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

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THE ROLE OF CIVIL SOCIETY IN INVESTMENT TREATY ARBITRATION: STATUS AND PROSPECTS

Farouk Fahmi El-Hosseny

THE ROLE OF CIVIL SOCIETY IN INVESTMENT TREATY ARBITRATION:
STATUS AND PROSPECTS

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إلى أبي العزيز

(TO MY DEAR FATHER)

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ABBREVIATIONS

ACHPR – African Commission for Human Rights

ASEAN – Association of South East Asian Nations

BITs – Bilateral Investment Agreements

CEDAW – Convention on the Elimination of all Forms of Discrimination against Women

CERDS – Charter of Economic Rights and Duties of States

CESCR – Committee on Economic, Social and Cultural Rights

DSU – Dispute Settlement Understanding

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

ECOSOC – United Nations Economic and Social Council

ECOWAS – Economic Community of West African States

EU – European Union

GATT – General Agreement on Tariffs and Trade

GATS – General Agreement on Trade in Services

FDI – Foreign direct investment

FTA – Free Trade Agreements

FTC – NAFTA Free Trade Commission

IACHR – Inter-American Convention on Human Rights

IACtHR – Inter-American Court for Human Rights

ICC – International Chamber of Commerce

ICCPR – International Covenant on Civil and Political Rights

ICESCR – International Covenant on Economic, Social and Cultural Rights

ICJ – International Court of Justice

ICSID – International Center for Settlement of Investment Disputes

IIAs – International Investment Agreements

ILC – International Law Commission

ITO – International Trade Organization

MAI – OECD Multilateral Agreement on Investment

NAFTA – North American Free Trade Agreement

NAALC – North American Agreement on Labor Cooperation

UNCED – United Nations Conference on Environment and Development

UNCITRAL – United Nations Commission on International Trade Law

UNCTAD – United Nations Conference on Trade and Development

UNDRIP – United Nations Declaration on the Rights of Indigenous Peoples

UNIDROIT – International Institute for the Unification of Private Law

SIAC – Singapore International Arbitration Center

OAS – Organisation of American States

TBT – Agreement on Technical Barriers to Trade

TRIPS – Agreement on Trade-Related Aspects of Intellectual Property Rights

TTIP – Trans-Atlantic Trade and Investment Partnership

WTO – World Trade Organisation

INTRODUCTION

In 2001, the tribunal in *Methanex v. the United States* allowed three civil society organizations[1] to submit written briefs or, in other words, *amicus curiae* briefs, as non-disputing third parties. The two sole parties to this arbitration were Methanex, a Canadian methanol producer, on the one hand; and the United States, a North American Free Trade Agreement (NAFTA) contracting party, on the other. The applicable law, i.e. NAFTA Chapter XI, and the applicable procedural rules, i.e. the 1976 UNCITRAL Arbitration Rules, do not contain any explicit provision that entitles arbitral tribunals to accept *amicus curiae* briefs. Notwithstanding the legal void, the *Methanex* tribunal relied on its discretionary procedural powers to accept these *amicus* submissions. It based its decision on both procedural and substantive interlocking considerations. With respect to the latter, the tribunal stated that '*there is an undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties*'.[2] The decision to accept the *amicus* submissions in *Methanex* not only set an important precedent, but also established a quasi-consensual assumption – the intervention of civil society as *amicus curiae* in investment treaty arbitrations would be considered as a means for addressing the 'broader' public interest at stake in such arbitrations.

The phenomenon of civil society's role in investment treaty arbitration has not, however, been confined to the ambit of *amicus* intervention. Civil society petitioners sought access as *third party intervenors* in other less frequent, yet equally important, cases. These cases closely related to public policy or human rights issues that not only concerned the *public's* 'broader' *interest*, but also affected the *direct interests* of certain communities or groups that those petitioners purported to represent.

One such case is the *Aguas del Tunari v. Bolivia* arbitration.[3] The arbitration arose out of Bolivia's revocation of a privatization concession awarded to Bechtel's subsidiary

[1] Those were the International Institute for Sustainable Development, the Communities for a Better Environment and the Earth Island Institute.
[2] Methanex Corporation v. United States, *infra* note 428, at para 49 (our emphasis).
[3] Aguas del Tunari, S.A. v. The Republic of Bolivia, *infra* note 533.

(Aguas del Tunari)[4] for the operation and management of water systems in the city of Cochabamba.[5] The company had implemented, what is alleged as, a sharp increase in water prices.[6] It was contended that the price-increasing measures severely affected the most disenfranchised segments of Cochabamba's population. Aguas del Tunari had, according to civil society petitioners, effectively undermined Cochabambans' right to access water. Affected communities from Cochabamba and its surrounding areas had carried out widespread protests over months, including civil disobedience and the blockade of the city. Bolivian police and army forces were deployed *en masse* and often met protesters with violence, which lead to the killing of a protester and the injury of a hundred others.[7] This tragic series of events was coined as '*La Guerra del Agua*'.

Perhaps paradoxically, or perhaps not, Bolivia had fully supported, and was effectively in need of, Aguas del Tunari's water distribution investments and services in its arguably deficient and poorly managed municipal water systems. This precisely echoes the reason why states, such as Bolivia and others, have entered into over 3,000 international or bilateral investment agreements/treaties ('IIA's or 'BIT's) in the first place.[8] By promoting and protecting foreign investments under international law, states

[4] Bechtel is a major US multinational, specialized in infrastructure projects including the provision of water services.

[5] Bolivia on the other hand is Latin America's poorest nation and Cochabamba is its third largest city. The city has been for long suffering from staggering levels of poverty and deficiencies in access to water. It is also worthy to note that indigenous peoples also represent the majority of Bolivia's population. See C. Ledo, '*Contaminación ambiental y pobreza en Bolivia: El caso de la periferia sur de Cochabamba*', (2010) 18 *Revista Brasileira de Ciências Ambientais* 25, at 32; and World Bank, 'Bolivia – Highlights: Indigenous Peoples, Poverty and Human Development in Latin America', available at: http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/LACEXT/0,,contentMDK:20505835~pagePK:146736~piPK:14683 ~theSitePK:258554,00.html (last accessed 06 October 2014).

[6] Arguably in order to cover the capital expenditures and operation costs of the water distribution concession.

[7] Civil society also mobilised against Bechtel on a global scale. Joseph Stiglitz branded Bechtel's measures as manifest evidence of 'corporate evil'. A popular Academy Award-nominated motion picture entitled 'Even the Rain' also dramatized the events. See J. Stiglitz, *supra* note 101, at 187.

[8] Proponents of investor-state arbitration such as The Honourable Charles Brower argue that 'the evidence is overwhelming, however, that the current system of international protection for foreign investment benefits developing states… There has long been consensus that foreign direct investment increases national income and employment and accelerates development and modernization, including by establishing valuable tangible assets within the host country, promoting the development of human capital, facilitating the acquisition of technical knowledge, and creating network effects that create opportunities for future market access abroad'. See C. Brower and S. Blanchard, 'What's in a Meme? The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States', (2014) 52 Columbia Journal of Transnational Law 689, at 701-703. Even vehement critics of the current system do concede that 'there is no doubt' that foreign investments by multinationals benefit host states. See M. Sornarajah, 'A Law for Need or a Law for Greed?: Restoring the Lost Law in the International Law of Foreign Investment', (2006) 06 International Environmental Agreements 329, at 331, 333.

avidly seek to attract foreign capital into their economies, including in key sectors such as water treatment and distribution.

Bolivia was, however, compelled to change course as a result of the immense public pressure by subsequently revoking the concession.[9] The Bolivian government's position had been in fact diametrically opposite to that of those adversely affected communities in Cochabamba – a crucial point to note for the purposes of this research. Crucial because it is now a recurring phenomenon for host states to adopt positions vis-à-vis foreign investments that conflict with the positions of their populations, or at least segments thereof.[10]

The revocation of Aguas del Tunari's concession triggered an arbitral claim against Bolivia under the Netherlands-Bolivia BIT.[11] Following Bolivia's unsuccessful attempt to dismiss the tribunal's jurisdiction,[12] the tribunal received a request for '*standing*' to intervene as third parties, or in the alternative as '*amicus curiae*', by a number of international and Bolivian civil society petitioners purporting to comprise and represent the adversely affected communities who opposed and contested Bechtel's water price increase.[13] They contended to have a myriad of facts and legal arguments to raise to

[9] Bechtel filed an ICSID case against Bolivia that it later settled due to the immense public pressure and negative publicity it faced. Prior to that, Bolivia unsuccessfully contested the ICSID tribunal's jurisdiction in order to dismiss Bechtel's claim. Again, this may be viewed in many ways as futile given that Bolivia approved the privatization and Bechtel's price-increasing measures all along, resisted those protesting against such measures; and, according to Bechtel, ultimately failed to protect the latter's investments.

[10] Bolivia's conflicting position is in fact similar to a position adopted by Mexico in the subsequently discussed case of *Metalclad v. Mexico*. See Metalclad Corporation v. United Mexican States, *infra* note 257. See also C. Schreuer, U. Kriebaum, *infra* note 617, at 1091.

[11] The BIT includes standards such as the right to national treatment, fair and equitable treatment, the most-favoured-nation treatment, prompt, adequate, as well as effective compensation in case of expropriation, and more fundamentally, the right to submit a claim against Bolivia, on the basis of violations of those standards, in front of an arbitral tribunal constituted under the ICSID Arbitration Rules. See also Articles 3 and 9 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Bolivia, entered into force 01 November 1994, available at: http://investmentpolicyhub.unctad.org/IIA/CountryBits/24#iiaInnerMenu (last accessed 06 October 2014). It is worthy to note here that Bolivia terminated this BIT in 2009. See also ICSID Arbitration Rules, *supra* note 411. Regarding the intricate corporate structures created by multinationals in order to benefit from BIT protection, see for instance J. Maupin, *infra* note 48, at 12.

[12] Bolivia's objection was later dismissed. See Aguas del Tunari, S.A. v. The Republic of Bolivia, *Decision on Respondent's Objections to Jurisdictions of 21 October 2005*.

[13] Those were the Coordinadora para la Defensa del Agua y la Vida (meaning the 'association for the defense of water and life'), Federación Departamental Cochabambina de Organizaciones Regantes (meaning 'Cochabamba Federation of Irrigators' Organizations'), SEMAPA Sur, Friends of the Earth-Netherlands, Oscar Olivera, Omar Fernandez, Father Luis Sánchez, and Congressman Jorge Alvarado. The petitioners were represented by Earthjustice. See the petitioners' requests at Aguas del Tunari, S.A. v. The Republic of Bolivia, *infra* 716, at para 34, 63.

the attention of the tribunal, and essentially alleged that (i) the sharp water price increase undermined the Cochabamban community's 'right to access water', including customary water usage rights recognized under Bolivian law; and moreover, (ii) the adjudication of Aguas del Tunari's claim could have a significant impact on Bolivia's ability to promote and protect the public welfare.[14]

The tribunal unanimously dismissed civil society's third party intervention petitions. It found that it lacked the power to 'join a non-party to the proceedings'.[15] Indeed, states have architected investment treaty arbitration as a dispute settlement process that solely involves two disputing parties with predefined roles, i.e. investors from contracting home states as claimants and contracting host states as respondents.[16] This means that no matter how compelling a third party intervention might be, because it covers sensitive human rights issues or otherwise; third parties have, according to the tribunal, no role to play as additional disputing parties in investor-state arbitration.

Since the *Methanex* and *Aguas del Tunari* decisions, procedural rules governing *amicus curiae* submissions to investor-state tribunals have been gradually formalized. Third parties may now submit written briefs as *amici curiae* – subject of course to the applicable treaty and arbitration rules. The issue of third party intervention has been, however, left unaddressed. It was assumed that third party intervention equates to the addition or joinder of a party to proceedings and that, therefore, it falls outside the jurisdiction of investor-state tribunals. Recently, Cecilia Malmström, the EU Commissioner for Trade, has brought the issue to the fore with a concept paper that includes various proposals for an overhaul of investor-state arbitration. The paper provides that '[i]n addition to the possibility for the Tribunal to accept *amicus curiae* briefs, the EU proposal should confer a right to intervene to third parties with a *direct and existing interest* in the outcome of a dispute'.[17]

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[14] *Ibid*., at para 18, 23.
[15] Aguas del Tunari, S.A. v. The Republic of Bolivia, *infra* note 539, at 1.
[16] See generally, W. Ben Hamida, *L'arbitrage transnational unilatéral: réflexions sur une procédure réservée à l'initiative d'une personne privée contre une personne publique* (2007).
[17] The paper also mentions that '[the EU-Canada Comprehensive Economic and Trade Agreement] and the EU/Singapore FTA provide for the possibility that the arbitration tribunal "may" accept *amicus curiae* briefs from third parties under certain conditions, in line with recently agreed UNCITRAL Rules on Transparency. But they do not specifically provide for right to intervene to persons with a clear and concrete interest in the case'. See C. Malmström, European Commission, 'Investment in TTIP and beyond – the path for reform: Enhancing

In this light, this research is concerned with understanding the regulation of both the *amicus* and third party intervention procedures, the differences between them, and to reflect on their adequacy as procedural vehicles for civil society participation in investor-state arbitration.[18]

1. Research aim and problem statement

i. Research aim

By first examining civil society's recently recognized *amicus curiae* role in addressing the 'broader' *public interest* at stake in investor-state arbitration, this research aims to provide a comprehensive understanding of civil society's role as practiced hitherto. It then considers whether such role may be equally adequate whenever investor-state arbitrations closely relate to environmental protection, public health, human rights or other public policy issues that could potentially affect the *direct interests* of certain communities or groups who are third parties to arbitration proceedings.

This research therefore scrutinizes civil society's *amicus* role and questions whether it constitutes the most enhanced form of access within the jurisdictional ambit set by IIAs or BITs, and whether it may be expanded. It will also consider whether third party intervention necessarily equates to the joinder of an additional party to arbitration proceedings.

The aim of this research is thus to first understand the current status of civil society's role in investor-state arbitration as amicus curiae and to subsequently assess its prospects therein as a third party intervenor.

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the right to regulate and moving from current *ad hoc* arbitration towards an Investment Court', 5 May 2015, available at: http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF (last accessed 10 May 2015), at 7–8 (the "European Commission Concept Paper"). This proposal has been since confirmed in the Commission's draft TTIP text. Article 23(1) of the draft 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, 'Commission Draft Text TTIP, Chapter II – Investment', September 2015, available at: http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf (last accessed 1 October 2015).

[18] In the line of the EU Commission proposal discussed above, other practitioners have also addressed the need to consider expanding the *amicus curiae* practice into third party intervention to the benefit of the European Commission, see E. Triantafilou, 'A More Expansive Role For Amici Curiae In Investment Arbitration?', *Kluwer Arbitration Blog*, 11 May 2009, available at: http://kluwerarbitrationblog.com/blog/2009/05/11/a-more-expansive-role-for-amici-curiae-in-investment-arbitration/ (last accessed 06 October 2014).

ii. Problem statement

The analysis undertaken in this research serves the purpose of answering the following problem statement:

Which procedural capacity could govern civil society's participation in investor-state arbitration and under what conditions?

iii. Research questions

Part I is entitled 'The Function and Modalities of Civil Society Participation Before Investor-State Disputes', it raises the following questions:

a) *What is the underlying background to the acceptance of civil society participation as amicus curiae in investor-state disputes?*
b) *What is the public interest at stake in investor-state arbitration?*
c) *Is there a need for civil society to raise public interest issues in addition to the host state?*
d) *To what extent does the influence of the international commercial arbitration model facilitate or obstruct civil society's participation in investor-state arbitration?*
e) *What was the reasoning behind investor-state tribunals' acceptance of civil society participation?*
f) *Has the acceptance of civil society participation been formalized?*
g) *How is civil society participation regulated?*
h) *What are the substantive arguments raised by civil society and are they relevant to the adjudication of investor-state disputes?*
i) *Are there any conclusions that may be drawn from civil society's participation as amicus curiae and are there limitations to such role?*
j) *To what extent does the current framework offer sufficient access to civil society to raise public interest issues?*

Part II is entitled 'The Function and Modalities of Civil Society Participation Before Other Jurisdictions: Four Models', it raises the following questions:

(a) *Which tribunals or jurisdictions allow civil society participation?*

(b) *What are the modalities available for civil society in other tribunals or jurisdictions?*

(c) *How is civil society's participation as amicus curiae regulated in other tribunals or jurisdictions?*

(d) *How third party intervention is regulated and is it available to civil society?*

(e) *What does standing by civil society entail?*

(f) *To what extent could models on civil society participation in other jurisdictions be transposed to enhance the status of civil society in investor-state arbitration?*

Part III is entitled 'An Enhanced Role for Civil Society Before Investor-State Tribunals?', it finally deals with the following questions:

(a) *Is there a need to transcend the amicus curiae procedure in an investor-state dispute settlement context?*

(b) *What were civil society's arguments in requesting third party intervention and what did investor-state tribunals decide?*

(c) *Are civil society's access to justice arguments valid?*

(d) *How should civil society's participation under the third party intervention procedure be regulated?*

(e) *Would investor-state tribunals exceed their jurisdiction by enhancing civil society's role in arbitration proceedings?*

2. Conceptual framework

This section aims to capture this research's understanding of three fundamental and systematically recurring concepts, i.e. 'civil society', '*amicus curiae*' and 'third party intervention'. The scope and actual meaning of each of those concepts are divisive. It is therefore important to provide, albeit succinctly, a preliminary understanding of these concepts for the purposes of the present research.

i. The concept of 'civil society'

The terms 'civil society', 'civil society actors', or 'civil society organizations' shall be used interchangeably throughout this study. Given its centrality, this section explores the use of the 'civil society' concept in international law contexts and then delimits its scope specifically for the purposes of this research. Particularly, this aims to debunk the perception that NGOs are the sole or primary constituents of civil society. As will be shown directly below, the concept of 'civil society' is more encompassing and faithful to the diversity of the actors that participate in international adjudication.

a. The socio-political dimension of 'civil society'

Although not to be construed as a general rule, civil society organizations are often advocates of public interest issues both at the domestic and international levels.[19] This understanding of 'civil society' is echoed in various disciplines. From a sociological standpoint for instance, Jürgen Habermas sees civil society as including NGOs, spontaneously emergent associations, organizations, and movements that 'attuned to how societal problems resonate in the private life spheres, distil and transmit such reactions in the amplified form to the public sphere'.[20] Habermas' definition stresses on another key

[19] This is also reflected in Logister's socio-political analysis of civil society. Logister identifies three theoretical models of civil society: an analytical, normative, and 'public sphere' models. Under the first model, civil society comprises all social associations that extend beyond the family excluding formal political institutions, firms, and criminal and terrorist organizations. Under the normative model, it underlines the special 'civil rationality' that guides its associations towards the realization of their view of a better world, it becomes a metaphor for the good society, which means a society that is 'civil'. Under the latter model, it stresses the importance of active citizenship in pursuit of the common interest, by way of public deliberation, rational dialogue and public action. See L. Logister, *infra* note 118, at 165-167 citing Michael Edwards.

[20] J. Habermas, *Contributions to a Discourse Theory of Law and Democracy* (1996), at 366-367.

feature of civil society: it comprises a network of associations that are concerned with questions of general interest inside the framework of organized public spheres. In addition, Habermas' understanding of 'civil society' excludes actors linked to economic or market interests – in contrast to the Marxist tradition.[21] The role of civil society in this regard challenges the *État providence* paradigm. It does not fit for instance with Hegel's view of states as the 'higher authority, in regard to which the laws and interests of the family and community are subject and dependent'.[22]

b. Identifying 'civil society' in an international law context

The concept of 'civil society' is chimerical, in particular in an international law context, because it combines far too many heterogeneous elements.[23] It is also a polemical and divisive one; no consensus exists on a single definition. Other adjectives are often adjoined to the term 'civil society' such as 'global'[24], 'international',[25] or 'transnational',[26] thereby fuelling further confusion. The versatile use of the terms 'NGO' and 'civil society' exacerbates this.[27] The Aarhus Convention refers to 'non-

[21] *Ibid*., at 366.
[22] A. W. Wood (ed.), *Hegel: Elements of the Philosophy of Right* (1991), para 261.
[23] On the chimerical characteristic of civil society, see J. Yvon Thériault, *La Société Civile, Ou, La Chimère Insaisissable* (1985); and M. Amouroux, 'La société civile globale: une «chimère insaisissable» à l'épreuve de la reconnaissance juridique', (2007) 12:02 Lex Electronica.
[24] See L. Logister, *infra* note 118, at 165. For a discussion relating to 'international' NGOs (both the 'NGO' and 'civil society' concepts are used interchangeably) and the concept of 'global civil society', see M. Majlessi, *infra* note 110, at 83, 97.
[25] See for instance the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations, entered into force 01 January 1991, available at: http://conventions.coe.int/Treaty/en/Treaties/Html/124.htm (last accessed 06 October 2014). Article 1 states that: 'This Convention shall apply to associations, foundations and other private institutions (hereinafter referred to as "NGOs") which satisfy the following conditions: have a non-profit-making aim of international utility; have been established by an instrument governed by the internal law of a Party; carry on their activities with effect in at least two States; and have their statutory office in the territory of a Party and the central management and control in the territory of that Party or of another Party.'. See also Ibid, at 85.
[26] See for instance A. Florini, (ed.), *The Third Force: The Rise of Transnational Civil Society* (2012).
[27] The fact that the concept 'civil society' is resorted to instead of 'NGOs' reflects this research's concern to transcend a growing perception that NGOs are essentially human rights and environmental protection lobbying 'machines' made up of organizations based in developed states. This view is somewhat reflected in Sornarajah's following statement which points to the fact that: 'a new phenomenon that has emerged in the area is the role of non-governmental organisations (NGOs) committed to the furtherance of environmental interests and human rights and the eradication of poverty. These NGOs operate within developed states and espouse, to a large extent, what they believe to be the interests of the people of the developing world and the world as a whole'. This is also echoed due to the participation of renowned NGOs such as Amnesty International in landmark and highly publicized cases such as the Pinochet saga in front of UK courts. See M. Sornarajah, *infra* note 221, at 4. See also Regina v Bartle and the Commissioner of Police for the Metropolis ex parte Pinochet (No 1) [1998] 3 WLR 1456.

governmental organizations' in its definition of the 'public concerned'.[28] While referring to organizations such as the International Association of Penal Law and Amnesty International, Judge Van den Wyngaert stated in her dissent in the *Arrest Warrant* case that the 'opinion of civil society [cannot be] completely discounted in the formation of customary international law today'.[29] Pascal Lamy stated in a speech that 'civil society is influencing the WTO agenda'.[30] Kofi Anan described 'civil society' as the 'new superpower'.[31] Both of these figures interchangeably referred to the terms 'civil society' and 'NGO' in their speeches.

It is important to first note that civil society is primarily a 'non-state actor' in international law, i.e. it has the same status as foreign investors under international law.[32] Inspired by Fernando Enrique Cardoso's report on UN-civil society relations,[33] this research identifies three basic fundamental assumptions to the concept of 'civil society', i.e. (i) civil society is free from governmental or corporate influence; (ii) its membership

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

[29] Judge Van Den Wyngaert was discussing the issue of the recognition of the principle of individual accountability for international core crimes. See Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), International Court of Justice (ICJ), 14 February 2002, *Dissenting opinion of Judge ad hoc Van den Wyngaert*, at para 27.

[30] P. Lamy, 'Civil Society Is Influencing The WTO Agenda', 04 October 2007, available at: http://www.wto.org/english/news_e/sppl_e/sppl73_e.htm (last accessed 10 August 2013). See also WTO, 'Relations with Non-Governmental Organizations/Civil Society', available at: http://www.wto.org/english/forums_e/ngo_e/intro_e.htm (last accessed 02 April 2013).

[31] UN Press Release, 'Secretary-General Describes Emerging Era In Global Affairs With Growing Role For Civil Society Alongside Established Institutions', 14 July 1998, available at: http://www.un.org/News/Press/docs/1998/19980714.sgsm6638.html (last accessed 10 August 2013).

[32] Private corporations, civil society organizations, armed groups, rebel groups, non-state political entities, national liberation movements, criminal organizations, and individuals, etc. may all be considered as non-state actors – from a general international law perspective. For present purposes, references to non-state actors shall solely include individuals, private corporations – including most notably foreign investors and multinationals, as well as civil society organizations. Such a definition is more relevant to the international law on foreign investment, and serves the purpose of highlighting a key aspect inherent to international adjudication, i.e. there are inter-state dispute settlement jurisdictions, which solely involve states such as the ICJ's; and other hybrid jurisdictions which involve non-state actors and states such as investor-state tribunals or international human rights jurisdictions.

[33] 'Civil society refers to the associations of citizens (outside their families, friends and businesses) entered into voluntarily to advance their interests, ideas and ideologies. The term does not include profit-making activity (the private sector) or governing (the public sector). Of particular relevance to the United Nations are mass organizations (such as organizations of peasants, women or retired people), trade unions, professional associations, social movements, indigenous people's organizations, religious and spiritual organizations, academic and public benefit non-governmental organizations'. See UN General Assembly, 'Report of the Panel of Eminent Persons on United Nations–Civil Society Relations', dated 11 June 2004 (A/58/817), at 13.

is associative and voluntary; and (iii) its aim excludes the pursuit of profit or the representation of corporate or business interests.[34]

c. Transcending the 'NGO paradigm': The diversity of civil society groups involved in international adjudication

Notwithstanding the nebulousness of civil society, one preliminary, yet fundamental, caveat bears stressing: there is an advantage when looking at the concept of 'civil society' from an international adjudication standpoint. The international tribunals of interest to this research systematically require civil society petitioners – as in fact any other third party – to clearly identify themselves as a general condition for granting them access. By looking at cases involving civil society, and through *ratione personae* criteria, one is able to pinpoint *in concreto* what and who is comprised within 'civil society'. Equally, through *ratione materiae* criteria, one is able to assess what message or, in other words, what factual and legal arguments does civil society purport to raise before international tribunals. This conveniently allows this research to adopt an idiosyncratic approach to the concept of 'civil society' that may not be helpful to other areas of international law or policy.[35]

As mentioned above, the focus in the literature seems to be primarily on 'major NGOs'[36] such as Amnesty International, Earthjustice, or the Center for Justice and

[34] See M. Majlessi, *infra* note 110, at 83 et seq.

[35] In a similar vein, the UN Economic and Social Council (ECOSOC) has an accreditation procedure for civil society organizations seeking consultative status that does in turn allow it to clearly identify them – again, for its own purposes. The consultative status at ECOSOC namely allows civil society organizations to attend meetings, propose provisional agenda items, and make written statements. Accreditation requirements include the following: applying organization's activities must be relevant to the work of ECOSOC; the NGO must have been in existence (officially registered) for at least 2 years in order to apply; the NGO must have a democratic decision making mechanism; the major portion of the organization's funds should be derived from contributions from national affiliates, individual members, or other non-governmental components. More generally, its aims and purposes should be in conformity with the spirit, purposes and principles of the UN Charter. As of 01 September 2013, there were 147 organizations in general consultative status and 2,774 in special consultative status. See ECOSOC Resolution 1996/31, 'Consultative relationship between the United Nations and non-governmental organizations', dated 25 July 1996, available at: http://www.un.org/documents/ecosoc/res/1996/eres1996-31.htm (last accessed 06 October 2014), ECOSOC, 'List of non-governmental organizations in consultative status with the Economic and Social Council as of 1 September 2013', dated 04 October 2013, available at: http://csonet.org/content/documents/e2013inf6.pdf (last accessed 06 October 2014). See also M. Majlessi, *infra* note 110, at 179.

