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

El Hosseny, F.F.

2. Could there be a basis for civil society's third party intervention?

The limitations of the *amicus curiae* role vis-à-vis disputing parties are evident. Civil society organizations have requested full standing whether as representatives of stakeholders to, or as directly (or adversely) affected by, investor-state arbitrations based on the access to justice principle. The question here is whether such requests are well-founded. In other words, is there an over-arching basis justifying a more expansive procedural role for civil society through the prism of the access to justice principle? The aim of this section is to question whether the access to justice principle might constitute the basis for a more expansive civil society participation in investor-state disputes. It thus tests civil society's access to justice arguments. *In concreto*, it considers whether the *right* to take part in proceedings, or in other words, the *right to be heard* could be secured if and when investor-state arbitration might affect the *rights* – and not merely the 'broader' *interests* – of civil society, or those it purports to represent.

2.1 Access to justice under international law

Prior to engaging in the analysis of civil society's requests to access justice, there is first a need to define what exactly is understood as access to justice and locate it within wider international law norms. There will be then a shift to an investor-state dispute-specific analysis of access to justice that will be looked at through the standpoints of both foreign investors and civil society. This section will finally assess whether access to justice may be applicable to civil society in investor-state disputes.

Access to justice is considered as a fundamental right as without it no other right can be effective.[1310] It is nonetheless a broadly defined concept and its understanding varies depending not only on the context, but also legal traditions. Francioni captures a generic conception from the domestic realm that might be relevantly applied to the investor-state dispute settlement context by defining it as:

> …the possibility for the individual to bring a claim before a court and have a court adjudicate it. In a more qualified meaning access to justice is used to signify the right of an individual not only to enter a court of law, but to have his or her case heard and adjudicated in accordance with substantive standards of fairness and justice…Thus, from the point of view of the individual, the

[1310] L. Burgorgue-Larsen, and A. Úbeda de Torres, *supra* note 44, at 503.

> term would normally refer to the right to seek a remedy before a court of law or a tribunal which is constituted by law and which can guarantee independence and impartiality in the application of the law.' [1311]

For present purposes, the *right to be heard* is a crucial element of the broader concept of access to justice. It is understood as the individual's right to obtain the protection of the law and the availability of legal remedies before a court.[1312] It is the '*possibility for the individual to bring a claim before a court and have a court adjudicate it*' as shown with respect to civil society's standing before international human rights jurisdictions.[1313] In the same vein, the Appellate Body confirmed that member states are the sole beneficiaries of the right to make submissions, or to be heard by the Appellate Body; in other words, solely member states have *access* to the Appellate Body's justice.[1314]

Meron succinctly and poignantly sums up access to justice as the *right to initiate* or *take part in proceedings*.[1315] Under IIAs or BITs, the sole persons entitled to initiate proceedings are foreign investors. Access to justice – from civil society's standpoint – could potentially entail the *right* to take part in investor-state arbitrations, and not necessarily to initiate them.

The overarching principle of access to justice is not underlying to any norm of customary international law.[1316] Access to justice is nonetheless considered to be enshrined under Article 10 of the UN Universal Declaration of Human Rights.[1317] It is further articulated in the provisions of international instruments such as Article 14 of the ICCPR,[1318] Article 6(1) of the ECHR,[1319] Article 47(2) of the Charter of Fundamental

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[1311] See F. Francioni, *supra* note 882, at 1.
[1312] F. Francioni, *supra* note 847, at 729.
[1313] See Part II – Section 2.
[1314] The Appellate Body previously noted that: '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'. See Report of the Appellate Body, *Hot-Rolled Lead* case *supra* note 1042, para 41.
[1315] T. Meron, *supra* note 848, at 318.
[1316] Although aspects of it, such as denial of justice, which is a duty to provide 'decent justice' to foreigners, is a violation of customary international law – as further discussed below. See F. Francioni, *supra* note 882, at 41; and J. Paulsson, *supra* note 107, at 1, 4.
[1317] Article 10 provides that: 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.'. See UN Universal Declaration of Human Rights, *infra* note 672. See also J. Paulsson, *supra* note 107, at 5.
[1318] Article 14(1), ICCPR, *supra* note 1250.
[1319] Article 6(1) provides that: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the

Rights of the European Union,[1320] Article 25 of the IACHR,[1321] or Article 7(1) of the Banjul Charter[1322] Some of these provisions have been tested in international adjudication, particularly in (i) an investor-state dispute context or (ii) international human rights cases involving foreign investment activities.

i. References by investor-state tribunals

Civil society petitioners in the previously discussed *UPS v. Canada* case requested to intervene as third parties, most notably on the grounds that 'all persons shall be equal before the courts and tribunals' and that 'everyone shall be entitled to a fair and public hearing' in accordance with Article 14 of the ICCPR. However, the *UPS* tribunal dismissed their petition and considered Article 14 to be inapplicable given that it relates to persons whose *rights* and *obligations* are being determined by a tribunal which, according to the *UPS* tribunal, was clearly not the petitioners' case.[1323] That is because the rights and obligations the tribunal was referring to are set out under the relevant investment treaty, in this case NAFTA's Chapter XI, which is essentially concerned with regulating NAFTA party conduct towards, and treatment of, investors who are nationals of other NAFTA parties.[1324]

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extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice'. See ECHR, *supra* note 844.

