The role of civil society in investment treaty arbitration : status and prospects
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3. Potential regulation of third party intervention in investor-state disputes

Unless a fundamental overhaul of IIAs or BITs is undertaken, treaty-based investor-state arbitration is predefined, so it is argued, as a form of *arbitrage unilatéral*.[1391] That is because only foreign investors may act as claimants, and thus seek damages from host states; whereas the latter may only act as respondents, with no opportunity to submit counter-claims for instance.[1392] The question here is how to define civil society's role in this bi-partite dynamic if (and when) it would be potentially recognized as a third party intervenor in a given investor-state dispute. Moreover, it is also clear from the *UPS* and *Bechtel* decisions that civil society may not participate as a 'party', i.e. *third party intervention cannot lead to granting civil society standing as a disputing party* – a position adopted by this research.[1393] The fact that several IIAs or BITs and the ICJ allow contracting or third states to act as 'non-party' intervenors may be a crucial source of inspiration in this regard. It is therefore key to locate the basis for civil society's third party intervention before investor-state tribunals (**Section 4.1**), as well as to identify the procedural and substantive challenges thereto (**Section 4.2**).

3.1 Rationalizing civil society's third party intervention in investor-state arbitration

For present purposes, the main question is to determine whether third party intervention should be based on a *'broader' public interest* or third parties' '*direct or legal interests*'.[1394] This section thus focuses on the fundamental difference between

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[1391] W. Ben Hamida, 'L'arbitrage Etat-investisseur cherche son équilibre perdu: Dans quelle mesure l'Etat peut produire des demandes reconventionnelles contre l'investissuer privé?', (2005) 7 International law FORUM 261, at 263.

[1392] The notion of counter-claims in investor-state arbitration might constitute an effective means in achieving a more equitable balance within, what Walid Ben Hamida calls, *l'arbitrage transnational unilateral*. Such a statement might be regarded as an oxymoron because arbitration is inherently and intrinsically bilateral. It is suggested, however, that investment arbitration is unilateral because up to now the only party capable of lodging a claim, and thus initiating the proceedings against the State, is the foreign investor. The designation of a 'claimant' and the role of a plaintiff are exclusively reserved to the latter, whereas the designation of a 'respondent' and the role of a defendant are exclusively reserved to the former. In any case, the possibility for lodging such counter-claims will depend on the dispute settlement provisions in the BIT and the procedural rules of the arbitral institution concerned with the case. See Ibid., at 263-266; see also W. Ben Hamida, *supra* note 16.

[1393] UPS v Canada, *supra* note 517, and Aguas del Tunari, S.A. v. The Republic of Bolivia, *supra* note 539.

[1394] On the distinction between 'rights' and 'legal interests', see B. Bonafe, *supra* note 1154, at 741; and A. Kawharu, *supra* note 393, at 289.

direct or interests on the one hand; and *'broader' public interests* on the other – as elaborated *in concreto* directly below. First, there is a need to shed light on the difference between *rights* and *interests*. The *UPS* tribunal rightly dismissed civil society petitioners assertion that 'everyone shall be entitled to a fair and public hearing' in accordance with Article 14 of the ICCPR. The tribunal considered Article 14 of the ICCPR 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.[1395] The *rights* and *obligations* the tribunal was referring to are set out under NAFTA's Chapter XI, which solely affords *rights* to investors who are nationals of other NAFTA parties.[1396] Therefore, in any case, a proposal for third party intervention may not be underlying to civil society's *rights* and, as such, it cannot equate to standing – as previously mentioned.

3.1.1 *Interests* are not *rights*

The *rights* v. *interests* question is relevant to standing criteria both in front of international and domestic jurisdictions. In the *Barcelona Traction case*, on Belgium's *ius standi*, the ICJ held that 'not a mere interest affected, but solely a right infringed involved responsibility…'.[1397] The ICJ ultimately found that Belgium could not establish *ius standi* based on the affected interests of Belgian nationals – as previously discussed.[1398] It is precisely for this same reason that the ICJ refuses to grant standing on the basis of *actio popularis*.[1399]

In a similar vein, the debate over whether to justify third party intervention solely on the basis of *rights* rather than *interests* is relevant to domestic courts. The following opinion was raised in relation to affirmative action-related litigation in the US:

1395 UPS v Canada, *supra* note 517, para 40 (our emphasis).
1396 Ibid., at para 40.
1397 *Barcelona Traction case*, *supra* note 357, at para 46. On the requirements of standing, see also A. Del Vecchio, *supra* note 69, at para 15.
1398 See Part I – Section 1.5.1.
1399 J. Crawford, *supra* note 74, at 266-267.

> Just because a case is of great interest in the community, broad intervention is not justified. *Only when it is clear that the rights of persons outside the case are directly at stake should the action be expanded to include [third parties]*.[1400]

This is essentially a warning against an expansive approach to intervention, its burden and costs, as well as both the difficulty in treating all potential third parties equally and drawing the line on their interventions.[1401]

Having said that, third party intervention is permissible if there is a direct, significant, and legally protectable interest; or a 'real and concrete' interest underlying to a legal norm – as set forth by US courts and the ICJ respectively, as well as under a wide variety of international treaties such as the United Nations Convention on the Law of the Sea, or the WTO DSU where third state intervention is premised on a '*legal interest*' or a '*substantial interest*' respectively. [1402]

The investor-state regime only guarantees the *rights* of foreign investors – a principle that this research does not contest. Conversely, investor-state arbitration serves as the *remedy* for the violation of such *rights*. [1403] The purpose of any third party intervention, whether by civil society or any other person, is not to vindicate *rights* or to seek *remedy*. Third party intervention is solely premised on *interests*.