[36] See for instance L. Hitoshi Mayer, *supra* note 911; S. Charnovitz, 'The Illegitimacy of Preventing NGO Participation', (2011) 36 Brooklyn Journal of International Law 891, at 898. See also a description of NGOs in the context of international adjudication in N. Vajic, 'Some Concluding Remarks on NGOs and the European Court of Human Rights', in Treves, T., et al. (eds.), *Civil Society, International Courts, and Compliance Bodies* (2005), at 93. See also an elaborate description of Amnesty International's experience in international

International Law, which are often portrayed as the main actors of civil society in international adjudication.[37] The diversity and heterogeneity of civil society is often forgotten.[38] Yet, this research has identified, *inter alia*, the following groups or actors in international adjudication: NGOs such as the World Wildlife Fund (WWF), faith-based associations such as the *Fundación de Ayuda Social de las Iglesias Cristianas*, indigenous organizations or associations such as the Quechan Indian Nation or the Endorois Welfare Council,[39] gender-focused associations such as the Tanzania Gender Networking Programme, epistemic communities or research institutions such as the International Institute for Sustainable Development (IISD), trade unions such as the Canadian Union of Postal Workers, and other associational bodies aimed at representing local communities or groups, i.e. what the UN call 'mass organizations',[40] including small-scale farmers for example, such as the *Coordinadora de Itoiz* or the *Federación Departamental Cochabambina de Organizaciones Regantes*.[41]

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adjudication in D. Zagorac, 'International Courts and Compliance Bodies: the Experience of Amnesty International', in Treves, T., et al. (eds.), *Civil Society, International Courts, and Compliance Bodies* (2005), at 11.

[37] These organizations have acted in a number of cases such as the case filed by Amnesty International at the ACHPR on behalf of two political dissidents, William Steven Banda and John Lyson Chinula, who were deported from Zambia. See *Amnesty International* v. *Zambia*, Decision of 5 May 1999, ACHPR (212/98); or the case of Inuit Circumpolar Council (ICC), *Petition to the Inter-American Commission on Human Rights seeking relief from violation resulting from global warming caused by acts and omissions of the United States* (2005) where Earthjustice and the Center for International Environmental Law filed the petition on behalf of the ICC. And, see Hitoshi Mayer's exhaustive study of the concentration of NGO intervention in international human rights jurisdictions, including a study of the cases presented by the CEJIL. See L. Hitoshi Mayer, *supra* note 911, at 932.

[38] 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 174.

[39] Tramontana questions whether indigenous organizations or associations (such as the Endorois Welfare Council) should be separated from indigenous self-governing organizations and institutions (such as the Quechan Indian Nation). Indeed, indigenous organizations or associations refer to bodies created by indigenous peoples at the local, national or international level, to promote their interests through collective action and common representation; whilst indigenous self-governing organizations and institutions rather refer to bodies which administer indigenous communities and have regulatory functions within those communities in variable degrees depending on the domestic legislation governing their status. A distinction is not merited in the context of international adjudication since both organizations would be, and were effectively, treated as non-state actors and/or non-disputing parties depending on the jurisdiction. When soliciting international jurisdictions, both seek to ultimately further indigenous concerns and rights in disputes where their constituents were direct stakeholders or victims of human right violations. See 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 177.

[40] UN General Assembly, 'Report of the Panel of Eminent Persons on United Nations–Civil Society Relations', *supra* note 33, at 13.

[41] The civil society organizations used as examples above have participated in international cases examined in this study. For the WWF, see *Shrimps* case, *infra* note 1018; the Fundación de Ayuda Social de las Iglesias Cristianas, see Castillo Petruzzi et al. v. the Republic of Peru, *infra* note 943; the Quechan Indian Nation, see

The case law therefore shows a wide array of civil society actors who could play a potentially active role in international adjudication. This diversity reflects in fact the categories set out under the UN's ECOSOC registration system for civil society organizations – the 'Integrated Civil Society Organization System'.[42]

Separately, indigenous civil society groups and associations[43] are of a particular interest to this research.[44] International cases involving indigenous groups are abundant.[45] These groups often forge alliances with other civil society organizations when attempting to access international justice.[46] Such alliances add to the complexity of the matter and

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Glamis Gold Ltd v. United States, *infra* note 496; the Endorois Welfare Council, see *CEMIRIDE* and *MRG on behalf of EWC* v. *Kenya*, *infra* note 608; the Tanzania Gender Networking Programme, see Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania, *infra* note 456; the IISD, see Methanex Corporation v. United States, *infra* note 428; Canadian Union of Postal Workers, see UPS v. Canada, *supra* note 517; the Coordinadora de Itoiz, see *Gorraiz Lizarraga and others* v. *Spain*, *infra* note 901; and the Federación Departamental Cochabambina de Organizaciones Regantes, see Aguas del Tunari, S.A. v. The Republic of Bolivia, *infra* note 716. See also 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 173.

[42] The system includes – *inter alia* – over 22,000 NGOs, 1300 associations, 50 trade unions, 1700 indigenous people organizations, and 400 disability, development and rights organizations. See UN Department of Economic and Social Affairs, 'Integrated Civil Society Organization System', available at: http://esango.un.org/civilsociety/login.do (last accessed 10 September 2013).

[43] There are nearly 370 million 'indigenous people' worldwide and more than one hundred isolated indigenous groups with more than half living in the Amazon. See N. Boecher, 'Third Party Petitions as a Means of Protecting Voluntarily Isolated Indigenous Peoples', (2009) 10 Sustainable Development Law and Policy 58, at 58.

[44] L. Burgorgue-Larsen, and A. Úbeda de Torres, The Inter-American Court of Human Rights: Case Law and Commentary (2011), at 500.

[45] This is reflected for instance at the IACtHR where it has set up a 'Rapporteurship on the Rights of Indigenous Peoples' which has a website that includes a substantial inventory of all the petitions and cases involving indigenous peoples at the IACtHR. See the Rapporteurship's website: http://www.oas.org/en/iachr/indigenous/decisions/iachr.asp (last accessed 12 December 2012).

[46] The dynamic of local-transnational alliances has become *monnaie courante* not only in international litigation, but also in international policy and lobbying, which is repeatedly signalled by commentators as one of the most pivotal powers and assets of contemporary global civil society. The Council is an organisation representing up to 150,000 individuals from north Alaska, Canada, Greenland and Russia. The petition of the Inuit Circumpolar Council to the Inter-American Commission against the United States is another example as it was submitted in association with Earthjustice and the Center for International Environmental Law. The petitioners claimed that the US was liable because its greenhouse gas emissions, which are among the highest on the planet, were a contributory factor of rapid global warming. This in turn led to adverse effects to the arctic environment, thereby threatening the cultural rights of the Inuits. The petitioners argued that the United States violated the right to the benefits of culture under Article XIII of the American Declaration of the Rights and Duties of Man. Article XIII states that 'Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries. He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author'. See American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9 (2003); 43 AJIL Supp. 133, entered into force 02 May 1948. This case is not subsequently discussed in this research. The Commission rejected the petition on the ground that the information provided was insufficient to consider possible violations of the American Declaration. See Inuit Circumpolar Council (ICC), *Petition to the Inter-American Commission on Human Rights seeking relief from violation resulting from global warming*

ultimately resonate with 'the need to take into account the full diversity of the non-governmental organizations at the national, regional and international levels'.[47]

d. The legitimacy of civil society representation and its relevance to third party intervention in investor-state arbitration

A few remarks are merited here on the issue of civil society's representative legitimacy. This issue stirs vigorous debates for not only political and social theorists, but also legal theorists and practitioners.[48] The socio-political critique of civil society in general, and NGOs in particular, points to their undemocratic nature.[49] In stark contrast to democratically elected states, the role of civil society is often viewed as non-transparent, and in some respect illegitimate.[50] Skepticism often surrounds the contention that civil society fills a gap between individual citizens and states or inter-state organizations by altruistically representing the public interest as well as adversely affected communities before international fora. Shifting this debate to investor-state arbitration, some argue that, 'as a rule', civil society is understood to oppose foreign investors' claims and favour host states' pursuit of the public interest.[51]

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caused by acts and omissions of the United States (2005), at 5. The Commission relayed its decision to the petitioners in a letter dated 16 November 2006, and also confirmed its position in a hearing on 01 March 2007 under the heading of 'Human Rights and Global Warming', available at: http://www.oas.org/es/cidh/audiencias/Hearings.aspx?Lang=en&Session=14 (last access 30 July 2014). See also Pasqualucci, 'International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples', (2009) 27 Wisconsin International Law Journal 51, at 78; UN General Assembly, United Nations Framework Convention on Climate Change, resolution adopted on 20 January 1994, A/RES/48/189, available at: http://www.unhcr.org/refworld/docid/3b00f2770.html (last accessed 18 January 2013), and L. Burgorgue-Larsen, and A. Úbeda de Torres, *supra* note 44, at 517.See Inuit Circumpolar Council, *Petition to the Inter-American Commission on Human Rights seeking relief from violation resulting from global warming caused by acts and omissions of the United States*, dated 07 December 2005, available at: http://www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf (last accessed 06 October 2014) ('ICC Petition to the Inter-American Commission'). See also K. Anderson, 'What NGO Accountability Means: And Does Not Mean', (2009) 103 American Journal of International Law 170, at 171.

[47] ECOSOC also acknowledged 'the breadth of non-governmental organizations' expertise and the capacity of non-governmental organizations to support the work of the United Nations'. See ECOSOC Resolution 1996/31, *supra* note 35.

[48] K. Anderson, *supra* note 46, at 176. See also J. Maupin, 'Public and Private in International Investment Law: An Integrated Systems Approach', (2014) 54:2 Virginia Journal of International Law (forthcoming 2014), at 36, 41.

[49] L. Logister, *supra* note 118, at 168.

[50] Ibid., at 166, 168; and A. Kawharu, *supra* note 393, at 285.

[51] Wälde for instance asserts that 'third parties, *essentially activist NGOs*, are allowed to submit *amicus* briefs…the introduction of amicus briefs by NGOs, *which as a rule oppose the claimant*, increases the cost burden on claimants substantially; not only do they have to incur litigation expenditures to raise the claim and rebut the respondent, but they now have to review the *amicus* briefs and attempt to rebut them'. As mentioned

However, any blanket presumption to the effect that civil society *exclusively* acts in the public interest to the detriment of foreign investors is not entirely accurate.[52] *Amicus* or third party intervention allow third parties, indeed '*any person*' as will be emphasized below,[53] to channel their interests before investor-state tribunals. If deemed adequate and relevant, third parties' factual and legal arguments *should* and *must* first and foremost contribute to investor-state tribunals' fulfillment of their mandate to adjudicate the dispute, rather than to support one disputing party over the other. Whether investor-state tribunals' *justice* ends up in favour of either claimants (foreign investors) or respondents (host states) is inexorably dependent on the facts and circumstances as well as the merits of each particular arbitration.[54] In other words, *amicus* or third party intervention – whether by civil society or 'any person' – should always, and primarily, be contingent upon a contribution to the adjudication of the investor-state dispute.

Indeed, because of investor-state tribunals' application of exacting *ratione materiae* and *ratione personae* criteria on the admissibility of civil society's role, investor-state tribunals should be able to appreciate and assess who does civil society purport to represent, and the rationale behind such representation. When unsatisfied with the information provided on civil society's identity, as well as the adequacy and purpose behind its participation, this research will in fact show that investor-state tribunals have not hesitated in closing the door in front of civil society. When rendering such decisions, investor-state tribunals have to consider the facts and circumstances of each particular case which, again, are the primary factors that need to be taken into account. It is precisely for these reasons that the debate over the legitimacy of civil society's role in

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above, this research will show that the facts and circumstances of each case are fundamental in assessing the burden, and thus the adequacy, of *amicus* interventions. See T. Wälde, 'Procedural Challenges in Investment Arbitration under the Shadow of the Dual Role of the State: Asymmetries and Tribunals' Duty to Ensure, Pro-actively, the Equality of Arms', (2010) 26:1 Arbitration International 3, at 33 (our emphasis).

[52] See for instance the *amicus* submission of the Office of the National Chief of the Assembly of Nations (a Native American civil society group for the purposes of this research) in support of the claimants in Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, *supra* note 148. In this case, the claimants, representing Native-Canadian tobacco business interests, sought up to $664 million for damages allegedly resulting from a 1998 settlement agreement between various US state attorneys general and major tobacco companies at the time.

[53] See definitions of '*amicus curiae*' and 'third party intervention' procedures in the section directly below.

[54] 'Justice' is of course an elusive concept. The Roman-Latin concept of *'justitia*' is understood to be strictly positivist and unconcerned with aspects other than settling disputes *inter-pares*. The ancient Greek concept of '*diké*' on the other hand, which could also be translated as 'justice', reflects a starkly different conception. *Diké* reflects an equitable dispute settlement that takes into account social harmony and general satisfaction. See G. Cros, et P. Solberg, *Droit et la doctrine de la justice* (1936), at 80-82.

representing the public interest or affected communities or groups should be nuanced in an investor-state dispute settlement context – i.e., the main focus of the present research.

ii. 'Amicus curiae' and 'third party intervention' procedures

The '*amicus curiae*' and '*third party intervention*' procedures are two notions of fundamental importance to this research. The distinction between both will be extensively addressed under Part II and Part III. However, a few remarks are merited here in order to elucidate, albeit preliminarily, their actual scope as well as to emphasize the need to clearly distinguish between them from the outset.

Both procedures are in fact fundamentally different but share one common feature, i.e. they are both aimed at enabling a third party to intervene in a given dispute.[55] Needless to say that, whether in an investor-state arbitration context or otherwise, in essence such a third party may be '*any person*' that is foreign to the dispute including, *inter alia*, an individual,[56] a state,[57] an inter-state organization,[58] a trade lobby or business

[55] See A. Zimmermann, 'International Courts and Tribunals, Intervention in Proceedings', (2006) *Max Planck Encyclopedia of Public International Law*; and P. Sands and R. Mackenzie, 'International Courts and Tribunals, Amicus Curiae, (2008) *Max Planck Encyclopedia of Public International Law*.

[56] See for instance the *amicus* submission of Mr. Barry Appleton in *Apotex v. United States*; see Apotex Holdings Inc. and Apotex Inc. v. United States of America, ICSID Case No. ARB(AF)/12/1, *Procedural Order on the Participation of the Applicant, Mr Barry Appleton' as a Non-Disputing Party of 4 March 2013*, at 43 ('Apotex v. United States').

[57] See for instance Morocco's *amicus curiae* submission in the WTO dispute of *Trade Description of Sardines*, *infra* note 1019 or the Netherlands' in Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13. Also, under various IIAs or BITs, as well as before the ICJ, non-disputing third states may intervene as third parties as will be further shown under Part II – Section 4.2.

[58] See the European Commission's *amicus curiae* submissions in, *inter alia*, Achmea B.V. v. The Slovak Republic, *supra* note 57; AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary (ICSID Case No. ARB/07/22); Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania (ICSID Case No. ARB/05/20); and Electrabel S.A. v. Republic of Hungary (ICSID Case No. ARB/07/19). See also the more recent submissions by the World Health Organization ('WHO') and the WHO's Framework Convention on Tobacco Control Secretariat, and the Pan American Health Organization in Philip Morris v. Uruguay, *infra* note 149.

group,[59] and of course a civil society organization or group as previously mentioned[60] and as will be discussed in further detail throughout this research.[61]

This conceptual commonality of enabling a third party to intervene in a given dispute may precisely explain why both procedures are often conflated.[62] Nowhere is this more evident than under Article 36 of the ECHR[63] whereby third party intervention is covered under paragraph 1[64] and *amicus curiae* intervention is covered under paragraph 2, yet they both fall under the heading of Article 36 which is entitled 'Third Party Intervention'.[65]

Both procedures – as practiced before international courts and tribunals – are primarily inspired by the common law tradition.[66] In general, the *amicus curiae* procedure is confined to allowing third parties to solely submit a written brief, and *assist a court as 'a friend'* by bringing relevant and helpful information to the attention of the tribunal.[67] Third-party intervention on the other hand is understood in the sense to bring a

[59] See for instance the *amicus curiae* submission of: The American Iron and Steel Institute and the Speciality Steel Industry of North America in the WTO dispute of *Hot-Rolled Lead infra* note 1042; the US Chamber of Commerce's in United Parcel Service v. Canada, *infra* note 515; the Study Center for Sustainable Finance in *Apotex v. United States*, described as 'the research and development arm of the Business Neatness Magnanimity BNM srl' – a consulting firm. See Apotex v. United States, ICSID Case No. ARB(AF)/12/1, *Procedural Order on the Participation of the Applicant, Bnm, as a Non-Disputing Party of 4 March 2013*, at 8.

[60] See *supra* note 41.

[61] In particular, see Part I – Section 3. Also, it is worthy to note here that, notwithstanding this procedural commonality, substantive considerations would need to be taken into account when assessing the adequacy and relevance of applying the *amicus* or third party intervention procedures to each of those actors. It would largely exceed the scope of this research if it were to undertake such a substantive analysis. Although some of those actors will be mentioned at times, the focus here will be primarily on civil society.

[62] See generally Yves Fortier's commentary on the *UPS* decision covering both the *amicus curiae* and third party intervention procedures, Y. Fortier and S. Drymer, *infra* note 323.

[63] ECHR, *infra* note 844.

[64] Article 36(1) allows contracting parties to intervene as third parties as follows: 'In all cases before a Chamber or the Grand Chamber, *a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings*'. Ibid (our emphasis).

[65] By contrast, Article 36(2) allows third parties to submit *amicus curiae* briefs as follows: '*The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party* which is not a party to the proceedings *or any person concerned* who is not the applicant *to submit written comments or take part in hearings*'. The wording of these two provisions is substantially similar in some key respects, i.e. the submittal of written 'comments' and taking part in hearings. Yet, it is generally understood that Article 36(2) allows *amicus curiae* submissions, i.e. written briefs aimed at assisting the Court, but rarely does it include leave to make oral observations. *Ibid* (our emphasis); see also A. Zimmermann, *supra* note 55, at 2.

[66] France noted at an UNCITRAL Working Group session that 'the [amicus curiae] procedure is…alien to the French legal tradition'. See UNCITRAL, Working Group II (Arbitration and Conciliation) – 'Compilation of Comments by Governments', *infra* 501. (discussed below). See also M. Majlessi, *infra* note 110, at 143, S. Krislov, *infra* note 971, at 694, and P. Sands and R. Mackenzie, *supra* note 55, at para 1.

[67] An *amicus curiae* is solely entitled to submit a written brief pursuant to the UNCITRAL Rules on Transparency and ICSID Arbitration Rules – i.e. the most relevant set of rules for the purposes of this research.

person or entity into litigation as a third party.[68] Third party intervention *does not* necessarily lead to standing – a fundamental point to note for the purposes of this research.[69] As will be shown, third party intervenors may act as 'parties' or as 'non-parties' depending on their stake in, and the circumstances of, a given dispute. Third party intervention as a 'party' is often referred to as third party 'joinder' whereby 'joined' third parties gain equivalent procedural rights as disputing parties, i.e. they become a party to a dispute. Third party intervention as a 'non-party' generally allows intervenors to access relevant case materials, submit arguments of fact and law both in oral and written form in a similar – but not equal – manner as disputing parties since they are typically confined to specific aspects of a dispute and not its entirety.

More fundamentally, third party intervention is not solely confined to the '*assistance of a court as a friend*' through the mere submission of a written brief. Rather, once admitted, a third party intervenor has the *right to be heard* albeit only with regard to the specific subject matter of its intervention.[70] Third party intervention is generally underlying to a third party's 'direct', 'substantial' or 'legal' interest.[71] By contrast, *amicus curiae* intervention is underlying to a 'broader' yet 'significant' public interest to a given dispute, i.e. a lesser degree of interest than third party intervention.[72] The question as to the determination of whether such interest exists and its characterization, i.e. whether it is 'broad' or 'direct', depends of course on a prospective intervenor's allegations as well as a tribunal's assessment of the facts and circumstances of a case before it. In addition, it may be predetermined *ipso facto* by virtue of a treaty-based right

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See article 4(2), UNCITRAL Rules on Transparency, *infra* note 414; and article 37(2), ICSID Arbitration Rules, *infra* note 411.

[68] Ibid., at 1442, 1518.

[69] On the notion of standing before international tribunals, see A. Del Vecchio, 'International Courts and Tribunals, Standing', (2010) *Max Planck Encyclopedia of Public International Law*.

[70] A. Zimmermann, *supra* note 55, at 13.

[71] See E. Triantafilou, *supra* note 18.

[72] Philippe Sands argues that '*amicus* briefs are more likely to be accepted when submitted in cases involving *broader* issues relating to, for example, the environment, human rights, or essential public services'. See P. Sands and R. Mackenzie, *supra* note 55, at para 2, 31 (our emphasis). In the same vein, Laura van den Eynde posits that '[t]he *amicus* can also inform the court of the *broader* consequences of the cases, by showing the potential implications of a decision or to point out unintended consequences for people or groups not party to the suit' (our emphasis). See L. van den Eynde, 'An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs Before the European Court of Human Rights' (2013), 31:3 Netherlands Quarterly of Human Rights 271, at 274. See also P. Palchetti, *infra* note 1153, at 181.

– as set forth for instance under Article 36(1) of the ECHR or a number of BITs or IIAs as will be further discussed subsequently.[73]

3. Approach and methodology

i. Research approach

This research adopts a comparative approach to international law. It considers the international law on foreign investment as part of public international law, and therefore, it adheres to a systemic approach to international law as a 'single and 'unified' body of law.[74] According to the ILC, 'international law is a legal system and that its rules and principles act in relation to, and should be interpreted against the background of, other rules and principles'.[75] This research thus looks at international law as a cohesive system where each branch may overlap or complement the other – a view taken by various investor-state tribunals including most notably in the landmark case of *AAPL v. Sri Lanka*. The *AAPL* tribunal indeed found that the Sri Lanka-United Kingdom BIT 'is not a self-contained closed legal system'.[76] By way of illustration, there is a compelling inter-

[73] See Part III – Section 4.2.2.

[74] In the *Diallo* case, Judge Greenwood declared that 'international law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law and each international court can, and should, draw on the jurisprudence of other international courts and tribunals, even though it is not bound necessarily to come to the same conclusions'; see *Diallo* case, *Judgement of 19 June 2012*, *infra* note 359, at para 8. The proposition that international law is a 'system' that is 'more than just disconnected rules' is also widely held in international law doctrine, see J. Crawford, *Chance, Order, Change: The Course of International Law – General Course on Public International Law* (2014), at 181 et seq. On the proposition that the international law on foreign investment is part of that system, see M. Sornarajah, *infra* note 221, at 78-79; T. Ishikawa, *infra* note 108, at 376; J. Maupin, *supra* note 48, at 4; and R. Lorz, 'Fragmentation, Consolidation, and the Future Relationship Between International Investment Law and General International Law', in F. Baetens (ed.), *Investment Law within International Law: Integrationist Perspectives* (2013), at 482 et seq.

[75] The ILC continues by stating that 'as a legal system, international law is not a random collection of such norms. There are meaningful relationships between them'. See ILC, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Report on the work of its Fifty-eighth session, 1 May to 9 June and 3 July to 11 August 2006, available at: http://legal.un.org/ilc/texts/instruments/english/draft%20Articles/1_9_2006.pdf (last accessed 06 October 2014) cited in J. Crawford, *supra* note 74, at 211.

[76] The tribunal in *LG&E et al. v. The Argentine Republic* also came to a similar conclusion with respect to the Argentina-United States BIT by find that 'as the tribunal concluded in the *Asian Agricultural Products, Ltd. (AAPL) v. Democratic Socialist Republic of Sri Lanka*, Award of June 27, 1990 … the [Sri Lanka-United Kingdom BIT] is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature'. See LG&E et al. v. The Argentine Republic, *infra* note 138, at 97 citing Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka, *infra* note 103, at 21.

linkage between international human rights law and the international law on foreign investment.[77] They are not, in the words of Judge Bruno Simma, 'separate worlds'.[78] Both in fact aim to protect the *individual* – as the 'ultimate' subject of international law[79] – against wrongful state conduct.[80]

The rules and practice of the international jurisdictions addressed in this research differ to a substantial extent. Looking at the jurisdictions of interest to the present research from a comparative standpoint may be considered as imperfect in a number of ways. Indeed, each of these jurisdictions has arguably unique mandates, rules and practice. The main common feature between the ICJ, WTO dispute settlement mechanism, IACtHR, ECtHR, and ACHPR is that they are international jurisdictions. Relatively significant importance is also afforded to US court practice.

It is indeed of fundamental importance to note that the *amicus curiae* procedure had been in fact initially 'transposed' by investor-state tribunals from other international

[77] This argument is not only brought forward with respect to the interlinkage between international human rights law and the international law on foreign investment, but also EU law and the international law on foreign investment as manifestly highlighted by the arbitrations of, *inter alia*, AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary, *supra* note 58; and Ioan Micula et al. v. Romania; *supra* note 58 where the EU Commission intervened as *amicus curiae* in order to address, amongst other issues, potential conflicts between its mandate and regulatory prescriptions on the one hand and both tribunals' jurisdiction and application of the Energy Charter Treaty, i.e. the applicable IIA to these investor-state arbitrations, on the other. See also E. Triantafilou, *supra* note 18; V. Prislan, *infra* note 82, at 452-455.

[78] See B. Simma, *infra* note 196, at 576. In a similar vein, the UN Human Rights Council designated John Ruggie as a Special Representative of the Secretary General on 'the issue of human rights and transnational corporations and other enterprises', with a mandate to articulate the link between business – including foreign investment – and human rights. See UN Human Rights Council, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises* (2011), available at: http://www.ohchr.org/Documents/Issues/TransCorporations/A.HRC.17.32.pdf (last accessed 04 December 2013).

[79] J. Crawford, *supra* note 74, at 211 citing H. Lauterpacht, *International Law and Human Rights* (1950), at 70.

[80] Both systems are namely aimed at strengthening the international rule of law, which is essential to the protection and promotion of human rights as well as foreign investment and trade. Their common principles include, *inter alia*, the fair and equitable treatment, non-discrimination, freedom of movement and expression, a right to recourse and access to justice, a fair trial and compensation against arbitrary conduct, in other words, principles that are essential to any individual, organization, or foreign investor. The concept of the rule of law also implies an expectation for transparency on the decision making and regulatory fronts, stability, clarity, predictability, a rejection of arbitrariness, and publicity. In fact, international economic organizations such as the IMF, the World Bank and the WTO systematically promote the rule of law on both the domestic and international levels. This is particularly reflected in the context of China's accession to the WTO, which was conditional upon the implementation of measures aimed at strengthening areas such as intellectual property protection but also substantial judicial reforms that have had a positive impact on human rights. See B. Simma, *infra* note 196, at 576; S. Tully, *Corporations and International Lawmaking* (2007), at 107, 306; W. Benedek, 'The WTO and Human Rights', in W. Benedek et al. (eds.), *Economic globalisation and human rights* (2007), at 152; D. Schneiderman, *infra* note 304, at 3; and R. Bratspies, *infra* note 620, at 242. In that respect, this research also discusses the access to justice that is granted to foreign investors by investor-state tribunals and the protection afforded against denial of justice before domestic courts. In particular, see Part III – Section 2.2.1.

jurisdictions and was precisely inspired by its manifestation under US court practice.[81] When deciding as to whether to accept *amicus curiae* petitions, investor-state tribunals also had to thoroughly consider the practice of other international and domestic jurisdictions. The same rationale could potentially apply to third party intervention. In the absence of any formal rules, a novel and theoretical approach to civil society access in investor-state tribunals as a third party intervenor requires a closer look at how third party intervention is regulated in other jurisdictions. This research therefore follows a comparative approach that is often undertaken by investor-state tribunals themselves.[82]

Regarding the choice of jurisdictions of interest, the ICJ, WTO dispute settlement mechanism, IACtHR, ECtHR, ACHPR were chosen because they deal with the most relevant areas of international law for the purposes of this research, i.e. public international law, international law on foreign investment, international trade law and international human rights law. It is precisely for this reason that other jurisdictions, concerned with different bodies of international law, that allow non-state actor access were not included in this analysis. These include the Central American Court of Justice,[83] the European Court of Justice,[84] the International Tribunal for the Law of the Sea (ITLOS)[85] or the ECOWAS Court.[86] Other international organs, such as the UN Human

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[81] On the relevance of domestic public law practice to investor-state arbitration, including US law, see also A. Asteriti, C. Tams, *infra* note 402, at 817.

[82] Investor-state tribunals' comparative approach will be highlighted throughout this research. Some have referred to this practice as 'judicial borrowing', see V. Prislan, 'Non-Investment Obligations in Investment Treaty Arbitration: Towards a Greater Role for States?', in F. Baetens (ed.), *Investment Law within International Law: Integrationist Perspectives* (2013), at 450-451.