[1320] Article 47(2) provides that: 'Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.'. See European Union, Charter of Fundamental Rights of the European Union, entry into force 01 December 2009, 2012/C 326/02.

[1321] Article 25(1) provides that: '1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.'. See the IACHR on Human Rights, supra note 66.

[1322] Article 7(1) provides that: '1.Every individual shall have the right to have his cause heard. This comprises: (a).The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b).The right to be presumed innocent until proved guilty by a competent court or tribunal; (c).The right to defence, including the right to be defended by counsel of his choice; (d).The right to be tried within a reasonable time by an impartial court or tribunal.'. See Banjul Charter, *infra* note 845. For a global analysis on international instruments relevant to access to justice, see F. Francioni, *supra* note 882, at 32. Article 7(1) is also the basis pursuant to which the ACHPR has also adopted Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, under E. Locus Standi which provides that: 'states must ensure, through adoption of national legislation, that in regard to human rights violations, which are matters of public concern, any individual, group of individuals or non-governmental organization is entitled to bring an issue before judicial bodies for determination'. See ACHPR Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted in 24 October 2011, available at: http://www.achpr.org/instruments/fair-trial/?prn=1 (last accessed 06 October 2014).

[1323] UPS v Canada, *supra* note 517, para 40 (our emphasis).

[1324] Ibid., at para 40.

Although more relevant to a foreign investor perspective, another example is *Mondev International v. the United States*.[1325] The *Mondev* tribunal applied Article 6(1) of the ECHR in a comparative analysis in order to determine a claim on the basis of Article 1105(1) of NAFTA on the fair and equitable treatment and full protection and security that should be afforded to NAFTA investors.[1326] Article 6(1) requires that in order to right a wrong a court must be open to recourse and that 'fair and public hearings within a reasonable time by an independent and impartial tribunal established by law' are guaranteed by the state.[1327] The tribunal found in this regard that Article 6(1) positions the 'right to court' as an aspect of human rights relevant to all persons which has been interpreted in an evolutionary way; yet, it cannot fall under the purpose of investment protection set forth under Article 1105.[1328] The reference to the ECHR in the *Mondev* award is interesting as the ECHR is a human rights instrument that neither the US nor Canada (the home state of the claimant) was a party to.[1329]

ii. References by international human rights jurisdictions

There are also examples from the IACtHR and the ACHPR, both applying the IACHR and the Banjul Charter respectively. In the previously discussed case of *Awas Tingni v. Nicaragua*, [1330] the indigenous community of Awas Tingni sought the recognition of its collective property right to its ancestral land. However, Nicaragua had granted a logging concession to Solcarsa, a subsidiary of a Korean-based multinational, on the Awas Tingni's ancestral land without the latter's consent. The IACtHR recognized

[1325] The case is a NAFTA Chapter XI dispute that was settled pursuant to the ICSID Additional Facility Rules. See Mondev International Ltd v. United States of America, ICSID (Additional Facility) Case No. ARB(AF)/99/2, *Award of 11 Ocober. 2002*.

[1326] The dispute arose out of a real estate development contract concluded between the City of Boston and the Boston Redevelopment Authority, and a subsidiary of Mondev. The latter successfully filed a lawsuit against both in a Massachusetts court. However, the trial judge upheld the jury's verdict for breach of the contract against the City, but found the Boston Redevelopment Authority immune from liability pursuant to a Massachusetts statute giving it immunity from suit for intentional torts. Mondev's subsidiary failed as well in its appeal. Mondev claims that due to the Massachusetts court decision and the acts of the City and the Boston Redevelopment Authority, the US breached its obligations under Chapter XI, in particular Article 1105. See Ibid., at para 2. See also NAFTA Article 1105, *supra* note 263.

[1327] F. Francioni, *supra* note 847, at 736.

[1328] In addition, it found that the problematic issue of the Boston Redevelopment Authority's immunity is a substantive issue given its stipulation under Massachusetts law; rather than a procedural one which would be more relevant to the scope of Article 6(1) of the ECHR. See Mondev International Ltd v. United States of America, *supra* note 1325, at para 144.

[1329] F. Francioni, *supra* note 847, at 736.