In sum, when *rights* are affected, then standing as a disputing party becomes warranted.[1404] By contrast, when *interests* are affected, then third party intervention can be applied in a manner that does not equate to standing as a disputing party.

3.1.2 'Broader' interests that do not require enhanced access

The question here is then whether civil society should be allowed to resort to third party intervention in investor-state disputes to raise, assert, or defend (i) *'direct' interests* – if and when affected by investor-state arbitrations; and also (ii) the '*broader' public*

[1400] R. Field et al., *supra* note 1084, at 986 citing J. Friedenthal, 'Increased Participation by Non-Parties: The Need for Limitations and Conditions', (1980) 13 University of California Davis Law Review 259, at 261-263.
[1401] R. Field et al., *supra* note 1084, at 986-988.
[1402] See Part II – Section 4.2.
[1403] Puig reminds us that 'in any given legal system there is no *right* without a *remedy*'. See S. Puig, 'No Right Without a Remedy: Foundations of Investor-State Arbitration', in Z. Douglas et al. (eds.), *The Foundations of International Investment Law* (2014), at 235.
[1404] A. Del Vecchio, *supra* note 69, at para 15.

interest. It is worthy to note nonetheless that civil society groups have not drawn a clear distinction between both issues in the previously discussed investor-state disputes.

However, it will be argued below that this has blurred investor-state tribunals' decisions on the matter and that, accordingly, there is a need to fundamentally distinguish between both issues when analyzing the adequacy of third party intervention in investor-state disputes.

i. The 'direct' interests of civil society, or those it purports to represent, as an underlying basis

Under this first assumption, third-party intervention would be used in order to effectively raise, assert, or defend the 'direct' interests of communities or groups – if and when affected by investor-state arbitrations.[1405] As discussed previously, in *UPS v. the United States*¸ the tribunal found that Article 14 of the ICCPR,[1406] cited by the Council of Canadians and Canadian Union of Postal Workers as an authoritative international norm on the basis of which they should be granted standing, relates to persons whose *rights* and *obligations* are being determined by a tribunal. This was clearly not the petitioners' case – according to the *UPS* tribunal. In fact, the tribunal emphasized that the sole two parties whose rights and obligations were at stake were the disputing parties, i.e. Canada and UPS.[1407] Again, the rights and obligations the tribunal was referring to are set out under NAFTA's Chapter XI. Clearly, both civil society petitioners and the *UPS* tribunal equated third party intervention to standing as disputing parties.

[1405] In looking at the EU Commission's *amicus* intervention in the case of *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, Triantafilou argues that 'given the unavailability of intervention in investment arbitration, participation as *amicus* is, in effect, the only recourse an interested third party has to participate in the proceedings. AES shows that an *amicus* can have a significant, direct, legally protectable interest in the outcome of the case that the disputing parties have not addressed, or have no incentive to address. The proper defense of that interest from the position of *amicus* might require a pleading of more than 30 pages, backed by evidence, and perhaps even targeted access to the record or the parties' pleadings'. See AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary, *supra* note 58; and E. Triantafilou, *supra* note 18.

[1406] Article 14(1) of the ICCPR 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.

[1407] UPS v Canada, *supra* note 517, para 40.

However, would the outcome have been different had civil society petitioners formulated their third party intervention request on the basis of (i) non-party intervention, i.e. explicitly ruling out standing as a disputing party from their request; and (ii) their 'direct' interests that are underlying to other international law norms or even applicable domestic law norms rather than NAFTA's Chapter XI? Would this pave the way for a potential recognition by an investor-state tribunal that 'non-party' third party intervention could be acceptable in disputes where the 'direct' interests of third parties are at stake?

An acceptance of 'non-party' third party intervention would allow civil society to raise, assert, or defend 'direct' interests pertaining to access to water or environmental protection for instance by (i) gaining access to case materials, including pleadings and documents, (ii) becoming entitled to submit a written statement, and (iii) making oral observations on the subject matter of the intervention.[1408] In fact, they *already do* through the recently recognized *amicus curiae* procedure which solely entails, however, the submittal of a written brief that is typically limited to 15 to 20 pages. Once granted third party intervenor status, civil society groups would be able to put forward arguments more *adequately* and *effectively* given that they would be recognized as non-disputing third parties – with all the procedural advantages that that entails.[1409]

ii. The 'broader' interests of civil society, or those it purports to represent, as an underlying basis

It may be argued that the intervention of civil society generally aims the furtherance of 'broader' public interest issues; and the rationale for allowing their involvement revolves *grosso modo* around transparency.[1410] But if rights are not at issue in a particular dispute, but merely 'broader' interests, then the answer should lie – so it is argued – in the political and decision-making process akin to the foreign investment or its

[1408] See Article 85, ICJ Rules of Court, *supra* note 852.
[1409] On the differences between the *amicus curiae* and third party intervention procedure, see Part III – Section 1.
[1410] This argument is uniquely manifested in the previously discussed *Methanex'* s tribunal's decision to accept *amicus curiae* submissions. It is worthy to note once more the tribunal's remarks in this regard that 'there is an undoubtedly public interest in this arbitration….The public interest in this arbitration arises from its subject-matter, as powerfully suggested in the [*amicus*] Petitions. In this regard, the *Tribunal's willingness to receive amicus submissions might support the process in general and this arbitration in particular*, whereas a blanket refusal could do positive harm'. See Methanex Corporation v United States, *supra* note 428, at para 49 (our emphasis).

operations.[1411] Answers to underlying controversies would then be resolved under a participatory-deliberative democratic decision-making model where values such as free, prior and informed consent and consultations would be crucial in ensuring that public interest concerns are addressed at an early stage of the investment process. The various grievance or consultation mechanisms set forth under several IIAs or BITs,[1412] or even the OECD National Contact Points,[1413] would also be crucial in ensuring that adversely affected communities could voice their concerns. Alternatively, if a matter reaches the dispute settlement point, the 'broader' public interest may also be adequately addressed through the now-recognized *amicus curiae* procedure in investor-state disputes.