[83] Established in 1907, the Court allows individuals to file claims against member-states (other than their national state). Indeed, Article 22 of its Statute states that: 'The Court's competence includes the following… (c) To hear, at the request of any interested party, any matter related to the legal, regulatory or administrative provisions or any other type of rules prescribed by a state, when such provisions or rules affect the conventions, treaties or any other norm of the Law of Central American Integration, or the agreements or resolutions of its organs or organisms'. See Statute of the Central American Court of Justice, entered into force 02 February 1994, 34 I.L.M 921 (1995), available at: http://www.jstor.org/stable/pdfplus/20698470.pdf?acceptTC=true&acceptTC=true&jpdConfirm=true (last accessed 06 October 2014). For an extensive analysis on the Court's mandate and functions, see F. Francioni, *infra* note 882, at 16.

[84] The European Court of Justice ensures the application and interpretation of EU law. It allows member States and in princple to 'any other person which can establish an interest in the result of a case submitted to the Court'. See Article 40, Statute of the Court of Justice of the European Union, published 30 March 2010, available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/statut_2008-09-25_17-29-58_783.pdf .

[85] Companies and nationals of state-parties have access to the Seabed Dispute Chamber of ITLOS. In certain instances, both 'a State Party or an entity other than a State Party' may avail itself of the right of intervention. That said, ITLOS deals with a specific area of international law that is somewhat remote to this research's interest, which is the main reason why it has not been addressed further. In any event, there have not been significant developments at ITLOS with respect to that question. See United Nations Convention on the Law of

Rights Committee,[87] the World Bank's Inspection Panel[88] and the OECD National Contact Points[89] were not included because they constitute non-adjudicatory mechanisms.[90]

ii. Research methodology

This research globally focuses on the international law on foreign investment[91] as well as relevant aspects of international trade law,[92] public international law and

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the Sea, entered into force 16 November 1994, 1833 UNTS 3; 21 ILM 1261 (1982), Article 32, Annex VI; and Article 100 of the Rules of Tribunal (ITLOS/8), as amended on 17 March 2009, available at: https://www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf (last accessed 06 October 2014). See also E. De Brabandere, *infra* note 852, at 90; F. O. Vicuña, 'Individuals and Non-State Entities before International Courts and Tribunals', (2001) 5 Max Planck Yearbook of United Nations Law 53, at 58.

[86] The ACHPR was chosen rather than ECOWAS because the latter has primarily an economic mandate restricted to the geographic area of fifteen West-African states, and has only recently started considering cases involving human rights violations, i.e. cases where civil society is more prone to intervene. In these cases, the ECOWAS Court referred to provisions of the Banjul Charter, which is the treaty establishing the ACHPR. See A.O. Enabulele, 'Reflections on the ECOWAS Community Court Protocol and the Constitutions of member States', (2010) 12 International Community Law Review 111, at 113-114. Also, for the purposes of the present research, those three jurisdictions shall be collectively referred to as 'international human rights jurisdictions'.

[87] The UN Human Rights Committee is a UN body that monitors compliance to the ICCPR. It also has competence to receive individual complaints pursuant to the First Option Protocol, which states in Article 1 that: 'A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol'. See UN General Assembly, Optional Protocol to the International Covenant on Civil and Political Rights, 19 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: http://www.refworld.org/docid/3ae6b3bf0.html last accessed 6 March 2014). See also M. Scheinin, 'Access to Justice before International Human Rights Bodies: Reflections on the Practice of the UN Human Rights Committee and European Court of Human Rights' in F. Francioni (ed.), *Access to Justice as a Human Right* (2007).

[88] The Panel is an accountability mechanism established by the World Bank's Board of Directors in 1993. It aims to address the social impact of the Bank's financing activities by providing adversely affected communities a forum where they could lodge complaints. See World Bank Inspection Panel website, available at: http://ewebapps.worldbank.org/apps/ip/Pages/AboutUs.aspx (last accessed 06 October 2014). See also F. Francioni, *infra* note 882, at 19.

[89] The OECD National Contact Points constitute an implementation mechanism to the OECD Guidelines for Multinational Enterprises, and handle complaints against companies that have allegedly failed to adhere to Guidelines' standards by providing a multi-stakeholder a mediation and conciliation platform. See P. Protopsaltis, 'La mise en oeuvre des Principes directeurs de l'OCDE à l'intention des entreprises multinationales: Réflexions sur le nouveau mandat des Points de contact nationaux', (2005) 7 International Law FORUM du droit international 251, and D. Collins, *infra* note 593.

[90] Yet, they could have been deemed as relevant in the sense that those organs are open as well to non-state actors and often deal with human rights and foreign investment issues.

[91] This research adheres to Sornarajah's definition of international law on foreign investment, which is comprised of international law norms concerned with the regulation of the transfer of tangible or intangible assets from one state to another for the purpose of their use in that state to generate wealth under the total or partial control of the owner of the assets. These norms are enshrined in both treaty law (e.g. in BITs) as well as customary international law (e.g. protection of foreign investors against denial of justice emanates from customary international law). Also, as apparent from the research's title, it is worthy to emphasize that this research does not look into contract-based investor-state arbitration. See M. Sornarajah, *infra* note 221, at 8.

international human rights law.[93] The analysis under each Part is grounded on an extensive body of international treaties and jurisprudence, relevant academic literature and other publications including those of international organizations such as UNCTAD or ECOSOC. The courts and tribunals of interest were all established through various treaties and conventions that set out the law and procedure applicable thereto. Concerning the foreign investment realm, this research primarily focuses on treaties entered into by states, i.e. IIAs or BITs, which set forth the law governing investment promotion and protection as well as the underlying dispute settlement mechanisms. The peculiarity here is that these treaties do in turn refer to various possibilities for arbitration under, for instance, the UNCITRAL's rules or ICSID's as norms governing strictly procedural aspects. Investor-state tribunals constituted pursuant to these rules then play a crucial role in interpreting IIAs or BITs as well as the UNCITRAL and ICSID arbitration rules. It is precisely for this reason that this research affords substantial attention to the decisions of investor-state tribunals – particularly those relating to the acceptance of *amicus curiae* and dismissal of third party intervention petitions. It is worthy to recall here that, pursuant to Article 38 of the ICJ Statute, decisions of international jurisdictions are subsidiary sources of international law.[94]

Part I is thus primarily concerned with the international law on foreign investment as contained in treaty provisions, interpreted by investor-state tribunals and commented in academic literature. Part I also addresses soft law principles and standards, i.e.

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[92] 'International trade law' is generally used interchangeably with the term 'international economic law'. It is argued that the term has practically become synonymous to WTO law – which fits with this research's usage of the term for the purposes of this study. See M. Majlessi, *infra* note 110, at 13.

[93] The international human rights referred to in this research are essentially contained in the UN Universal Declaration of Human Rights, *infra* note 672, international treaties and conventions, most notably including the 1966 International Covenant on Civil and Political Rights, entered into force 23 March 1976, United Nations, Treaty Series, vol. 999, p. 171 ('ICCPR'), or the 1966 Covenant on Economic Social and Cultural Rights ('ICESCR'), *infra* note 672, non-binding instruments such as UN General Assembly resolutions, or in other words soft law instruments (e.g. the UN General Assembly Resolution on 'The Human Right to Water and Sanitation', *infra* note 689), and regional instruments such as the ECHR, *infra* note 844, or Banjul Charter, *infra* note 845.

[94] Article 38 of the ICJ Statute states that: '1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a). international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b). international custom, as evidence of a general practice accepted as law; (c). the general principles of law recognized by civilized nations; (d). subject to the provisions of Article 59, *judicial decisions* and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. (2). This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto' (our emphasis). See Statute of the International Court of Justice, entry into force 26 June 1945, Can. T.S. 1945 No. 7 ('ICJ Statute').

formulated in international non-binding instruments and declarations essentially relating to principles on environmental protection, human rights such as the right to water, and indigenous rights.[95] These are for the most part non-binding resolutions and declarations adopted by states under the auspices of international organizations such as the UN. They include the UNCED 1992 Rio Declaration on Environment and Development,[96] Agenda 21, the UN Declaration on the Rights of Indigenous Peoples,[97] or the various General Comments of human rights treaty bodies such as the UN Committee on Economic, Social and Cultural Rights (CESCR)'s General Comments on the right to water. [98] Although soft law instruments cannot be deemed as sources of international law for the purposes of Article 38 of the ICJ's Statute, they remain nonetheless pertinent as states do refer to them, and in some cases adopt soft law standards and principles in their constitutions, thereby recognizing their importance.[99] In addition, they may open the door for the interpretation of relevant treaty provisions as well as clarify the obligations of parties thereto.[100] More fundamentally, for present purposes, soft law standards and principles shed light on the potential for conciliation – or conflict – between state obligations vis-à-vis foreign investment protection on the one hand and securing the welfare of their citizens on the other.

Because Part II sets out this research's comparative study, it focuses on other international law instruments in addition to those relevant to the international law on

[95] Those rights are discussed in further details under Part II – Section 3.
[96] UNCED, Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992), available at: http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm (last accessed 06 October 2014).
[97] See UNDRIP, *infra* note 762.
[98] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 15: The Right to Water (Art. 11 and 12 of the Covenant)*, *infra* note 685.
[99] For instance, in the WTO *Shrimps* dispute (which will be examines in further detail below), the United States argued that the need for the use of turtle excluder devices (TEDs) – aimed at protecting sea turtles from harmful shrimp fishing – was consistent with the international community's recognition to protect endangered species. In order to support its argument, which ultimately aimed at justifying the prohibition of the importation of shrimps fished in a manner that poses danger to sea turtles, the United States namely referred to paragraph 17.46(c) of Agenda 21. Paragraph 17.46(c) states that: 'States commit themselves to the conservation and sustainable use of marine living resources on the high seas. To this end, it is necessary to… Promote the development and use of selective fishing gear and practices that minimize waste in the catch of target species and minimize by-catch of non-target specie'. See Report of the Panel, *Shrimps* case, *infra* note 1018, at para 7.57. See also Agenda 21, Programme of Action for Sustainable Development, U.N. GAOR, 46th Sess., UN Doc A/Conf.151/26 (1992), available at: http://sustainabledevelopment.un.org/content/documents/Agenda21.pdf (last accessed 06 October 2014) ('Agenda 21'). See also D.A. Dam-De Jong, *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* (2013), at 38.
[100] Ibid.

foreign investment, including in the areas of international human rights law and international trade law. It also looks at certain aspects of Canadian and US law regarding the regulation of *amicus curiae* and third party interventions.

Part III then considers how third party intervention could apply in investor-state arbitration. It thus looks back at relevant legal norms discussed in Part I and Part II while essentially focusing on procedural aspects of the international law on foreign investment.

4. Structure

This research is divided into three main Parts discussing: 'The Function and Modalities of Civil Society Before Investor-State Tribunals' (Part I); 'The Function and Modalities of Civil Society Before other Jurisdictions' (Part II); and 'An Enhanced Role for Civil Society Before Investor-State Tribunals?' (Part III).

Part I embarks on an exhaustive understanding of the current regulation of civil society's role within investor-state disputes. An appreciation for the relevance of such role requires a discussion of the public interest issues at stake. This section thus aims at defining what is understood by the 'public interest', depict the interplay between these issues and states' obligations towards foreign investors, as well as the potential obligations of the latter. It will be argued that the framework of foreign investment promotion and protection has been often criticized as imbalanced, particularly due to its ambiguousness concerning the validity of host states' regulatory measures aimed at upholding the public interest in general. More fundamentally, this section sheds light on the absence of third party stakeholder representation in investor-state arbitration as part of such criticism. Part I then looks at the rules governing civil society's access to investor-state arbitration from a procedural standpoint. It traces these rules back to their inception as well as their foundation on international commercial arbitration rules, and thus highlights the changes that have occurred since. It will be argued there that public interest imperatives, and the criticism of imbalance emphasized previously, were underlying to these changes and ultimately lead to the acceptance of civil society within investor-state disputes as *amicus curiae*. The arguments raised by civil society as *amicus curiae* are then scrutinized. These arguments are often grounded on the protection of the

environment, the promotion of human rights including indigenous as well as minority rights or other public policy concerns – from the standpoint of stakeholders affected by investor-state disputes. Having extensively discussed the relevant rules and the case law, an appraisal of civil society's role would then be merited, both on the procedural and substantive levels. More specifically Part I is divided into the following sections:

- Following introductory remarks, the aim of Section 1 ('Identifying the 'public interest' in an investor-state arbitration context') – is to illustrate the peculiarity of investor-state arbitration in light of foreign investment protection on one hand; and the public interest on the other. Again, this sets the context to the rationale behind the gradual acceptance of civil society's role in investor-state arbitration – as opposed to international commercial arbitration where it is *a priori* viewed as irrelevant.
- Section 2 ('Procedural rules governing civil society's participation as *amicus curiae*') – highlights the acceptance of civil society's *amicus curiae* role as a means to positively address the peculiarity of investor-state arbitration; again, in light of the often significant public interest issues at stake.
- Section 3 ('From theory to practice: Investor-state tribunals' regulation of *amicus curiae* participation') – highlights that the regulation, and therefore, the acceptance of the *amicus curiae* procedure is currently a *fait accompli* in international investment arbitration.
- Section 4 ('Civil society participation: Where procedure intertwines with substance') – explores arguments put forward by *amici curiae* in past cases in order to shed light on both the content and purpose of *amicus* submissions.
- Section 5 ('An appraisal of civil society's *amicus curiae* role') – explores both the procedural and substantive repercussions triggered hitherto by civil society's role as *amicus curiae*.
- Section 6 ('Concluding remarks') – highlights that the acceptance of the *amicus curiae* is a benchmark position, a no-turning-back point which paves the way for

this research to consider whether a further enhanced role could be conceived to the benefit of civil society in investor-state arbitration.

Part II examines the modalities available to civil society before a wide array of jurisdictions. The idea behind this Part is to shed light on the differences, both conceptual and practical, between such modalities. In essence, it shows that civil society may be granted (i) standing either as a victim of human rights violations or a representative of victims, i.e. through *actio popularis*; (ii) the status of an *assistant to the court* or, in other words, *amicus curiae*; (iii) access as a third party intervenor. The latter is, however, peculiar given that civil society does not benefit of such access before any international jurisdiction. The aim of Part II is thus to shed light on the broad spectrum of access to justice modalities through the prism of civil society participation. More specifically, Part II is divided into the following sections:

- Following introductory remarks, Section 1 ('Absent, but not entirely: Indirect participation at the ICJ') – highlights the ICJ's practice vis-à-vis non-state actors in general, and civil society in particular. The aim of this section is to show that civil society benefits from a heavily restricted, if not any, access to the ICJ.

- Section 2 ('Standing for civil society – A look at international human rights jurisdictions') – sheds light on the concept of standing. Civil society may act as a claimant before international human rights jurisdictions to defend *rights* that are recognized under international human rights conventions. The aim of this section is to show that standing as a party is the highest degree of access to justice available to civil society in international adjudication and to shed light on the requirements for such access.

- Section 3 ('What is a *'friend of the court'*? – A cross-jurisdictional perspective outside the realm of investor-state arbitration') – will flesh out the features of *amicus curiae* participation in a wide array of jurisdictions. It shows that an *amicus* is far from being considered as a party to proceedings.

- Section 4 ('The peculiar case of third party intervention') – addresses a procedural modality that has not been extensively explored in the literature. This section aims

at showing that third party intervention lies somewhere between standing and *amicus* participation. It sheds light on the characteristics of this procedure and looks at how it is regulated by various courts and tribunals. This is a necessary prelude to the discussion in Part III on civil society's third party intervention petitions to investor-state tribunals.

Part III finally delves into civil society's potential within investor-state disputes. It first identifies the limitations of the *amicus curiae* procedure from a holistic standpoint. Part III then explores civil society's third party intervention petitions including underlying access to justice arguments. It will be posited that, if construed on the basis of 'non-party' intervention, the procedure of third-party intervention could potentially present a viable enhancement to the *amicus curiae* procedure. More specifically Part III is divided into the following sections:

- Following introductory remarks, Section 1 ('Transcending *amicus curiae* submissions') – highlights the fundamental differences that exist between the *amicus curiae* procedure on the one hand; and the third party intervention procedure on the other by looking at the advantages and disadvantages of both from a cross-jurisdictional standpoint.

- Section 2 ('Could there be a basis for civil society's third party intervention?') – questions whether the access to justice principle might constitute the basis for broader civil society participation in investor-state disputes – as in fact argued by civil society, i.e. whether civil society is entitled to standing before investor-state tribunals as before international human rights jurisdictions.

- Section 3 ('Potential regulation of third party intervention in investor-state disputes') – looks at the potential modalities for third party intervention in investor-state arbitration as well as the underlying procedural and substantive challenges.

- Section 4 ('Concluding remarks') – argues that when the 'direct' interests of third party stakeholders are at stake, and not merely their 'broader' interests, there

could be a compelling need to secure a more expansive role for civil society in investor-state arbitration.

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

Introductory remarks

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

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

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

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

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

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

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

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

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

[106] *Supra* note 8.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[168] See Part I – Section 4.

[169] See also Introduction – Section 1.

1.2.1 Foreign investors' rights

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

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

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

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

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

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

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

i. Fair and equitable treatment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ii. Expropriation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[197] Ibid., at 320.

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

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

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

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

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

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

1.2.2 Foreign investors' obligations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ii. Legitimacy of host state public interest regulatory measures

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[290] Ibid., at para 150.

[291] Ibid., at para 152.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[316] Ibid., at para 55.

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

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

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

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

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

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

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

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

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

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

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

[325] Ibid., at para 2.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

i. Diplomatic protection of foreign investors

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

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

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

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

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

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

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

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

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

iii. The creation of ICSID and UNCITRAL arbitration

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

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

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

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

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

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

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

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

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

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

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

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

[376] Ibid., at 373.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.5.3 Confidentiality and transparency issues as testaments of inadequate interchangeability

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[410] Ibid, Article 835(3).

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

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

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

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

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

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

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

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

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

[417] Ibid., at 377.

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

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

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

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

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

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

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

2. Procedural rules governing civil society's participation as *amicus curiae*

The access granted by investor-state tribunals to civil society as *amicus curiae* comes as a destabilizing phenomenon to the investor-state dispute settlement regime. It was not initially foreseen when the system was created. Treaty-based investor-state arbitration inherently – and solely – opposes foreign investors, acting as claimants; and host states, acting as respondents. As discussed, the international commercial arbitration model was meant to ensure the private settlement of disputes between foreign investors and host states under the same rules that govern international commercial disputes between two private persons. This was construed as an alternative to diplomatic protection, and the interference of capital-exporting states. Such arbitration rules were not initially tailored to the 'particular needs' of investor-state disputes where significant public issues appear to be at stake.[424] Again, international commercial arbitration allows business competitors for instance to settle their disputes while protecting trade secrets and avoiding any potentially negative publicity, or public-listed companies to avoid adverse effects on their stock price. Under such a model, no potential role for third parties that are concerned with the public interest could have been foreseen.

However, it will be argued that the impact of the international commercial arbitration model on investor-state arbitration eventually receded in certain respects with (i) the increasing recognition by arbitral tribunals – starting with the *Methanex v. United*

[422] J. Maupin, *supra* note 48, at 32; A. Kawharu, *supra* note 393, at 283.
[423] See *supra* note to 343 note 348.
[424] The term 'particular needs' of investor-state arbitration was coined by the *Methanex* tribunal – as will be further discussed below. See Methanex Corporation v. United States, *infra* note 428, at para 26-27.

States tribunal's decision[425] – for a shift in procedure where the public interest is at stake (**Section 2.1)**; (ii) both ICSID and UNCITRAL amending existing, or adopting new, arbitration rules; (iii) NAFTA parties setting out new guidelines to increase third-party participation and transparency under Chapter XI disputes; and (iv) newly negotiated BITs adhering to similar principles (**Section 2.2**).

The aim of this section is thus to highlight the acceptance of civil society's *amicus curiae* role as a means to positively address the peculiarity of investor-state arbitration vis-à-vis international commercial arbitration; again, in light of the often significant public interest issues at stake.

2.1 Acceptance of civil society's participation as *amicus curiae*

Following the relative success at the WTO with the *Shrimps*[426] case and earlier precedents from the Iran-US tribunal case law, and in light of the prevalence of the practice in domestic jurisdictions,[427] civil society organizations have sought to push for the acceptance of the *amicus curiae* procedure in investor-state disputes where public interest issues were at stake. *Methanex Corporation v. United States* presented in 2001 the first investor-state arbitration in which civil society actors have successfully made such a request.[428] Numerous arbitral decisions later confirmed the acceptance of *amicus curiae* briefs. However, the *amicus curiae* practice was only endorsed in a binding manner once the substantive rules governing investor-state disputes were amended. This was indeed the case for the ICSID Arbitration Rules, the UNCITRAL Rules on Transparency, and a number of newly signed BITs.

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[425] Ibid.

[426] Report of the Appellate Body, *United States: Import Prohibitions of Certain Shrimp and Shrimp Products*, *infra* note 1027.

[427] Two South African human rights organizations, the Legal Resources Centre and the Centre for Applied Legal Studies, requested to intervene in the *Piero Foresti* ICSID dispute partly on the basis of this rationale. See J. Brickhill and M. Du Plessis, 'Two's Company, Three's a Crowd: Public Interest Intervention in Investor-State Arbitration (Piero Foresti v South Africa)', (2011) 27 South African Journal on Human Rights 152, at 152. Also, a more detailed analysis of the regulation of the *amicus curiae* procedure under US law will be undertaken in Part III – Section 3.1.

[428] Methanex Corporation v. United States, *Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae of 15 January 2001*. See also E. De Brabandere, *infra* note 852, at 98.

2.1.1 The Iran-US Claims Tribunal precedent

As will be subsequently shown in this research, the WTO Appellate Body's decision in the *Shrimps* case marked a turning point in international adjudication and presented a pivotal precedent for international jurisdictions in terms of accepting *amicus curiae* submissions by non-state actors in general, and those made by civil society in particular.[429] The *Shrimps* decision dated back to 1998, i.e. three years preceding the *Methanex* decision. In addition to the *Shrimps* decision, the *Methanex* tribunal relied as well on the practice of the Iran-US Claims Tribunal, an earlier precedent given that the Tribunal was established in 1981. Its mandate covers the settlement of disputes that ensued the November 1979 hostage crisis at the US embassy in Tehran, and the subsequent global freezing of Iranian assets. It has jurisdiction to decide, *inter alia*, claims of US nationals against Iran, and conversely of Iranian nationals against the US, which arise out of debts, contracts, expropriations or other measures affecting property rights; as well as claims between US and Iranian banks.[430] It has operated for nearly twenty-five years and has produced a substantial jurisprudence that has triggered changes beyond the jurisdiction of the tribunal – as illustrated by its interpretation of Article 15(1) of the UNCITRAL Arbitration Rules (detailed below).[431] The function of the tribunal is reminiscent of various post-conflict *ad hoc* mixed claim dispute settlement organs, such as the arbitral tribunals instituted under Article 304 of the Treaty of Versailles. It has set an important precedent for subsequent international organs such as the UN Compensation Commission, which was established following Iraq's aggression against Kuwait in 1990.[432]

[429] See P. Sands, *infra* note 1048. For a review of the analysis on the Appellate Body's decision, see Part III – Section 3.2.
[430] Claims had to be filed with the Tribunal by 19 January 1982. Approximately 4,000 claims were filed.
[431] See F. Francioni, *infra* note 882, at 20.
[432] Article 304 of the Treaty of Versailles gave *ad hoc* arbitral tribunals the competence to adjudicate a variety of claims lodged by citizens of the allied powers against Germany, which included those concerning war damage suffered as a consequence of 'exceptional war measures', such as requisition and other measures affecting the property of claimants, and claims arising in connection with disputes over contracts concluded before the entry into force of the treaty. See F. Francioni, *supra* note 882, at 16, and at 21 regarding UN Compensation Commission.

The Tribunal has its own arbitration rules, inspired by the UNCITRAL Arbitration Rules, and contains interpretive notes to each of their provisions. The most relevant of these provisions is Article 15(1) 'General Provisions' which states that:

> …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.[433]

The interpretive notes provide that:

> (5) The arbitral tribunal may, having satisfied itself that the statement of one of the two Governments — or, under special circumstances, *any other person* — who is not an arbitrating party in a particular case is likely to assist the tribunal in carrying out its task, permit such Government or person to assist the tribunal by presenting oral or written statements.[434]

Although third parties made a limited number of submissions before the Iran-US Claims Tribunal, both the *Methanex* and *UPS* tribunals resorted to the Tribunal's interpretation of Article 15 and did in fact cite a number of its cases where *amicus curiae* submissions were effectively made.[435] These did not include submissions by civil society *per se*. Rather, they most notably included 'certain interested' banks.[436]

In light of the absence of any explicit guidance under Article 15(1) of the UNCITRAL Arbitration Rules on the question of *amicus curiae*, the Iran-US Claims Tribunal's interpretation allowed the *Methanex* tribunal to find that the procedure is acceptable under international arbitration, and not just under common law proceedings – as will be shown directly below.

2.1.2 The *Methanex* precedent – a point of no return

Methanex Corporation v. United States is a seminal case. It paved the way for investor-state tribunals to accept *amicus curiae* submissions. It shall be dealt with at this stage mainly from a procedural standpoint, whereas a more substantive analysis will be

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[433] Iran-US Claims Tribunal, 'Tribunal Rules of Procedure' (03 May 1983), available at: http://www.iusct.net/General%20Documents/5-TRIBUNAL%20RULES%20OF%20PROCEDURE.pdf (last accessed 02 December 2013).
[434] Ibid (our emphasis).
[435] See UPS v Canada, *infra* note 517, at para 64 citing Iran v United States case A/15 Award No. 63 – A/15 – FT; 2 Iran – US CTR 40, 43. See also E. De Brabandere, *infra* note 852, at 99.
[436] Ibid.

engaged subsequently on civil society's arguments with respect to the protection of the environment.[437]

Methanex, a Canadian company and major producer of methanol, filed a claim against the US on the ground that a Californian ban on MTBE,[438] a methanol-based fuel additive, amounted to expropriation in violation of NAFTA's Chapter XI. The decision explored here was merely a procedural order dealing with the *amicus curiae* issue; thus, the Methanex case will be considered from the perspective of (i) the *amicus curiae* petitioners; (ii) Methanex; (iii) the US; and finally (iv) the tribunal. Concluding observations will then highlight some of the major points raised by the decision for the purposes of the present research (v).

i. The amicus petitioners

The International Institute for Sustainable Development (IISD), 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.[439]

Their petitions included requests to (a) make oral and written *amicus curiae* submissions; (b) participate in the arbitration proceeding as *amici curiae*; (c) have the opportunity to review pleadings of the parties (preferably prior to submitting the briefs) and any other submissions or orders in the proceedings; and (d) attend and gain observer status at oral hearings.[440] The petitioners argued that the tribunal has the authority to grant such requests under its general procedural powers contained in Article 15(1) of the UNCITRAL Arbitration Rules, and that there are no contrary provisions under NAFTA Chapter XI which would preclude the tribunal from doing so. They further asserted that the acceptance of the *amicus curiae* practice at the WTO Appellate Body as well as judicial instances in both Canada and the US should serve as a relevant precedent.

ii. The claimant

[437] See Part II – Section 4.2.
[438] MTBE stands for: Methyl Tertiary Butyl Ether.
[439] Methanex Corporation v. United States, *supra* note 428, at para 5.
[440] Ibid., at para 5-8.