[1330] *The Mayagna (Sumo) Awas Tingni Community* v. *Republic of Nicaragua* case, *supra* note 955.

the communal property of the Awas Tingni. In addition, and more relevantly for the purposes of this section, the IACtHR found that Nicaragua violated Article 25 of the IACHR, which guarantees the right of everyone to 'simple and prompt recourse, or any other effective recourse…for protection against acts that violate his fundamental rights', on the basis of the absence of an effective procedure for the demarcation and registration of indigenous communal property. [1331]

The previously discussed *SERAC v. Nigeria* case is another example of international adjudication discussing the issue of access to justice. [1332] Although the ACHPR did not explicitly cite Article 7(1) of the Banjul Charter, in its analysis on admissibility of the complaint (and the fulfilment of the exhaustion of local remedies condition), it nonetheless found that:

> The Military government of Nigeria had enacted various decrees ousting the jurisdiction of the courts and thus depriving the people in Nigeria of the right to seek redress in the courts for acts of government that violate their fundamental human rights. In such instances, and as in the instant communication, the [African] Commission is of the view that *no adequate domestic remedies are existent*.[1333]

The case ultimately shed light on the grave human rights abuses suffered by the Ogoni people, which were the direct result of oil exploitation by both Nigerian and multinationals in the Nile Delta region.[1334] The Ogoni were indeed denied any adequate recourse by the Nigerian judicial system, which ultimately lead them to resort a number of times to international jurisdictions and foreign courts.[1335] The prevalence of inadequate or ineffective domestic regulations and remedies lead several groups such as the Ogoni to seek remedy in other accessible domestic courts, particularly in the US under the Alien Tort Claims Act.[1336] Indigenous groups, in particular those unrecognized domestically

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[1331] Ibid., para 138. See also F. Francioni, *supra* note 847, at 739. For a more in-depth analysis of the case, see Part II – Section 2.2.

[1332] As previously discussed, the complaint was filed to ACHPR by two civil society organizations, including SERAC – a Nigeria-based NGO, in relation to the human rights violations suffered by the Ogoni people who inhabit the oil-rich Niger Delta region. See SERAC and Center for Economic and Social Rights v. Nigeria, *supra* note 931, para 30 (our emphasis). See also F. Francioni, *supra* note 847, at 740. For a more in-depth analysis of the case, see Part II – Section 2.2.

[1333] Ibid., at para 42.

[1334] Indeed, in its response to the ACHPR, the newly-appointed civilian government in Nigeria stated that 'there is no denying the fact that a lot of atrocities were and are still being committed by the oil companies in Ogoni Land and indeed in the Niger Delta area'. See Ibid., at para 42.

[1335] G. Akpan, *supra* note 596, at 74-75.

[1336] The advantage of the Alien Tort Claims Act is that it allows victims to directly sue multinationals, generally those engaged in the exploitation of natural resources that give rise to torts, and damages for human rights abuses

such as the Ogoni or the Awas Tingni, resort to foreign and international human rights jurisdictions not only as a result of the unavailability of a domestic judicial system in redressing the violations they claim to be the victims of, but also often due to its ineffectiveness.[1337]

2.2 Is there a civil society *ius standi* before investor-state tribunals?

Is civil society's access to justice relevant to the investor-state dispute context? An answer to this question will be given below from the standpoint of both foreign investors and civil society. It is clear from the outset that a fundamental difference exists between the two groups. IIAs and BITs bestow upon foreign investors *rights*. By contrast, any person, including civil society, that does not fall under the definition of an 'investor' under IIAs or BITs *does not benefit from any rights* under those treaties – as further shown below.

2.2.1 Foreign investors as the primary beneficiaries of access to justice

As previously mentioned, foreign investors historically relied on diplomatic protection or inter-state claims in order to seek redress from injuries caused by host state conduct such as unfair and discriminatory treatment or uncompensated expropriations of their investments. In addition, the international law on foreign investment evolved to establish a dispute settlement that is meant to be fair, independent, and impartial to

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or environmental degradation. This is for instance clearly manifested in the case of *Jota v. Texaco*, a case brought by indigenous groups inhabiting the Oriente region in Ecuador, as well as others inhabiting the downstream area in Peru, against Texaco (now Chevron, a US-based multinational) for environmental and personal injuries that allegedly resulted from Texaco's exploitation of the region's oil fields between 1964 to 1992. Interestingly, a petition to the judge by an Ecuadorian legislator highlighted the importance of seeking remedy in a US court: 'only the adjudication of jurisdiction in the claim filed by Ecuadorians... in a federal court of N.Y. against the Texaco Company, will bring to those affected the possibility of finding just treatment and a solution to the serious situation that they are going through'. See Jota v. Texaco, *supra* note 141, at para 157. That said, lodging a successful claim in US courts under the Alien Tort Claims Act might be quite difficult; whereas, examples of successful claims in international human rights jurisdictions are abundant. It is argued that the repeated application by US judges of the *forum non conveniens*, international comity, and sovereign immunity rules are a significant impediment to the success of such claims. See G. Akpan, *supra* note 596, at 62, 67, 77.