Having said that, a closer look at the case law shows that the intervention of civil society certainly comprises, but also transcends, the furtherance of 'broader' public interest issues. Civil society does equally and distinctly raise, assert, or defend 'direct' interests of communities or groups, i.e. third parties, who are stakeholders to investor-state disputes.[1414] This is by all means congruent to the need for enhancing transparency and legitimacy.[1415] Addressing public interest, transparency, and participatory issues works in tandem with, and is intricately tied to, raising, asserting, or defending 'direct' interests of third parties – if and when affected by investor-state arbitrations. This is clearly reflected in petitioners' arguments in investor-state disputes as further discussed directly below.

3.1.3 Differences in civil society's stakes in investor-state arbitration

A closer look at the investor-state disputes examined hitherto sheds light on a fundamental point, i.e. while all disputes where civil society could have potentially intervened because the 'direct' interests of third parties were at stake are intrinsically public interest-related disputes; the inverse is not necessarily true, i.e. not all disputes

[1411] C. Harlow, *supra* note 1083, at 5.
[1412] See for instance the previously discussed consultation mechanism set forth under the NAALC, *supra* note 225.
[1413] P. Protopsaltis, *supra* note 89, at 255; and D. Collins, *supra* note 593; See A. Nienaber, *supra* note 928, at 543.
[1414] see C. Schreuer, U. Kriebaum, *infra* note 617, at 1091.
[1415] E. Tramontana, 'Civil Society Participation In International Decision Making: Recent Developments and Future Perspectives in the Indigenous Rights Arena', (2012) 16 the International Journal of Human Rights 173, at 175.

where 'broader' public interests were at stake affected the 'direct' interests of third parties. This is uniquely manifested in the difference between some of the cases previously discussed.

More specifically, there is a fundamental difference, and indeed an equally important need to make a clear distinction, between the stakes of (i) on the one hand, those civil society groups who sought to intervene as *amici curiae* in a case such as *Methanex v. the United States*,[1416] whereby they essentially aimed to promote the validity under international law of the contested Californian ban on MTBE in the name of environmental protection and 'the public interest at stake'; and (ii) on the other hand, those who sought to intervene as third party intervenors in a case such as *Aguas del Tunari* v. *Bolivia*.[1417] In the latter, the petitioners were against the excessive increase of water prices by Aguas del Tunari, and aimed to show the tribunal the harm caused to them and those they represent. The civil society Cochabamban groups' right to access water was not only recognized under 'soft' international law instruments, but also under water customary usage rights that were claimed to be fully recognized under Bolivian law.[1418] Regardless of the substantive weight of the right to access water under international law, any such right recognized under Bolivian law could have been potentially relevant by virtue of the applicable law of the investor-state dispute.[1419] The relevance of municipal law to investor-state arbitrations is in fact widely recognized

[1416] In this case, it is worthy to recall that the International Institute for Sustainable Development, the Communities for a Better Environment and the Earth Island Institute submitted separate petitions for leave to file *amicus curiae* briefs: 'on the basis of the immense public importance of the case and the critical impact that the Tribunal's decision will have on environmental and other public welfare law-making in the NAFTA region'. Methanex Corporation v. United States, *supra* note 428, at para 5.
[1417] Aguas del Tunari, S.A. v. The Republic of Bolivia, *supra* 716.
[1418] It is worthy to note once more that one of the petitioners, the Federación Departamental Cochabambina de Organizaciones Regantes (meaning 'the Cochabamba Federation of Irrigators' Organizations') particularly affected by the dispute given it had been successful in obtaining formal legal recognition of customary water usage rights and practices, including the access as well as management of local water irrigation sources in the region of Cochabamba, under Bolivian law. The petitioners argued that Aguas del Tunari's investment activities lead to the suspension of those rights, and the Federación members were therefore subjected to 'discriminatory regulatory practices' and financially burdensome usage fees. See Ibid., at para 2, 9.
[1419] Francioni argues for instance that municipal law provisions related to health, environmental, or social standards bind foreign investors in accordance with Article 42(1) of the ICSID Convention. Article 42(1) of the ICSID Convention states that: 'The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable'. See ICSID Convention, *supra* note 379. See also F. Francioni, *supra* note 847, at 740. See also the discussion on the relevance of human rights to investor-state disputes, in particular, the discussion on access to water under Part I – Section 4.3.2.

given that foreign investments underlying to investor-state arbitrations are *ipso facto* undertaken in a host state pursuant to the applicable municipal law. Moreover, the right to access water may be easily deemed as a 'legal interest'.