Methanex made a number of arguments against the acceptance of the *amicus curiae* petitions that were based on three fundamental principles: (a) confidentiality, (b) jurisdiction, and (c) fairness.[441] Firstly, the principle of confidentiality meant that, pursuant to Article 25(4) of the UNCITRAL Arbitration Rules, hearings are to be held *in camera*, i.e. not only meaning that solely the disputing parties had the right to attend the hearings, but also all documents of the proceedings were to be kept confidential. Secondly, the principle of jurisdiction precluded the tribunal from adding a party to the proceedings without the disputing parties' consent. Methanex clearly considered that granting the petitioners the status of *amicus curiae* would amount to adding them as parties to the dispute in clear contradiction with NAFTA provisions, which restrict access to arbitral tribunals to the disputing parties, as well as NAFTA parties pursuant to Article 1128.[442] Finally, the principle of fairness would not be upheld given that the disputing parties would have no opportunity to cross-examine the factual basis of the *amici*'s contentions. It is precisely for this reason that, according to Methanex, only NAFTA parties should raise public interest issues pursuant to Article 1128 and not any other person. Methanex also suggested that the NAFTA disputing party would have the possibility to call on any of the petitioners as witnesses, thereby making cross-examination possible. Methanex' argument plainly suggests that legal arguments in favour of the public interest rest within the sphere of the state, who should be the sole entity asserting it, and not the petitioners.

iii. The respondent

The US on the other hand was in favour of the acceptance of the *amicus curiae* petitions by the tribunal on the basis that the tribunal (a) had the power to accept *amicus curiae* submissions; and (b) would benefit from the assistance it would be afforded by the petitioners.

According to the US, Article 15(1) of the UNCITRAL Arbitration Rules grants the tribunal a wide discretion to conduct arbitral proceedings subject to both parties being treated equally and given a full opportunity to present their case. This discretion includes

[441] Ibid. at para 12-14.
[442] Article 1128 of NAFTA states that: 'On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement'. See NAFTA, *supra* note 170.

the authority to accept *amicus curiae* submissions as the Iran-US Claims Tribunal and WTO Appellate Body, particularly in light of the public international law issues and 'substantial public interests' at stake in the dispute. The US emphasized the need to distinguish the dispute from 'typical' commercial arbitration given that it could have 'a significant effect extending beyond the two Disputing Parties'.[443] It also pointed out that an *amicus curiae* is not a party to the dispute. However, it acknowledged that it did cause an additional burden that could be nonetheless justified if the tribunal deems the *amicus* submission as helpful.[444]

The US then asserted that the petitioners might have valuable knowledge or expertise. The US' arguments reveal its seemingly pressing concern to mitigate the perception of NAFTA Chapter XI dispute resolution as being '*exclusionary and secretive*'.[445] Citing this precise same reason, it also consented to the open and public hearing of all proceedings as well as disclosure of documents to the extent permissible by the tribunal.

It is worthy to note that both Canada and Mexico made written submissions to the tribunal, pursuant to Article 1128 of NAFTA, containing opposite positions with regard to the acceptance of the *amicus curiae* petitions.[446] Indeed, the latter was for an outright dismissal of *amicus* petitions; whereas the former favoured their acceptance for the sake of enhancing openness and transparency of NAFTA proceedings. Mexico in fact reiterated its opposition towards the *amicus curiae* procedure in the *UPS* case – discussed subsequently below.[447]

iv. The tribunal's decision

[443] Methanex Corporation v. United States, *supra* note 428, at para 17.
[444] Ibid. at para 21.
[445] Ibid. at para 22 (our emphasis).
[446] On the one hand, Mexico opposed the acceptance of the *amicus curiae* petitions. It argued that NAFTA did not provide for the participation of non-disputing parties in a given dispute other than in the case set forth by Article 1128. It also pointed out that, unlike in the US and Canada, its domestic courts do not have the authority to accept *amicus curiae* petitions, and that the dispute settlement mechanism established under Chapter XI of NAFTA was meant to strike a balance between those common law states, and Mexico as a civil law state. As such, the fact that the procedure is accepted in common law domestic jurisdictions does not mean it could be 'transported to a transnational NAFTA arbitration'. On the other hand, Canada asserted that it supports greater openness in arbitration proceedings, as well as the tribunal's acceptance of the *amicus curiae* petitions whilst pointing out that only NAFTA parties had the right to make submissions on questions of interpretation of NAFTA. See Ibid., at para 9-10.
[447] UPS v Canada, *infra* note 517, at para 10.

The tribunal's decision may be broadly scrutinized under three headings: (a) its discretionary powers under Article 15(1) of the UNCITRAL Arbitration Rules; (b) the rights afforded to *amici curiae*; and finally (c) transparency and confidentiality issues as well as the public interest arguments that were raised by both the petitioners, the US, and Canada.

First, the tribunal noted that there were no provisions under the UNCITRAL Arbitration Rules or NAFTA Chapter XI that expressly authorize or preclude the tribunal from accepting *amicus curiae* submissions. The tribunal found that the *amicus curiae* issue falls under Article 15(1) of the UNCITRAL Arbitration Rules. The Article allows the tribunal 'to conduct the arbitration in such manner as it considers appropriate' and is intended to provide it with 'the broadest procedural flexibility'. It noted that the provision is one of the 'hallmarks' of international arbitration and enabled it to adapt to the '*particular needs*' of a given arbitration.[448] As mentioned previously, the tribunal then referred to the practice of the Iran-US Claims Tribunal and cited its interpretive note (5) on Article 15(1).[449] According to the tribunal, not only both the US and Iran resorted to this provision in order to request leave to make written submissions, but also other 'non-state third persons' such as foreign banks.[450] Against this backdrop, it asserted that it did not need to rely on the relevance of the *amicus curiae* procedure in the respective domestic jurisdictions of NAFTA parties.[451]

Second, the tribunal had to consider whether *amici curiae* would be potentially granted any rights if their petitions would be accepted – as contended by Methanex. It noted that accepting *amicus curiae* submissions does not confer third parties any substantive rights. Petitioners would in no way acquire the rights of disputing parties nor NAFTA parties as set forth by Article 1128 of NAFTA. In reaching this conclusion, the tribunal referred to WTO case law as well. It looked at the Appellate Body's report in the *Hot-Rolled Lead and Carbon Steel* dispute, which emphasized that solely WTO member states have a 'right to be heard' by the Appellate Body and that the acceptance of *amicus*

[448] Ibid., at para 5, 26-27 (our emphasis).
[449] Iran-US Claims Tribunal, 'Tribunal Rules of Procedure', *supra* note 433.
[450] Ibid. at para 32.
[451] Ibid., at para 47.

curiae submissions is a mere matter of discretion rather than third-party rights.[452] The tribunal indeed noted that WTO case law demonstrates that the acceptance of such submissions 'confers no rights, procedural or substantive, on such persons'.[453] It is worthy to note here that Methanex pointed to the limited scope of the *amicus curiae* practice at the WTO, and stressed that it should not therefore constitute an example.[454] The tribunal seemingly acknowledged this limited scope but has nonetheless used it to back its conclusion and clarify an essential, as well as a systematically recurring, characteristic of *amici curiae*: they do not have the *right* to take part in proceedings, or in other words, *the right to be heard*. In reasserting its discretion on whether to accept or even consider *amicus curiae* submissions, the tribunal noted that the additional burden that could be potentially caused would be mitigated by the fact that (i) submissions would be made solely in writing in a form and subject to limitations set by the tribunal; and (ii) it would be for the tribunal 'to decide what weight (if any) to attribute to those submissions'.

On the petitioners' request to attend hearings and access case materials, the tribunal found that, pursuant to Article 25(4) of the UNCITRAL Arbitration Rules, hearings are to be held *in camera* unless both parties consent otherwise, thereby excluding members of the public – including 'non-party third persons', i.e. the petitioners. Although the US was in favour to open hearings to the public as previously mentioned, Methanex categorically opposed it; thus, the tribunal rejected the petitioners' request in this regard. As to the disclosure of case materials, the tribunal found that the disputing parties had concluded a 'Consent Order' regarding disclosure and confidentiality, it therefore deferred to the parties to decide on that matter.[455]

More fundamentally, the tribunal's procedural analysis was further complemented by the recognition of the public importance of the case in its concluding remarks:

> There is an undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties. This is not merely because one of the Disputing Parties is a State: there are of course disputes involving States which are of no greater general public importance than a dispute between private persons.

[452] Ibid., at para 33. See also WTO, Report of the Appellate Body, *Hot-Rolled Lead and Carbon Steel* case, *infra* note 1042.
[453] Ibid., at para 33.
[454] Methanex Corporation v. United States, *supra* note 428, at para 15.
[455] Ibid., at para 41, 46.

> *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.[456]

Here, the tribunal explicitly referred to arguments raised by the IISD, the Communities for a Better Environment and the Earth Island Institute, on the public importance of the case. The public interest in this instance was both used as an underlying rationale for procedural contentions, as well as substantive ones. The tribunal seemingly accepted it from a procedural standpoint, and explicitly referred to the public interest as complementary to its analysis of Article 15(1) of the UNCITRAL Arbitration Rules. Incidentally, this raises the need to assess the weight of the *amici*'s substantive arguments, which would be later put to the test in the tribunal's subsequently discussed final award.[457]

v. Concluding remarks

By focusing on public interest arguments, and stating that accepting *amicus curiae* submissions 'might support the process in general and this arbitration in particular, whereas a blanket refusal could do positive harm', the tribunal responded to an argument raised by the IISD and other civil society actors to the effect that the participation of an *amicus curiae* 'would allay public disquiet as to the closed nature of arbitration proceedings' under NAFTA's Chapter XI.[458] The fact that the tribunal acquiesced to this argument echoes the growing recognition by arbitral tribunals for greater transparency in investor-state disputes. This was also an argument raised by both Canada and the US. The tribunal's conclusion is diametrically opposed to the position of the *Metalclad* tribunal mentioned previously, whereby the latter recommended the parties to '*limit public discussion of the case to a minimum*'.[459] The *Methanex* tribunal indeed showed how both issues of transparency and third-party participation are intertwined and confirmed the need to address them in investor-state arbitrations where public interest issues are at stake.

Methanex's concerns regarding third-party intervention resonate with those preoccupied with the consensual nature of arbitration and other fundamental principles of

[456] Ibid., at para 49 (our emphasis).
[457] See Part II – Section 4.1.
[458] Ibid., at para 5.
[459] See Metalclad Corporation v. United Mexican States, *supra* note 273.

international commercial arbitration. As mentioned, international commercial arbitration has been used as a tool to settle both disputes arising from (i) 'all relationships of a commercial nature', as defined by the UNCITRAL Model Law on International Commercial Arbitration, as well as (ii) 'investment transactions'.[460] Investor-state arbitration is in such case viewed as solely fulfilling the function of an international dispute settlement mechanism that should not be concerned with law-making, standardization, or legitimation functions of other international jurisdictions.[461] In other words, investor-state tribunals should solely focus on settling disputes between foreign investors and host states without the need to consider other functions, imperatives or objectives.

Yet, the *Methanex* tribunal dismissed such concerns. The acceptance by the *Methanex* tribunal of the *amicus curiae* practice is portrayed as a procedural innovation. It clearly departed from the general practice of international commercial arbitration and adapted the 1976 UNCITRAL Arbitration Rules proceedings in order to '*fit the particular needs*' – to use the terms of the tribunal – of investor-state arbitration.[462] In other words, it confirmed the need to distinguish between international commercial arbitration and investor-state arbitration where public interest issues are at stake.

2.2 Formalization of *amicus curiae* participation – the opening up to 'third persons'

Not long after the *Methanex* decision, ICSID amended its arbitration rules, UNCITRAL followed suit by adopting new rules specifically 'tailored' for investor-state arbitrations, and NAFTA parties confirmed, through interpretative statements, the *Methanex* tribunal's approach. This was also confirmed by a number of other states in newly negotiated BITs. With ICSID and UNCITRAL arbitration rules governing the overwhelming majority of investor-state proceedings, these measures effectively

[460] See Article 1(1), UNCITRAL Model Law, *supra* note 109. See also T. Ishikawa, *supra* note 108, at 373.
[461] A. Von Bogdandy and I. Venzke, *supra* note 162, at 59, 63. Also citing Romak SA (Switzerland) v.Uzbekistan, PCA Case No. AA280, *Award of 26 November 2009*, at para. 171. On the wider functions of international jurisdictions, see also Shany's arguments with respect to the European Court of Justice or the WTO Appellate Body in Y. Shany, 'No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary', (2009) 20 The European Journal of International Law 73, at 82.
[462] Methanex Corporation v. United States, *supra* note 428, at para 27 (our emphasis). See also A. Van Duzer, *supra* note 171, at 685.

constitute the formalization of *amicus curiae* participation in investor-state disputes. They merit close attention at this stage in order to be fleshed out prior to the analysis of the case law in the subsequent section.[463]

2.2.1 Amendments to the ICSID Arbitration Rules

The *Methanex* precedent was supported by an increasing recognition in public and academic discourse of the need for greater transparency and third party participation in investor-state arbitration.[464] The ICSID Arbitration Rules were amended on 10 April 2006. The amended rules were implemented following consultations with member states and recommendations made by the ICSID Secretariat as early as 2004. According to the latter, the amended rules aim to achieve a more efficient and transparent process.[465] Not only do they cover access of third parties to proceedings and publication of awards, but also preliminary procedures concerning provisional measures, expedited procedures for the dismissal of unmeritorious claims as well as additional disclosure requirements for arbitrators. In this sense, the amendments to the ICSID Arbitration Rules were considered as substantially extensive and not merely as a response to public pressure regarding the pivotal issues of transparency and third party participation.[466]

As mentioned above, the amended version of Article 32(2) requires an objection from the parties to prevent access to hearings as opposed to a positive consent to access.[467] More fundamentally for the purposes of this research, Article 37(2) now explicitly grants arbitral tribunals the authority to accept *amicus curiae* briefs subject to certain conditions:

> After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "nondisputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing,

[463] See Part I – Section 3.
[464] See generally, Y. Fortier and S. Drymer, *supra* note 323.
[465] See ICSID Annual Report (2006), available at: https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnualReports# (last accessed 01 July 2013), at 3.
[466] R. Buckley, and P. Blyschak, 'Guarding the Open Door: Non-party Participation Before the International Centre for Settlement of Investment Disputes', (2007) 22 Banking and Financial Law Review 353, at 354-355.
[467] Article 32(2) states that: 'Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements'. See ICSID Arbitration Rules, *supra* note 411.

> the Tribunal shall consider, among other things, the extent to which: (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (b) the non-disputing party submission would address a matter within the scope of the dispute; (c) the non-disputing party has a significant interest in the proceeding.
>
> 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.[468]

Although the term is not explicitly mentioned under the amended Rules, (i) the 'public interest' subject-matter of a given dispute, and (ii) the role of the civil society organization as a representative of that interest, could be viewed as *sine qua non* conditions to the acceptance of *amicus curiae* briefs by civil society actors. It is indeed expected from these *amici curiae* to 'represent a "public", that is, a non-state, non-corporate interest'.[469] This is in addition to a clearly articulated condition on the utility of the briefs, i.e. they should assist the tribunal by covering arguments that are distinct from those of the disputing parties.[470] It is important to emphasize that the Rules are not exclusively aimed at civil society organizations; rather, they open the door to 'a person or entity that is not a party to the dispute'.

In sum, the amended rules signal a clear departure from the international commercial arbitration model initially construed by the World Bank when ICSID was created.[471] In turn, this has also led UNCITRAL to adapt its own arbitration rules to the particular needs of investor-state arbitration – as further detailed below.

2.2.2 Adoption of the UNCITRAL Rules on Transparency

Proposals to adapt the UNCITRAL Arbitration Rules – typically used for most NAFTA Chapter XI disputes – to the same effect as the ICSID Arbitration Rules have been recently enacted. The UNCITRAL Rules on Transparency are an attempt to adapt to the 'particular needs' of investor-state arbitration.[472] In contrast to the ICSID Arbitration Rules, the UNCITRAL Rules on Transparency do not consist of an amendment to the

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[468] Article 37(2), ICSID Arbitration Rules, entered into force 10 April 2006, available at: https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf (last accessed 20 November 2013).
[469] E. De Brabandere, *supra* note 852, 103.
[470] Ibid., at 103.
[471] A. Van Duzer, *supra* note 171, at 706, 722-723.
[472] UNCITRAL Rules on Transparency, *supra* note 414. See also Methanex Corporation v. United States, *supra* note 428, at para 27.

UNCITRAL Arbitration Rules *per se* – which were recently amended in 2010. Rather, the Rules are essentially meant to apply to investor-state arbitration initiated under the UNCITRAL Arbitration Rules pursuant to an investment treaty concluded following 1 April 2014 and/or those concluded prior to 1 April 2014 if (i) the disputing parties agree to their application, or (ii) the parties to an investment treaty have agreed to their application.[473] This has effectively allowed UNCITRAL to establish two separate sets of procedural rules for each type of arbitration and is, therefore, a positive response to calls for a distinct procedural approach in investor-state arbitration as discussed above.[474]

It is worthy to note here that the question of transparency in general, and *amicus curiae* participation in particular, stirred seemingly extensive debates amongst UNCITRAL's Working Group members. As early as 2006, some members argued for Article 15 of the UNCITRAL Arbitration Rules to be amended in order to provide that (i) all documents received or issued by the arbitral tribunal should be published; and (ii) the arbitral tribunal should have the discretion to allow persons or entities other than the disputing parties to submit *amicus curiae* briefs.[475] Arguments were also made in favour of amending Article 25(4) to provide that hearings should be open to the public rather than *in camera* and that Article 32(5) should provide for the systematic publication of awards. Most Working Group members had noted, however, that investor-state arbitration was 'still developing', and had agreed to maintain a generic approach applicable to all types of arbitration irrespective of the subject matter of the dispute. [476] Certain issues such as wider transparency concerns, particularly akin to investor-state arbitration, would be dealt with subsequently but as 'a matter of priority'. This indeed materialized with the adoption of the new Rules.[477]

Effective as of April 2014, the UNCITRAL Rules on Transparency thus set the publicity of proceedings as the general over-arching rule, and confidentiality as the

[473] See Article 1. Ibid.
[474] See Part I – Section 1.5.
[475]UNCITRAL, Report of the Working Group II (Arbitration and Conciliation), 46th session, 5-9 February 2007 (A/CN.9/592), available at: http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html (last accessed 12 November 2013), at para 61.
[476]Ibid., at para 62.
[477] UNCITRAL, Report of the Working Group II (Arbitration and Conciliation), 53rd session, 4-8 October 2010 (A/CN.9/712), available at: http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html (last accessed 12 November 2013), at para 2.

exception.[478] More fundamentally, Article 4(1) adopts the wording of the first part of Article 37(2) of the amended ICSID Arbitration Rules[479] by stating that:

> After consultation with the disputing parties, the arbitral tribunal may allow a person that is not a disputing party, and not a non-disputing Party to the treaty ("third person(s)"), to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute.

There are differences between the UNCITRAL Rules on Transparency and the ICSID Arbitration Rules in the subsequent paragraphs. The UNCITRAL Rules on Transparency adopt a two-pronged test on the acceptance of *amicus curiae* submissions. The first deals with information required from potential *amici* when applying for leave to make submissions; whilst the second provides guidance to arbitral tribunals in deciding whether or not to grant such leave.

First, third persons wishing to act as *amicus curiae* are requested to submit significantly detailed information regarding their: (i) identity, (ii) connection to disputing parties; (iii) sources of funding; (iv) interest in the dispute; and (v) arguments of facts or law in the arbitration they would like to address.[480] Regarding the issue of identity, the Rules provide interesting insight by requiring a description of the 'third person' that would include its 'legal status (e.g., trade association or other non-governmental organization)' thereby leaving the door open to both civil society actors as well as business or trade groups to file *amicus curiae* briefs. This is effectively in line with WTO case law. For instance, in the previously discussed *Hot-Rolled Lead and Carbon Steel* case, the American Iron and Steel Institute and the Speciality Steel Industry of North America groups filed *amicus curiae* submissions.[481] Also, in *UPS v. Canada*, the US

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[478] See Article 6, UNCITRAL Rules on Transparency, *supra* note 414.
[479] Article 37(2), ICSID Arbitration Rules, *supra* note 411.
[480] Article 4(2) states that: '2. A third person wishing to make a submission shall apply to the arbitral tribunal, and shall, in a concise written statement, which is in a language of the arbitration and complies with any page limits set by the arbitral tribunal: (a) Describe the third person, including, where relevant, its membership and legal status (e.g., trade association or other non-governmental organization), its general objectives, the nature of its activities and any parent organization (including any organization that directly or indirectly controls the third person); (b) Disclose any connection, direct or indirect, which the third person has with any disputing party; (c) Provide information on any government, person or organization that has provided to the third person (i) any financial or other assistance in preparing the submission; or (ii) substantial assistance in either of the two years preceding the application by the third person under this Article (e.g. funding around 20 per cent of its overall operations annually); (d) Describe the nature of the interest that the third person has in the arbitration; and (e) Identify the specific issues of fact or law in the arbitration that the third person wishes to address in its written submission.'. See UNCITRAL Rules on Transparency, *supra* note 414.
[481] Report of the Appellate Body, *United States: Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismut Carbon Steel Products Originating in the United Kingdom*, *infra* note 1042.

Chamber of Commerce filed an *amicus* brief.[482] It confirms the prevalent understanding that a 'third person' in an investor-state arbitration context does not exclusively refer to civil society actors, but simply covers any 'third person' to the dispute in the literal sense – as is the case under the ICSID Arbitration Rules.[483]

Second, tribunals are required to consider the following:

> In determining whether to allow such a submission, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant: (a) whether the third person has a significant interest in the arbitral proceedings; and (b) the extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.[484]

Again, as is the case under the ICSID Arbitration Rules, the 'public interest' subject-matter of a given dispute is not an explicitly identified criterion. As mentioned above, both civil society actors as well as business or trade groups may file *amicus curiae* briefs. That said, civil society actors wishing to participate in arbitral proceedings arguably need to make a case for their interest, i.e. they will need to assert that there is a significant public interest at stake.

In addition, in line with Article 37(2) of the ICSID Arbitration Rules, the UNCITRAL Rules on Transparency address the issue of the potential burden and prejudice to disputing parties. Indeed, the potentially adverse effect of *amicus* intervention on equality of arms is a commonly expressed concern amongst arbitration practitioners.[485] Article 4 of the Rules provides that:

> 5. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.
> 6. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by the third person. [486]

Finally, another key recurring criterion is setting the purpose of *amicus curiae* submissions as the assistance of the tribunal, rather than the exercise of any substantive

[482] United Parcel Service v. Canada, *infra* note 515.
[483] Although it is worthy to note that submissions made by states are covered by Article 5 ('Submission by a non-disputing Party to the treaty'). See Ibid.
[484] Article 4(3), ibid.
[485] On the impact of the *amicus curiae* submissions on the 'equality of arms' of disputing parties, see for instance T. Wälde, *supra* note 51, at 33.
[486] Article 4(5) and 4(6), Ibid.

right the *amicus* might have.[487] This is also reflected in the FTC Statement, which will be discussed directly below.

2.2.3 Acknowledgment through state practice – NAFTA parties and newly negotiated BITs

Prior to the amendment of the ICSID Arbitration Rules in 2006, measures were taken at the NAFTA level and through newly negotiated BITs to enhance transparency in general, and confirm *amicus curiae* participation in particular. These measures are complementary to the amendments at the ICSID level and the adoption of new rules at UNCITRAL.[488] Indeed, IIAs or BITs systematically refer to either set of arbitration rules as the applicable procedural rules governing investor-state dispute proceedings. It is important to discuss these measures since they have in many respects paved the way for the amendment to the ICSID Arbitration Rules and the adoption of the new UNCITRAL Rules on Transparency.

i. NAFTA

Although the measures undertaken at the NAFTA level do not amount to an amendment of the treaty *per se*, they were viewed as a positive response to those who called for the amendment of investment treaties to confirm the possibility for third-parties, including civil society actors, to make *amicus curiae* submissions when relevant. The aim here was to avoid uncertainties, as well as to clearly set out criteria that would guide arbitral tribunals in their decisions as to whether or not to accept such submissions. The FTC Statement on Non-Disputing Party Participation (the 'FTC Statement')[489] was passed on 07 October 2003 confirming the *amicus curiae* practice developed hitherto by arbitral tribunals. It asserted the discretionary authority of arbitral tribunals to accept

[487] Article 4(3)(b). Ibid.
[488] Having said that, IIA or BIT provisions allowing *amicus* participation may be crucial in UNCITRAL disputes to which the UNCITRAL Rules on Transparency do not apply (given their entry into force only in 2014).
[489] NAFTA Free Trade Commission, 'Statement of the Free Trade Commission on Non-disputing Party Participation' (7 October 2003), available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Nondisputing-en.pdf (last accessed 01 July 2013). The FTC is made up of ministerial representatives from NAFTA parties. Its mandate includes the supervision of the implementation of NAFTA and the provision of assistance in resolving disputes arising from its interpretation. It also oversees the work of NAFTA committees, working groups and other bodies.

amicus curiae submissions by non-disputing parties.[490] As the FTC Statement does not amount to an amendment of Chapter XI provisions, some doubt the extent to which the FTC Statement may bind arbitral tribunals.[491]

In its first section, the FTC Statement clearly sets out that no NAFTA provision 'limits a Tribunal's discretion to accept written submissions from a person or entity that is not a disputing party'. It also specifies the information that should be provided along with the application for leave to file *amicus curiae* briefs (section A):

> (d) disclose whether or not the applicant has any affiliation, direct or indirect, with any disputing party;
> (e) identify any government, person or organization that has provided any financial or other assistance in preparing the submission;
> (f) specify the nature of the interest that the applicant has in the arbitration;
> (g) identify the specific issues of fact or law in the arbitration that the applicant has addressed in its written submission;
> (h) explain, by reference to the factors specified in paragraph 6, why the Tribunal should accept the submission.[492]

Furthermore, the FTC Statement provides guidance to arbitral tribunals in deciding on whether or not to grant leave (section B). Tribunals are advised to assess the extent to which:

> (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
> (b) the non-disputing party submission would address matters within the scope of the dispute;
> (c) the non-disputing party has a significant interest in the arbitration; and
> (d) *there is a public interest in the subject-matter of the arbitration*.
>
> The Tribunal will ensure that:
> (a) any non-disputing party submission avoids disrupting the proceedings; and
> (b) neither disputing party is unduly burdened or unfairly prejudiced by such submissions.[493]

Again, and in line with arbitral precedents, the FTC Statement stressed the fulfillment of the quintessential role of an *amicus curiae*; i.e. its sole purpose is to assist the tribunal by raising arguments, perspectives, and expertise that the disputing parties have not been raised. The FTC highlighted another key condition, i.e. the 'public interest' subject-matter of the dispute. This could be viewed as a *sine qua non* condition to the acceptance

[490] E. De Brabandere, *infra* note 852, 100.
[491] See A. Van Duzer, *supra* note 171, at 706, 721.
[492] NAFTA Free Trade Commission, FTC Statement, *supra* note 489.
[493] Ibid.

of civil society *amicus curiae* briefs. By contrast, the ICSID Arbitration Rules and UNCITRAL Rules on Transparency do not explicitly refer to the notion of the 'public interest' as mentioned previously. The FTC Statement also confirms the position reiterated in several arbitral precedents by clearly dismissing the idea that *amici curiae* may be entitled to any procedural or substantive rights.[494]

In sum, the FTC Statement solely provides guidance to tribunals. From a legalistic standpoint, arbitral tribunals maintain their discretion, they are not bound by the Statement in deciding whether or not to accept *amicus curiae* briefs.[495] NAFTA case law suggests that the Statement has nevertheless provided useful guidance to arbitral tribunals. This is clearly reflected in the subsequently discussed *Glamis Gold* case.[496]

ii. Recently signed BITs

Recently signed BITs confirm numerous decisions of arbitral tribunals in accepting *amicus curiae* briefs and reiterate the position adopted through the amendment to the ICSID Arbitration Rules and the adoption of the UNCITRAL Rules on Transparency. In fact, as early as 2004, the US BIT model contained a provision allowing arbitral tribunals to accept *amicus curiae* briefs.[497] The exact provision has been retained in the 2012 US Model BIT.[498] It has been adopted in the Central American Free Trade Agreement concluded by the US and the following states: the Dominican Republic, Nicaragua, Costa Rica, El Salvador, Guatemala, and Honduras.[499] This is also reflected in the recently signed US and Peru BIT, as well as BITs signed by Canada with Columbia, Chile, and Peru. In sum, it is fair to expect that the US and Canada would essentially

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[494] Section B(9) of the FTC Statement states that: 'The granting of leave to file a non-disputing party submission does not require the Tribunal to address that submission at any point in the arbitration. The granting of leave to file a non disputing party submission does not entitle the non-disputing party that filed the submission to make further submissions in the arbitration'.