[1337] G. Akpan, *supra* note 596, at 74-75.

adjudicate foreign investors' claims against host states, i.e. an access to (an international) justice.[1338] It is indeed argued that:

> investor-state arbitration serves fundamentally as a remedy to ensure *access to justice*, neutrality, and fairness by empowering individuals and corporations to participate directly in a dispute settlement process—arguably an option that may be unavailable to foreigners before domestic justice systems or elsewhere. [1339]

One of the main concerns of such a dispute settlement framework was to guarantee recourse to those foreign investors who suffered *denial of justice* in front of the judiciary of host states. Understanding the rationale behind securing such access to foreign investors, including the protection against *denial of justice*, is necessary in order to assess whether the access to justice principle may equally benefit civil society before investor-state tribunals – as will be discussed in the subsequent section. Holistically, it also reflects that foreign investor protection is concerned *in fine* with the upholding the international rule of law.[1340]

Denial of justice is a violation of the customary international law duty to provide 'decent justice' to foreigners, and thus foreign investors, i.e. it is a duty upon states not to administer justice to aliens in a fundamentally unfair manner, and whereby procedural fairness and due process is measured by an international standard.[1341] Foreign investors often face arbitrary and discretionary conduct by host state institutions which (adversely) affect their investments, or lead to their outright expropriation for instance.[1342] The judiciary, as an instrument of the host state,[1343] can also play a role in denying foreign

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[1338] See J. Paulsson, *supra* note 107, at 28, 55; and P. Dumberry, *supra* note 221, at 112. For a more detailed discussion, see Part I – Section 1.5.1.

[1339] S. Puig, *infra* note 1403, at 249 (our emphasis).

[1340] See *supra* note 80.

[1341] J. Paulsson, *supra* note 107, at 1, 4. See also Article 5(2)(a), United States of America Bilateral Investment Treaty Model, *infra* note 1350.

[1342] Host state arbitrary and discretionary conduct was alleged in the case of *Siag v. Egypt*. The Egyptian government confiscated the claimants' property, which was intended for touristic development, partially due to a business agreement signed by the latter with an Israeli company (which was subsequently revoked by the claimants in the hope of avoiding the confiscation of their property). Having failed to enforce numerous domestic court judgements ruled in their favour against the government, the claimants dropped their Egyptian citizenship, and filed an ICSID claim against Egypt on the basis of the Italy-Egypt BIT given that they were dual citizens. Egypt was ultimately found liable to pay nearly $75 million dollars in damages to the claimants, most notably due to the unlawful expropriation of the latters' investments and the violation of fair and equitable standard set forth in the Italy-Egypt BIT. See Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15 ('Siag v. Egypt').

[1343] This is consistent with Article 4(1) of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts, which states that: 'The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever

investors the opportunity to adequately or effectively defend their rights and interests, or even to be heard. The problem in such cases may simply relate to the fact that the foreign investor is an alien, a national of a foreign state.[1344] Although various investor-state disputes dealt with the issue of denial of justice,[1345] the concept is particularly manifested in the *Loewen International v. the United States* case.[1346]

The dispute concerns litigation brought in a Mississippi State Court against Loewen, a Canadian-owned group of companies with a subsidiary in the US engaged in the funeral home and funeral insurance business, by a Mississippi-based company called O'Keefe – Loewen's competitor – as a result of a commercial dispute between the two companies. Although the value of the litigation was slightly under $7.5 million, the Mississippi jury awarded O'Keefe $500 million in damages, including $75 million for emotional distress and $400 million of punitive damages.[1347] Following the settlement with O'Keefe, Loewen filed a NAFTA Chapter XI claim against the US alleging most

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position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.'. See *supra* note 833 (cited in J. Paulsson, *supra* note 107, at 40), and *Robert Azinian and others v. Mexico*, *infra* note 1345, at para 98 (in which Jan Paulsson acted as president of the arbitral tribunal).

[1344] In this regard, see for instance the 1985 UN Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live. Article 5 states that: 'Aliens shall enjoy, in accordance with domestic law and subject to the relevant international obligations of the State in which they are present, in particular the following rights:… (c) The right to be equal before the courts, tribunals and all other organs and authorities administering justice and, when necessary, to free assistance of an interpreter in criminal proceedings and, when prescribed by law, other proceedings'. See UN General Assembly, Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live : resolution / adopted by the General Assembly, dated 13 December 1985, A/RES/40/144.

[1345] In the NAFTA case of *Robert Azinian and others v. Mexico*, the claimants sought to contest various Mexican courts' decisions confirming the annulment of a waste disposal services contract for a suburb of Mexico city. The arbitral tribunal found that NAFTA Chapter XI tribunals cannot act as appellate jurisdictions to national court decisions. More fundamentally for our purposes, the tribunal articulated the concept of denial of justice by stating that: 'a denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way'. It most notably found that there was no such evidence to that effect, and ultimately dismissed the claim. See Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States, ICSID Case No. ARB (AF)/97/2, *Award of 01 November 1999*, at para 99, 102 ('*Robert Azinian and others v. Mexico*'). For a further discussion of the case, see also R. Klager, *supra* note 1252, at 217. Another example is the previously discussed case of Mondev International Ltd v. United States of America, *supra* note 1325.

[1346] Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3 ('Loewen Group v. United States of America').