Just like the petitioners in *Methanex*, the *Aguas del Tunari amicus* petitioners additionally contended that there were 'issues of broad public concern' relevant to the dispute; whereas, the petitioners in *Methanex* did not ground their *amicus* intervention on the basis of any third party's 'direct' interest.[1420] It can be thus argued that the stakes in the *Aguas del Tunari v. Bolivia* case are more direct than in *Methanex* – at least when looked at through the prism of third party interests. Indeed, when 'direct' interests are at stake, then there would be a more solid case for intervention.[1421] In such cases, intervention could potentially receive wider recognition.

The debate on whether to justify third party intervention solely on the basis of *'direct' interests* rather than 'broader' *interests* is relevant to domestic courts and may be potentially transposed to investor-state tribunals. Although an intervention on the basis of 'broader' interests may be perceived as a seemingly divisive issue, it is nonetheless clear that intervention is legitimate whenever the *'direct' interests* of third parties are at stake in a particular dispute.

The facts and circumstances of each case will ultimately be pivotal factors in assessing the adequacy and relevance of third party intervention. In addition, third party intervention is regulated differently in each jurisdiction examined hitherto. Any proposal for a recognition of a broader role to civil society as a potential third party intervenor in investor-state arbitration would have to take into account the extent to which such proposal would fit within the existing framework.

[1420] Ibid., at para 2.

[1421] In looking at the potential expansion of the EU Commission's *amicus* intervention into third party intervention in the case of *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, Triantafilou asserts that 'the nature of the EC's interest in this case was broader and more substantial than ensuring that the tribunal was aware of, say, environmental or cultural implications of the project at issue. The EC sought to assert the relevance of its legally prescribed regulatory mandate, which is replete with policy implications for the entire European Union, and to address the consequences of a conflict between that mandate and the tribunal's jurisdiction. Given the nature of its interest in the dispute, a more effective legal recourse for the EC arguably would have been intervention, not an amicus submission'. See AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary, *supra* note 58; and E. Triantafilou, *supra* note 18.

3.2 Procedural void and substantive barriers: How to reconcile third party intervention with the investor-state arbitration regime?

IIAs or BITs do not address the issue of civil society's third party intervention in investor-state arbitration.[1422] There is indeed a legal void. Any investor-state tribunal deciding to accept a third party intervention petition would face both procedural and substantive challenges. The first question here is whether international commercial arbitration rules on third party joinder may be used by civil society organizations as potential grounds for intervention. This requires a further look at Article 17(5) of the UNCITRAL Arbitration Rules and the intention behind its drafting, as well as the conditions contained therein and how these may be relevantly applied to civil society. Faced with such legal void, it would appear that investor-state tribunals would have to exert their procedural discretion, which is *in se* problematic.

3.2.1 Filling the legal void: A look back at the regulation of third party intervention

As previously mentioned, third party intervention (or joinder)[1423] is regulated under a number of arbitration rules including the LCIA, SIAC, Swiss Arbitration Association, and more recently UNICTRAL – as previously discussed.[1424] Article 17(5) of the UNICTRAL Arbitration Rules opens the door to third party joinder in international arbitrations governed by those rules.[1425] The Article provides 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

[1422] Although referring to a possibility for the EU Commission to act as a third party intervenor in investor-state arbitration, see E. Triantafilou, *supra* note 18.
[1423] As mentioned previously, there is a subtle difference between third party intervention and joinder. The latter is necessarily subject to the application of one of the disputing parties; whereas third party intervention is the result of the sole initiative of the third party in question. See Permanent Court of Arbitration (ed.), *supra* note 1168, at 217.
[1424] See Part II – Section 4.2.3.
[1425] Indeed, it is worthy to recall that a great number of NAFTA and BIT-governed investor-state disputes are resolved in accordance with the UNCITRAL Arbitration Rules. This was in fact noted in the preamble of the UNCITRAL Rules on Transparency which states that: 'Bearing in mind that the Arbitration Rules are widely used for the settlement of treaty-based investor-State disputes'. See UNCITRAL Rules on Transparency, *supra* note 414 , para 4.

> opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties.[1426]

Simply put, the problem is that third party intervention under Article 17(5) of the UNICTRAL Arbitration Rules is premised on the basis of 'party' as opposed to 'non-party' intervention, i.e. third party intervenors under Article 17(5) become additional disputing parties to the disputes.[1427]

In addition, it is worthy to note once more that the UNCITRAL Arbitration Rules were initially construed for the settlement of commercial disputes; rather than investor-state disputes which involve 'broader' public interest issues – as extensively discussed in previous sections.[1428] As previously mentioned, UNCITRAL created a separate set of rules for investor-state disputes, i.e. the UNCITRAL Rules on Transparency in order to address the particular needs of investor-state disputes.[1429] The UNCITRAL Rules on Transparency do not include a similar provision on third party joinder as Article 17(5); whereas the UNCITRAL Arbitration Rules do not include any explicit provision regulating *amicus curiae* participation. When considering whether an express provision on third party intervention should be included in a revised version of the UNCITRAL Arbitration Rules, the Working Group noted that civil society organizations, acting as third parties, may request for an opportunity to explain their positions, particularly in investment treaty arbitration.[1430] The Working Group did nevertheless solely mention the possibility for those to act as *amici curiae*; and not as joined third party intervenors – which would place them at an equal footing with disputing parties (as opposed to the limited role akin to the *amicus* status).[1431] It is therefore unlikely that Article 17(5) was