[495] A. Van Duzer, *supra* note 171, at 709.

[496] Glamis Gold Ltd v. United States, *Award of 8 June 2009*.

[497] Article 28(3): 'The tribunal shall have the authority to accept and consider amicus curiae submissions from a person or entity that is not a disputing party'. See United States of America Bilateral Investment Treaty Model (2004), available at: http://www.ustr.gov/sites/default/files/U.S.%20model%20BIT.pdf (last accessed 12 November 2013).

[498] See United States of America Bilateral Investment Treaty Model (2012), available at: http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf (last accessed 12 November 2013).

[499] See Article 10.20(3), Central American Free Trade Agreement, entered into force 01 January 2009, available at: http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file328_4718.pdf (last accessed 12 November 2013(('CAFTA-DR').

transpose provisions similar to the amended ICSID Arbitration Rules into their BITs over a decade ago. Both had indeed supported greater transparency and third-party involvement from the outset when the issue was first raised in the *Methanex* case as previously mentioned.[500]

Although some EU states such as France had expressed reservations with regard to the *amicus curiae* practice in investor-state arbitration,[501] the EU's Economic Partnership Agreement, amongst other agreements, with the CARIFORUM states allows it for instance.[502] The EU position vis-à-vis this issue has never been clearer, particularly in the wake of the TTIP negotiations.[503] The trend also seems to have echoed in BITs concluded amongst non-North American and non-EU states. Chile for instance has entered into BITs with Mexico (1999), South Korea (2004), Japan (2007), Peru (2009), Australia (2009) and Colombia (2009), which explicitly authorize arbitral tribunals to accept *amicus curiae* submissions under their respective investment-related chapters.[504]

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[500] Methanex Corporation v. United States, *supra* note 428, at para 17.

[501] See France's comments on the use of the *amicus curiae* procedure at the UNCITRAL Working Group II regarding the UNCITRAL Transparency Rules: 'This procedure can be useful for the parties and for the judge, if the intervention of the *amicus curiae* clarifies the subject under discussion and thus contributes to the quality of the arbitration process and the settlement of the case. The procedure is, however, alien to the French legal tradition. It may, moreover, give rise to abuse and inequalities. *Its use should therefore be strictly limited.* The intervention of amicus curiae may actually extend a dispute to people not parties to the case. Such an intervention will also entail additional costs, which may be borne by both parties, even though only one party will benefit from the submissions concerned.' (our emphasis). See UNCITRAL, Working Group II (Arbitration and Conciliation) – 'Compilation of Comments by Governments', 53rd session, 4-8 October 2010 (A/CN.9/WG.II/WP.159/Add.3), available at: http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html (last accessed 12 November 2013), at 5.

[502] CARIFORUM states include: Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, the Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Saint Christopher and Nevis, Suriname, Trinidad and Tobago. Article 217 of the Agreement states that: 'At the request of a Party, or upon its own initiative, the arbitration panel may obtain information from any source, including the Parties involved in the dispute, it deems appropriate for the arbitration panel proceeding. The arbitration panel shall also have the right to seek the relevant opinion of experts as it deems appropriate. Interested parties are authorised to submit amicus curiae briefs to the arbitration panel in accordance with the Rules of Procedure. Any information obtained in this manner must be disclosed to each of the Parties and submitted for their comments'. See EC-CARIFORUM Economic Partnership Agreement, entered into force 30 October 2007 (L 289/I/3), available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:289:0003:1955:EN:PDF (last accessed 06 October 2014).

[503] European Commission Concept Paper, Cecilia Malmström, *supra* note 17.

[504] See for instance Article 11.20(3), *Acuerdo de Libre Comercio Chile – Perú*, entered into force 01 March 2009, available at: http://www.direcon.gob.cl/wp-content/uploads/2011/11/TLC-Chile-Per%C3%BA_Parte2.pdf (last accessed 12 November 2013). See also UNCITRAL, Working Group II (Arbitration and Conciliation) – 'Compilation of Comments by Governments', 53rd session, 4-8 October 2010 (A/CN.9/WG.II/WP.159/Add.4), available at: http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html (last accessed 12 November 2013).

Separately, BITs often provide guidance on the criteria governing the acceptance of *amicus curiae* submissions. Recently signed BITs contain similar criteria as the ones set out by ICSID, UNCITRAL, and the NAFTA FTC. Below is a look at criteria in the Canada-Peru FTA, as well as the United States-Peru BIT.[505] Other interchangeable examples exist – *amicus curiae* participation is indeed finding its way in an increasing number of BITs.

The Canada-Peru FTA entitles 'any person other than a disputing party' to apply for leave in order to file a written submission. Such written submissions are required to be concise, only covering matters within the scope of the dispute, and in no case longer than twenty pages. The Canada-Peru FTA does not afford *amici curiae* an absolute right to file written submissions. Article 836 'Submissions by Other Persons' sets forth the criteria governing the acceptance of those submissions:

> 4. In determining whether to grant the leave the Tribunal shall consider, among other things, the extent to which:
> a. the applicant's submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
> b. the applicant's submission would address a matter within the scope of the dispute;
> c. the applicant has a significant interest in the arbitration; and
> d. *there is a public interest in the subject-matter of the arbitration*.
>
> 5. The Tribunal shall ensure that:
> a. any applicant's submission does not disrupt the proceedings; and
> b. neither disputing party is unduly burdened or unfairly prejudiced by such submissions.[506]

These conditions are in line with the FTC Statement. Furthermore, the fact that the *amicus curiae* does not benefit from any substantive rights is well-reflected in the following sub-paragraph of Article 836:

> 7. The Tribunal that grants leave to file a submission to an applicant *is not required to address the submission at any point in the arbitration*, nor is the person that files the submission entitled to make further submissions in the arbitration.

Although not explicitly mentioned by the ICSID Arbitration Rules, or the UNCITRAL Rules on Transparency, this provision clearly is in line with arbitral precedents discussed hitherto. *Amici curiae* are not entitled to make submissions pursuant

[505] See United States Trade Promotion Agreement with the Republic of Peru (2006), available at: http://www.ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file144_9539.pdf (last accessed 12 November 2013).
[506] Canada-Peru Free Trade Agreement, *supra* note 170 (our emphasis).

to a substantive right such as for instance the right of affected third persons to be heard; rather, tribunals followed the Iran-US Claims Tribunal and WTO Appellate Body's approach in restricting the matter to the mere procedural discretion of arbitrators.

Similar provisions exist under the United States-Peru BIT. Article 21.10 'Rules of Procedure' states that:

> …the Panel will consider requests from non-governmental entities in the disputing Parties' territories to provide written views regarding the dispute that may assist the panel in evaluating the submissions and arguments of the disputing Parties.[507]

Tribunals would then assess whether or not to grant leave on the basis of (i) the identity of the 'non-governmental entity' (or 'NGE'), including its membership and sources of financing; (ii) the issues of fact or law relevant to the dispute that it wishes to address; (iii) the degree to which it may assist the tribunal; and (iv) its independence vis-à-vis disputing parties.[508]

In sum, that the US and Canada have embraced the *amicus curiae* procedure is not anomalous given that it is a common law procedure that is widely used in their respective domestic jurisdictions.[509] They have also embraced the need to ensure transparency by providing that proceedings under their BITs will be public.[510] It is worthy to note here that provisions on *amicus curiae* participation are much more restrictive, in the procedural sense, from those regulating third party interventions by non-disputing BIT parties, i.e. contracting states – as will be further explored in Part III.[511]

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[507] United States-Peru BIT, *supra* note 505.

[508] Specifically, the US Model Rules of Procedure for Dispute Settlement, state that: 'The request shall: (a) contain a description of the NGE submitting the request, including, if applicable, the nature of its activities, its membership, legal status, sources of financing, and the address in the territory of a Party; (b) identify the specific issues of fact and law directly relevant to any legal or factual issue under consideration by the panel that the NGE will address in its written views; (c) explain how the NGE's written views will contribute to resolving the dispute and why its views would be unlikely to repeat legal and factual arguments that a Party has made or can be expected to make, or why it brings a perspective that is different from that of the Parties; (d) contain a statement disclosing whether the NGE has any relationship, direct or indirect, with either Party as well as whether it has received or is expected to receive any assistance, financial or otherwise, from any Party, other governments, persons, or organizations other than its members or its counsel in the preparation of its request or written views…'. See Article 55, US Model Rules of Procedure for Dispute Settlement (2012), available at: http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/model-rules-of-procedure-for-dispute-settlement (last accessed 06 October 2014).

[509] A. Van Duzer, *supra* note 171, at 696.

[510] Although tribunals are granted powers to protect confidential information, see Article 835, Canada-Peru Free Trade Agreement, *supra* note 170; and Article 21.10(d), United States-Peru BIT, *supra* note 505.

[511] See Part II – Section 4.2.2.

It is worthy to finally note that both the US and Canada are major capital-exporting economies, particularly in areas where environmental and human rights problems are ubiquitous such as the exploitation of natural resources. The BITs signed by both states with various Latin American states aim in several ways to support the activities of both American and Canadian petroleum and mining companies. The past years have seen numerous instances of unprecedented, and often violent, conflict between American and Canadian multinationals on the one hand, and local as well as indigenous communities on the other.[512] Potential arbitrations under those BITs may well involve numerous *amicus* petitions by such communities or their representatives. The recently signed BITs clearly grant investor-state tribunals the authority to accept such petitions.

3. From theory to practice: Investor-state tribunals' regulation of *amicus curiae* participation

Having looked at the substantive issues raised by *amici curiae*, and thereby identifying the underlying rationale for their participation in investor-state arbitrations, a closer look at the criteria regulating such participation is now merited. As mentioned previously, the amendment to the ICSID Arbitration Rules, as well the adoption of the

[512] The controversy surrounding the Tia Maria project in Peru is one of such many examples. The project involves Southern Copper, an American mining multinational, which had been planning for a number of years to implement a major copper mining project in the Islay region in Peru. The project required over a billion dollars' worth of initial investments and its annual production capacity was estimated at 120,000 tons. It was thus highly promoted by the Peruvian government. Peru is indeed aiming to become the world leading exporter of copper and has been striving to meet an increasing demand for the metal from China and other emerging markets. However, local communities were concerned by the potentially adverse environmental impacts of the project, particularly with respect to the magnitude of forecasted mining activities and the ensuing risks of contamination of fresh water sources used both for drinking as well as local agriculture. Civil society and municipal authorities had organized a *consulta*, a common form of public consultation or local referendum in Latin America, where roughly 80% of voters expressed their opposition to the project. The Peruvian government had indicated that it would not be bound by the *consulta* results. Local communities carried out demonstrations, road-blocks, and strikes against the project over months and were often met with violence by government troops. Civil society organizations condemned the violence and Peru's handling of the situation. The government ultimately suspended plans to exploit the mine in 2011. Despite ongoing discussions over the continuation of the project and the possibility of a renewed approval by Peru, it is still not clear whether Southern Copper intends to file any claim against Peru under the United States-Peru BIT as a result of the project's suspension. See FIDH, '*La FIDH condena represion y violencia para resolver conflicto minero en Islay*' (8 April 2011), available at: http://www.fidh.org/IMG/Article_PDF/Article_a9491.pdf (last accessed 01 April 2013); BBC, '*Peru cancels Tia Maria copper mine after protest*' (9 April 2011), available at: http://www.bbc.co.uk/news/world-latin-america-13025971 (last accessed 06 October 2014). See also World Finance, 'Southern Copper Corporation provide benchmark for mining transactions', (31 October 2013) available at: http://www.worldfinance.com/infrastructure-investment/project-finance/southern-copper-corporation-provide-benchmark-for-mining-transactions (last accessed 06 October 2014). Similarly, see also The Renco Group, Inc. v. The Republic of Peru, ICSID Case No. UNCT/13/1 – a dispute governed by the US-Peru BIT.

UNCITRAL Rules on Transparency, explicitly allowing, and regulating, *amicus curiae* submissions now ensures consistency at the level of ICSID and UNCITRAL arbitral decisions.[513] At the NAFTA level, the FTC has issued a statement on the matter, which has been effectively used by arbitral tribunals as guidance. Numerous recently negotiated BITs also confirm the acceptance of the *amicus curiae* procedure. The aim of this section is thus to highlight that the regulation, and therefore acceptance, of the *amicus curiae* procedure is currently a *fait accompli* in international investment arbitration.

Investor-state tribunals' treatment of the *amicus curiae* procedure may be divided into two groups; i.e. (i) those who applied the *Methanex* criteria (**Section 3.1**) and (ii) those applying the newly-enacted criteria of the ICSID and UNCITRAL Arbitration Rules (**Section 3.2**).

3.1 Tribunals that applied the *Methanex* precedent

Below is a closer look at investor-state tribunals' procedural analysis of the *amicus curiae* issue in the disputes of *UPS v Canada*, *Aguas del Tunari SA v. Republic of Bolivia*, and *Chevron and Texaco v. Ecuador*. These were some of the earlier cases dealing with civil society's petitions to intervene as *amicus curiae*. Equally, these arbitrations raise a number of core substantive public interest issues that shed light, from a holistic perspective, on the relevance of *amicus curiae* intervention, including most notably the provision of basic public services (*UPS*), the human right to access to water (*Aguas del Tunari*), and indigenous peoples' rights and interests (*Chevron*).

3.1.1 *Amicus* acceptance as a mere matter of procedural discretion: *UPS v. Canada*

In *UPS v. Canada*, UPS – an American postal and courier services company – essentially alleged that Canada violated the protection and promotion of fairness enshrined by NAFTA, and in particular Article 1102[514] by not providing 'UPS and UPS

[513] See ICSID Arbitration Rules, *supra* note 411, and UNCITRAL Rules on Transparency, *supra* note 414.
[514] NAFTA Article 1102 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 with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. 2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in

Canada with the best treatment available to domestic competitors', i.e. Canada Post, which is a state-run company that benefits from a partial monopoly.[515]

The Canadian Union of Postal Workers and the Council of Canadians submitted *amicus* petitions. They requested to address the potential ramifications of the tribunal's decision on Canadian postal workers and consumers, an issue that neither Canada nor UPS raised.[516] The petitioners' request to the tribunal included, *inter-alia*, (i) standing as parties to certain proceedings; (b) alternatively, the right to intervene as *amicus curiae* in the proceedings 'on terms that are consistent with the principles of fairness, equality, and fundamental justice'; as well as (c) the disclosure of case materials.[517]

It is worthy to note that an *amicus curiae* petition was subsequently submitted by the US Chamber of Commerce. The Chamber's interest was said to be significant as (i) it is a proponent of free trade, consistently supports ambitious and comprehensive free trade agreements, and remains a staunch advocate of NAFTA; as well as (ii) its members are collectively responsible for a substantial portion of overseas investment activity, and that the matters at issue directly implicate the interests and reasonable expectations of those investors.[518] The US and Mexico have also provided comments on the petitioners' requests pursuant to Article 1128 of NAFTA.[519]

The tribunal first noted the disputing party's position with regards to the petitioners' requests. Although both clearly opposed the petitioners' request for third

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like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. 3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part. 4. For greater certainty, no Party may: (a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or (b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party.'. See NAFTA, *supra* note 170.

[515] United Parcel Service v Canada, *Final Award of 11 June 2007*, at para 13 ('UPS v Canada').

[516] T. Ishikawa, *supra* note 108, at 402.

[517] United Parcel Service v. Canada, *Decision of the Tribunal on Petitions for Intervention and Participation as Amicus Curiae of 17 October 2001*, at para 1.

[518] The Chamber's submission was essentially concerned with Canada's arguments in relation to the scope of its national treatment obligations under Article 1102 of NAFTA. In this regard, it contended that Canada cannot avoid international responsibility by taking treaty inconsistent measures through state enterprises that it controls, i.e. Canada Post. See United Parcel Service v Canada, *Amicus curiae submission by the Chamber of Commerce of the United States of 20 October 2005*, at para 5-6. It is worthy to note as well that neither Canada nor UPS objected to Chamber's submission, but only the former responded to it. Having said that, the tribunal did not revisit any of the Chamber's arguments – as was the case with the other *amici*. See United Parcel Service v Canada, *Final Award of 11 June 2007*, at para 3.

[519] Article 1128 of NAFTA, *supra* note 442.

party intervention, both UPS and Canada were not necessarily against granting petitioners 'an *amicus curiae* status', and did indeed recognize that the tribunal may grant such status by virtue of its discretional authority pursuant to Article 15(1) of the UNCITRAL Arbitration Rules.[520] As in the *Methanex* case, Canada expressed its support for greater openness in NAFTA Chapter XI proceedings as well as 'its appreciation of the contribution that transparency brings to building public confidence in the investor-state dispute settlement process'.

Having said that, both disputing parties conversely specified the conditions that should govern the tribunal's acceptance of granting such status, most notably in order to mitigate the potential burden on the costs and efficiency of proceedings.[521] By following the criteria governing the practice in its domestic judicial system, Canada proposed the following four factors for the tribunal to consider:

> In exercising its discretion, the Tribunal should consider whether:
>
> (a) There is a public interest in the arbitration;
> (b) The Petitioners have sufficient interest in the outcome of the arbitration;
> (c) The Petitioners' submissions will assist in the determination of a factual or legal issue related to the arbitration by bringing a perspective or particular knowledge that is different from that of the disputing parties; and
> (d) The Petitioners' submissions can be received without causing prejudice to the disputing parties.[522]

UPS on the other hand specified that the *amicus* status should (i) not be granted at – what was then – an early stage of the proceedings; (ii) not entail the attendance of hearings or access to any material submitted to the tribunal; and (iii) be restricted to a written submission of a limited number of pages on specific issues to be determined by the tribunal.[523] Mexico proposed an outright dismissal of the *amicus* petition, on the basis of the absence of express provisions under NAFTA allowing its submission, as well as the inexistence of the *amicus* procedure under Mexican law. Both disputing parties as well as the US were against allowing *amici* to make submissions on the tribunal's jurisdiction or the place of arbitration.[524]

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[520] UPS v Canada, *supra* note 517, at para 6(i), 7(ii).
[521] For instance, Canada proposed that potential *amicus* briefs should not exceed 20 pages, whilst UPS suggested 10 pages. See Ibid., at para 54.
[522] Ibid., at para 7(iii).
[523] Ibid., at para 5(iii).
[524] Ibid., para 9-10. On Mexico's arguments, see para 56-58.

It is worthy to note for now that the tribunal rejected the petitioners' request for standing as third-parties in the dispute by finding that it did not have the authority to join a party without both disputing parties' consent.[525] It also noted that such a question does not fall under its discretionary authority pursuant to Article 15(1) of the UNCITRAL Arbitration Rules.[526] Following the same rationale, the tribunal did not allow the disclosure of case materials nor the attendance at hearings in light of the lack of both disputing parties' consent.[527]

In deciding on the scope of Article 15(1), and whether it allows tribunals to accept *amicus* submissions, the tribunal explicitly referred to the *Methanex* precedent, but also to the practice of both the Iran-US Claims tribunal and the WTO Appellate Body.[528] While recognizing the public interest nature of the dispute, the tribunal acknowledged that it had the power to accept *amicus curiae* submissions pursuant to Article 15(1) and emphasized that '*it is a matter of its power rather than of third party right*'.[529] In the same vein, it acknowledged the criteria proposed by Canada and noted that those were indeed in line not only with Canadian court practice, but also those developed by the WTO Appellate Body in the *Asbestos* case[530] as well as the *Methanex* tribunal.[531] More fundamentally, the tribunal emphasized once more a fundamental and consistently applied principle in relation to *amici curiae*, i.e. they are not entitled to make submissions pursuant to a procedural or substantive right such as the right of affected third persons to be heard; rather, the acceptance of *amicus curiae* submissions is merely a matter of procedural discretion. In addition, in agreement with both disputing parties, it found that the *amici* could not make submissions in relation to the tribunal's jurisdiction nor the place of arbitration.[532] The tribunal asserted that the requirement of equality and the parties' right to present their cases do limit the power of the tribunal to conduct the arbitration in such manner as it considers appropriate. That power is to be used not only to protect the rights

[525] The issue of third-party standing will be discussed in further detail in Part III.
[526] Ibid., at para 36-37.
[527] Ibid., at para 68.
[528] Ibid., at para 64 citing Iran v United States case A/15 Award No. 63 – A/15 – FT; 2 Iran – US CTR 40, 43.
[529] Ibid., at para 61 (our emphasis).
[530] Report of the Appellate Body, *European Communities: Measures Affecting Asbestos and Asbestos-Containing Products*, *infra* note 1030. See also our discussion of those criteria in our WTO analysis in Section – 4.2 of Part II.
[531] Methanex Corporation v. United States, *supra* note 428.
[532] UPS v. Canada, *supra* note 517, at para 53.

of the disputing parties, but also to investigate and determine the matter subject to arbitration in a just, efficient and expeditious manner. The power of the tribunal to permit *amicus* submissions is not to be used in a way that is unduly burdensome for the parties or which unnecessarily complicates the tribunal process. The tribunal envisaged that it would place limits on the submissions to be made in writing in terms, for instance, of their length. The third parties would not have the opportunity to call witnesses and, as a result, the disputing parties would not face the need to cross-examine or call contradictory evidence. The disputing parties would also be entitled to have the opportunity to respond to any such submissions.

3.1.2 Exclusion of *amicus* at the jurisdictional phase: *Aguas del Tunari v. Republic of Bolivia*

Aguas del Tunari SA v Republic of Bolivia[533] is the first ICSID case in which the third-party standing and *amicus curiae* issues have arisen. A number of activists and civil society organizations,[534] including the *Coordinadora para la Defensa del Agua y la Vida*, a local Bolivian civil society organization, requested 'permission to intervene in the arbitration' shortly after the tribunal was constituted.[535] As in the *Methanex* case, the petition was presented as an enhancer of the transparency of arbitral proceedings. Petitioners argued that they had a 'direct' interest in the case and could provide 'unique expertise and knowledge'.[536] Their primary request was for the tribunal to grant them standing, through Earthjustice acting as their 'representative', and therefore to participate as parties 'in any proceedings convened to determine AdT's claim, and to afford the petitioners all rights of participation accorded to other parties'.[537] Alternatively, the petitioners sought leave to participate in the proceedings as *amici curiae*, which according to them entailed (i) making submissions concerning the procedural aspects of the tribunal, its jurisdiction, the arbitrability of the claims raised by AdT and their merits;

[533] Aguas del Tunari, S.A. v. The Republic of Bolivia (ICSID Case no. ARB/02/3) (the 'Bechtel' case).
[534] Those were: La Federación Departamental Cochabambina de Organizaciones Regantes, SEMAPA Sur, Friends of the Earth-Netherlands, Oscar Olivera, Omar Fernandez, Father Luis Sánchez, and Congressman Jorge Alvarado.
[535] See the tribunal's decision on jurisdiction, Aguas del Tunari, S.A. v. The Republic of Bolivia, *supra* note 12, at 3-4.
[536] Ibid., at 4.
[537] Ibid., at 3.

(ii) attending all hearings; (iii) making oral presentations during hearings of the tribunal; and, (iv) having immediate access to all submissions made to the tribunal. In addition, petitioners requested that the tribunal: (i) publicly disclose all statements, including written submissions, concerning the claims and defenses of both Parties; (ii) open all hearings to the public; and, (iii) visit the area of Cochabamba.[538]

In a letter addressed to Earthjustice dated 29 January 2003, the tribunal considered that, in the absence of both disputing parties' consent, the intervention of a third party would contravene the consensual nature of investment arbitration.[539] The same rationale applied with regards to granting access to hearings to non-disputing parties and/or the public in general, as well as disclosure of case materials and documents. In each of these cases, the tribunal needed both parties' consent in order to acquiesce to the petitioners' requests. Furthermore, and partially due to the early jurisdictional stage of the proceedings, the tribunal discarded the *amicus curiae* request while reserving the right to subsequently 'call witnesses or receive information from non-parties on its own initiative'.[540] Therefore, the tribunal did not entirely discard the possibility of a subsequent participation by civil society petitioners. It did finally emphasize that it was confined to the authority it receives from the underlying investment treaties and arbitration rules, and for that matter it noted that *amicus curiae* participation had been recognized under the US-Singapore BIT; but that this was arguably not the case with the relevant Netherlands-Bolivia BIT.[541]

3.1.3 *Sociedad General de Aguas de Barcelona v. Argentina* – the first *amicus* ICSID case

The case of *Sociedad General de Aguas de Barcelona, S.A. v Argentina*[542] became the first ICSID case where *amicus curiae* briefs were filed.[543] It concerned the protection

[538] Ibid., at 3.
[539] Aguas del Tunari, S.A. v. The Republic of Bolivia, *Letter to NGO regarding petition to participate as amici curiae of 29 January 2003*, available at: http://www.italaw.com/sites/default/files/case-documents/ita0019_0.pdf (last accessed 06 October 2014). See also E. De Brabandere, *supra* note 852, 101.
[540] Ibid., at 5.
[541] Aguas del Tunari, S.A. v. The Republic of Bolivia, *supra* note 539, at 2.
[542] Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic (ICSID Case no. ARB/03/19) ('Sociedad General de Aguas de Barcelona case' or 'Sociedad General de Aguas de Barcelona v. The Argentine Republic').
[543] E. De Brabandere, *infra* note 852, 101.

of foreign investments in a privatisation concession for water distribution and wastewater treatment services in the city of Buenos Aires in the wake of the country's financial crisis.[544] The claimants alleged that Argentina's refusal to apply previously agreed incremental tariff adjustments, and the ensuing termination of their concession, essentially amounted to expropriation, and violations of their right to fair and equitable treatment as well as the full protection and security of their investments.[545]

The case was regarded in the same vein as the *Bechtel* case as it raised fundamental issues relating to human rights and access to water. Five civil society organizations[546], including local grassroots Argentine associations such as the *Asociación Civil por la Igualdad y la Justicia* and the *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*'.[547] They referred to the *Methanex* and *UPS* precedents. Their requests included (a) access to hearings; (b) an opportunity to submit *amicus curiae* briefs; and (c) unrestricted access to materials of the case.

