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PART III: AN ENHANCED ROLE FOR CIVIL SOCIETY BEFORE INVESTOR-STATE TRIBUNALS?

Introductory remarks

Having looked at the rules and practice governing civil society's role within investor-state disputes, attention towards its potential or future therein is now merited. As shown, the procedural role available to civil society is solely that of a friend of the court – an *amicus curiae*. It was a progressively acquired role that has allowed a wide array of civil society groups and organizations such as international NGOs and indigenous groups or associations to access investor-state tribunals. It allowed them to act as non-disputing parties and raise public interest issues and/or submit arguments as stakeholders, or representatives thereof. In other words, civil society's participation as *amicus curiae* addressed the 'broader' public interest at stake and/or the 'direct' interests of third parties.

The *amicus* role is not subject to any third party right, but is rather a matter of procedural discretion exerted by investor-state tribunals. In addition, *amicus* participation triggered – to a varying degree – limited substantive repercussions on investor-state tribunals' decisions. A closer look in this section at the procedural characteristics that are inherent to the *amicus* role in general, and not solely within the realm of investor-state arbitration in particular, might provide further clarity in understanding these two findings.

There is then a need to question whether civil society had solely requested access to investor-state tribunals as *amicus curiae*. A look back at the *UPS* and *Bechtel* cases sheds light on civil society's request for standing as third party intervenors in light of its 'direct' interests in these arbitrations. Indeed, third-party intervention presents fundamental differences with *amicus curiae* intervention. It generally entails a more expansive access to tribunals. A closer look at investor-state tribunals' analysis on this question is thus merited. It will attempt to explain these tribunals' decisions and flesh out the criteria that guided them in dismissing civil society's requests (**Section 2**).

In the *UPS* and *Bechtel* cases, civil society petitioners sought to intervene as third parties in order to effectively raise, assert, or defend the 'direct' interests of certain communities or groups that had been, or have alleged to be, particularly affected by the activities or arbitral claims of foreign investors. These civil society petitioners advanced an 'access to justice' argument in support of their requests. This raises the question as to whether civil society could benefit from the *right* to take part in proceedings, or in other words, the *right to be heard*, before investor-state tribunals – as argued by civil society petitioners (**Section 2**). Once the petitioners' arguments are scrutinized, Part III will aim to shed light on the numerous limitations raised by the third party intervention procedure before investor-state tribunals. These are both procedural and substantive. In particular, they relate to (i) the absence of rules governing third party intervention by third parties; and, more fundamentally, (ii) the inexistence of *rights* and *obligations* set forth under IIAs or BITs that relate to persons other than foreign investors and host states respectively. In this light, this research will advance a proposal on the conditions that could potentially render third party intervention acceptable before investor-state tribunals. The modalities of such proposal would remain within the limitations that are inherent to the investor-state dispute settlement regime (**Section 4**).

1. Transcending *amicus curiae* submissions

Part III questions the validity of civil society's contentions to the effect that it has a *right* to take part in proceedings, or in other words, a *right to be heard* before investor-state tribunals. There is thus a need to revisit the *amicus* procedure and attempt to understand whether an *amicus* benefits from the *right to be heard*. It is key to identify – from a holistic and cross-jurisdictional perspective – whether there are limitations to the *amicus curiae* role. Previous petitions by civil society to investor-state tribunals for standing as third party intervenors, and not merely as *amici*, are then explored in further detail. The aim of this section is therefore to highlight the fundamental differences that exist between the *amicus curiae* procedure on the one hand; and the third party intervention procedure on the other, by looking at the advantages and disadvantages of both. This is a necessary prelude to the analysis of civil society's third party intervention petitions and access to justice arguments – as further explored below.[1201]

[1201] Part III – Section 2.

1.1 The inherent limitations of the *amicus curiae* role – A comparative perspective

The courts and tribunals that were examined throughout this research treated the *amicus curiae* in a fairly consistent manner. Although an analysis of the case law has already been engaged, it is necessary at this point to flesh out common denominators. A more detailed emphasis on these will constitute the background to exploring enhanced forms of procedural access to civil society, i.e. through third party intervention.

Under US law, third party intervention and *amicus curiae* participation work in tandem. An alternative to third party intervention is participation in ongoing proceedings as *amicus curiae*. The inverse may also be true.[1202] This fact sheds light on the advantages and disadvantages to each alternative. On the one hand, an *amicus* inherently *lacks the procedural rights of a party*, particularly the right to offer direct and rebuttal evidence and the right to take an appeal.[1203] Intervention may be thus considered as more advantageous as it typically takes the form of the right to participate in discovery, present written arguments, right to present oral arguments, right to present evidence, cross-examine witnesses, and the right to tender issues, as well as the right to seek redress, compensation, and other remedies – all of which are not available to *amici curiae*.[1204] Despite a widespread recognition that *amici curiae* have made over the years a contribution on numerous legal issues in US litigation, the extent to which judges accord scrutiny to *amicus curiae* briefs remains unclear.[1205]

On the other hand, precisely because intervenors become third parties to litigation, numerous third party stakeholders opt for the *amicus curiae* procedure in order to curb the costs and time of acquiring such a status.[1206] Those who cannot participate as intervenors may request leave for an enhanced *amicus* role that could include – upon the exceptional approval of the court – the right to present oral argument.[1207] It is equally