[1347] Loewen argued that O'Keefe's attorneys made irrelevant and discriminatory nationality-based, racial and class-based references in their pleadings, which were not discarded by the trial judge; and therefore sought to appeal the judgment to the Mississippi Supreme Court. However, Mississippi law requires an appeal bond equivalent to 125% of the value of judgment as a condition of suspending execution of the judgment. The Mississippi Supreme Court refused to reduce the appeal bond and required Loewen to post a $625 million bond within seven days in order to pursue its appeal and to avoid facing immediate execution of the judgment. Loewen was thus compelled to enter into a settlement with O'Keefe under which it agreed to pay the latter $175 million. See Loewen Group, Inc. and Raymond L. Loewen v. United States of America, *Award of 26 June 2003*, at para 3-8.

notably that: (i) the Mississippi trial court, by admitting nationality-based, racial and class-based discrimination pleadings violated Article 1102 on national treatment as well as Article 1105 of NAFTA on the fair and equitable treatment it should have been afforded;[1348] and (ii) notwithstanding the discriminatory aspects, the excessive verdict and judgment of the Mississippi State Court violated Article 1105.[1349] Loewen did not allege a 'denial of justice' *per se* since NAFTA does not even contain that expression.[1350] The US argued on the other hand that Loewen's claim is not arbitrable because the judgments of domestic courts, including the Mississippi court judgments complained of, in private disputes should not be considered as 'measures adopted or maintained' by a NAFTA party, and therefore should not fall under the scope of Chapter XI.[1351] In addition, the US contended that these judgments cannot give rise to a breach by the US of Chapter XI because they were not final acts of its judicial system.[1352]

The tribunal was unequivocal in finding that the judicial acts or wrongs of host states may be considered as relevant government measures within the scope of NAFTA Chapter XI.[1353] On the second point, the tribunal found that Loewen failed to pursue

[1348] The Article provides that: '1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors…'. See NAFTA Article 1102, *supra* note 514. Article 1105 on the other hand states that: '1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security…'. See NAFTA, *supra* note 227.

[1349] Ibid., at para 39.

[1350] Rather, Loewen claimed a violation of the fair and equitable treatment, as well as treatment in accordance with international law, pursuant to Article 1105 of NAFTA. Although not mentioned under NAFTA, it is interesting to note that the concept of denial of justice falls under the fair and equitable treatment clause under the 2012 US BIT Model. Indeed, Article 5(2)(a) provides that: '"fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world'. See United States of America Bilateral Investment Treaty Model, *supra* note 498; R. Klager, *supra* note 1252, at 213. See also Article 1105 of NAFTA, *supra* note 227; J. Paulsson, *supra* note 107, at 6.

[1351] Indeed, Article 1101 of NAFTA on the scope and coverage of Chapter XI, provides that: '1. This Chapter applies to measures adopted or maintained by a Party relating to: (a) investors of another Party; (b) investments of investors of another Party in the territory of the Party…'. See Ibid.

[1352] The US argued that Loewen should have (i) pursued its appeal despite the risk of execution on its assets; or (ii) sought protection under Chapter Eleven of the US Bankruptcy Code which would have resulted in a stay of execution against Loewen's assets; or (iii) filed a petition for *certiorari* and sought a stay of execution in the Supreme Court of the United States. For the present purposes, there are two main questions the tribunal had to decide upon, i.e. whether (i) the Mississippi courts decisions and judgements may be considered as 'measures adopted or maintained' by a NAFTA party, and therefore falling under the scope of Chapter XI; and (ii) the appeal to the Mississippi Supreme Court was an available remedy which Loewen should have pursued before it could establish that the Mississippi State Court's judgment constituted a US measure violating Article 1105 of NAFTA. See Ibid., at para 41, 207.

[1353] The tribunal resorted to a liberal interpretation of Article 201 of NAFTA, which defines 'measure' as including: 'any law, regulation, procedure, requirement or practice'. See NAFTA, *supra* note 227. See Ibid., at para 218. See also J. Paulsson, *supra* note 107, at 42.

available domestic remedies, notably the Supreme Court recourse. In consequence, Loewen has not established a violation of customary international law or a violation of NAFTA.[1354] Although it recognized that a failure by the US to provide adequate means of remedy may amount to an international wrong, and indeed reiterated its criticism on the improper conduct of proceedings in front Mississippi State Court, the tribunal warned nonetheless against an interpretation of NAFTA which would lead it to exercise an appellate function parallel to that which belongs to the courts of the host state.[1355]

Loewen was (controversially) unsuccessful in its NAFTA claim against the US. Yet, the *Loewen* award is considered as 'undoubtedly one of the most important international decisions rendered in the field of denial of justice'.[1356] It confirms the broad recognition that access to justice is effectively guaranteed to foreign investors by virtue of IIAs or BITs. Indeed, foreign investors benefit from a direct access to an international justice system, as evidenced by the availability of a recourse to the NAFTA-constituted tribunal in *Loewen*, where they can directly petition an independent and impartial arbitral tribunal to order host states the payment of damages for injuries caused by their violation of investment protection obligations – also set out in IIAs or BITs, including any acts or omissions which amounted to a denial of justice. Again, such recourse is available without any intervention on behalf of the foreign investors' home-state, whether by way of diplomatic protection or the initiation of inter-state claims.[1357] Essentially, foreign investors' right to be heard is guaranteed by the availability of recourse to an independent and impartial investor-state tribunal, with the latter having the authority to decide adequate and effective legal remedies for injuries caused to foreign investors by host state conduct.

