, Commercial Arbitration Rules and Mediation Procedures, 1 October 2013, available at: https://www.adr.org/aaa/ShowProperty?nodeId=UCM/ADRSTG_004103&revision=latestreleased (last accessed 1 December 2015).

¹¹⁷³ For an exhaustive survey of national arbitration legislation on the matter, see G. Born, *International Commercial Arbitration, Volume II – International Arbitration Procedures* (2014), at 2573-2589.

¹¹⁷⁴ Article 1045 of the Netherlands Arbitration Act provides one of the few examples of such national legislation. It provides that: '(1). At the written request of a third party who has an interest in the outcome of the arbitral proceedings, the arbitral tribunal may permit such party to join the proceedings, or to intervene therein. The arbitral tribunal shall send without delay a copy of the request to the parties.... (3). The joinder, intervention or joinder for the claim of indemnity may only be permitted by the arbitral tribunal, having heard the parties, if the third party accedes by agreement in writing between him and the parties to the arbitration agreement'. See Netherlands Arbitration Act, 01 December 1986 Code of Civil Procedure, available at: <http://www.jus.uio.no/lm/netherlands.arbitration.act.1986/1045.html> (last accessed 06 October 2014). Article 1709 of the Belgian Judicial Code states that: '(1er). Tout tiers intéressé peut demander au tribunal arbitral d'intervenir dans la procédure. Cette demande est adressée par écrit au tribunal arbitral qui la communique aux parties. (§ 2) Une partie peut appeler un tiers en intervention. (§ 3) En toute hypothèse, pour être admise, l'intervention nécessite une convention d'arbitrage entre le tiers et les parties en différend. Elle est, en outre, subordonnée, à l'assentiment du tribunal arbitral qui statue à l'unanimité'. See Code Judiciaire, 10 Octobre 1967, available at: <http://just.fgov.be/> (last accessed 06 October 2014). For further analysis, including on relevant provisions from Iranian and Italian law, see also T. Bevilacqua, *supra* note 1168, at 519, 520, 521.

¹¹⁷⁵ G. Born, *supra* note 1173, at 2601.

¹¹⁷⁶ LCIA Arbitration Rules, entered into force 01 January 1998, available at: http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx#Article22 (last accessed 06 October 2014).

It is generally understood that this provision allows the possibility of a party-initiated joinder of a third party even in cases in which one of the existing parties to the arbitration is opposed.¹¹⁷⁷

iii. Article 24.1(b) of the SIAC Arbitration Rules

The SIAC Arbitration Rules contain a similar provision under the heading of ‘Additional Powers of the Tribunal’, which states that:

In addition to the powers specified in these Rules and not in derogation of the mandatory rules of law applicable to the arbitration, the Tribunal shall have the power to...upon the application of a party, allow one or more third parties to be joined in the arbitration, provided that such person is a party to the arbitration agreement, with the written consent of such third party, and thereafter make a single final award or separate awards in respect of all parties...¹¹⁷⁸

The formulation of this provision is practically identical to Article 22.1(h) of the LCIA Arbitration Rules.

iv. Article 4(2) of the Swiss Rules of International Arbitration

The Swiss Rules of International Arbitration leave open the possibility of third-party intervention without necessarily requiring the consent of all parties.¹¹⁷⁹ The relevant provision is Article 4(2), which states that:

Where one or more third persons request to participate in arbitral proceedings already pending under these Rules or where a party to pending arbitral proceedings under these Rules requests that one or more third persons participate in the arbitration, the arbitral tribunal shall decide on such request, after consulting with all of the parties, including the person or persons to be joined, taking into account all relevant circumstances.¹¹⁸⁰

This formulation differs fundamentally from the LCIA Rules. The Swiss Rules are indeed more liberal as they give the arbitral tribunal the discretion to decide on the intervention of a third party without requiring that one of the disputing parties to the arbitration give its consent to the participation of the third party, i.e. joinder.¹¹⁸¹ It only imposes on the

¹¹⁷⁷ See also T. Bevilacqua, *supra* note 1168, at 509.