[1426] See UNCITRAL Arbitration Rules (2010), *supra* note 1303.
[1427] G. Born, *supra* note 1173, at 2596-2597. This is similar to the intervention of right procedure pursuant to Article 63 of the ICJ Statute. See discussion under Part II – Section 4.2.1.
[1428] See Part I – Section 1.5.2.
[1429] UNCITRAL Rules on Transparency, *supra* note 414.
[1430] In further detail, the Working Group stated that: 'Third parties, for example non-governmental organizations, may request for an opportunity to explain their positions, particularly in investment treaty arbitrations. Article 15, paragraph (1), of the UNCITRAL Rules, which provides that "the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate", could be interpreted as encompassing power of the arbitral tribunal to accept such interventions, for example in the form of amicus curiae briefs'. See UNCITRAL, Working Group II (Arbitration and Conciliation) – 'Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules', 45th session, *supra* note 1185, at para 69.
[1431] Ibid., at para 69.

intended to potentially benefit civil society organizations as well by opening to them the door of third party joinder in investor-state disputes.

Having said that, aside from the distinctions between the UNCITRAL Arbitration Rules and the UNCITRAL Rules on Transparency, both set of rules are seemingly complementary as clearly indicated by the newly amended UNCITRAL Arbitration Rules, effective as of 01 April 2014.[1432] Could third party joinder be potentially an acceptable procedure in investor-state disputes? Article 17(5) contains certain conditions. Below is a discussion on how those might apply to civil society.

Article 17(5) contains three fundamental conditions: (i) the joinder of a third party should be supported by the request of at least one disputing party; (ii) the third party in question is a party to the underlying arbitration agreement; and (iii) third party joinder should not be permitted if it causes prejudice to any of the disputing parties.[1433]

First, in order to achieve condition (i), civil society would require the avail of the host state or the foreign investor prior to submitting a petition to intervene as a third party to an investor-state tribunal. This means that either disputing party would first have to recognize, and indeed acknowledge the need for civil society participation as a third party intervenor either because it would act as a representative of stakeholders, or is itself directly (or adversely) affected by the investor-state dispute.

Condition (ii) may not – *prima facie* – be relevant to the investor-state dispute context, but is rather applicable to international commercial arbitrations. Foreign investors submit claims pursuant to an IIA or BIT; rather than a contract containing an arbitration agreement. The 'arbitration agreement' mentioned in Article 17(5) does not exist in an investor-state arbitration context. Rather, the underlying IIA or BIT contains an 'offer to arbitrate'. That said, an IIA or BIT will typically include binding terms and

[1432] Article 1(4) states that: 'For investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors, these Rules include the UNCITRAL Rules on Transparency in Treaty based Investor-State Arbitration ("Rules on Transparency"), subject to Article 1 of the Rules on Transparency.' See, UNCITRAL Arbitration Rules, effective as of 01 April 2014, available at: http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf (last accessed 01 December 2014). Aside from Article 1(4), those newly amended rules contain the exact same provisions as the 2010 version. See UNCITRAL Arbitration Rules (2010), *supra* note 1303.

[1433] Article 17(5), UNCITRAL Arbitration Rules (2010), *supra* note 1303. See also G. Born, *supra* note 1173, at 2596-2597.

conditions of that 'offer'. These could include third party intervention. This means that either (i) IIAs or BITs need to be amended in order to set forth a right for third parties to request third party intervention or allow their joinder (just as is the case with numerous BITs recognizing the right of third parties to make *amicus curiae* submissions),[1434] as is reflected in the recent TTIP proposal;[1435] or (ii) arbitral tribunals would perhaps apply their discretionary powers in order to allow the intervention but not in the form of a joinder. In this respect, it is indeed clear that tribunals have a broad authority – previously confirmed in numerous arbitral precedents – most notably in order to take into account 'the public interest in transparency in treaty-based investor-state arbitration and in the particular arbitral proceedings'.[1436]

Finally, condition (iii) echoes a widely held concern that third party intervention could burden proceedings in general, and cause prejudice to one of the disputing parties (if not both).[1437] It is indeed worthy to recall that in exercising its discretion, such as potentially accepting third party intervention, tribunals must conduct the proceedings in a manner 'so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute'.[1438] In this light, tribunals have full authority to

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[1434] See for instance Article 21.11, US Trade Promotion Agreement with Peru, *supra* note 505; or Article 834, Canada-Peru Free Trade Agreement, *supra* note 170.

[1435] Article 23 of the draft TTIP text proposed by the European Commission provides that '(1) The Tribunal shall permit any natural or legal person which can establish a direct and present interest in the result of the dispute (the intervener) to intervene as a third party. The intervention shall be limited to supporting, in whole or in part, the award sought by one of the disputing parties… (3) If the application to intervene is granted, the intervener shall receive a copy of every procedural document served on the disputing parties, save, where applicable, confidential documents. The intervener may submit a statement in intervention within a time period set by the Tribunal after the communication of the procedural documents. The disputing parties shall have an opportunity to reply to the statement in intervention. The intervener shall be permitted to attend the hearings held under this Chapter and to make an oral statement'. See European Commission, *supra* note 17.

[1436] Under 'discretion and authority of the arbitral tribunal', the UNCITRAL Rules on Transparency provide that: '4. Where the Rules on Transparency provide for the arbitral tribunal to exercise discretion, the arbitral tribunal in exercising such discretion shall take into account: (a) The public interest in transparency in treaty-based investor-State arbitration and in the particular arbitral proceedings; and (b) The disputing parties' interest in a fair and efficient resolution of their dispute. 5. These Rules shall not affect any authority that the arbitral tribunal may otherwise have under the UNCITRAL Arbitration Rules to conduct the arbitration in such a manner as to promote transparency, for example by accepting submissions from third persons. 6. In the presence of any conduct, measure or other action having the effect of wholly undermining the transparency objectives of these Rules, the arbitral tribunal shall ensure that those objectives prevail'. Articles 4, 5, and 6, UNCITRAL Rules on Transparency, *supra* note 414.