[1202] See R. Garcia, *supra* note 972, at 342.
[1203] G. Hazard et al., *supra* note 977, at 770.
[1204] See C. Tobias, 'Rethinking Intervention in Environmental Litigation', (2000) 78 Washington University Law Quarterly 313, at 317, and G. Hazard et al., *supra* note 977, at 771.
[1205] C. Tobias, *infra* note 1204, at 318.
[1206] See R. Garcia, *supra* note 972, at 342.
[1207] Rule 29(g) of the Federal Rules of Appellate Procedure provides that: 'An amicus curiae may participate in oral argument only with the court's permission'. See Federal Rules of Appellate Procedure, *supra* note 982. See also R. Garcia, *supra* note 972, at 342.

recognized that participation as an *amicus* can in many instances prove an effective alternative to formal intervention of right, particularly because *amicus* briefs are less cumbersome on the judicial system.[1208] It is in this light that courts do have the authority to limit or place conditions or requirements on third party interventions for the purposes of enhancing (or safeguarding) the efficiency of proceedings.[1209] In any case, it is argued that procedural barriers should not be erected before third parties whose interests are affected by litigations.[1210]

The treatment of the *amicus curiae* under WTO law has been extensively dealt with.[1211] The WTO's DSU does not regulate nor mention *amicus* submissions. The WTO has developed its *amicus* practice strictly through the jurisprudence of the Appellate Body. Furthermore, the Appellate Body emphasized that civil society or, more precisely, non-WTO member States, do not benefit from a substantive right to submit *amicus curiae* briefs under the DSU:

> Individuals and organizations, which are not members of the WTO, *have no legal 'right' to make submissions or to be heard by the Appellate Body*, The Appellate Body has no legal 'duty' to accept or consider unsolicited amicus curiae briefs submitted by individuals or organizations, not members of the WTO…[1212]

Amici do not benefit from a right to take part in proceedings or, in other words, a right to be heard by WTO Panels nor the Appellate Body. They in turn may – at their sole discretion – accept un-solicited *amicus* submissions so long as they remain pertinent to a given dispute; and more fundamentally, for the sole and unique purpose of assisting a Panel or the Appellate Body, provided no undue delays or burdens affect the dispute settlement process.[1213] Against this backdrop, *amicus* submissions at the WTO have triggered the opposition of numerous member States who are wary of (i) the additional

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[1208] P. Appel, *supra* note 1095, at 308.
[1209] Ibid., at 309.
[1210] The example of minority representation in affirmative action litigation shows that intervention can serve as the vehicle through which such representation can be achieved. Ibid., at 986 citing E. Jones; P. Appel, *supra* note 1095, at 295. P. Sands and R. Mackenzie, *supra* note 55, at para 29.
[1211] See Part II – Section 3.2.
[1212] 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*, *supra* note 1042, para. 41 (our emphasis).
[1213] Article 12.2 of the DSU states that: 'Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process'. See WTO, Report of the Appellate Body, *United States: Import Prohibitions of Certain Shrimp and Shrimp Products*, *supra* note 1027, para. 107-108.

dispute settlement costs and burdens; and (ii) the proliferation of submissions from trade lobbies or pressure or interest groups from industrialized WTO member States.[1214]

In an investor-state dispute context, the limitations of the *amicus curiae* role are well-reflected in a quote by the *UPS* tribunal. In comparing between the *amicus curiae* and third party intervention procedures, the tribunal questioned whether it might grant leave for a 'lesser, *amicus curiae* role' in light of its dismissal of the Canadian Union of Postal Workers and the Council of Canadians requests to be afforded standing as third parties to the proceedings as further discussed subsequently.[1215] Again, *amicus curiae* involvement is confined to presenting solely written, but not oral, statements. Unlike with written statements by experts, disputing parties cannot call on *amici curiae* to examine their statements.[1216] Tribunals rarely granted *amici* access to case materials, who only had the benefit of those that were publicly available, and thus it may be argued that *amici* could not really be in a position to thoroughly address the subject matter of a given dispute.

It is worthy to emphasize once more the context that lead to the acceptance of *amici curiae*. Tribunals have repeatedly acknowledged the existence of public interest issues as and when raised by the *amici*. Here, it may be argued that the *amicus curiae* reform was a procedural development designed to address the issues of transparency and opacity of the investment treaty arbitral process. More fundamentally, it is underlying to public interest issues rather than a recognition of a given stakeholder right. This is precisely because *amici* are not intervenors in a technical sense; accordingly, they cannot challenge arguments or evidence put forward by the disputing parties, they cannot vindicate their own rights.[1217] This is uniquely manifested in the *Methanex* decision, which laid the basis for *amicus* participation in investor-state disputes. While recognizing the public interest nature of the dispute, the tribunal acknowledged that it had the power to accept *amicus curiae* submissions pursuant to Article 15(1) and emphasized that '*it is a matter of its power rather than of third party right*'.[1218]

[1214] R. Buckley, and P. Blyshak, *supra* note 999, at 371.
[1215] UPS v Canada, *supra* note 517, at para 59.
[1216] A. Moore, *supra* note 1040, at 269.
[1217] F. Francioni, *supra* note 847, at 740.
[1218] Cited in UPS v Canada, *supra* note 517, at para 61 (our emphasis).

Having said that, *amicus curiae* participation has now become an important feature of investor-state dispute settlement.[1219] The amendment of the ICSID Arbitration Rules[1220] and entry into force of the UNCITRAL Rules on Transparency,[1221] as well as numerous newly signed BITs,[1222] confirm the practice. *Amicus curiae* briefs have been submitted hitherto in landmark cases and, as mentioned previously, have ultimately allowed civil society groups and organizations to raise public interest issues and/or submit arguments on behalf of stakeholders whose interests were affected by a given arbitral dispute.