2.2.2 Does civil society have a 'right to be heard' before investor-state tribunals?

Having looked at the application of the principle of access to justice to the benefit of foreign investors in an investor-state dispute context, it is now essential to consider whether it may be relevantly applied to civil society in the same sphere. As mentioned,

[1354] Ibid., at para 217.
[1355] Ibid., at para 242.
[1356] J. Paulsson, *supra* note 107, at 6, R. Klager, *supra* note 1252, at 221, and F. Francioni, *supra* note 847, at 734.
[1357] F. Francioni, *supra* note 847, at 731.

civil society organizations have previously petitioned for full standing whether as a representative of stakeholders to, or as directly (or adversely) affected by, investor-state arbitrations. From a more procedural standpoint, it is worthy to note once more that the *amicus curiae* role is the sole avenue currently contemplated for civil society organizations to access investor-state tribunals. Civil society petitioners' requests for third party intervention were thus premised on the fundamentals of access to justice. This implies the right to take part in proceedings as defined by Meron, or in other words, *the right to be heard*, which are foreign to the *amicus* role – as previously mentioned. [1358]

i. Arguments in favour of applying access to justice principles to civil society

The importance of environmental protection and human rights in an investor-state dispute context has been previously highlighted.[1359] The possibility for civil society to raise, assert, or defend those 'direct' interests certainly falls under the rationale for applying access to justice principles to civil society. From a more holistic perspective, it is argued that the achievement of justice should be equally considered as a founding principle for the international law on foreign investment – just like it is for any other law – that complements the imperative of foreign investment protection.[1360] The previously discussed Osgoode Statement, a 'statement of concern about the international investment regime' by eminent academics, reflects this argument:

> Private citizens, local communities and civil society organizations should be afforded a right to participate in decision-making that affects their rights and interests, including in the context of investor-state dispute settlement or contract renegotiation.[1361]

It is thus contended that an opportunity should be afforded to those whose not only rights, but also interests, are affected by an investor-state dispute to adequately and effectively participate in the investor-state dispute settlement process. Also, in referring to the right of citizens, local communities and civil society organizations to participate in decision-making, it could be argued that the Osgoode Statement alludes to earlier stages of the foreign investment process – which can be equally problematic if the free, prior and

[1358] T. Meron, *supra* note 848, at 318. See Part III – Section 1.2.
[1359] See Part I – Section 4.
[1360] M. Sornarajah, *supra* note 8, at 330.
[1361] Osgoode Statement, *supra* note 670.

informed consent of the host-population was not sought for instance.[1362] Although such a statement might be considered as more relevant to a political process, e.g. under a deliberative democratic mode of governance, rather than a judicial one, it is nonetheless argued that even judicial processes could be improved when a greater number of voices are involved.[1363]

These arguments are further supported by the fact that foreign investors benefit from a full access to justice; whereas civil society does not. In the *UPS v. Canada* case, the Council of Canadians and Canadian Union of Postal Workers precisely contended that third parties such as themselves, who are non-parties to NAFTA just like foreign investors such as UPS, should also be granted access to the tribunal because their interests are directly affected by a given dispute.[1364] The position of the Council of Canadians and Canadian Union of Postal Workers echoes Francioni's arguments:

> Indeed, the increasing impact of foreign investment on the social life of the host state has raised the question whether the principle of access to justice, as successfully developed to the benefit of investors through the provision of binding arbitration, ought to be matched by a corresponding right to remedial proceedings for individuals and groups adversely affected by the investment in the host state...[1365]

There is no converse right to access justice that is guaranteed to third-party stakeholders to the investor-state dispute that would be equivalent in any degree to what foreign investors are entitled to. This is manifestly reflected in the previously discussed case of *Metalclad v. Mexico*, where stakeholders from the Guadalcazar community were not afforded the right to raise arguments or issues at no stage of the arbitration. They could have had a myriad of potentially relevant arguments and issues to raise regarding the construction of a hazardous waste landfill by Metalclad within their community, including facts or allegations of sickness caused by the hazardous waste that had already been dumped on the site, or additional environmental scientific evidence or assessments on its potential adverse effects that Mexico did not raise as part of its pleadings. An adequate and effective participation of third party stakeholders could have contributed to