[1437] G. Born, *supra* note 1173, at 2568-2567, 2597.

[1438] Article 17(1), UNCITRAL Arbitration Rules (2010), *supra* note 1303. This concern was indeed equally raised in the context of US litigation, where there has been an increasing recognition for the need to protect: (i) third parties' interest, (ii) disputing parties' interest in controlling the dispute, and (iii) the accuracy and efficiency of proceedings. See M. Harris, *supra* note 1082, at 881.

limit or place conditions or requirements on interventions for the purposes of enhancing (or safeguarding) the efficiency of proceedings.

In sum, Article 17(5) of the UNCITRAL Arbitration Rules not only was not intended to apply to investor-state arbitration, but also to civil society as a potentially joined third party. Perhaps the avail of the host state, acting as respondent, would be necessary in order to draw inspiration from Article 17(5) on third party joinder under the UNCITRAL Arbitration Rules – but this remains highly speculative. The sole possibility for civil society to act either as a third party intervenor, under the current investor-state arbitration framework, would solely depend on investor-state tribunals' discretion. Such discretion would allow civil society petitioners to benefit from the procedural entailments available to non-party third party intervenors as articulated under several IIAs or BITs or the ICJ's Statute – as further detailed below.

3.2.2 A last resort: The exercise of investor-state tribunals' discretion

This research fully recognizes that the addition of civil society petitioners as a disputing party to an investor-state dispute is problematic. If granted by an investor-state tribunal, it would certainly amount to an *ultra vires* order. Indeed, not a single IIA or BIT allows investor-state tribunals to add any third party to a dispute between an investor and a contracting state – other of course than contracting states who may, under some of these treaties, intervene as non-disputing third parties. Therefore, the application *strictu sensu* of Article 17(5) of the UNCITRAL Arbitration Rules is simply not feasible. Investor-state tribunals have to, instead, apply their procedural discretion and limit civil society's access as third party intervenors to 'non-party' intervention.

The United States-Peru BIT concretely reflects the modalities of such procedure:

> A Party that is not a disputing Party, on delivery of a written notice to the disputing Parties, shall be entitled to attend all hearings, to make written and oral submissions to the panel, and to receive written submissions of the disputing Parties…'.[1439]

In addition, the ICJ Rules of the Court provide that an intervening third state (i) gains access to case materials, including pleadings and documents, becomes entitled (ii) to

[1439] Article 21.11, United States-Peru BIT, *supra* note 505 (our emphasis).

submit a written statement, and (iii) make oral observations on the subject matter of its intervention.[1440]

Third party intervention would thus entirely depend on investor-state tribunals' discretion and authority under Article 17(1) of the 2010 UNCITRAL Arbitration Rules (or 15(1) of the 1976 UNCITRAL Arbitration Rules), Article 1 of the UNCITRAL Rules on Transparency,[1441] or Article 44 of the ICSID Convention.[1442] Civil society petitioners would face numerous challenges from both procedural and substantive standpoints – as evidenced by the arguments raised against, and the tribunals' decisions' on, petitions made to that effect in *UPS v. Canada* and *Aguas del Tunari v. Bolivia*.[1443]

There has been nonetheless a number of developments that have occurred since these two decisions, most notably including the full recognition of the *amicus curiae* procedure in investor-state disputes, as well as the possibility of allowing third party joinders under arbitrations governed by the 2010 UNCITRAL Arbitration Rules. It is therefore worthy to conclude this analysis with an *état des lieux* of those procedural and substantive challenges that might stand in the way of the possibility for civil society organizations to petition investor-state tribunals for third party intervention.

i. Procedural challenges

First, IIAs and BITs at this stage do not provide for the right to any third party to intervene in an investor-state dispute – aside of course from the now-recognized *amicus curiae* procedure and other states party to the investment agreement in certain agreements such as NAFTA. This legal void is paradoxically reminiscent of the state of the law at the time of the *Methanex v. the United States* decision.[1444] At that time, the *amicus* procedure had only been (i) regulated under domestic law rather than under IIAs or BITs; and (ii) limitedly accepted as a matter of practice, and subject to tribunals' procedural discretion, by the Iran US Claims Tribunal and the WTO Appellate Body.

[1440] Article 85, ICJ Rules of Court, *supra* note 852.
[1441] Article 1 of the UNCITRAL Rules on Transparency gives wide discretion and authority to investor-state tribunals: 'Where the Rules on Transparency provide for the arbitral tribunal to exercise discretion, the arbitral tribunal in exercising such discretion shall take into account: (a) The public interest in transparency in treaty-based investor-State arbitration and in the particular arbitral proceedings; and (b) The disputing parties' interest in a fair and efficient resolution of their dispute…'. See UNCITRAL Rules on Transparency, *supra* note 414.
[1442] Article 17(1) UNICTRAL Arbitration Rules, *supra* note 433; ICSID Convention, *supra* note 379.
[1443] UPS v Canada, *supra* note 1241; and Aguas del Tunari, S.A. v. The Republic of Bolivia, *supra* 716.
[1444] Methanex Corporation v. United States, *supra* note 428.