¹¹⁷⁸ SIAC Arbitration Rules, 5th Edition of 01 April 2013, available at: http://www.siac.org.sg/our-rules/rules/siac-rules-2013#siac_rule24 (last accessed 06 October 2014). For further elaboration, see G. Born, *supra* note 1173, at 2602-2605.

¹¹⁷⁹ T. Bevilacqua, *supra* note 1168, at 510; G. Born, *supra* note 1173, at 2599-2601.

¹¹⁸⁰ Swiss Rules of International Arbitration, entered into force 01 June 2012, available at: https://www.swissarbitration.org/sa/download/SRIA_english_2012.pdf. (last accessed 06 October 2014).

¹¹⁸¹ K. Kim and J. Mitchenson, *supra* note 1168, 413.

tribunal a duty to consult with all the parties and to take into account all the relevant and applicable circumstances.¹¹⁸²

v. *Article 17(5) of the UNCITRAL Arbitration Rules*

A significant number of NAFTA and other investor-state disputes are resolved pursuant to the UNCITRAL Arbitration Rules. Article 17(5) of the UNCITRAL Arbitration Rules provides that, at the request of any disputing party, the tribunal may allow third persons to be joined in the arbitration if those were parties to the underlying arbitration agreement.¹¹⁸³ The amendment Article 17(5) is in fact a significant development.¹¹⁸⁴ The UNCITRAL Working Group had extensively discussed joinder of third parties prior to the adoption of Article 17(5) in 2010 and reference was made to the practice under both the Swiss Rules of International Arbitration and LCIA Rules.¹¹⁸⁵ The Working Group noted that a provision on joinder would constitute a major modification to the UNCITRAL Arbitration Rules.¹¹⁸⁶ UNCITRAL received input from the ICC,¹¹⁸⁷ the LCIA and the Swiss Arbitration Association (ASA).¹¹⁸⁸ Accordingly, a proposal for

¹¹⁸² See UNCITRAL, Working Group II (Arbitration and Conciliation) – ‘Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules’, 47th session, *infra* 1186, at, para 8.

¹¹⁸³ See UNCITRAL Arbitration Rules (2010), *supra* note 1303.

¹¹⁸⁴ G. Born, *supra* note 1173, at 2596.

¹¹⁸⁵ The Working Group stated that ‘the Swiss Rules, for instance, expressly provide, under Article 4, paragraph (2), that: “Where a third party requests to participate in arbitral proceedings already pending under these Rules or where a party to arbitral proceedings under these Rules intends to cause a third party to participate in the arbitration, the arbitral tribunal shall decide on such request, after consulting with all parties, taking into account all circumstances it deems relevant and applicable”’. See UNCITRAL, Working Group II (Arbitration and Conciliation) – ‘Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules’, 45th session, 11-15 September 2006 (A/CN.9/WGII/WP.143), available at: http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html#45thsession (last accessed 06 October 2014), at, para 69-71.

¹¹⁸⁶ UNCITRAL, Working Group II (Arbitration and Conciliation) – ‘Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules’, 47th session, 10-14 September 2007 (A/CN.9/WG.II/WP.147/Add.1), available at: http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html#47thsession (last accessed 06 October 2014), at, para 8.

¹¹⁸⁷ The Working Group noted the ICC’s generally conservative view that only the claimant is entitled to identify the parties to the arbitration. However, it found that the ICC joined a new party to the arbitral proceedings at the request of a respondent in three recent cases. In this regard, it noted that: ‘It appears that the ICC may only allow a new party to be joined in the arbitration at the respondent’s request if two conditions are met. First, the third party must have signed the arbitration agreement on the basis of which the request for arbitration has been filed. Second, the respondent must have introduced claims against the new party’. See *Ibid.*, at para 8. It is also worthy to note that the ICC has recently amended Article 7 of its arbitration rules capturing the conditions set out above. See ICC Rules of Arbitration, entry into force 01 January 2012, available at: http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/#Article_7 (last accessed 06 October 2014). See also G. Born, *supra* note 1173, at 2599.