International human rights jurisdictions deal with the *amicus curiae* in a similar manner. Although they liberally accept *amicus* briefs, it remains unclear whether the ECtHR, IACtHR, or ACHPR have any substantive obligation to *hear amici*. The relevant rules of these jurisdictions clearly present the *amicus* as a 'supplier of information'.[1223] The IACtHR and ACHPR allow civil society organizations to represent victims, and stand *on their behalf*, therefore interested third parties benefit from a broad access to those jurisdictions, i.e. their *right to be heard* may be secured through adequate and effective standing, which transcends the *amicus curiae* procedure. Whilst lacking this last possibility, the ECtHR on the other hand equally grants '*any person*' standing so long as they can establish their status as a victim. Because of such broader procedural possibilities, which are similar to those existent in domestic jurisdictions, it would be difficult to assimilate an *amicus* – inherently considered as an *assistant* to the Court – to a disputing party who has a *right to be heard*.

1.2 To be an *amicus*, or not to be: Fundamental differences with third party intervention

An *amicus curiae* is defined as a friend of the court. The *amicus curiae* issue is first and foremost a procedural one and its acceptance is entirely subject to a court or

[1219] F. Francioni, *supra* note 847, at 740.
[1220] See ICSID Arbitration Rules, *supra* note 411.
[1221] UNCITRAL Rules on Transparency, *supra* note 414.
[1222] See Part II – Section 2.2.3.
[1223] See Part II – Section 3.3.

tribunal's discretion.[1224] The ethos of the *amicus* is that of a bystander in a bipartite dynamic where two disputing parties resort to a court or a tribunal to settle their dispute. It should, and is expected to, solely and exclusively act as an assistant to the latter by bringing forward useful arguments, perspectives, and expertise that are distinct from the disputing parties'. Accordingly, the *amicus* cannot challenge arguments or evidence put forward by the disputing parties.

Another look at the criteria governing *amicus* access also reflects the limitations of its role in a given dispute. These criteria are essentially reflected in Canada's proposal in the *UPS* case. By following the criteria governing the practice in its domestic judicial system, Canada proposed the following factors for the *UPS* tribunal to consider:

> In exercising its discretion, the Tribunal should consider whether: (a) there is a public interest in the arbitration; (b) the Petitioners have sufficient interest in the outcome of the arbitration; (c) the Petitioners' submissions will assist in the determination of a factual or legal issue related to the arbitration by bringing a perspective or particular knowledge that is different from that of the disputing parties; and (d) the Petitioners' submissions can be received without causing prejudice to the disputing parties.[1225]

Indeed, the *UPS* tribunal noted that the above-mentioned criteria capture the essence of the ones developed by the WTO Appellate Body and the *Methanex* tribunal.[1226]

Amici curiae do not therefore have *the right to be heard*.[1227] Rather, their intervention is entirely subject to a court or a tribunal's discretion in assessing that the information brought forward by the *amicus* might assist it in settling the dispute.[1228] By contrast, and as mentioned previously, third party intervention generally entails the right to present written arguments including evidence, oral arguments, and full access to hearings and case documents.[1229] Once admitted, a third party intervenor has the right to be heard and submit arguments, albeit only with regard to the subject matter of its intervention.[1230]

The *amicus curiae* procedure is generally understood to be premised on 'broader' interests that are stake in a pending dispute. In a rather telling passage, Palchetti argues

[1224] A. Moore, *supra* note 1040, at 262; See also T. Ishikawa, *supra* note 108, at 388.
[1225] UPS v Canada, *supra* note 517, at para 7(iii).
[1226] Ibid., at para 51.
[1227] T. Ishikawa, *supra* note 108, at 404.
[1228] P. Sands and R. Mackenzie, *supra* note 55, at para 2.
[1229] See Part II – Section 4.3.
[1230] A. Zimmermann, *supra* note 55, at 13.

that the ICJ should consider accepting *amicus* interventions by states with '*a less 'direct' interest*' notwithstanding the silence of the ICJ Statute on the issue:

> When a state seeks to participate for protecting *a less 'direct' interest*, a more limited form of participation would be adequate. For that purpose, the Court should consider the possibility of introducing an *amicus curiae* procedure.[1231]

This difference sheds light on the need to shift to civil society's previous petitions for third party intervention in investor-state disputes where it was precisely argued that 'direct' interests', and not merely 'broader' interests, were at stake and that, accordingly, civil society petitioners had the *right to be heard* – as further discussed directly below.

1.3 Petitions to uphold the 'direct' interest in investor-state arbitration

Whilst it might be challenging to determine the exact number of investor-state disputes in which civil society organizations could have potentially participated as third party intervenors, a request for 'standing' as third party intervenors has been submitted in two instances, i.e. the *UPS*[1232] and *Bechtel*[1233] cases. In the latter, Earthjustice was acting as a 'representative' of other stakeholders – which included numerous Bolivian civil society groups and individuals.[1234] The NGO is familiar with petitioning for standing and representation as it systematically does so in public interest litigation in the US.[1235] This is in contrast to the *UPS* case where solely two Canadian civil society organizations sought to personally intervene. Rather than requesting 'standing', civil society petitioners in both cases could have petitioned for third party intervention as 'non-parties'.[1236]