By an order dated 19 May 2005, the tribunal rejected the petitioners' request to access hearings in light of the absence of both parties' consent to that effect – in line with the provisions of Article 32(2) of the ICSID Arbitration Rules.[548] It deferred its decision on access to materials of the case until it decided on whether or not to grant leave to the petitioners to submit *amicus curiae* briefs.[549] Referring to the *Methanex* precedent, the tribunal found that it had in principle the authority to accept *amicus curiae* briefs

[544] The claims were therefore made pursuant to the France, Spain and United Kingdom BITs entered into with Argentina. Sociedad General de Aguas de Barcelona v. The Argentine Republic, *Decision on liability of 30 July 2010*, at para 2.
[545] Ibid., at para 127.
[546] 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*.
[547] Sociedad General de Aguas de Barcelona v. The Argentine Republic, *infra* note 731, at 2 (our emphasis).
[548] Article 32(2) of the ICSID Arbitration Rules states that: 'The tribunal shall decide, with the consent of the parties, which other persons besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal may attend the hearings'. See Sociedad General de Aguas de Barcelona v. The Argentine Republic, *supra* note 547, at 3.
[549] In its order of 12 February 2007, the tribunal dispensed itself from 'resolving the general question of a non-party's access to the record' as it deemed the petitioners to have had already sufficient information on the case. Ibid., at 8; and Sociedad General de Aguas de Barcelona v. The Argentine Republic, *Order in response to a petition by five non-governmental organizations for permission to make an amicus curiae submission of 12 February 2007*, at 12.

pursuant to its discretionary authority under Article 44 of the ICSID Convention states that:

> Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.[550]

In applying such authority, the tribunal stated that it had to take into account three basic criteria, i.e. 'the appropriateness of the subject matter of the case'; 'the suitability of a given non-party to act as *amicus curiae* in that case'; and 'the procedure by which the *amicus* submission is made and considered'.[551] The tribunal provided further requirements to be met by non-disputing parties wishing to submit *amicus curiae* briefs. In particular, the tribunal expected the petition to include details regarding 'the identity and background of the petitioner'; the nature of its interest in the case; whether the petitioner had received financial or any other support from any of the disputing parties; and the reasons why the tribunal should accept its brief.[552] In setting these conditions, the tribunal's intention was to establish three factors of importance: expertise, experience, and independence.[553] A petition was indeed submitted accordingly on 1 December 2006. The tribunal then issued an order dated 12 February 2007 finally accepting the petition and in which it noted that:

> the five petitioners are respected nongovernmental organizations and that they have as a group developed an expertise in and are experienced with matters of human rights, the environment, and the provision of public services.[554]

This is in contrast with an earlier decision in 2006 by the same tribunal in a related dispute – *Aguas Provinciales de Santa Fe and others v. Argentina* – where it rejected an *amicus curiae* petition submitted by the *Fundación para el Desarrollo Sustentable*, a civil society organization based in Argentina, on the basis of the three factors mentioned above: expertise, experience, and independence.[555] The tribunal found that no

[550] See ICSID Convention, *supra* note 379.
[551] Ibid., at 5.
[552] Ibid., at 7.
[553] Ibid., at 6.
[554] Sociedad General de Aguas de Barcelona v. The Argentine Republic, *supra* note 549, at 8.
[555] The petition also included three individuals identified as experts in human rights law: Professor Ricardo Ignacio Beltramino, Dr. Ana María Herren, and Dr. Omar Darío Heffes. See Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v.

information had been provided on the nature and size of the *Fundación*'s membership, the qualifications of its leadership, the expertise of its staff, and the activities in which it had been engaged. The tribunal was therefore unable to determine the *Fundación*'s expertise and experience. As to the evaluation of its independence, the tribunal expected additional information on the *Fundación*'s membership, which again was, according to the tribunal, lacking. In addition, the tribunal further elaborated on the requirements it expected with respect to the interest criterion. It found that 'it is not enough for a nongovernmental organization to justify an *amicus* submission on general grounds that it represents civil society or that it is devoted to humanitarian concerns'.[556] In this light, the tribunal found that the *Fundación* stated its interest in the case in 'the most general of terms' solely by specifying that it is 'a civic organization concerned with the management of sustainable development and with policies affecting environmental and human needs'.[557]

Against this background, the *Sociedad General de Aguas de Barcelona* tribunal cautiously reiterated that the role of the petitioners is not that of a litigant and is solely restricted to the assistance of the tribunal, i.e. 'the traditional role of an *amicus curiae*'.[558] Petitioners should therefore not challenge arguments or evidence put forward by the disputing parties. The tribunal had defined the 'traditional role of an *amicus curiae*' as consisting of assisting the decision maker arrive at its decision by providing it with arguments, perspectives, and expertise that the litigating parties may not provide', i.e. as 'a volunteer' whose offer the tribunal is 'free to accept or reject'.

3.1.4 No assistance, no participation: *Chevron and Texaco v. Ecuador*

The case of *Chevron and Texaco v. Ecuador* is a highly complex investor-state dispute governed by the US-Ecuador BIT.[559] Chevron's claims against Ecuador most notably relate to Ecuadorian court decisions in the Lago Agrio litigation and their

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The Argentine Republic (ICSID Case no. ARB/03/19), *Order in response to a petition for participation as amicus curiae of 17 March 2006* ('Aguas Provinciales de Santa Fe S.A et. al. v. The Argentine Republic'). It is worthy to note that this case was later joined to the *Sociedad General de Aguas de Barcelona* case, *supra* note 547.

[556] Ibid., at para 33.

[557] Ibid., at para 30-34. See also A. Van Duzer, *supra* note 171, at 719.

[558] Ibid., at 10, 13.

[559] Chevron and Texaco v. Ecuador, *supra* note 141.

enforcement. Chevron/Texaco face nearly $18 billion of damages to be paid to indigenous groups inhabiting the Oriente region in Ecuador, as well as others inhabiting the downstream area in Peru. The IISD and *Fundación Pachamama* sought to intervene in the arbitration as *amicus curiae*. The *amicus* petitioners recognized that their intervention primarily focused on the jurisdiction of the arbitral tribunal and the justiciability of Chevron/Texaco's claim.[560]

The tribunal dismissed their petition in its entirety. In light of both Chevron and Ecuador's objection, they were denied the request to attend oral hearings pursuant to Article 25(4) of the UNCITRAL Arbitration Rules. Given that the tribunal was at a preliminary stage dealing with jurisdictional and justiciability issues, it agreed with both parties that an *amicus* intervention would not assist it given that these issues were strictly legal and had been already extensively discussed by both disputing parties. Citing its discretionary powers under Article 15(1) of the Rules, the tribunal thus rejected the *amici*'s petition.[561]

In this case, the outright dismissal of the *amicus* petition clearly sheds lights on (i) the fact that host states do not necessarily consider civil society's *amicus* interventions as additional support to their position; and (ii) investor-state tribunals' exercise of discretion on the matter, i.e. the acceptance of *amicus curiae* submissions is far from being considered as automatically granted by investor-state tribunals – in stark contrast to other jurisdictions such as international human rights jurisdictions as shown subsequently in Part II.

3.2 Tribunals that applied the recently-enacted criteria

Below are cases that have considered newly-enacted criteria under ICSID Arbitration Rules or referred to the ones set forth under the FTC Statement. Those were: *Glamis Gold v. the United States*; *Biwater Gauff v. the Republic of Tanzania*; and *Piero Foresti et al. v. the Republic of South Africa*. Similar to the arbitrations discussed in Section 3.1, these were some of the first tribunals to accept civil society's petitions to intervene as *amicus curiae*. Equally, these arbitrations raise a number of core substantive

[560] Chevron and Texaco v. Ecuador, *infra* note 803, at para 3.3
[561] Chevron and Texaco v. Ecuador, *Procedural Order No. 8 of 18 April 2011*, at para 17-20.

public interest issues that shed light, from a holistic perspective, on the relevance of *amicus curiae* intervention, including most notably indigenous peoples' rights and interests (*Glamis* and *Piero Foresti*) and the human right to access to water (*Biwater*).

3.2.1 Clear guidelines and no objections: *Glamis Gold v. the United States*

Glamis Gold is a case that concluded following the release of the FTC Statement. The Quechan Indian Nation, which is a federally recognized tribe in the US, sought to intervene in the dispute as *amicus curiae*. In fact, had it not been through the *amicus curiae* procedure, the Nation – which is a direct stakeholder to the dispute – would not have had any access to the tribunal.[562] Friends of the Earth Canada and Friends of the Earth United States, the National Mining Association, and Sierra Club and Earthworks also made submissions. These submissions were accepted as appropriate in accordance with the principles stated in the FTC Statement.[563] The tribunal acknowledged receipt of the petitioners' application and referred them to section B of the FTC Statement.[564] It noted that accepting *amicus curiae* submissions falls within its discretionary authority under Article 15(1) of the UNCITRAL Arbitration Rules, and that the parties have not made objections to that effect (subject to the submissions being made in accordance with the FTC Statement). It also stated that no undue burden or delay would be caused.[565] The authority of the tribunal to accept *amicus curiae* briefs was not questioned given that the proceedings began following the release of the FTC Statement. In fact, Glamis did not object to any of the briefs made by the *amici* except the one submitted by Friends of the Earth as it largely addressed the nationality of Glamis, i.e. a jurisdictional issue that exceeded the agreed scope of *amicus curiae* submissions.[566]

3.2.2 Bringing issues unaddressed by disputing parties to the fore – *Biwater Gauff v. the Republic of Tanzania*

The case was concluded following the amendment of the ICSID Arbitration Rules and provided useful guidance as to how the new rules applied. *Amicus curiae* petitions

[562] E. De Brabandere, *infra* note 852, at 105.
[563] Ibid., at 101.
[564] NAFTA Free Trade Commission, FTC Statement, *supra* note 489.
[565] Glamis Gold Ltd v. United States, *supra* note 496, at 127.
[566] Glamis Gold Ltd v. United States, *supra* note 496, at 130.

were made by five civil society organizations[567] including renowned international civil society organizations such as the IISD, but also local Tanzanian grassroots organization such as the Tanzania Gender Networking Programme. The tribunal accepted to grant the petitioners leave to submit an *amicus curiae* brief, notwithstanding Biwater Gauff's objection, by virtue of the newly amended Article 37(2) of the ICSID Arbitration Rules. Although the tribunal had such authority in accordance with the amended ICSID Arbitration Rules, it nonetheless cited the *Methanex* decision to highlight the public interest at stake as a rationale for accepting *amicus curiae* submissions.[568]

The tribunal also dismissed the claimant's contention that the *amici* could add nothing 'which could not be said by either party' and thus failing the test of 37(2)(a) of the Rules. The tribunal clearly noted the *amici*'s distinct position and perspectives vis-à-vis both parties.[569] Tanzania had indirectly relied on human rights arguments and did not articulate the aspects raised by the *amici*, i.e. it did not invoke the access to water as a human right as part of its defense.[570] The tribunal denied, however, their request to attend oral hearings in light of Biwater Gauff's objection.[571] As in the *Sociedad General de Aguas de Barcelona, S.A. v. Argentina* decision, the petitioners were requested to submit a single joint *amicus curiae* brief. The tribunal considered that information in the public domain was sufficient for the *amici* to make their submission and did not grant them access to the record. In their brief, the *amici* lamented this decision as the inability to properly access the record necessarily meant that their submission was based on an incomplete set of factual information. They were unaware of the legal arguments made

[567] The Lawyers' Environmental Action Team, the Legal and Human Rights Center, the Tanzania Gender Networking, the Center for International Environmental Law, and the International Institute for Sustainable Development. See Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania (ICSID Case No. ARB/05/22), *Final award of 24 July 2008*.
[568] Ibid., at para 358.
[569] 'The five Petitioners comprise NGOs with specialised interests and expertise in human rights, environmental and good governance issues locally in Tanzania. They approach the issues in this case with interests, expertise and perspectives that have been demonstrated to materially differ from those of the two contending parties, and as such have provided a useful contribution to these proceedings'. See Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania, *infra* note 741, at para 359.
[570] For further analysis on this point, see C. Schreuer, U. Kriebaum, *infra* note 617, at 1091.
[571] Indeed, Article 32(2) states that: '(2) Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information'. See Ibid., at para 63-65.

by both parties or the facts they alleged; and therefore, they could not comment on the parties' positions.[572]

3.2.3 Unprecedented access to case materials in *Piero Foresti et al. v. the Republic of South Africa*

The South African Legal Resources Centre and the Centre for Applied Legal Studies' – acting amongst others as petitioners[573] – requests included leave to submit a written *amicus curiae* brief, access to specifically identified case materials, attend hearings and present key submissions orally. The tribunal indeed granted the petitioners leave by applying the conditions set out under Article 41(3) of the ICSID Additional Facility Rules, which mirrors Article 37(2) of the ICSID Arbitration Rules and provides the same conditions.[574] The tribunal emphasized that its decision was guided by two principles:

> (1) [Non-disputing party ('NDP')] participation *is intended to enable NDPs to give useful information and accompanying submissions to the Tribunal*, but is not intended to be a mechanism for enabling NDPs to obtain information from the Parties.
>
> (2) Where there is NDP participation, *the Tribunal must ensure that it is both effective and compatible with the rights of the Parties and the fairness and efficiency of the arbitral process*.[575]

On the basis of the above, in an unprecedented decision, the tribunal also partially accepted the petitioners' request to access certain case materials.[576] It requested the parties to agree on submitting redacted versions of the Memorial and Counter-Memorial, as well as legal opinions, and a non-descriptive list of witnesses and experts that had provided evidence on facts and damages.[577] The basis for the tribunal's decision in this regard was simply logical. It found that:

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[572] Biwater Gauff v. Tanzania, *infra* note 744, at paras 13-14.
[573] The remaining two other petitioners are renowned organizations: the International Centre for the Protection of Human Rights and the Centre for International Environmental Law.
[574] ICSID Additional Facility Rules, entered into force 10 April 2006, available at: https://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR_English-final.pdf (last accessed 01 June 2013).
[575] Piero Foresti, Laura de Carli and others v. Republic of South Africa, *Letter regarding non-disputing parties of 05 October 2009*, available at: http://italaw.com/sites/default/files/case-documents/ita0334.pdf (last accessed 06 October 2014). For additional commentary, see also J. Brickhill and M. Du Plessis, *supra* note 427, at 160.
[576] *Ibid* (our emphasis).
[577] The tribunal made this decision on the basis that: '(1) that NDP participation is intended to enable NDPs to give useful information and accompanying submissions to the Tribunal, but is not intended to be a mechanism for enabling NDPs to obtain information from the Parties; and (2) where there is NDP participation, the Tribunal must ensure that it is both effective and compatible with the rights of the Parties and the fairness and efficiency

> NDPs must be allowed access to those papers submitted to the Tribunal by the Parties *that are necessary to enable the NDPs to focus their submissions upon the issues arising in the case and to see what positions the Parties have taken on those issues*. The NDPs must also be given adequate opportunity to prepare and deliver their submissions in sufficient time before the hearing for the Parties to be able to respond to those submissions.[578]

The tribunal had deferred making a final decision on the request relating to attendance of the hearings and oral submissions. As mentioned, the case was later discontinued following a settlement between the parties to the dispute.

3.3 Common procedural grounds

The UNCITRAL and ICSID cases examined hitherto show fairly consistent attitudes by investment treaty arbitration tribunals. Primarily, tribunals have asserted their discretion in accepting *amicus curiae* briefs while emphasizing that non-disputing parties do not benefit from any substantive right to file such briefs.[579] By acknowledging their authority to accept *amicus curiae* briefs, as mentioned previously, tribunals have also sought to establish three factors of importance relating to petitioners, i.e. their expertise, experience, and independence. They also systematically expected petitioners to clearly establish and articulate their interest in the dispute, which has to necessarily be distinct from either disputing party's. As to attendance at hearings, oral submissions, and access to case materials, tribunals have generally found that they did not have the authority to acquiesce to such requests in the absence of both disputing parties' consent (with the exception of the *Piero Foresti* tribunal).

Again, more fundamentally for the purposes of this research, the most salient common denominator here is that there is clearly no right *per se* entitling non-disputing parties to submit *amicus curiae* briefs, i.e. non-disputing parties – whether represented by civil society actors or not – do not have the *right to be heard* by investor-state tribunals. As mentioned above, civil society actors sought to intervene as *amicus curiae* in the *Sociedad General de Aguas de Barcelona* on the basis of '*the right of every person to participate and make their voices heard in cases where decisions may affect their*

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of the arbitral process'. See Piero Foresti, Laura de Carli and others v. Republic of South Africa, *infra* note 789, at para 27-28.

[578] Piero Foresti, Laura de Carli and others v. Republic of South Africa, *supra* note 575.

[579] T. Ishikawa, *supra* note 108, at 388-389.

rights'.[580] It has been consistently pointed out that this argument is not relevant. Tribunals have regarded the *amicus curiae* issue as a strictly procedural one notwithstanding the significance of the public interest at stake. In this light, petitioners were particularly requested to limit their briefs to the sole and unique purpose of assisting tribunals by bringing arguments, perspectives, and expertise other than those of the disputing parties, i.e. *amici curiae* are not expected to, and should not, act as litigants, in other words, they should not challenge arguments or evidence put forward by the disputing parties, nor deal with jurisdictional or justiciability issues. In the same vein, investor-state tribunals fully exercise their discretion on the matter and have not shied away from entirely dismissing *amicus* petitions.[581]

4. Civil society participation: Where procedure intertwines with substance

Investor-state tribunals are *solely* concerned with adjudicating international treaty rights of foreign investors, as well as the obligations of host states under international law as set out under IIAs and BITs.[582] This research does not purport to suggest otherwise – a fundamental point to note for the ensuing discussion on environmental protection and human rights. Notwithstanding this widely recognized fact, civil society petitions have sought to put forward before investor-state tribunals issues that are underlying to the *'broader' public interest* and/or *'direct' interests* of third parties. If looked at through the prism of human rights, the discourse on civil society participation in investor-state arbitration is therefore not about advancing the adjudication of human rights before investor-state tribunals 'at the expense' of the adjudication of foreign investors' rights.[583] Rather, it is about recognizing that the human rights of third parties to investor-state disputes, whether recognized under municipal law or international law instruments, either 'hard' or 'soft', could nonetheless translate into third party *interests* at the investor-state

[580] Sociedad General de Aguas de Barcelona v. The Argentine Republic, *infra* note 731, at 2 (our emphasis).
[581] See, as mentioned, Chevron and Texaco v. Ecuador, *supra* note 561, at para 17-20; Aguas Provinciales de Santa Fe S.A et. al. v. The Argentine Republic, *supra* note 555, at para 30-34; see also Section 5.1.
[582] In addition, depending on the drafting of the relevant treaty, contractual obligations as well.
[583] C.E. Côté, *La participation des personnes privées dans le règlement des différends internationaux économiques : L'élargissement du droit de porter plainte à l'OMC* (2007), at 416, 419.

dispute level.[584] These *interests* only become worthy of consideration by investor-state tribunals if and when they are relevant to the adjudication of a given dispute. Indeed, the adequacy of accepting factual and legal arguments concerning these *interests* primarily depends on the facts and circumstances of each case.[585]

As an independent third party to an investor-state dispute, an *amicus* is expected to present factual and legal arguments that the parties do not make before the tribunal. Although civil society's *amicus* participation is generally perceived as supporting host states against claimants, civil society petitioners have nonetheless raised specific arguments on public health, environmental, human rights or other public policy issues underlying the *'broader' public interest* and/or *'direct' interests* of third parties that were not necessarily asserted by host states. Host states could deliberately omit such arguments because of tactical considerations, e.g. by focusing on raising jurisdictional objections to foreign investors' claims, or out of reluctance to shed light on their shortcomings in addressing these *interests* – as reflected for instance by the previously mentioned *Metalclad v. Mexico* and *Aguas del Tunari v. Bolivia* cases. Accordingly, host states do not systematically favour transparency or, for that matter, civil society participation in investor-state disputes.[586]

Against this background, it is necessary to take a closer look at civil society's arguments as *amicus curiae* as this sheds light on its role in not only addressing the *'broader' public interest* at issue in investor-state disputes, but also in raising, asserting, and defending the *'direct' interests* of affected third parties.[587] This section will consider substantive arguments put forward in relation to the protection of the environment (**Section 4.2)** and human rights, including most notably the promotion of the human right to water (**Section 4.3**), as well as indigenous and ethnic minority rights (**Section 4.4**) – these three systematically appear in public interest-related investor-state arbitration, they

[584] It is important to note that this section refers interchangeably to rights and obligations contained in both 'hard' and 'soft' law instruments, such as for instance the human right to water.
[585] See procedural analysis above, Part II – Section 3.
[586] In particular, see Mexico's request to the *Metalclad* tribunal to order the parties to 'limit public discussion of the case to a minimum'. See Metalclad Corporation v. United Mexican States, *supra* note 273. See also, T. Ishikawa, *supra* note 108, at 393. See Part I – Section 1.4.2; Chevron and Texaco v. Ecuador, *supra* note 561, at para 17-20.
[587] A more elaborate analysis will also be undertaken on this point in the wake of the analysis of the scope and regulation of a proposed third party intervenor role for civil society, and whether such role should be subject to third party *interests* or *rights* (that would be potentially at stake in investor-state disputes). See Part III – Section 3.1.

are therefore worthy of a closer look. That said, a preliminary discussion over the debate on the relevance of such issues to investor-state arbitration is merited (**Section 4.1**).

4.1 Are environmental protection and human rights issues relevant to the adjudication of investor-state disputes?

The debate over the relevance of environmental and human rights issues to investor-state disputes is an immense subject that could easily exceed the scope of this research. There is nonetheless a need to address this debate, particularly in light of the arguments raised by civil society as *amicus curiae*. If environmental and human rights issues are deemed irrelevant to the adjudication of host state responsibility towards foreign investors; then, the idea of civil society participation in investor-state disputes becomes altogether obsolete.[588] Investor-state disputes involving both environmental or human rights issues and civil society are arguably limited in number.[589] Many practitioners often regard the relevance of human rights issues to the international law on foreign investment as overstated.[590]

If human rights issues are raised, these would often relate to rights such as, for instance, the human right to access water. It is argued that, in any event, international human rights obligations are solely incumbent upon states.[591] Host states have an international duty to, *inter alia*, 'respect, protect, and provide' the economic and social

[588] This section is not concerned with the human rights violations that may be claimed by foreign investors. Denial of justice vis-à-vis foreign investors is discussed under Part III – Section 2.2.1. See also the examples of Antoine Biloune (Syria), Marine Drive Complex Ltd (Ghana) v. Ghana Investments Centre, the Government of Ghana, UNCITRAL, *Awards of 27 Oct 1989 and 30 June 1990*; Mr. Patrick Mitchell v. Democratic Republic of the Congo (ICSID Case No. ARB/99/7), *Award of 9 February 2004* cited in C. Schreuer, U. Kriebaum, *infra* note 617, at 1090. On the relevance of human rights to foreign investors' claims, see also J. Levine, *infra* note 758, at 109.

[589] 13 investor-state disputes in total as previously mentioned, see *supra* note 167. Although it is worthy to note that civil society actors have only gained limited access to arbitral tribunals – through the *amicus curiae* procedure – recently, and therefore their seemingly limited involvement should be placed into perspective.

[590] B. Simma, *supra* note 196, at 578.

[591] International human rights jurisdictions generally reassert the state's duties in protecting human rights, and their positive obligations to protect individuals and groups against private actors. Therefore, it is argued that a host state should be the primary respondent when multinationals commit violations since it is primarily responsible for the protection of human rights within its realm. See A. Nienaber, *infra* note 928, at 543; C. Schreuer and U. Kriebaum, *infra* note 617, at 1085.

rights of their citizens. This makes it arguably futile to address wrongdoing or harm, or even abuses, allegedly committed by foreign investors before investor-state tribunals.[592]

States have a concomitant international duty to promote and protect foreign investments. Investor-state tribunals are essentially mandated with censoring a host state's performance of its international obligations under IIAs or BITs, i.e. they are not adequate fora to deal with allegations of environmental or human rights abuse nor accept civil society participation. It is therefore argued that the proper fora for civil society participation should be rooted in the domestic court system, before international human rights jurisdictions, other non-judicial avenues such as the OECD National Contact Points,[593] or the various consultation mechanisms set forth under IIAs such as the NAFTA National Administrative Offices and Commission for Labor Cooperation.[594]

There are various counter-arguments to these contentions. Judge Bruno Simma submits that solely emphasizing the scarcity of such cases is a 'myopic way' of viewing the matter.[595] The attraction by host states of substantial sums of foreign capital, as well as the need to supply an exponential global demand in natural resources, requires an increasingly complex balancing exercise with local community rights and concerns as

[592] B. Simma, *supra* note 196, at 579.

[593] As mentioned previously, the grievance mechanism set forth through the OECD National Contact Points is concerned with the application of the OECD Guidelines for Multinational Enterprises. Several scholars have promoted the OECD National Contact Points as a suitable forum for individuals and civil society to assert environmental, and human rights concerns linked to foreign investors' activities. It has in fact an effervescent case inventory where civil society organizations are increasingly representing local stakeholders in disputes with multinationals, including: *Frente de Defensa Miguelense Coalition* v. Goldcorp, Final statement of 3 May 2011, OECD National Contact Point Canada; *The LEAD Group* v. *Innospec*, Final statement of 1 February 2012, OECD National Contact Point United States of America; *Centro de Derechos Humanos y Ambiente et al.* v. Nidera, Final statement of 2 March 2012, OECD National Contact Point Netherlands; *Sakhalin Environment Watch and Stroitel* v. *Royal Dutch Shell, Standard Charter, Barclays, and Royal Bank of Scotland*, Claim filed 31 July 2012, OECD National Contact Point United Kingdom; *European Center for Constitutional and Human Rights et al.* v. *Louis Dreyfus Commodities Suisse SA*, Final statement of 29 February 2012, OECD National Contact Point Switzerland. For a further analysis, see P. Protopsaltis, *supra* note 89, at 255; and D. Collins, '*Alternative Dispute Resolution for Stakeholders in International Investment Law*', (2012) 15 Journal of International Economic Law 673.

[594] The NAALC set forth a mechanism whereby each NAFTA party maintains a National Administrative Office (NAO) within its labor ministry, which receives and responds to public communications regarding labor law matters arising in another NAFTA country. It is nonetheless heavily criticized for its ineffectiveness. See HRW, 'NAFTA Labor Accord Ineffective: Future Trade Pacts Must Avoid Pitfalls', 16 April 2001, available at: http://www.hrw.org/news/2001/04/15/nafta-labor-accord-ineffective (last accessed 06 October 2014). See NAALC, *supra* note 225.

[595] B. Simma, *supra* note 196, at 578-579.

reflected for instance by the impact of mining activities on water sources and local agriculture.[596]

Civil society has sought access not only to international human rights jurisdictions, but also to investor-state tribunals, where it seeks to uphold the validity of environmental and human rights principles contained under a vast array of international norms and separate international legal regimes or even under municipal law.[597] It is to be recalled that the impact of an investor-state tribunal's decision inexorably binds the host state and could potentially cause adverse repercussions on the host state's population.[598] In such cases, investor-state tribunals would have to weigh between both these populations' rights and foreign investors'.[599] This raises several difficult questions:

> Once a tribunal has before it the applicable human rights norms, it must decide whether or how these rules affect the arguments advanced by the parties… Are a State's obligations to its own population to be weighed against investor rights under BITs? How can we harmonize the host State's obligations under the two regimes? This will always be a difficult exercise and sometimes compliance with both set of obligations will be virtually impossible.[600]

The dynamics of foreign investment necessarily set the finality of host state measures as defenses by host states that have interfered in allegedly harmful investments.[601] In this light, it is argued that the protection guaranteed to foreign investors under IIAs or BITs should be reduced if (i) cases of harm or abuses are

[596] It is worthy to note here that water is used by the mining industry for processing and transport of ore and waste, minerals separation, dust suppression, washing of equipment, and human consumption at sites. Furthermore, the direct disposal of mining waste and wastewater has the potential of causing widespread water contamination – and numerous examples of such occurrences exist. See D. Kemp, et al. 'Mining, Water, and Human Rights: Making the Connection', (2010) 10 Journal of Cleaner Production 1553, at 1554. See also the Dongria Kondh indigenous community of Eastern India discussed above, *infra* note 695. See also G. Akpan, 'Litigation Problems that Arise from Natural Resources Exploitation in Foreign Courts: Impediments to Justice', (2002) 20 Journal of Energy and Natural Resources Law 55, at 78.

[597] The major difference between both types is that the latter render internationally enforceable decisions, whereas the former do not. The benefit of intervening in jurisdictions such as ICSID tribunals and obtaining a favourable decision appear evident: the binding and enforceable character of the decision is crucial in providing adequate relief. On the distinction between 'first' and 'second generation' tribunals, see G. Born, 'A New Generation of International Adjudication', (2012) 61 Duke Law Journal 775, at 810. See also I. Feichtner, 'The Waiver Power of the WTO: Opening the WTO for a Political Debate on the Reconciliation of Competing Interests', (2009) 20:3 European Journal of International Law 615, at 615-616; see also 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 174; and M. Wells-Sheffer, *supra* note 206, at 491

[598] G. Akpan, *supra* note 596, at 77-78.

[599] Judge Bruno Simma argues that pressing calls for balance in the international investment regime are no longer solely associated with anti-globalization movements, they presently stem from a wide array of actors. See B. Simma, *supra* note 196, at 573-574.

[600] Ibid., at 591.

[601] Ibid., at 577.

established before investor-state tribunals; and (ii) host states take adverse measures towards them for such reason.[602] This is manifestly reflected in the *Metalclad v. Mexico* case – as mentioned previously. Although it was established that Metalclad's subsidiary had dumped 20,000 tons of untreated toxic waste near the Guadalcazar community, Metalclad still successfully obtained damages from Mexico due to the discretionary and inequitable treatment it allegedly suffered as a result of state and municipal authority measures.[603] But again, Mexico never grounded its defense on the basis of its duty to protect the environment of the Guadalcazar community.[604] How could it credibly do so if it had granted Metalclad various federal environmental approvals? The more fundamental question is: should the dumping of 20,000 tons of untreated toxic waste by a foreign investor be considered relevant by an investor-state tribunal adjudicating the rights of that foreign investor and the obligations of the host state towards it under international law? The answer to this question is heavily dependent on the facts and circumstances of each case.