Having said that, the notion of third party intervention is far from alien to international law. As previously discussed, several BITs allow non-disputing state parties to act as third party intervenors. In addition, the ICJ allows third states to intervene in on-going proceedings based on 'non-party' intervention if they have a 'real and concrete interest'; i.e. that is underlying to a legal norm at stake. In such cases, third party intervenors do not become disputing parties – which may be of most relevance to civil society in investor-state arbitration.

Although investor-state tribunals might apply their procedural discretion and authority under the relevant arbitration rules in order to accept civil society's petitions to act as 'non-party' intervenors, criteria governing such acceptance would have to be developed. In this regard, investor-state tribunals might find it unhelpful to refer to the practice of previous international commercial arbitrations in an investment treaty arbitration context. Below is a proposition that might assist investor-state tribunals in this regard.

ii. Proposed criteria

Investor-state tribunals could refer to the criteria developed under US litigation where third party intervention is particularly resorted to in public interest cases, i.e. in cases that present numerous similarities with investor-state disputes.[1445] They could also refer to the ICJ's jurisprudence for guidance on determining the adequacy of third party intervention.[1446]

More relevantly, the criteria already developed for *amicus* participation could be built upon and adapted to civil society's third party intervention *mutatis mutandis*. As previously mentioned, the criteria governing *amicus* participation was summarized by the *UPS* tribunal as follows:

> *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

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[1445] Article 24(a)(2) of the Federal Rules of Civil Procedure for the US District Courts on 'intervention of right' contains contains four elements: (i) timeliness; (ii) the interest relating to the specific property or transaction at issue in the pending litigation; (iii) a threat that the movant's interest could be impaired by disposition of the action; and (iv) a lack of adequate representation of the movant's interest by either of the disputing parties. See J. Oakley, and V. Amar, *American Civil Procedure: A Guide to Civil Adjudication in US Courts* (2009), at 151; E. Shaver, *supra* note 1098, at 1552, M. Harris, *supra* note 1082, at 892; P. Appel, *supra* note 1095, at 227.
[1446] See Part II – Section 4.2.1.

> 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.[1447]

It is worthy to emphasize once more that the acceptance of *amicus curiae* is subject to the tribunal '*exercising its discretion*' as reiterated in the *UPS* decision. The same would apply to the acceptance of civil society's third party intervention. Criteria (a), (c), and (d) would also remain relevant and could actually be transposed *mutatis mutandis* to third party intervention. Criterion (b) on the other hand requires a more stringent construction. A '*sufficient interest in the outcome of the arbitration*' is not *sufficient* enough to justify third party intervention. As previously shown, non-disputing third party intervention is generally underlying to interests that are articulated as direct, significant, and legally protectable interests; real and concrete interests underlying a legal norm; legal interests; or substantial interests. [1448] Because third party intervention is an enhanced form of *amicus* participation, it logically entails a 'direct' interest that transcends the mere '*sufficient interest*' standard.[1449] Therefore, this research proposes a standard on the basis of a '*direct and substantial interest in the outcome of the arbitration*'.[1450]

Separately, the entire scope of what civil society may or may not do as a third party intervenor would entirely depend on an arbitral tribunal's discretion. For instance, they could preclude intervenors from making arguments on jurisdictional questions – as is the case for *amici curiae*.

In essence, nothing would preclude investor-state tribunals to use their discretionary powers in order to 'tailor' the third party intervention role of civil society in a manner that would best suit the arbitration process – as is done by US courts for example. As mentioned, depending on the facts and circumstances of each case, investor-state tribunals would finally have to decide the matter whilst taking into account the

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[1447] UPS v Canada, *supra* note 517, at para 7(iii) (our emphasis). See also Part III – Section 1.2.

[1448] See Part II – Section 4.2.

[1449] P. Palchetti, *supra* note 1153, at 181; and A. Zimmermann, *supra* note 55, at 13. See generally, Part III – Section 1.2.

[1450] The draft TTIP text proposed by the European Commission suggests a slightly different wording. Article 23(1) provides that 'the Tribunal shall permit any natural or legal person which can establish *a direct and present interest in the result of the dispute* (the intervener) to intervene as a third party'. See European Commission, *supra* note 17.

potential burden on the (i) efficiency of the proceedings and, more fundamentally, (ii) prejudice to the disputing parties.[1451]

There is undeniably an 'equality of arms argument' that could be made against third party intervention, even if it is premised on 'non-party' intervention as is suggested by this research.[1452] Equally, this argument had been made with respect to *amicus curiae* intervention, and in fact it remains relevant until now notwithstanding the formalization of the *amicus curiae* procedure.[1453] The answer of investor-state tribunals and institutions such as ICSID and UNCITRAL was to implement condition (d), i.e. 'the Petitioners' submissions can be received without causing prejudice to the disputing parties'.[1454] In this respect, investor-state tribunals have a wide discretion. For instance, they could order petitioners to pay costs to either disputing party, a decision that was reserved by the *Philip Morris v. Uruguay* tribunal.[1455] In essence, from a procedural standpoint, investor-state tribunals would be adhering to a similar screening as the one they engage in when facing *amicus* petitions.[1456] A screening that cannot be deemed as consistently in favour of *amicus* intervention in general, or civil society in particular, as clearly manifested by, *inter alia*, the recent decision in *Bernhard von Pezold v. Republic of Zimbabwe*.[1457] *In concreto*, investor-state tribunals would merely have to decide whether a third party