[1231] Palchetti continues by stating that 'since the Statute does not envisage expressly such procedure, the Court would be likely to resist any attempt by third states to present an *amicus curiae* brief in a particular case'. See P. Palchetti, *supra* note 1153, at 181 (our emphasis).
[1232] United Parcel Service v Canada , *supra* note 515.
[1233] Aguas del Tunari, S.A. v. The Republic of Bolivia, *supra* note 533.
[1234] Ibid., at 3.
[1235] According to its website, Earthjustice is currently engaged in over 300 active legal cases in front of US courts. Those include for instance: Carpenters Industrial Council et al v. Kempthorne (Federal court case no. 1:08-cv-01409-EGS, filed 09 January 2010, in the District of Columbia), where Earthjustice and other civil society groups have filed a motion to intervene on a challenge to two decisions by the U.S. Fish and Wildlife Service that impact northern spotted owls. See Earthjustice, '2014 Legal Docket: Our Litigation Spotlight', (2014) available at: http://earthjustice.org/features/ourwork/2014-docket (last accessed 01 April 2014).
[1236] The difference between both types of third party interventions is highlighted under Part II – Section 4.2.1 discussing the regulation of the procedure by the ICJ, and is further detailed under Part II – Section 4.2.2 which highlights 'non-disputing party' intervention by IIA or BIT contracting states.

Indeed, it will be later argued that investor-state tribunals might have come to a different decision had petitioners requested to intervene as 'non-parties'.[1237]

1.3.1 The impossibility of 'adding strangers to the arbitration' – *UPS v. Canada*

In the *UPS* case,[1238] the Canadian Union of Postal Workers ('CUPW') and Council of Canadians did not merely petition the arbitral tribunal for leave to make an *amicus* submission; rather, they requested 'standing as parties to any proceedings that may be convened' to determine UPS' claim against Canada.[1239] The tribunal responded in a provisional order in 2001,[1240] i.e. six years prior to rendering a final judgment, in which it has extensively discussed the issue of 'adding a party' – to use the tribunal's terminology.

i. Petitioners' requests

In its petition to the tribunal, the CUPW submitted that it represented 46,000 Canada Post employees. Its interest is manifested in its commitment 'within the broader labour movement, and with groups in civil society, to preserve the integrity of Canadian public services'.[1241] The Council of Canadians on the other hand defines itself as 'a non-governmental organization', composed of more than 100,000 members, that is concerned with social programs, democratic governance, and the protection of public health and the environment.[1242]

First, the petitioners started by putting into question and criticizing the current investor-state framework, i.e. they considered investor-state tribunals as bodies that allow private interests to trump public ones.[1243] They then argued that, through its arbitral claim, UPS – which described itself as the world's largest express carrier and package delivery company – is challenging Canadian policy, programs, and law in relation to the activities

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[1237] See Part II – Section 3.2.
[1238] UPS v Canada, *supra* note 515.
[1239] UPS v Canada, *infra* note 1241, para 1(i).
[1240] UPS v Canada, *supra* note 517.
[1241] UPS v Canada, *Submissions of the Canadian Union of Postal Workers and of the Council of Canadians dated 8 November 2000*, at para 8.
[1242] Ibid., at para 10.
[1243] Ibid., at para 17.

of Canada Post. If successful, UPS' claim could entail the potential restructuring of the entire Canadian postal services framework, including the dismantling of certain courier and package delivery services, so the petitioners argued. This would cause 'immediate and long term impacts' on Canadian postal workers' (many of which are CUPW members) job security including lay-offs and permanent job reductions. Equally, this would impact the citizens recipients of such services, particularly those living in remote rural areas (including Council of Canadians members and others).[1244]

On their right to standing, the petitioners grounded their request on their (i) 'direct' interests in the proceedings in light of the 'immediate and long term impacts' on Canadian postal workers; (ii) interests in the broader public policy implications of the dispute 'that are of vital concern to the petitioners'; and (iii) interest in making submissions concerning certain matters that are exclusively reserved to the parties to the proceedings.[1245]

More fundamentally, the petitioners acknowledged the inexistence of 'international commercial arbitration' rules regarding third party intervention. They contended that third parties with legitimate interests in arbitral proceedings should be afforded a 'much greater role'.[1246] Equality and fairness as enshrined under Article 15(1) of the UNCITRAL Arbitration Rules carry – so it is argued by the petitioners – 'broader implications' that are relevant to investor-state disputes. In particular, equality and fairness should extend to third parties in light of the public character of disputes and the diverse interests which may be (adversely) affected by foreign investors' claims.[1247] In addition, petitioners argued that intervention should be granted pursuant to the precepts of access to justice. They claimed that it would be 'unfair and inconsistent with the principles of fundamental justice' for the tribunal to deny them the opportunity to defend their interests in the proceedings.[1248] To this effect, they referred to both domestic and international sources by relying on the 'authoritative definition' of the sources of

[1244] Ibid., at para 19-20.
[1245] Ibid., at para 23.
[1246] Ibid., at para 23.
[1247] It is worthy to quote here Article 15(1) once more with an emphasis on the notion of equality: '…the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that *the parties are treated with equality* and that at any stage of the proceedings each party is given a full opportunity of presenting his case' (our emphasis). See Article 15(1) UNICTRAL Arbitration Rules, *supra* note 433. See also Ibid., at para 64, and UPS v Canada, *supra* note 517, para 21.
[1248] UPS v Canada, *supra* note 1241, at para 2(i).

international law under Article 38(1) of the ICJ Statute, and in particular to 'the general principles of law recognized by civilized nations'.[1249] Articles 14 and 26 of the ICCPR[1250] were most notably cited as 'support for the notion of extending the principle of equality to third parties with an interest in arbitral proceedings'.[1251]