Indeed, in response to an objection by the host state against the consideration of human rights issues affecting the claimant's executives, the *Hulley Investments v. Russia* tribunal explicitly said that it 'recognizes that it is not a human rights court'.[605] However,

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[602] Sornarajah further asserts that the creation of competing objectives of protecting human rights and the environment from the abuse of multinational corporations leads to a recognition of the regulatory right of the host state to interfere in circumstances where the former abuses human rights such as labour rights or causes environmental damage. The increasing recognition of such a regulatory right should contribute to balance the aim of investment protection and require the recognition that a host state has the right to intervene in an investment that poses a danger to the environment or involves an abuse of human rights. In practice, however, with FDI being prescribed as a key instrument to economic development and progress, few host states are inclined, or are in fact in a position, to step up such a confrontation with foreign investors or multinationals. In general, quite the contrary occurs, it is recognized that host states, particularly developing ones, are rather in a staunch competition amongst each other to attract FDI and multinationals to their economies. M. Sornarajah, *supra* note 221, at 78, 147

[603] United Mexican States v. Metalclad Corporation, *supra* note 314.

[604] Rather, Mexican federal authorities had approved the Metalclad project, from an environmental standpoint, all along. This situation echoes with Pogge's idea on 'the human rights of the global poor'. According to Pogge, the widespread violation of human rights also plays a decisive role in explaining the global deficit in civil and political human rights which demand democracy, due process, and the rule of law. He asserts that poor citizens from developing and least-developing states are often physically and mentally stunted due to malnutrition in infancy, illiterate due to lack of schooling, and much preoccupied with their family's survival – and can cause little harm or benefit to the state officials who rule them. Such rulers therefore have far less incentive to attend to the interests of their constituents compared with the interests of agents more capable of reciprocation, including foreign governments, companies, and tourists. See T. Pogge, 'Recognized and Violated by International Law: the Human Rights of the Global Poor', (2005) 18 Leiden Journal of International Law 717, at 718, 727. See also See NAFTA Article 1114, *supra* note 170.

[605] 'Respondent observes that "the alleged violations of the human rights of Messrs. Khodorkovsky, Lebedev and others . . . are outside the scope of this Tribunal's jurisdiction, unless Claimants can establish that any such

it found that the alleged human rights violations constituted relevant factual evidence to conclude that the expropriation of the claimant's investments was not done in accordance with the 'due process of law' as required by the Energy Charter Treaty.[606] The *Hulley* tribunal's findings here were specific to a set of facts and circumstances that may not be relevant to other cases. Yet, the tribunal clearly articulated how issues that typically fall outside investor-state tribunals' jurisdiction – such as human rights issues – may nonetheless remain relevant to the adjudication of foreign investors' claims.[607]

Against this backdrop, civil society is often viewed as an essential actor that could potentially raise, assert, or defend relevant non-jurisdictional issues that are underlying to the *'broader' public interest* and/or the *'direct' interests* of third parties before investor-state disputes – as will be shown directly below.

4.2 The *leitmotiv* of environmental protection

A substantial number of civil society actors consider environmental protection as their *leitmotiv*. These actors have been particularly active as *amici curiae* at the WTO, but also other jurisdictions such as the IACtHR or ACHPR.[608] This is also true for investor-state disputes, as particularly manifested by the *Methanex v. the United States* case. Aside from its procedural importance, the *Methanex* case was also a case that presented

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violations directly impaired the management or operation of their investments."… *The Tribunal recognizes that it is not a human rights court*. Nevertheless, it is within the scope of the Tribunal's jurisdiction to consider the allegations of harassment and intimidation as they form part of the factual matrix of Claimants' complaints that the Russian Federation violated its obligations under Part III of the ECT. The Tribunal's task includes determining whether the Russian Federation "in any way impair[ed] by unreasonable or discriminatory measures [Claimants'] management, maintenance, use, enjoyment or disposal" of its investment, or subjected Claimants' investment to measures having the effect equivalent to an expropriation. In the context of that inquiry, the Tribunal will set out the evidentiary record with respect to the alleged "campaign of harassment and intimidation."'. See Hulley Enterprises Limited (Cyprus) v. The Russian Federation, PCA Case No. AA 226, *Final award of 18 July 2014*, at para 764-765 (our emphasis).

[606] Ibid., at 1583-1585; Energy Charter Treaty, 2080 UNTS 95; 34 ILM 360 (1995), available at: http://www.encharter.org/fileadmin/user_upload/document/EN.pdf.

[607] For a more elaborate discussion on the human rights dimension of the *Yukos* arbitrations, see E. De Brabandere, 'Yukos Universal Limited (Isle of Man) v The Russian Federation Complementarity or Conflict? Contrasting the Yukos Case before the European Court of Human Rights and Investment Tribunals' (2015), 30:2 ICSID Review 345.

[608] See Report of the Appellate Body, *European Communities: Measures Affecting Asbestos and Asbestos-Containing Products*, *supra* note 1030; Report of the Appellate Body, *United States: Import Prohibitions of Certain Shrimp and Shrimp Product*, *supra* note 1027.
Centre for Minority Rights Development (Kenya) and *Minority Rights Group International on behalf of Endorois Welfare Council* v. *Kenya*, Decision of 4 February 2010, ACHPR (276/2003); and *The Mayagna (Sumo) Awas Tingni Community* v. *Republic of Nicaragua*, *supra* note 1066; and *SERAC and Center for Economic and Social Rights v. Nigeria*, *infra* note 931.

complex environmental issues that merit further scrutiny. The *Methanex* case will serve as an example that illustrates civil society's quest in promoting the protection of the environment before investor-state tribunals. Prior to that, it is worthy to briefly discuss the issue of environmental protection from a general normative perspective as prelude to the case analysis.

4.2.1 The environment: An exclusive affair for states?

A detailed look at the applicable law on environmental protection would largely exceed the scope of the present research. The purpose here is to further articulate the previously mentioned inter-play between environmental protection and investor-state arbitration. Indeed, international environmental treaties cover, *inter alia*, enhancing access to environmental information (the Aarhus Convention),[609] restrictions on greenhouse gas emissions (most notably the Kyoto Protocol),[610] persistent organic pollutants (the Stockholm Convention),[611] international trade in hazardous chemicals (the Rotterdam Convention),[612] or the control of transboundary movements of hazardous waste and their disposal (the Basel Convention).[613] There are also a myriad of environmental norms contained in non-binding instruments.[614] In equal importance, each state adopts its own domestic environmental regulations or measures, which could be the subject of investor-state tribunals' scrutiny. Domestic environmental regulations or measures such as, for instance, requirements for environmental impact assessments on

[609] See Aarhus Convention, *supra* note 119.
[610] Kyoto Protocol to the United Nations Framework Convention on Climate Change, entry into force 16 February 2005, UN Doc FCCC/CP/1997/7/Add.1, Dec. 10, 1997; 37 ILM 22 (1998).
[611] Stockholm Convention on Persistent Organic Pollutants, entry into force 17 May 2004, 2256 UNTS 119; 40 ILM 532 (2001).
[612] Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, entry into force 24 February 2004, 2244 UNTS 337; 38 ILM 1 (1999) ('Rotterdam Convention').
[613] Basel Convention, *supra* note 295. In fact, the tribunal in the previously mentioned *S.D. Myers Inc. v. Canada* dispute extensively scrutinized the Convention, see Part I – Section 1.3.3. See also S.D. Myers Inc. v. Canada, *supra* note 277.
[614] Although contained in non-binding instruments, it is also argued that, there is a substantive obligation on host states to impose environmental impact assessments in order to ensure that economic activity is not carried out at the expense of the environment. They are also held to be consistent with BITs when contained in domestic legislation. For instance, the rigorous application of environmental impact assessment requirements by the Spanish authorities was held to be perfectly consistent with the applicable Argentina-Spain BIT. See *Maffezini v. Spain*, *supra* note 145. See also N. Craik, *The International Law of Environmental Impact Assessments* (2008), at 87.

mining activities[615] or noise-control in oil pipeline construction aimed at protecting belugas and caribous[616] have been, or could potentially be, scrutinized before investor-state tribunals.

That being said, there are a plethora of stakeholders who have an interest in upholding environmental protection at all levels, including before investor-state tribunals. The environment has progressively emerged as a 'common concern of humanity' or an *intérêt general*.[617] Environmental protection imposes duties on society as a whole and each of its individual members.[618] In fact, any person from the 'public', including civil society, is deemed to have an 'interest' in promoting environmental protection under international law as reflected by the Aarhus Convention.[619] Climate change for instance, a primary environmental concern, has become one of the main contemporary societal challenges.[620] Along with other compellingly urgent environmental concerns, climate change brings environmental protection to the fore of international law.[621]

Finally, as *public interest* concerns, environmental protection and human rights issues overlap in significant ways.[622] International environmental law and human rights law are two distinct realms, particularly because human rights focus on protecting human beings from environmental degradation, rather than protecting the environment *in se*.[623] Yet, the overlap between them is most notably evidenced by the numerous references to

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[615] Vito G. Gallo v. The Government of Canada, *supra* note 172.
[616] CBC News, 'Quebec denies TransCanada approval to resume work in Cacouna: Environment ministry says it's not persuaded pipeline company will respect noise levels to protect belugas', 15 October 2014, available at: http://www.cbc.ca/news/canada/montreal/quebec-denies-transcanada-approval-to-resume-work-in-cacouna-1.2799981 (last accessed 05 January 2015).
[617] D. Shelton, *supra* note 400, at 37; C. Schreuer, U. Kriebaum, 'From Individual to Community Interest in International Investment Law' in U. Fastenrath, et al. (eds.), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (2011), at 1080.
[618] D. Shelton, *supra* note 400, at 37.
[619] The Aarhus Convention defines the 'public' as 'one or more natural or legal persons, and…their associations, organizations or groups'; and the 'public concerned' as the: 'public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, *non-governmental organizations promoting environmental protection…shall be deemed to have an interest*'. See Articles 2(4) and 2(5) of the Aarhus Convention, *supra* note 119 (our emphasis).
[620] R. Bratspies, 'Human Rights and Environmental Regulation' (2012), 19 New York University Environmental Law Journal 225, at 243.
[621] R. Rayfuse, and S. Scott, 'Mapping the Impact of Climate Change on International Law', in R. Rayfuse, and S. Scott (eds.), *International Law in the Era of Climate Change* (2012), at 19.
[622] G. Alfredsson, 'Human Rights and the Environment' in D. Leary, and B. Pisupati (eds.), *The Future of International Envrionmental Law* (2010), at 127. See also A. Boyle, 'Human Rights and the Environment: Where Next?', (2012) 23 European Journal of International Law 613, at 614.
[623] It is in this regard that human rights law is viewed as 'anthropocentric'. See R. Bratspies, *supra* note 620, at 245.

environmental protection in international human rights instruments relating to the rights to life, food, water, health, home, property, political participation, freedoms of information, association and expression, in addition to cultural rights including those of indigenous peoples.[624] In fact, one of the earliest and most reflective instruments of this duality is the 1972 Stockholm Declaration.[625] It is also well-manifested under the Banjul Charter;[626] and indeed, in the subsequently discussed case of *SERAC v. Nigeria*.[627] Also, the right to a healthy environment is enshrined in several constitutions.[628] The Bolivian constitution for instance provides that 'persons have a right to a healthy, protected, and balanced environment'.[629]

[624] See Ibid., at 128-129 citing those mentioned rights set forth under the ICCPR, ICESCR, CEDAW, UN Convention on the Rights of the Child, UNESCO Convention. See ICCPR, *supra* note 93; ICESCR, *supra* note 672; CEDAW, *infra* note 675; UN Convention on the Rights of the Child, *infra* note 673; and the Convention Concerning the Protection of the World Cultural and Natural Heritage, entry into force 15 December 1975, 1037 UNTS 151; 27 UST 37; 11 ILM 1358 (1972) ('UNESCO Convention').

[625] Principle 1 provides that: 'Man has the fundamental right to freedom, equality and adequate conditions of life, *in an environment of a quality* that permits a life of dignity and well-being, *and he bears the solemn responsibility to protect and improve the environment* for present and future generations'. See Declaration of the United Nations Conference on the Human Environment, dated 16 June 1972, U.N. Doc. A/Conf.48/14/Rev. 1(1973); 11 ILM 1416 (1972) (our emphasis). See also R. Bratspies, *supra* note 620, at 245.

[626] Article 24 provides that 'All peoples shall have the right to a general satisfactory environment favorable to their development.'. See Banjul Charter, *infra* note 845.

[627] In this case, the ACHPR ordered Nigeria to undertake significant clean-up measures to remedy the environmental harm suffered by the Ogoni People. Notwithstanding those arguably close inter-linkages, some argue that there is no generally recognized human right to a healthy environment under international law. See *SERAC and Center for Economic and Social Rights v. Nigeria*, *infra* note 931; see also R. Bratspies, *supra* note 620, at 239.

[628] Constitutionalization is often viewed a signal that a given state has accepted the validity of a human right norm. For instance, there have been repeatedly unsuccessful efforts to implement an amendment to the US Constitution to the effect that 'every person has the inalienable right to a decent environment. The United States and every state shall guarantee this right'. In fact, it is worthy to mention that US courts have shown reticence with respect to admitting environmental wrongs as violations of the law of nations. See Ibid., at 232.

[629] Article 33 goes on to provide that 'the exercise of such right should enable individuals and collectivities of present and future generations, in addition to other living creatures, to develop in a normal and permanent manner'. It is worthy to note as well that Article 34 further enables any individual or collectivity to engage legal proceedings in defense of the right to a healthy environment. In addition, Article 312(III) provides that all forms of economic organizations have the obligation to protect the environment. In fact, the constitution is unique in referring to the concept of 'Pachamama', or in other words, 'Mother Earth' – which holds significant value to indigenous peoples from the Andes region. Similar provisions exist in the Ecuadorian and Venezuelan constitutions. These constitutions cannot, however, be viewed as reflective of general state practice on the matter. See *Constitución Política del Estado*, *infra* note 724; Venezuela's constitution, Chapter IX 'Environmental Rights', *Constitución de La Republica Bolivariana de Venezuela* (1999), *Gaceta Oficial Extraordinaria N° 36.860 de fecha 30 de diciembre de 1999*.

4.2.2 NAFTA's sustainable development goal – The example of *Methanex*

Previously discussed from a procedural standpoint,[630] it is worthy to revisit the *Methanex* case in a more substantive light as it clearly manifests those issues relating to environmental protection that are susceptible of arising in investor-state disputes. The dispute was highly complex and extensively discussed scientific and technical evidence with respect to the potentially adverse effects of MTBE on public health and the environment.

The US had considered the Californian ban on MTBE as a measure to protect public health as well as the environment. California in fact enacted the ban following a scientific evaluation by the University of California. Methanex on the other hand considered that there was no valid environmental, health, or safety justification for the MTBE ban. Methanex denounced the ban as a protectionist measure in the following terms: 'local interests often try to use pseudo-environmental measures to disguise the more favourable treatment they seek vis-à-vis foreign competitors'.[631] Indeed, it alleged that California sought to replace the use of MTBE with ethanol-based additives (ETBE), which can also serve as octane and oxygenate for gasoline just like MTBE except that they are manufactured from biomass feedstocks. A competitor of Methanex, Archer Daniels Midland, a major US-based producer of ethanol, is alleged to have made significant contributions to the election campaign of the Governor of California around the time of the ban.[632]

Against this background, Methanex argued that the ban was meant to grant preferential treatment to manufacturers of 'like products'. It thus submitted a NAFTA Chapter XI claim on the basis of a violation of the right to national treatment (Article

[630] See Part I – Section 2.1.2.
[631] Methanex Corporation v. United States, *Final award on jurisdiction and merits of 03 August 2005*, at 13.
[632] Ibid., at 5.

1102),[633] fair and equitable treatment (Article 1105)[634] and compensation as a result of expropriation (Article 1110).[635]

i. Amicus allegations and arguments

The International Institute for Sustainable Development (IISD), 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.[636]

The IISD asserted that there was 'an increased urgency in the need for *amicus* participation' in light of the *Metalclad* award,[637] which – according to the IISD – failed to consider 'environmental and sustainable development goals'.[638] It also argued that Chapter XI of NAFTA should reflect legal principles underlying the concept of sustainable development and that its submission aims to assist the tribunal in that regard. It finally pointed out that given the absence of any right of appeal under investment arbitration, the tribunal should ensure that there should be no errors 'resulting from the lack of a fresh and relevant perspective' which IISD could provide with respect to the underlying environmental protection and sustainable development issues.[639] Communities for a Better Environment and the Earth Island Institute asserted that the dispute raised issues of 'constitutional importance' where (a) governmental authority to implement environmental regulations and (b) property rights had to be balanced. As previously discussed, this argument echoes the idea that investor-state arbitration presents aspects of 'Global Administrative Law', i.e. where the accountability, and decisions, of domestic regulatory bodies have ramifications of a global instead of a domestic nature.[640] The *amici* thus placed the Californian measures in a wider context of environmental

[633] The Article provides that: '1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in *like circumstances*, to its own investors…'. See NAFTA Article 1102, *supra* note 170 (our emphasis).
[634] See Article 1105 of NAFTA, *supra* note 263.
[635] See Article 1110 of NAFTA, *supra* note 232.
[636] Methanex Corporation v. United States, *supra* note 428, at para 5.
[637] Metalclad Corporation v. United Mexican States, *supra* note 257.
[638] Methanex Corporation v. United States, *supra* note 428, at para 6.
[639] Ibid., at para 5.
[640] Ibid., at para 8. See also Part II – Section 1.5.2 for a review of the analysis on the 'Global Administrative Law' aspects of investor-state arbitration.

protection and raised the issue of the host state's right to protect the environment and promote sustainable development.[641]

Both civil society organizations subsequently submitted detailed *amicus* briefs that directly tackled Methanex's arguments. On the alleged violations of national treatment and fair and equitable treatment, the IISD essentially asserted that Methanex's arguments were construed to establish environmental protection as an exception to international foreign investment rules. This would amount to incorrectly incorporate certain trade law rules into Chapter XI, as well as to incorrectly impose the limitations set forth under the exceptions of Article XX of the GATT and NAFTA itself into Chapter XI, which deals with investment-related as opposed to trade-related obligations of host states.[642] This would go, so the IISD argued, against a clear recognition of environmental protection and sustainable development in NAFTA's preamble, which should guide the interpretation of NAFTA provisions. The IISD further posited that the environmental goals and objectives of NAFTA were reconfirmed in the NAAEC.[643] This should thus influence the interpretation of NAFTA provisions pursuant to Article 31(2)(a) of the Vienna Convention.[644]

With respect to Methanex's allegation that a ban on MTBE was meant to favour US ETBE manufacturers, the IISD argued that Methanex's interpretation of NAFTA in light of WTO law and practice is misappropriated, particularly in light of its interpretation of Article 1102 on national treatment. Methanex should not be viewed as 'in like circumstances' with producers of other gasoline oxygenates such as ETBE.[645] In addition, 'circumstances' cannot be limited to the physical characteristics of a product produced by a foreign investor or constitute an investment *in se*. The IISD contended that

[641] T. Ishikawa, *supra* note 108, at 402.
[642] Methanex Corporation v. United States, *IISD amicus submission of 09 March 2004*, at 23.
[643] According to the IISD, the NAAEC explicitly *reconfirms* the importance of environmental protection the following terms of its preamble: 'Reconfirming the importance of the environmental goals and objectives of the NAFTA, including enhanced levels of environmental protection'. See NAAEC, *supra* note 226.
[644] Article 31(2)(a) provides that: '2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty'. See Vienna Convention, *infra* note 1051.
[645] Methanex Corporation v. United States, *supra* note 642, at para 33-36.

investments are not only physical 'things', but also leave a 'footprint' on the ground in terms of impacts on the environment and the community.[646]

On the last point relating to expropriation, the IISD noted that there is a source of concern about 'the disputed notion' of regulatory measures, whereby the diminution of economic value due to a regulation that protects the public interest becomes the basis for a finding of expropriation.[647] The IISD rebuked Methanex's reliance on the previously discussed *Santa Elena v. Costa Rica* case.[648] It argued that the substantive issues of the latter are not relevant given that the tribunal in that case was faced with a prior determination by both parties that an expropriation had effectively taken place. The tribunal therefore did not scrutinize whether there was expropriation, but solely adjudicated upon the amount of compensation due; and accordingly, it ruled that once an expropriation had taken place, compensation is due even if it is for an environmental purpose. In turn, the IISD posited that *bona fide* public health and welfare measures fall outside the concept of expropriation, i.e. they are not expropriations of any kind, and are therefore not subject to compensation.[649] This position is in fact in line with the US's response to Methanex's claim.

ii. The tribunal's response

In its final award, the tribunal scrutinized in great detail the scientific and technical evidence presented by both parties, including the study prepared by the University of California. It noted that the study involved more than 60 researchers and comprised 17 papers covering ten distinct topics including – *inter alia* – (i) an assessment of the risks and benefits to human health and the environment of MTBE and its combustion byproducts found in air, water and soil, and a comparison of those risks and benefits to ETBE and ethanol which could be used as a replacement of MTBE in gasoline; and (ii) an evaluation of the scientific peer-reviewed research and literature on the human health and environmental effects of MTBE.[650] Although there was no evidence that air quality was significantly affected by the use of MTBE as a fuel additive, the study found

[646] Ibid., at para 39.
[647] Ibid., at para 82.
[648] Ibid., at para 87-89. See also Santa Elena v. Costa Rica, *supra* note 245.
[649] Ibid., at para 86.
[650] Methanex Corporation v. United States, *supra* note 631, at 160.

that there were important risks and costs associated with water contamination due to the use of MTBE. Various public hearings and consultations were in fact subsequently held to discuss the findings of the University's study. The tribunal then noted that Californian authorities had detected water contaminations in South Lake Tahoe, Santa Monica, Los Angeles, San Francisco, Santa Clara, and other locations, as well as low levels of MTBE in drinking water; and finally, acknowledged the existence of widespread public support for a ban on MTBE.[651]

The tribunal then had to consider Methanex's allegations of discriminatory treatment. It found that political contributions to candidates for office in the US are not prohibited. Equally, there were no allegations by Methanex that ADM's contributions were made illegally. A long regulatory process on the MTBE ban had started long before the Governor's election. More fundamentally, the ban's implementation was subject to the findings of the scientific study of the University of California, which was followed by public hearings, public testimony and peer review. The tribunal thus asserted that the Governor '(whoever he or she might have been)' had no discretion to deviate from the results and recommendations of the study. From a substantive standpoint, the tribunal dismissed Methanex's claim with respect to national treatment (Article 1102) given that the MTBE ban irrespectively applied to all manufacturers, i.e. it did not receive treatment less favorable than US investors in 'like circumstances' – as set forth under Article 1102.[652] In this light, it also dismissed Methanex's claim under Article 1105 on fair and equitable treatment. With regards to expropriation (Article 1110), the tribunal found that there is no expropriation decree or a creeping expropriation, i.e. a 'taking' in the sense of any property of Methanex being seized and transferred; nor was the Californian ban 'tantamount to expropriation'. In order to be successfully claimed, the latter requires the establishment of discriminatory conduct towards foreign investors in the following terms:

> an intentionally discriminatory regulation against a foreign investor fulfils a key requirement for establishing expropriation. But as a matter of general international law, *a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable* unless specific commitments had been given by the regulating government to the then putative

[651] Ibid., at 173.

[652] The term 'like circumstances' was also held not too cover 'like goods' or 'products'; thereby dismissing Methanex's argument with regards to the preferential treatment afforded to producers of ETBE – which may be considered under a 'like product' interpretation consistent with WTO law. See Ibid., at 253, 260.

> foreign investor contemplating investment that the government would refrain from such regulation.[653]

It is worthy to finally note that the tribunal did not revisit procedural aspects nor summarize the content of the *amici*'s submission. However, it noted the IISD's 'carefully reasoned Amicus submission' in which it argues against Methanex's contention that 'trade law approaches can simply be transferred to investment law'.[654]

Civil society organizations such as the IISD viewed the decision favorably.[655] Particularly in light of the tribunal's finding that government measures (i) aimed at ensuring a public purpose; (ii) that are non-discriminatory; and (iii) enacted 'in accordance with due process', are in principle not deemed as expropriatory and compensable. This finding was in line with the IISD's *amicus curiae* arguments. A more detailed assessment of the *amici*'s impact on the tribunal's final award will be undertaken further below.[656]

4.3 Civil society as a human rights advocate

Human rights issues have been raised in in a number of investor-state disputes, particularly those relating to both the Argentine financial crisis of 2001 and access to water. This section looks at three cases: *Aguas del Tunari SA v. Bolivia*, *Sociedad General de Aguas de Barcelona, S.A. v. Argentina*, and *Biwater Gauff v. Tanzania*.[657]

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[653] Ibid., at 278 (our emphasis). It is worthy to note that the principle set out by the *Methanex* tribunal was confirmed in a similar NAFTA dispute. The dispute concerned a ban on the sale of lindane pesticide by the Pest Management Regulatory Agency of Canada (PMRA). In this respect, the tribunal stated that '[it] considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent's police powers. As discussed in detail in connection with Article 1105 of NAFTA, the PMRA took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation'. See Chemtura Corporation v. Government of Canada, *supra* note 134, at para 266.

[654] Ibid., at 258.

[655] Mann argues that 'the Methanex Tribunal has applied a modern regulatory approach to the police powers concept, an approach long argued for by IISD and other civil society groups'. See H. Mann, 'The Final Decision in Methanex v United States: Some New Wine in Some New Bottles', International Institute for Sustainable Development, August 2005, available at: http://www.iisd.org/pdf/2005/commentary_methanex.pdf (last accessed 06 October 2014).

[656] See Part I – Section 5.2.

[657] Aguas del Tunari SA v. Bolivia, *infra* note 716, Sociedad General de Aguas de Barcelona v. The Argentine Republic, *infra* note 542, and Biwater Gauff v. Tanzania, *infra* note 740. Other disputes not addressed include: Azurix Corp. v. The Argentine Republic, *infra* note 658.

These were seminal, and some of the first, arbitrations dealing directly with issues related to the human right to access water.

4.3.1 The need for foreign investment in water distribution

As a human rights issue, access to water is a manifest example of transcendent public interests and, incidentally, it has been the subject matter of a number of investor-state disputes of importance to this research.[658] 884 million people lack access to safe drinking water and more than 2.6 billion do not have access to basic sanitation.[659] Enhancing access to water is part of the UN Millennium Development Goals,[660] which are *in se* multi-stakeholder concerns.[661] Although considered as a public good, water may be deemed as an economic good as well due to its increasing '*marchandisation*'. Private corporations may profit from states delegating the provision of water distribution services, the outright privatization of such services, or the acquisition of water resources and rights.[662] Privatization is often linked to World Bank and IMF loans or structural adjustment programs – as reflected for instance in the cases of *Aguas del Tunari v.*

[658] Aguas del Tunari, S.A. v. The Republic of Bolivia, *infra* note 533; Sociedad General de Aguas de Barcelona v. The Argentine Republic, *infra* note 542; Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic, *infra* note 378; and Azurix Corp. v. The Argentine Republic (ICSID Case No. ARB/01/12), and Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania, *infra* note 741.

[659] UN General Assembly, Resolution 64/292, 'The Human Right to Water and Sanitation', dated 28 July 2010, *infra* note 689.

[660] Target 7.C sets a goal to 'halve, by 2015, the proportion of the population without sustainable access to safe drinking water and basic sanitation'. See UN Millennium Development Goals, *infra* note 682. In order for states to achieve viable solutions to this problem, they require – *inter alia* – the technology, know-how, experience, and more fundamentally, the capital of private corporations; as well as the support of inter-state organizations and donors, but also civil society organizations such as those representing affected communities or those working directly with them 'at the bottom of the pyramid'. For instance, it is estimated that the EU is channelling more than two-thirds of its relief aid through NGOs. This fact reflects the advantages for civil society of working 'at the bottom of the pyramid'. See L. Logister, *supra* note 118, at 167.