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[1362] See Article 32(2), UNDRIP, *supra* note 762; Article 6, ILO Indigenous and Tribal Peoples Convention, *supra* note 766; K. Sing'Oei, *supra* note 766, at 520; and K. Engle, *supra* note 761, at 147-148.
[1363] R. Garcia, *supra* note 972, at 342, and C. Harlow, *infra* note 1083, at 13 – who counters such argument and is against the use of, what is viewed as, political advocacy by civil society groups within the realm of the judicial process.
[1364] UPS v Canada, *supra* note 1241, at para 83.
[1365] F. Francioni, *supra* note 847, at 738.

a reduction of the amount of damages Metalclad obtained for the expropriation of its hazardous waste site, or even the outright dismissal of its claim.[1366]

Furthermore, again in the *UPS v. Canada* case, the Council of Canadians and Canadian Union of Postal Workers contended that, although initially construed for the benefit of disputing parties, and in particular foreign investors, the scope of the principles of equality and fairness – as enshrined under Article 15(1) of the UNCITRAL Arbitration Rules – should also benefit third parties in light of the pubic character of investor-state disputes and the diverse interests which may be (adversely) affected by foreign investors' claims.[1367] Again, this view is in several ways supported by authors such as Francioni, who states that:

> The right of access to justice is inextricably linked to the principle of 'fair and equitable' standard enshrined in international investment instruments which entails that foreign investors who seek equity for the protection of their investments must also be accountable, under principles of equity and fairness, to the host state's population affected by the investment. It is hard to conceive equity as a one-sided concept: equity requires fair and equitable balancing of competing interests, in this case the interests of foreign investors and the interest of those who seek judicial protection against possible adverse impacts of the investment on their life or their environment.[1368]

Indeed, the fair and equitable standard set forth under Article 1105 of NAFTA also includes treatment in accordance with international law.[1369] It is precisely in this regard that the claimants in the *Loewen International v. the United States* case alleged a denial of justice in front of US courts, and therefore sought redress in front of, and effectively had access to, a NAFTA Chapter XI-constituted tribunal – as previously discussed.[1370]

ii. Arguments against applying access to justice principles to civil society

Having said that, it is often nonetheless argued that civil society groups ought to seek redress in domestic courts given that investor-state tribunals have a specifically

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[1366] Whilst *Metalclad* contested the fact that it was not consulted by the Guadalcazar municipality prior to the rejection of its construction permit, did not have the right to be heard, and was therefore not treated equitably; the exact inverse could potentially be argued by local citizens from Guadalcazar at the level of the arbitral tribunal. The tribunal ultimately ordered Mexico to pay $16,685,000.00 in damages to Metalclad. See Metalclad Corporation v. United Mexican States, *supra* note 257, at para 50, 131. For a more detailed discussion on this aspect of the case, see Part I – Section 1.4.

[1367] 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 UPS v Canada, *infra* note 1241, at para 64, and UPS v Canada, *supra* note 517, para 21.

[1368] F. Francioni, *supra* note 847, at 739.

[1369] See Article 1105 of NAFTA, *supra* note 227.

[1370] Loewen Group v. United States of America, *supra* note 1346.

defined purpose of solely adjudicating upon host states' conduct towards, and treatment of, foreign investors.[1371] In general, investor-state arbitration has been often perceived as an ill-suited place for civil society's claims and concerns.[1372] The right of access to a court for third party stakeholders, e.g. indigenous groups that may be (adversely) affected, should be typically guaranteed by the domestic law and judicial system of the host state. In most cases, third-party stakeholders do indeed have access to domestic courts where they may seek damages for the harm caused by foreign investors' activities.

Yet, the *forum conveniens* underlying to the investor-state dispute is not necessarily (and not only) the domestic one.[1373] Host state domestic court decisions against foreign investors may be contested by foreign investors before an investor-state tribunal on the basis of the violation of host state obligations towards foreign investment promotion and protection.[1374] This is clearly manifested in the previously discussed *Chevron and Texaco v. Ecuador* legal saga. In this case, Chevron initiated an arbitration against Ecuador primarily to contest Ecuadorian court judgments ordering Chevron to pay billions of dollars in damages to indigenous groups inhabiting the area surrounding one of its former petroleum exploitation sites.[1375] Accordingly, civil society actors who had an interest in ensuring the success of the contested Ecuadorian court judgments – such as the Canadian-based IISD and the Ecuadorian-based *Fundación Pachamama* – followed Chevron's action in initiating investor-state arbitration, and sought to intervene in that arbitration.[1376]

Although polemical, and rejected by a significant number of practitioners, the current trend at the procedural level towards a more expansive construction of civil society's access to justice is supported by the increasing acceptance of *amicus curiae* participation in investor-state disputes – as further discussed below.[1377]

iii. The right to be heard of amici curiae and third party intervenors

[1371] N. Rubens, *supra* note 368, at 488; T. Wälde, *supra* note 51, at 33.
[1372] See discussion above on the impact of the international commercial arbitration model on civil society's participation in investor-state disputes at Part I – Section 1.5.
[1373] F. Francioni, *supra* note 847, at 738.
[1374] Ibid., at 738.
[1375] Chevron and Texaco v. Ecuador, *supra* note 141.
[1376] See discussion on the third party interests, as opposed to rights, at stake in investor-state arbitrations below at Part III – Section 3.1.1.
[1377] Although Francioni points to the fact access to justice is construed as a procedural guarantee dependent on other substantive rights that are protected under the relevant treaty. See F. Francioni, *supra* note 847, at 747.