In their domestic sources analysis, the petitioners submitted that, under common law, the more a decision-making process takes the form of a judicial process, the more likely the courts will require a full range of procedural protections including that individuals affected by a decision be given adequate notice in respect of the proceedings, a fair opportunity to present their case and to respond to the opposing party, and a right to an independent and un-biased decision-maker.[1252] In a similar vein, a person may be accorded standing if it is an 'aggrieved person', an 'affected person', or someone who is 'exceptionally prejudiced by the proceedings'.[1253] The petitioners then pointed to the extensive third party intervention practice under Canadian law where a clear distinction is made between the right to intervene as a party or *amicus curiae* in civil proceedings. Citing the Ontario Rules of Civil Proceedings,[1254] the petitioners argued that intervenors are afforded the same procedural rights as litigating parties which include the right to file

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[1249] See Article 38 of the ICJ Statute, *supra* note 94. See also UPS v Canada, *supra* note 517, at para 18.

[1250] Article 14(1) states that: '1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law…'. And Article 26 states that: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'. See ICCPR, *supra* note 93.

[1251] UPS v Canada, *supra* note 1241, at para 66.

[1252] Although it is also argued that, under common law, procedural fairness also applies in administrative decision-making processes , and aims to provide affected individuals with a fair opportunity to be heard in order to ensure a given decision's integrity. Indeeed, it is broadly recognized that the *audi alteram partem* rule also applies in principle to such processes. See R. Klager, *'Fair and Equitable Treatment' in International Investment Law* (2011), at 214, and Ibid., at para 86.

[1253] Ibid., at para 87.

[1254] Article 13.01 of the Ontario Rules of Civil Proceedings: 'A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims, (a) an interest in the subject matter of the proceeding; (b) that the person may be adversely affected by a judgment in the proceeding; or (c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding. (2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just. Furthermore, Article 13.02 states that: 'Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument'. See Ontario Rules of Civil Procedure [R.R.O. 1990, Reg. 194], last amended 04 March 2014, available at: http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_900194_e.htm (last accessed 06 October 2014).

pleadings, submit evidence, cross-examine witnesses and make oral statements.[1255] Intervenors must, and most notably, establish in their petition to the tribunal that they have an interest in the subject matter of the proceedings or they may be (adversely) affected by a judgment in the proceedings.[1256]

The petitioners have also referred to the then expanding practice of the WTO Appellate Body in asserting its, as well as Panels', authority in accepting *amicus* briefs as strong support for the acceptance of the intervention of non-parties more generally. They referred to the Appellate Body's findings in *Shrimps*[1257] and *Hot-Rolled Lead*[1258] as to the non-existence of a third-party right to make *amicus* submissions under the DSU. The petitioners called for the need to make a clear distinction between inter-state dispute settlement mechanisms such as the WTO's and the investor-state dispute settlement mechanism established under NAFTA. The latter grants, so the petitioners argued, foreign investors (who are inherently non-parties to NAFTA) the opportunity to engage in disputes against NAFTA parties. By virtue of the precepts of equality and fairness, third parties, who are also non-parties to NAFTA just like foreign investors, should also be granted access via third party intervention when their interests are directly affected by a given dispute.[1259] In sum, the over-arching idea suggested by the petitioners was to argue for the acceptance of the third party intervention procedure (or alternatively, the *amicus curiae* procedure), as it exists in civil proceedings under Canadian law, as well as in light of the requirements of judicial review of administrative decisions under common law and, more fundamentally, 'natural justice'.[1260]

ii. The tribunal's response

The tribunal responded with an extensive argumentation on third-party standing and clearly distinguished between its conclusions on the admissibility of the third party intervention and *amicus curiae* procedures.[1261] The US and Mexico have also provided

[1255] Ibid., at para 84.
[1256] Ibid., at para 85.
[1257] Report of the Appellate Body, *United States: Import Prohibitions of Certain Shrimp and Shrimp Products*, *supra* note 1027.
[1258] 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*, *supra* note 1042.
[1259] UPS v. Canada, *supra* note 1241, at para 83.
[1260] UPS v. Canada, *supra* note 517, para 26.
[1261] Ibid., para 11.

comments on the petitioners' request by way of submissions made pursuant to Article 1128 of NAFTA.[1262]

The tribunal noted the disputing party's position with regards to the petitioners' requests. It noted that both UPS and Canada agreed that the tribunal does not have jurisdiction to 'grant party status to strangers to the arbitration'.[1263] This position was also supported by the US' and Mexico's submissions. The tribunal then shifted to the petitioners' arguments. It acknowledged that their 'direct' interests' stem from the potential consequences of the proceedings on Canada Post employees, which include CUPW members, and for those dependent on mail and other services provided by Canada Post, which include the Council of Canadians members and others.[1264] In addition, it noted the petitioners' contention as to the existence of 'broader' public interest issues at stake in the dispute.