¹¹⁸⁸ The ASA reported that it favours a liberal solution such as the one contained in Article 4(2) of the Swiss rules. No decision on joinder under Article 4(2) of the Swiss rules have yet been reported. See *Ibid.*, at, para 8.

an additional paragraph to Article 15 of the Rules (relating to the general procedural powers of the tribunal), whereby the joinder of parties would be permitted, was worded as follows:

The arbitral tribunal may, on the application of any party...allow one or more third persons to be joined in the arbitration as a party and, provided such a third person and the applicant party have consented, make an award in respect of all parties involved in the arbitration.¹¹⁸⁹

The above wording is inspired by Article 22.1(h) of the LCIA Arbitration Rules.¹¹⁹⁰ Additional wording was also proposed to the effect that third parties must be a party to the underlying arbitration agreement; and the exercise of the tribunal's discretion is contingent upon the avoidance of 'unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute'.¹¹⁹¹ Ultimately, the final wording adopted under Article 17(5) is as follows:

The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party *provided such person is a party to the arbitration agreement*, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that *joinder should not be permitted because of prejudice to any of those parties*.¹¹⁹²

As mentioned previously, discussions revolving around the newly amended provision mentioned insurers as the most common intervenors in arbitral proceedings.¹¹⁹³

4.3 Common denominators

It is broadly understood that third party intervention entails the right to present written arguments including evidence, oral arguments, and full access to hearings and case documents. Once admitted, a third party intervenor has the right to be heard and to submit arguments, albeit only with respect to the subject matter of its intervention.¹¹⁹⁴ US law provides that third party intervention may be allowed on the basis of a direct, significant, and legally protectable interest in an action to intervene. Intervenors are not

¹¹⁸⁹ See UNCITRAL, Working Group II (Arbitration and Conciliation) – 'Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules', 46th session, 5-9 February 2007 (A/CN.9/WG.II/WP.145/Add.1), available at: http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html#46thsession (last accessed 06 October 2014), at para 2.

¹¹⁹⁰ Ibid., at para 6.

¹¹⁹¹ Ibid., at para 2.

¹¹⁹² See UNCITRAL Arbitration Rules (2010), *infra* note 1303.

¹¹⁹³ J. Paulsson and G. Petrochilos, 'Report: Revision of the UNCITRAL Arbitration Rules', 03 September 2006, available at: http://www.uncitral.org/pdf/english/news/arbrules_report.pdf (last accessed 06 October 2014), at 73.

¹¹⁹⁴ A. Zimmermann, *supra* note 55, at 13.

required to establish independent standing. This is similar to the ICJ where third state intervention as a non-party solely requires the establishment of an interest of a ‘legal nature’ also characterized as a ‘real and concrete’ interest in relation to the proceedings. The provisions of several IIAs and BITs as well as the ICJ’s practice shed light on the possibility for a contracting state or a third state to intervene as a ‘non-party’ in the absence of a jurisdictional link with the disputing parties. A third state seeking to intervene as a ‘non-party’ to pending proceedings does not need to establish that its *rights* may be affected, in other words, they do need to establish *ius standi*. This could turn out be a crucial precedent for civil society petitioners aiming to participate in investor-state disputes as third party intervenors and not merely as *amici curiae* – as further discussed in Part III.

¹¹⁹⁵ See WTO, Report of the Appellate Body, *United States: Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismut Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R (10 May 2000), para. 41 (*‘Hot-Rolled Lead case’*).

¹¹⁹⁶ See generally, A. Zimmermann, *supra* note 55.

¹¹⁹⁷ *Ibid.*, at para 17.