It appears that defining access to justice in a relevant manner to civil society in an investor-state dispute context could potentially be unclear. This is particularly due to the fact that the investor-state regime, i.e. through the underlying IIAs or BITs, does not mention any *rights* or *obligations* pertaining to civil society as duly pointed out by the *UPS* tribunal when dismissing the petitioners request for standing as third parties.[1378] Access to justice could simply entail the *right* to take part in proceedings as suggested by Meron,[1379] or in other words, the *right to be heard*. Again, this is a crucial element of the broader concept of access to justice,[1380] and it is precisely what both *amicus* and third party intervention petitioners argued for in front of investor-state tribunals.

Indeed, the petitioners in the *UPS* case 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.[1381] The petitioners in the *Bechtel* case also made a substantially similar formulation.[1382] In the latter, the petitioners poignantly articulated 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.[1383]

This statement also echoes the *amicus* petitioners' arguments in the *Sociedad General de Aguas de Barcelona* case where five civil society organizations,[1384] including local grassroots Argentine associations such as the *Asociación Civil por la Igualdad y la Justicia* and *Centro de Estudios Legales y Sociales*, filed a 'Petition for Transparency and Participation as Amicus Curiae' on the basis of '*the right of every person to participate and make their voices heard in cases where decisions may affect their rights*'.[1385]

[1378] As previously pointed out, the *UPS* tribunal dismissed the petitioners argument to the effect that 'everyone shall be entitled to a fair and public hearing' as set forth under Article 14 of the ICCP and considered it to be inapplicable given that it relates to persons whose rights and obligations are being determined by a tribunal which, according to the tribunal, was clearly not the petitioners' case. See UPS v Canada, *supra* note 517, para 40.
[1379] T. Meron, *supra* note 848, at 318.
[1380] F. Francioni, *supra* note 847, at 729.
[1381] UPS v Canada, *supra* note 1241, para 2(i).
[1382] Aguas del Tunari, S.A. v. The Republic of Bolivia, *supra* 716, para 2.
[1383] See the petitioners' requests at Aguas del Tunari, S.A. v. The Republic of Bolivia, *supra* 716, para 48.
[1384] The remaining three were: the Center for International Environmental Law, *Consumidores Libres Cooperativa Ltda. de Provisión de Servicios de Acción Comunitaria*, and *Unión de Usuarios y Consumidores*.
[1385] Sociedad General de Aguas de Barcelona v. The Argentine Republic, *supra* note 731, at 2 (our emphasis).

The *amicus curiae* role is the sole avenue currently contemplated for civil society groups to access investor-state tribunals. It is a result of an extensive evolution of the entire investor-state regime, which included amendments to both arbitration rules and IIAs and BITs – as previously discussed.[1386] It is indeed perceived as an improvement of the opportunities of access to justice for the benefit of affected third parties to investor-state disputes.[1387] Third party intervention on the other hand has not been accepted as investor-state tribunals essentially considered the authority to accept it as either (i) requiring the consent of both disputing parties, and/or (ii) falling outside their jurisdiction.[1388] As previously mentioned, the difference between the two procedures is however fundamental.[1389] More significantly, this difference leads to a fundamental assumption: *amici do not have the right to be heard*; whereas intervenors do because they gain third party status.[1390]

In any event, directing the principle of access to justice to the benefit of civil society is inexorably confined by the rights and obligations set forth under the international law on foreign investment and the investor-state dispute settlement regime, i.e. under IIAs or BITs. More specifically, the international law on foreign investment, as the *lex causae* of investor-state disputes, solely affords foreign investors the right to make claims against host states, who in turn – by virtue of the same law – have an obligation to abide by a certain set of conduct that promotes and protects foreign investments, and thus to solely respond to violations thereof. The normative reality – at least from a strictly positivist perspective – is such that there is no such 'thing' as a *right* to take part in proceedings, or a *right to be heard*, for communities or groups that may be (adversely) affected by investor-state arbitrations under IIAs or BITs. With that being said, a further elaboration of the scope and regulation of potential interventions in the investor-state arbitration realm is thus merited.

[1386] See Part I – Section 2.1.
[1387] F. Francioni, *supra* note 847, at 740.
[1388] UPS v. Canada, *supra* note 517, para 39, and Aguas del Tunari, S.A. v. The Republic of Bolivia, *supra* note 539, at 2.
[1389] See Part III – Section 1.2. See also, D. Shelton, *supra* note 979, at 150.
[1390] For a broader discussion on the characteristics of the *amicus curiae* and third party intervention procedures, see respectively Part III – Section 1.2.