In its conclusion, the tribunal emphasized that it is established, and solely has the powers conferred, by NAFTA's Chapter XI – which is of course a paramount limitation that binds the tribunal.[1265] Following the *Methanex* tribunal's analysis, the *UPS* tribunal found that NAFTA's Chapter XI clearly does not set out any provisions conferring authority to the tribunal to accept third party intervention that essentially amounts to 'add parties' to the arbitration.[1266] Indeed, it noted that '*the disputing parties have consented to arbitration only in respect of the specified matters and only with each other and with no other person*'.[1267] Arbitration is therefore quintessentially restricted to the authority set forth under the agreement governing both parties' dispute.[1268]

The tribunal then shifted its attention towards interpreting the provisions of Article 15(1) of the UNCITRAL Arbitration Rules. In its view, the Article essentially

[1262] Article 1128 of NAFTA, *supra* note 442.
[1263] UPS v. Canada, *supra* note 517, para 5(i).
[1264] Ibid., at para 13.
[1265] Ibid., at para 35.
[1266] Ibid., at para 36.
[1267] Ibid., at para 36 (our emphasis).
[1268] The tribunal did note, however, that NAFTA provides a limited role for third parties to a given dispute under two exceptional circumstances as set forth under Article 1126 (which allows tribunals to consolidate cases), and 1128 of NAFTA (which allows NAFTA parties to make written submissions in disputes to which they are third parties). Article 1126(2) states that: '2. Where a Tribunal established under this Article is satisfied that claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common, the Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties, by order: (a) assume jurisdiction over, and hear and determine together, all or part of the claims; or (b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others'. See Article 1128 of NAFTA, *supra* note 446, and Ibid., at para 36.

recognizes two fundamental procedural powers for arbitral tribunals: (i) the ability to conduct the arbitration in an appropriate manner; and (ii) the need to secure the fundamental procedural rights of the disputing parties to a fair proceeding, natural justice or due process.[1269] Article 15(1) is therefore about:

> …the procedure to be followed by an arbitral tribunal in exercising the jurisdiction which the parties have conferred on it. It does not itself confer power to adjust that jurisdiction to widen the matter before it *by adding as parties persons additional to those which have mutually agreed to its jurisdiction* or by including subject matter in it arbitration additional to what which the parties have agreed to confer.[1270]

This is in line with the tribunal's position in *Methanex*.[1271] Although civil society organizations did not request standing in the latter, the tribunal was clear in pointing out that Article 15(1) does not confer the authority to arbitral tribunals to add parties to a given dispute. Precisely in the same vein, it cannot be used to grant third parties any '*substantive status, rights, or privileges*' akin to those of the disputing parties.[1272]

Turning to the petitioners' international law arguments, the tribunal confirmed their observation as to the non-existent or limited reference to third party intervention under international law and international courts and tribunals' practice.[1273] It deemed the reference to Article 14 of the ICCPR as remotely relevant given that it relates to persons whose *rights* and *obligations* are being determined by a tribunal, which is clearly not the petitioners' case – according to the tribunal. In fact, it emphasized that the sole two parties whose rights and obligations are at stake are the disputing parties, i.e. UPS and Canada.

1.3.2 Extreme circusmtances, standard limitations – *Aguas del Tunari v. Bolivia*

The *Bechtel* case has been dealt with in earlier sections to discuss endeavors by civil society to promote and protect the human right to water at stake in investor-state disputes,[1274] as well as investor-state tribunals' analysis on the acceptance of *amicus*

[1269] Ibid., at para 38.
[1270] Ibid., at para 39 (our emphasis).
[1271] Methanex Corporation v. United States, *supra* note 428.
[1272] Cited in UPS v. Canada, *supra* note 517, para 39 (our emphasis).
[1273] Ibid., at para 40.
[1274] See Part I – Section 4.3.3.

curiae petitions.[1275] It is key to shift back to the case with the aim of discussing the issue of third party standing or intervention. As previously mentioned, the case arose following Bolivia's termination of a privatization concession granted to AdT – a Bolivian subsidiary of Bechtel – for the provision of water and sewage services to the city of Cochabamba.[1276] The peculiarity of this case also lies in the fact that Earthjustice acted as a representative of a number of stakeholders,[1277] and therefore filed a third party intervention, or alternatively *amicus curiae*, petition *on their behalf*.[1278] Indeed, the petition echoes the practice of international human rights jurisdictions such as the IACtHR or the ACHPR where standing on the basis of representation of stakeholders is explicitly permitted – as previously discussed.[1279] Unlike the *UPS* tribunal, the *Bechtel* tribunal responded to the petitioners in quite a succinct manner. In fact, its decision on the matter of third party intervention did not extend the length of two pages.[1280] A closer look at the petitioners' requests, followed by the tribunal's response thereto, is merited.

i. Petitioners' requests

Given that the *Bechtel* case was filed later than the *UPS* case, the petitioners in the former case clearly had an extensive source of inspiration. However, the petitioners' requests in the *Bechtel* case were more ambitious. In addition to their request for standing as third parties, they sought the public disclosure of all documents and transcripts related to the arbitration, the opening of all hearings in the arbitration to the public, and more particularly, for the tribunal to visit Cochabamba and hold a hearing on the facts of the claim in the city.[1281] In line with the petitioners' arguments in *UPS*, the petitioners in *Bechtel* grounded their request for standing as third parties not only on the basis of their

[1275] See Part I – Section 3.1.
[1276] The concession was concluded in September 1999 and ceased to be effective in April 2000. See Aguas del Tunari, S.A. v. The Republic of Bolivia, *supra* note 721, at para 2.
[1277] Those were: Coordinadora para la Defensa del Agua y la Vida, La Federación Departamental Cochabambina de Organizaciones Regantes, SEMAPA Sur, Friends of the Earth-Netherlands, Oscar Olivera, Omar Fernandez, Father Luis Sánchez, and Congressman Jorge Alvarado.
[1278] The expression 'on behalf of' was in fact used by the *Bechtel* tribunal in its decision on jurisdiction. See Aguas del Tunari, S.A. v. The Republic of Bolivia, *supra* note 721, at para 15.
[1279] See Part II – Section 2.2.
[1280] The tribunal itself noted, while referring to the petitioners, that 'the briefness of our reply should not be taken as an indication that your request was viewed in other than a serious manner'. See Aguas del Tunari, S.A. v. The Republic of Bolivia, *supra* note 539.
[1281] See the petitioners' requests at Aguas del Tunari, S.A. v. The Republic of Bolivia, *supra* 716, para 34.