[1451] In looking at the potential expansion of the EU Commission's *amicus* intervention into third party intervention in the case of *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, Triantafilou posits that 'at the antipode of this argument [in favour of third party intervention] lies, of course, the additional time and money that the disputing parties must expend to address third party arguments that may be new, more expansive, and/or better informed than current practice allows for. Especially when such arguments support one side's position over the other (as was the case, for example, in AES, where Hungary stood to benefit from the EC's jurisdictional objection), tribunals will be wary of any prejudice introduced by increased amicus participation'. See AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary, *supra* note 58; and E. Triantafilou, *supra* note 18.
[1452] Equality of arms is enshrined under the New York Convention and the UNCITRAL Model Law. Article 18 of the latter provides that 'the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case'. See Article V(1)(b), New York Convention, *supra* note 381; and UNCITRAL Model Law, *supra* note 109. See also M. Livingstone, *supra* note 392, at 532.
[1453] T. Wälde, *supra* note 51, at 33 and see more generally the discussion under Part I – Section 1.5.
[1454] UPS v Canada, *supra* note 517, at para 7(iii). It is worthy to recall here the relevant provisions the ICSID Arbitration Rules, which states that 'the Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission'; and the UNCITRAL Rules on Transparency . See 37(2), ICSID Arbitration Rules, *supra* note 411 and.
[1455] In its procedural order accepting the Pan American Health Organization's *amicus* intervention, the tribunal decided 'the Tribunal reserves the right to make at the appropriate time an order for costs to be paid or reimbursed by the Petitioner should either Party request the reimbursement of properly documented costs it has incurred by reason of the Submission'. See Philip Morris v. Uruguay, *supra* note 821, at para 32.
[1456] See investor-state tribunals' analysis on *amicus* admissibility under Part I – Section 3.
[1457] *Bernhard von Pezold v. Republic of Zimbabwe*, *supra* note 823. See also Apotex v. the United States, *supra* note 56, at 43-44 and note 59, at 33, 37. For further elaboration, see the discussion under Part I – Section 5.1.

should be restricted to submitting a brief as an *amicus curiae* or engage in the arbitration as a *third party intervenor* – again, depending on the facts and circumstances of each case.[1458]

iii. Substantive challenges

Ideally, IIAs and BITs should be amended, or new agreements should be negotiated, to explicitly recognize that non-disputing parties' '*direct and significant interest in the outcome of the arbitration*' justifies intervention – if and when such interest is affected by investor-state disputes. This concept would not be foreign to the international law on foreign investment given that a number of IIAs and BITs already recognize third party intervention for non-disputing contracting parties as previously discussed.[1459]

Having said that, the *amicus curiae* procedure is now recognized in investment treaty arbitration. It will be therefore necessary for civil society organizations seeking to act as third party intervenors to justify an alternative, more enhanced, more complex access to investor-state tribunals. This would likely require a motive that is not merely based on the 'broader' public interest' issues typically at stake in investor-state disputes. A rather more robust argumentation would have to be put forward in cases where the 'direct' interests of third parties, and not solely the 'broader' public interest, may be (adversely) affected. This would often require a compelling case for the relevance or nexus between human rights or environmental protection on the one hand, as recognized under international law instruments or municipal law, and the investor-state arbitration on the other. This means that the facts and circumstances of each case will be pivotal factors that civil society ought to coherently and robustly articulate in its favour if ever it wishes to gain a more enhanced access to investor-state tribunals. In turn, a coherent and robust articulation entails a challenging burden on civil society to show investor-state tribunals that issues raised by third party interventions would not only fall outside the scope of the substantive matters under their jurisdiction, but also not be repetitive of the disputing parties' arguments. Civil society would be thus required to solely address those factual

[1458] For a summary of the difference between both procedures, see Part III – Section 1.2.
[1459] See Part II – Section 4.2.2.

and legal matters that investor-state tribunals need to take into consideration to adjudicate host state responsibility vis-à-vis foreign investors pursuant to the applicable IIA or BIT.

In more practical terms, part of the problem for civil society to come up with coherent and robust arguments is that case materials, or even the existence of an arbitration, are often confidential. Civil society petitioners would therefore be in a difficult position to seek leave from investor-state tribunals to participate in proceedings, and robustly articulate their substantive arguments for such participation accordingly, if they only have vague ideas about the case subject matter, the issues at stake and the disputing parties' positions. The newly-amended ICSID Arbitration Rules and recently-enacted UNCITRAL Rules on Transparency discussed above should change this situation and provide increasing opportunities for the publicity of investor-state arbitration.[1460] In turn, and as mentioned, the onus would be on civil society to coherently and robustly articulate its arguments in a manner that matches the typical complexity of the subject matter as well as the level of sophistication of investor-state tribunals and the disputing parties, who are consistently represented by a selective pool of highly technical and qualified arbitrators and lawyers from international law firms.[1461]

[1460] See Part I – Section 1.5.3.

[1461] Various empirical studies clearly suggest the dominance by international law firms of the investor-state dispute settlement 'regime'. See for instance C. Olivet and P. Eberhardt, *infra* note 1470. See also P. Sergio, 'Social Capital in the Arbitration Market', (2014) 25:2 European Journal of International Law 388.

[1462] R. Field et al., *supra* note 1084, at 986 citing J. Friedenthal, 'Increased Participation by Non-Parties: The Need for Limitations and Conditions', (1980) 13 University of California Davis Law Review 259, at 261-263.