‘direct’ interest, but also ‘issues of broad public concern’ relevant to the dispute.[1282] On the one hand, the ‘direct’ interest of the petitioners was premised on the potential adverse effects of the tribunal’s award on each of the petitioners. Indeed, it was particularly argued that any damages to AdT would be ultimately paid by the *Servicio Municipal de Agua Potable de Cochabamba* (SEMAPA), which is the municipal corporation in charge of water and sewage distribution prior to the concession granted to AdT. As a result, SEMAPA would most likely increase water price rates if Bolivia loses the arbitration. According to the petitioners, this would in turn limit Cochabamba’s residents’ access to water and undermine the petitioners’ extensive endeavors to secure the right to affordable and equitable access to water in Cochabamba.[1283] It was additionally argued that one of the petitioners, the *Federación Departamental Cochabambina de Organizaciones Regantes*,[1284] an association of small-scale farmers from the Cochabamba region, that works for the protection of customary water usage rights and practices, including the access as well as management of local water irrigation sources in the region of Cochabamba, is particularly affected by the dispute given it had been successful in obtaining formal legal recognition of those rights under Bolivian law. However, the privatization concession granted by Bolivia to AdT lead to the suspension of these rights, and the *Federación*’s members were therefore allegedly subjected to ‘discriminatory regulatory practices’ and financially burdensome usage fees.[1285] In the wake of the concession’s termination, and the ensuing investor-state dispute, the petitioners had a ‘direct’ interest to ensure that their customary usage rights and practices, as recently recognized under Bolivian law, would not be perceived as inconsistent with the rights of foreign investors. A negative outcome of the dispute would most likely lead to pressure on Bolivian legislators to reconsider such recognition.[1286]

Moreover, the petitioners argued that they all had a ‘direct’ interest in the proceedings in the following terms:

> An award against Bolivia will also harm the ‘direct’ interest of all the Bolivian petitioners in ensuring that the Government of Bolivia can implement legitimate measures to maintain public

[1282] Ibid., at para 2.
[1283] Ibid., at para 18.
[1284] Meaning ‘the Cochabamba Federation of Irrigators’ Organizations’.
[1285] Ibid., at para 9.
[1286] Ibid., at para 19.

> order and guarantee *access to services and resources essential to the lives of all Bolivians* without fear of major financial penalties for doing so.[1287]

In a similar vein, with regards to 'issues of broad concern', the petitioners argued that the dispute was not merely private in character given that it raises issues that may have 'far-reaching impacts' on a broad diversity of non-party interests 'such as governmental authority to guarantee public order and the provisions of essential services', and suggested that their request was aimed at addressing the lack of transparency 'that traditionally attends international arbitral processes', and called for issues that have broad public impacts to be resolved 'through democratic processes that provide for meaningful public participation'.[1288] In this regard, they referred to the *Methanex* precedent where the tribunal explicitly recognized the broader implications of the proceedings – as previously discussed.[1289] Again, precisely because the dispute relates to actions by Bolivia aimed at securing the public order, and more fundamentally, access to water.[1290]

Separately, in light of their 'unique expertise and knowledge', the petitioners claimed to have evidence showing that (i) Bechtel's subsidiary increased water prices by an average rate of 50%; and (ii) thereby significantly restricted Cochabamba's residents access to water, particularly poorer ones.[1291] They also contended that their position is distinct from the Bolivian government's as the latter might be 'encumbered by conflicting objectives' given the 'strong pressure to attract foreign investment' it faces, and that it does not fully represent petitioners' interests in the proceedings.[1292] The petitioners' intervention would, it was argued, enable the tribunal to have a fuller appreciation of the consequences of the broader issues raised by the dispute and, therefore, render a more just decision.[1293]

More fundamentally, in line with the petitioners' arguments in the *UPS* case, they grounded their intervention on the principle of access to justice. They argued that a denial

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[1287] Ibid., at para 20 (our emphasis).
[1288] Ibid., at para 2(ii),(iii).
[1289] See Methanex Corporation v. United States, *supra* note 428, at para 49 (our emphasis); and our discussion regarding the same in Part II – Section 2.1.2. See also Ibid., at para 33.
[1290] Ibid., at para 25.
[1291] Ibid., at para 35.
[1292] Ibid., at para 36.
[1293] Ibid., at para 2(iii).

by the tribunal to allow them to defend their rights in the proceedings would be 'unfair and inconsistent with the principles of fundamental justice'.[1294] They contended that:

> *…this Tribunal's award will determine Petitioners' rights*. As such, it is essential that Petitioners have an opportunity to be heard by the Tribunal.[1295]

Here, the petitioners argued that the tribunal should adopt fair and democratic procedures, which necessarily entail the participation of affected individuals and organizations.[1296] They also cited WTO precedents and the need to distinguish between inter-state dispute settlement mechanisms, and the investor-state dispute settlement mechanism set forth under the Netherlands-Bolivia BIT. The petitioners argued that they should be afforded access as affected and interested third parties by virtue of the principles of equality as well as fairness and, therefore, not to be treated less advantageously than foreign investors.[1297]

From a procedural standpoint, the petitioners argued that Article 44 of the ICSID Convention, i.e. the corollary of Article 15(1) of the UNCITRAL Arbitration Rules, explicitly allowed tribunals to decide procedural matters – such as those relating to third party intervention – that were not covered by the ICSID Convention, ICSID Arbitration Rules or other agreements between the disputing parties.[1298] Again, using similar arguments as those raised by the petitioners in *UPS*, the petitioners here contended that the ICSID Convention and ICSID Arbitration Rules guarantee the principle of a fair hearing, and that this should transcend the disputing parties and be extended to take into account diverse interests which may be (adversely) affected by the foreign investors' claims.[1299] In support of their arguments, the petitioners followed the *UPS* example and quoted international law sources such as Article 14 of the ICCPR,[1300] but also domestic

[1294] Ibid., at para 2.
[1295] Ibid., para 48.
[1296] Ibid., at para 31.
[1297] Ibid., at para 45.
[1298] See Article 44 of the ICSID Convention states that 'any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question'. See ICSID Convention, *supra* note 379.
[1299] Ibid., at para 39.
[1300] See Article 14(1), ICCPR, *supra* note 1250.

ones, in particular the Bolivian Civil Procedure Code, which explicitly allows third party intervention.[1301]

ii. The tribunal's response

In a letter addressed to Earthjustice dated 29 January 2003, the tribunal essentially considered that, in the absence of both disputing parties' consent, the intervention of a third party would contravene the consensual nature of investment arbitration.[1302] The petitioners' request for standing would amount to joining a party to the proceedings, which clearly goes beyond the tribunal's power or authority. This position is in line with the *UPS* precedent, as well as the provisions of Article 17(5) of the newly amended UNCITRAL Arbitration Rules, which 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.[1303] Indeed, it noted that both the ICSID Convention and the Netherlands-Bolivia BIT refer to the disputing parties' consent in order to deal with the procedural issue of joining a party – which was absent in this particular instance. This also applied to granting access to hearings to the public and the public disclosure of proceedings documents. The tribunal ultimately highlighted a fundamental aspect emphasized below:

> The Tribunal appreciates that you, and the organizations and individuals with whom you work, are concerned with the resolution of this dispute. *The duties of the Tribunal*, however, *derive from the treaties which govern this particular dispute*.[1304]

Therefore, absent explicit treaty or arbitration rules provisions allowing tribunals to add third parties to a given dispute, or alternatively the consent of both disputing parties,

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[1301] See Articles 355-369 on third party intervention. Article 356 provides that: 'the intervenor shall establish its intervention on the basis of a personal interest, a positive right, and certain existence , although its exercise may be subject to terms and conditions.' (our translation). See *Código de Procedimiento Civil*, entry into force 02 April 1976, available at: http://www.wipo.int/wipolex/es/details.jsp?id=11445 (last accessed 06 October 2014).

[1302] Aguas del Tunari, S.A. v. The Republic of Bolivia, *supra* note 539.

[1303] Article 17(5) of the UNCITRAL Arbitration Rules states that: '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' (our emphasis). See UNCITRAL Arbitration Rules (2010), entry into force 06 December 2010, available at: http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf (last accessed 01 November 2013).

[1304] Aguas del Tunari, S.A. v. The Republic of Bolivia, *supra* note 539, at 2 (our emphasis).

investor-state tribunals will be arguably reluctant to accept such petitions – as succinctly articulated by the tribunal.

1.3.3 Jurisdictional barriers set by the *UPS* and *Bechtel* tribunals

Both the *UPS* and *Bechtel* cases showed that third party intervention could have been permissible had both disputing parties consented to it.[1305] In light of the absence of such consent, civil society organizations sought inspiration to request third party intervention on the basis of the prevalence of the practice under municipal law.[1306] More fundamentally, Earthjustice sought to act as a representative of Bolivian civil society groups and individuals by petitioning the arbitral tribunal *on their behalf*; therefore, it followed a well-established standing model practiced at the IACtHR and ACHPR, which effectively means that Earthjustice is not a direct stakeholder *per se*, but is rather a representative of (adversely) affected civil society groups and individuals from the Cochabamba community.

However, the petitioners in both the *UPS* and *Bechtel* cases formulated requests that are tainted with clear substantive and procedural deficiencies – from the tribunals' perspective. Substantively, the *UPS* tribunal deemed the reference to Article 14 of the ICCPR as remotely relevant. It found that 'the Petitioners' rights and obligations are not engaged in that way or indeed at all'.[1307] On the other hand, it further noted that '*the Investor and Canada are the parties whose rights and obligations are to be determined by the arbitration, and no one else's*'.[1308] Procedurally, the petitioners made a request that no investor-state tribunal could possibly accept, i.e. they requested their addition as a disputing party which, if granted by a tribunal, would certainly be *ultra vires* and a clear violation of the Netherlands-Bolivia BIT or NAFTA.[1309] It would render a tribunal's award an easy target for annulment or set-aside on the basis of excess of jurisdiction.

[1305] A. Kawharu, *supra* note 393, at 287.
[1306] On Earthjustice's experience as intervenor in US public interest litigation, see *supra* note 1235.
[1307] UPS v Canada, *supra* note 517, para 40.
[1308] Ibid., at para 41 (our emphasis).
[1309] This issue is further addressed in Part III – Section 3.