[661] It is widely recognized that multi-stakeholder efforts, and not just state or inter-state ones, are required in order to achieve those goals. As reflected by initiatives such as the UN Global Compact, Business Call to Action, or CEO Water Mandate. Those widely endorsed initiatives bring together multiple stakeholders including companies, states, civil society, and international organizations. They are most notably aimed at the respect and promotion of sustainable development goals and human rights by companies in general, and multinationals in particular. All of which are UN-endorsed initiatives. See UN Global Compact, available at: http://www.unglobalcompact.org/ (last accessed 06 October 2014; Business Call to Action, available at: http://www.businesscalltoaction.org/about/about-us/ (last accessed 06 October 2014); and CEO Water Mandate, available at: http://www.ceowatermandate.org/ (last accessed 06 October 2014). See also in W. Benedek, 'Multi-Stakeholderism in the Development of International Law' in U. Fastenrath, et al. (eds.), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (2011), at 203.

[662] See Ibid., at 592. Also, A. Taithe, *L'eau. Un bien? Un droit?* (2008), at 40.

Bolivia and *Biwater Gauff v. Tanzania*.[663] That said, private corporations' investments constitute a much-needed component for the enhancement of water access and, thus, development.[664] As an example, it is estimated that Suez, the French parent company and majority shareholder of the claimants in the case of *Sociedad General de Aguas de Barcelona v. Argentina*,[665] invested $1.7 billion between 1993 and 2002 on water distribution and treatment infrastructure in Buenos Aires.[666] Some corporations in the water 'business' distribute water to over 100 million persons worldwide.[667] These corporations are, for the most part, quintessentially 'multinational' and inherently engage in foreign investments. Yet, privatization is often perceived as symptomatic of the '*state's retreat*'.[668] The privatization of basic public services such as water distribution implies that private corporations may replace states in this regard and, as a result, overshadow states' duty to 'respect, protect, and fulfil' the 'right to access water'.[669] Foreign investment in privatized basic public services raises serious concerns in light of

[663] *Aguas del Tunari, S.A. v. The Republic of Bolivia*, *supra* note 533; and *Biwater Gauff v. Tanzania*, *infra* note 740.

[664] The United Nations Conference on Environment and Development (UNCED)'s Agenda 21 in many ways does confirm such recognition. See clause 2.34 of Agenda 21: 'It is necessary to establish … economic policy reforms that promote the efficient planning and utilization of resources for sustainable development through sound economic and social policies, foster entrepreneurship and the incorporation of social and environmental costs in resource pricing, and remove sources of distortion in the area of trade and investment.' See Agenda 21, *infra* note 99. See also J. Letnar Černič, *infra* note 695, at 306. On the World Bank's role in promoting such an approach, see V. Petrova, *supra* note 668, at 578, 582, 585; C. Schreuer and U. Kriebaum, *supra* note 617, at 1082.

[665] Sociedad General de Aguas de Barcelona v. The Argentine Republic, *supra* note 544.

[666] This sum was equivalent to two to three times the average capital expenditure made by the Argentinian state entity previously in charge of the project. See A. Taithe, *supra* note 662, at 45.

[667] Out of 15 companies servicing water to more than 13 million persons each, 7 engage in cross-border activities, including most notably the French multinationals Veolia Environnement (servicing 131,260,000 persons), and Suez Environnement (servicing 117,350,000 persons) – both of which are affiliated to the claimants in Sociedad General de Aguas de Barcelona v. The Argentine Republic, *infra* note 542 (discussed below). For further details regarding those statistics, see: Pinsent Masons, Water Yearbook Report (2012-2013), available at: http://wateryearbook.pinsentmasons.com/ (last accessed 06 October 2014). See also J. Letnar Černič, *infra* note 695, at 307; V. Petrova, *supra* note 668, at 578, 590; M. Sornarajah, *supra* note 8, at 333; and M. Majlessi, *supra* note 110, at 82.

[668] This expression is inspired by the title of a book published in 1990s. See S. Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (1996). The 'state's retreat' is also seen as linked to Washington Consensus policies, a term designating a set of 10 policies that the US government and the World Bank and IMF promoted to increase global economic growth. See WHO, 'Trade, Foreign Policy, Diplomacy, and Health: the Washington Consensus', available at: http://www.who.int/trade/glossary/story094/en/ (last accessed 06 October 2014). On the IMF and the World Bank's promotion of privatizations through structural adjustment loans and other debt programmes, see also V. Petrova, 'At the Frontier for the Rush for Blue Gold: Water Privatization and the Human Right to Water', (2006) 31 Brooklynn Journal of International Law 577, at 578; M. Majlessi, *infra* note 110, at 95; E. De Brabandere, *infra* note 699 at 3.

[669] States' obligation to protect, respect, and fulfill socio-economic and cultural human rights was first articulated by the UN Special Rapporteur, Asbjørn Eide, in his 1987 report. See Report prepared by Asbjørn Eide, *The Right to Adequate Food as a Human Right*, E/CN.4/Sub.2/1987/23. See also J. Letnar Černič, *infra* note 695, at 334; V. Petrova, *supra* note 668, at 593; E. De Brabandere, *infra* note 699 at 3.

the constraints it could potentially pose on state regulatory powers, particularly when promoted and protected under the umbrella of an IIA or BIT. [670]

4.3.2 Is there a 'human right to water'?

A human right to access water is considered as an embryonic and widely contested human right. [671] It is solely enshrined explicitly in 'soft' international law instruments. Few human rights instruments treat the right to water as a human right *per se*. [672] The 1989 Convention on the Rights of the Child[673] is the first such instrument to explicitly mention water, environmental sanitation, and hygiene. [674] Other international instruments include the Convention on the Elimination of all Forms of Discrimination

[670] An academic statement of 'concern about the international investment regime' – the Osgoode Statement – points to 'the harm done to the public welfare by the international investment regime, as currently structured, especially its hampering of the ability of governments to act for their people in response to the concerns of human development and environmental sustainability'. The signatories include, *inter alia*, M. Sornarajah, Peter Muchlinski, Sol Picciotto, Gus Van Harten, and David Schneiderman. See York University – Osgoode Hall Law School, Public Statement on The International Investment Regime, dated 31 August 2010, available at: http://www.osgoode.yorku.ca/public_statement (last accessed 06 October 2014) ('the Osgoode Statement'). In the same vein, a recent UNCTAD report points that investor-state claims and awards 'can still exert significant pressures on public finances and create potential disincentives for public-interest regulation, posing obstacles to countries' sustainable economic development'. See UNCTAD 2013 Report, *supra* note 210, at 3.

[671] For an overall view of the historic development of the human right to water and the debate surrounding its recognition, see V. Petrova, *supra* note 668, at 593; M. Gavouneli, 'A Human Right to Groundwater' (2011), 13 International Community Law Review 305, at 318.

[672] It is not explicitly mentioned in the UN Universal Declaration of Human Rights. However, it could fall within the scope of Article 25(1), which provides that: 'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care…'. See UN General Assembly, Universal Declaration of Human Rights, dated 10 December 1948, 217 A (III), available at: http://www.refworld.org/docid/3ae6b3712c.html (last accessed 15 December 2013). The same applies to the ICESCR, although the right to water was considered to fall within the scope of Article 11(1): 'The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions'. See UN General Assembly, ICESCR, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: http://www.refworld.org/docid/3ae6b36c0.html (last accessed 15 December 2013). For further details on this issue, see F. Marrella, *infra* note 693, at 338.

[673] Article 24(2) provides that: 'States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: …(c) to combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution…'. See UN General Assembly, Convention on the Rights of the Child, dated 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: http://www.refworld.org/docid/3ae6b38f0.html (last accessed 15 December 2013) ('UN Convention on the Rights of the Child').

[674] UN-Water Decade Programme on Advocacy and Communication, 'The Human Right to Water and Sanitation: Milestones' (2011), available at: http://www.un.org/waterforlifedecade/pdf/human_right_to_water_and_sanitation_milestones.pdf (last accessed 14 December 2013).

against Women ('CEDAW'),[675] the Convention on the Rights of Persons with Disabilities;[676] and regionally, the European Charter on Water Resources,[677] the African Charter on the Rights and Welfare of the Child,[678] and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women.[679] International humanitarian law instruments also allude to the right to water.[680]

Numerous declarations and resolutions, which are inherently non-binding, later built up on the notion.[681] Access to water was included in the Millennium Development Goals under 'Goal 7 – Ensure Environmental Sustainability'.[682] Interestingly, the *Biwater*

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[675] See Article 14(2)(h) which states that: 'States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right… To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.'. See UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, available at: http://www.refworld.org/docid/3ae6b3970.html (last accessed 26 February 2014).

[676] Article 28(a) provides that: 'States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures…To ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs'. See UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution / adopted by the UN General Assembly, dated 24 January 2007, A/RES/61/106, available at: http://www.refworld.org/docid/45f973632.html (last accessed 26 February 2014).

[677] Article 5 provides that: 'Everyone has the right to a sufficient quantity of water for his or her basic needs. International human rights instruments recognise the fundamental right of all human beings to be free from hunger and to an adequate standard of living for themselves and their families. It is quite clear that these two requirements include the right to a minimum quantity of water of satisfactory quality from the point of view of health and hygiene…'. See Council of Europe, dated 17 October 2001, available at: https://wcd.coe.int/ViewDoc.jsp?id=231615 (last accessed 26 February 2014).

[678] Article 14(2)(c) states that: 'Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health. States Parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures…to ensure the provision of adequate nutrition and safe drinking water'. See Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, dated 11 July 1990, CAB/LEG/24.9/49 (1990), available at: http://www.refworld.org/docid/3ae6b38c18.html (last accessed 26 February 2014).

[679] Article 15 provides that: 'States parties shall ensure that women have the right to nutritious and adequate food. In this regard, they shall take appropriate measures to: provide women with access to clean drinking water.' See African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, dated 11 July 2003, available at: http://www.refworld.org/docid/3f4b139d4.html (last accessed 26 February 2014).

[680] These most notably include the Geneva Convention. Article 26(3) states that: 'Sufficient drinking water shall be supplied to prisoners of war…'. See Convention Relative to the Treatment of Prisoners of War, dated 12 August 1949, 75 U.N.T.S. 135. Generally, for an exhaustive account of reference to the human right to water, see J. Letnar Černič, *infra* note 695, at 311-314.

[681] Ibid.

[682] Target 7.C sets a goal to 'halve, by 2015, the proportion of the population without sustainable access to safe drinking water and basic sanitation'. In order to achieve this goal, five normative criteria for the full realization of the right to water have been identified: availability, accessibility, quality/safety, affordability, and acceptability; with five-cross cutting ones: non-discrimination, participation, accountability, impact, and sustainability. See F. Marrella, *infra* note 693, at 340. See also UN Millennium Development Goals, available at: http://www.un.org/millenniumgoals/environ.shtml (last accessed 01 September 2013).

Gauff tribunal explicitly mentioned this – as will be further discussed below.[683] Other instruments most notably include the CESCR's General Comment No. 15 on the right to water on the basis of Articles 11 and 12 of the ICESCR.[684] Article I.1 states that 'the human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights'.[685] Comment No. 15 also defined the right to water as including *available* and *affordable* water for personal and domestic uses.[686] The CESCR articulated the need to 'respect, protect, and fulfil' the human right to water by ensuring its availability, accessibility, and affordability.[687] In a similar vein, there is also a three-pronged procedural component to the right to water relating to the right to information, the right to participate in policy and decision-making, and the right to effective judicial remedies.[688]

The human right to water was further supported by a UN General Assembly resolution of 28 July 2010, in which the Assembly '*recognizes the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights*'.[689] The right to water has also gained further impetus as a result of its constitutionalization by an increasing number of states, particularly from Latin

[683] See *infra* note 838.
[684] Article 12 states that: '1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness'. See ICESCR, *supra* note 672.
[685] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 15: The Right to Water (Art. 11 and 12 of the Covenant)*, 11-29 November 2003, E/C.12/2002/11, available at: http://www.refworld.org/docid/4538838d0.html (last accessed 17 December 2013).
[686] See 12(a) 'Availability': 'The water supply for each person must be sufficient and continuous for personal and domestic uses…'; and 12(c)(ii) 'Economic Accessibility': 'Water, and water facilities and services, must be affordable for all. The direct and indirect costs and charges associated with securing water must be affordable, and must not compromise or threaten the realization of other Covenant rights'. Ibid.
[687] J. Letnar Černič, *infra* note 695, at 306.
[688] Article 55 of General Comment 15 states that: 'Any persons or groups who have been denied their right to water should have access to effective judicial or other appropriate remedies at both national and international levels'. See *General Comment No. 15: The Right to Water*, *supra* note 686. See also V. Petrova, *supra* note 668, at 596.
[689] UN General Assembly, Resolution 64/292, 'The Human Right to Water and Sanitation', dated 28 July 2010, available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/64/292 (last accessed 01 September 2013) (our emphasis).

America and Africa, which more recently included Tunisia.[690] Ecuador's constitution is apposite, it provides that 'the human right to water is fundamental and inalienable. Water constitutes a national strategic patrimony of public use, [that is] inalienable, imprescriptible, indefeasible and essential for life'.[691] It is worthy to note as well that such constitutional measures often cover the protection of other essential public services from privatization.[692] In such cases, the right to water would not be considered as merely hortatory given that the privatization of water distribution would be unequivocally illegal under municipal law, thereby ensuring that access to water remains *public*.

States have a duty to protect, respect, and fulfil – *inter alia* – the human right to water. Conversely, states bound by IIAs or BITs are seemingly compelled to undertake their human right to water duties in a manner that is consistent with foreign investors' right to due process and predictability, rule of law, fair and equitable treatment, and compensation in the event of expropriation, amongst other potentially relevant international investment protection obligations.[693] The human right to water thus fits within the challenge states face in promoting economic development in general, and foreign investments in particular, while abiding by their human rights obligations.[694] There is, however, an underlying problem for states in addressing both. The right to water may often conflict with economic development such as mining for instance.[695] Foreign

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[690] Uruguay and Ecuador have actually unconstitutionalized the privatization of water services. Other states' constitutions that have referred to the right to water include – *inter alia* – Bolivia, Laos, Ethiopia, Gambia, Guatemala, Panama, Uganda, South African, Venezuela, and Zambia. For instance, the Article 27 of the South African Constitution states that: '(1) Everyone has the right to have access to… (b) sufficient food and water… (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights'. See Constitution of the Republic of South Africa (No. 108 of 1996), available at: http://www.gov.za/documents/constitution/1996/a108-96.pdf (last accessed 06 October 2014). Tunisia's recently promulgated constitution provides under Article 44 that: '*Le droit à l'eau est garanti. La préservation de l'eau et son utilisation rationnelle sont un devoir pour l'Etat et la société*.' See *Constitution de La République Tunisienne*, dated 26 January 2014, available at: http://www.marsad.tn/fr/constitution# (last accessed 02 February 2014). See also F. Marrella, *infra* note 693, at 339, and J. Letnar Černič, *infra* note 695, at 320-321 for an exhaustive analysis of state constitutions mentioning access to water.

[691] Article 12, *Constitución de la Republica de Ecuador* (2008), *Registro Oficial 449 de 20 Octubre 2008*.

[692] For instance, in 2009, Bolivia passed a new constitution in which it enshrines the 'right of every person to universal and equal access to drinking water, sanitation, electricity, domestic gas, postal, and telecommunications basic services'. See Article 20(I), *Constitución Política del Estado*, *infra* note 724. See also V. Petrova, *supra* note 668, at 580.

[693] See F. Marrella, 'On the Changing Structure of International Investment Law: the Human Right to Water and ICSID Arbitration', (2010) 12 International Community Law Review 335, at 335, 336.

[694] This is in continuation to the discussion initiated under Introduction – Section 1.

[695] Černič gives the example of the Dongria Kondh indigenous community, inhabiting the Niyamgiri Hills in Eastern India, where the Indian government approved a project to mine bauxite which is widely reported to have

investors – or corporations in general – may, through their actions or omissions, ultimately undermine the human right to water. For instance, they may deprive individuals of their access to water through contamination (in the case of mining activities), the excessive use of water,[696] or substantially increase the price of water (in the case of privatized water supply and services),[697] which could potentially lead to preventing the poorest segments of a given population of their right to access water.[698]

Addressing these problems is incumbent upon states since it is clearly established, under international law, that human rights cannot be enforced against corporations in general as no binding international instrument imposes human rights obligations on them.[699] Human rights obligations are quintessentially directed at states – the primary subjects of international law[700] – and include the duty to protect against human rights violations through adequate 'policies, legislation, regulations, and adjudication'.[701] Having said that, there is an increasing recognition that corporations have a responsibility to respect human rights, such as the right to water, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts caused by their activities.[702] This due diligence obligation is clearly reflected in the *Biwater Gauff v. Tanzania* case.[703]

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serious adverse effects on fresh water sources from the Hills. See J. Letnar Černič, 'Corporate Obligations under the Human Right to Water', (2011) 39 Denver Journal of International Law 303, at 303-304.

[696] See the case of *Perumatty Grama Panchayat* v *State of Kerala*, which involved Coca Cola's activities in the Indian state of Kerala; and more specifically, its allegedly excessive use of fresh groundwater in its manufacturing processes. *Perumatty Grama Panchayat v State of Kerala*, High Court of Kerala, India, W.P. (C) No. 34292 of 2003, Judgement of 16 December 2003.

[697] See Aguas del Tunari SA v Bolivia, *infra* note 716, Sociedad General de Aguas de Barcelona v. The Argentine Republic, *supra* note 542, and Biwater Gauff v Tanzania, *infra* note 740 cases, which will be discussed further below. See also Ibid., at 317.

[698] Ibid., at 306.

[699] Ibid., at 310. See also E. De Brabandere, 'State-Centrism and Human Rights Obligations: Challenging 'Stateless' Approaches towards Direct Corporate Responsibility', *International Law Association – Research Seminar on Non-state Actors* (March 2009), at 14.

[700] James Crawford explains that 'there is an expanding range of actors in the international system, but states very much remain the key-holders and gate-keepers of personality'. See J. Crawford, *supra* note 74, at 211.

[701] See for instance the UN Guiding Principles on Business and Human Rights, which state that: '[the] Guiding Principles are grounded in recognition of: (a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms'. See UN Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, dated 21 March 2011, UN General Assembly A/HRC/17/31, available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (last accessed 02 February 2014). See also J. Letnar Černič, *supra* note 695, at 325.

[702] This is not only reflected in the UN Guiding Principles on Business and Human Rights, but also the OECD Guidelines which state that: 'Enterprises should… Respect the internationally recognised human rights of those

Against this backdrop, it is posited that the realization of the human right to water requires responsive and accountable institutions, with a clear designation of responsibilities and coordination between different entities involved. In cases of violations – be it by state organs or non-state actors – states have to provide accessible and effective judicial or other appropriate remedies at both national and international levels. Victims of violations should be entitled to adequate reparation, including restitution, compensation, satisfaction and/or guarantees of non-repetition.[704] Yet, concessions on the privatization of water services for instance do not include the 'privatization' of a given state's international obligations in terms of protecting, respecting, and fulfilling human rights, 'including the right to water of the people'.[705] Indeed, foreign investors often find themselves engaged in activities involving sensitive human rights obligations incumbent upon states.[706] In order to attract foreign investments, host states have allowed multinationals to charge higher bills to citizens for water with the result of potentially undermining human rights. Faced with growing discontent, governments have then often been compelled to issue administrative measures (such as price-freezing) to the detriment of foreign investors, resulting in potential breaches of international investment obligations.[707]

In sum and *in concreto*, notwithstanding the fact that the right to water is ambiguously regulated under international law, it could be deemed in any event, whether it is recognized as 'soft' or 'hard' law under international law, as a 'legally protectable interest' that could potentially justify the intervention of third parties in investor-state arbitrations.[708]

4.3.3 Privatizations, protests, and problems – A look at some of the key decisions

i. Aguas del Tunari v. Bolivia

affected by their activities'. See Ibid., at 4, and Principle II.2 of the OECD Guidelines. See also Letnar Černič, *supra* note 695, at 327.
[703] Biwater Gauff v. Tanzania, *infra* note 740.
[704] F. Marrella, *supra* note 693, at 342.
[705] Ibid., at 342.
[706] C. Schreuer and U. Kriebaum, *supra* note 617, at 1085.
[707] Ibid., at 348.
[708] The definition of 'legally protectable interest' is addressed in Part III – Section 4.1.2.

This is the first investor-state dispute that dealt with the polemical issue of access to drinking water. It is also the first ICSID case in which both the third-party intervention (or standing) and *amicus curiae* issues have arisen. It is therefore a highly publicized case; the underlying events were coined as the 'Water War' where for the first time a conflict over water did not oppose two states or peoples; but rather, a multinational and those local citizens opposed to its operations.[709]

As mentioned, the case involved Aguas del Tunari, a subsidiary of Bechtel – a major American infrastructure company – which had been granted a 40-year water and sewage services privatization concession by the government of Bolivia for the city of Cochabamba.[710] The government of Bolivia revoked the concession following a steep increase in water prices and ensuing widespread protests by the local population. As a result, Aguas del Tunari filed an ICSID claim against Bolivia pursuant to the Netherlands-Bolivia BIT.

a. Amicus allegations and arguments

From the outset, civil society organizations including the *Coordinadora para la Defensa del Agua y la Vida* and the *Federación Departamental Cochabambina de Organizaciones Regantes*,[711] sought standing as parties to the dispute or alternatively as *amici curiae*.[712] Petitioners mainly argued that they had a 'direct' interest in the dispute. The *Coordinadora* is a coalition of community organizations, labour groups, human rights organizations, farmers' associations, students and other broad-based civil society networks from the region of Cochabamba. It opposed AdT's concession from the outset and had also carried out a public *consulta*, a common form of popular consultation process in Latin America, whereby 60,000 people voted against the concession. The Bolivian government even involved the Coordinadora during the AdT concession negotiations to represent those opposed to the privatisation process.[713] It was also actively involved in the protests that ultimately lead to AdT's exit from Bolivia. As for the

[709] A. Taithe, *supra* note 662, at 13.
[710] In fact, it is worthy to mention here that Bechtel is engaged in a myriad of projects including civil infrastructure, energy, mining, oil and gas, and water – which has become one of the world's largest industries.
[711] Meaning 'the Cochabamba Federation of Irrigators' Organizations'.
[712] These were SEMAPA Sur, Friends of the Earth-Netherlands, Oscar Olivera, Omar Fernandez, Father Luis Sánchez, and Congressman Jorge Alvarado.
[713] Ibid., at para 5.

Federación Departamental Cochabambina de Organizaciones Regantes, it is an association of small-scale farmers from the Cochabamba region aimed at protecting customary water usage rights and practices, as well as the access and management of local water irrigation sources.

The petitioners' aim was essentially to demonstrate that (i) Bechtel's subsidiary increased water prices by an average rate of 50%; and (ii) thereby significantly restricted Cochabamba's residents' access to water, particularly poorer ones.[714] They have also contended that their position is distinct from the Bolivian government's as the latter might be 'encumbered by conflicting objectives' given the 'strong pressure to attract foreign investment', and that it does not 'fully represent Petitioners' interests in this arbitration'.[715] Again, this is a situation similar to the *Metalclad* case where the Mexican federal government approved the construction of the hazardous chemical waste landfill, whereas the local community surrounding the project vehemently opposed it. Here, the Bolivian government approved the privatization of water services in favour of Bechtel's subsidiary, despite widespread opposition from the citizens of Cochabamba. Indeed, Bolivia would not have raised factual and legal arguments against AdT's claim by asserting 'the right of its citizens' to water' as an exception to AdT's international foreign investment rights when it had initially agreed to privatize water distribution to the benefit of AdT. According to the petitioners, Bolivia only revoked the concession at a much later stage that followed a failure to control protesters, including a week long general strike which entirely shut down the city of Cochabamba, through an imposed state of emergency and suspension of constitutional rights, as well as repression that lead to the death of a seventeen year-old protester and the injury of a hundred others.[716] In several ways, the result of the 'Water War' was not only perceived as a defeat for Bechtel and AdT, but also for Bolivia, which was compelled to concede to Cochabamban civil society's demands.[717] It is worthy to note here that the petition to intervene had

[714] Ibid., at para 35.
[715] Ibid., at para 36.
[716] The concession was granted in September 1999 and ceased to be effective in April 2000. See Aguas del Tunari, S.A. v. The Republic of Bolivia (ICSID Case no. ARB/02/3), *Petition by NGOs and people to participate as an intervening party or amici curiae of 29 August 2002*, at para 1 (the 'Bechtel Case' or 'Bechtel v. Bolivia').
[717] This was the perception of some civil society organizations. See L. Sanchez Gomez, and P. Terhorst, 'Cochabamba, Bolivia: Public-Collective Partnership after the Water Water', available at: http://www.tni.org/sites/www.tni.org/archives/books/watercochabamba.pdf (last accessed 06 October 2014).

galvanized widespread support. Over 300 civil society organizations from Bolivia, the Netherlands, the US, and 38 other countries sent letters to the tribunal to express their concerns towards AdT's claims and urge the tribunal to allow the petitioners to intervene.[718]

b. The tribunal's response

Having said that, the tribunal responded to the petitioners by a letter in 2003 – considered unfavorable – as previously mentioned.[719] The tribunal did not have the chance to examine any further *amicus* petitions nor the merits of the case as Bechtel's subsidiary ultimately dropped its claim and both parties settled the dispute.[720] The tribunal only managed to issue a decision rejecting Bolivia's objection to jurisdiction in 2005, which was essentially based on the following arguments: (i) Bolivia did not consent to ICSID jurisdiction; and (ii) AdT is not a Dutch national as defined by the Netherlands-Bolivia BIT.[721]

It is worthy to mention here that, following the election of Evo Morales, the country's first indigenous president, who personally criticized ICSID, Bolivia withdrew from the ICSID Convention (the withdrawal took effect as of November 2007) and terminated its BIT with the Netherlands in 2009.[722] A move that was later followed by both Ecuador and Venezuela, while other states such as Nicaragua as well as Argentina have been contemplating to follow suit.[723] In 2007, Bolivia also revoked a concession granted to the French multinational – Suez, which is involved in the subsequently discussed case of *Sociedad General de Aguas de Barcelona v. Argentina* – for water

[718] Ibid., at para 4.
[719] See Part I – Section 1.3.2.
[720] It is worthy to note that Bechtel's claim was portrayed as a telling sign of the 'evils of globalisation'. The fact that it dropped the case has been portrayed by civil society organizations as 'victory'. See Earthjustice, 'Victories: Bechtel Drops Case in Bolivia Water Case', available at: http://www.earthjustice.org/our_work/victory/?issue=&region=&office=27410256 (last accessed 06 October 2014). See also J. Stiglitz, *supra* note 101, at 187; and IISD, 'Bolivian water dispute settled, Bechtel forgoes compensation', Investment Treaty News, available at: www.iisd.org/pdf/2006/itn_jan20_2006.pdf (last accessed 06 October 2014).
[721] Aguas del Tunari, S.A. v. The Republic of Bolivia (ICSID Case no. ARB/02/3), *Decision on Respondent's Objections to Jurisdiction of 21 October 2005*, para 5.
[722] UNCTAD, 'Denunciation of the ICSID Convention and BITs: Impact on Investor State Claims', IIA Issues Note No. 2 (December 2010), available at: http://www.unctad.org/en/docs/webdiaeia20106_en.pdf (last accessed 15 December 2013), at 1.
[723] IISD, 'Venezuela's Withdrawal From ICSID: What it Does and Does Not Achieve', available at: http://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/ (last accessed 10 December 2013).

distribution in the capital, La Paz. In addition, in 2009, Bolivia passed a new constitution in which it enshrined the 'right of every person to universal and equal access to drinking water, sanitation, electricity, domestic gas, postal, and telecommunications basic services'.[724] Water concessions and privatizations have also been un-constitutionalized.[725]

ii. Sociedad General de Aguas de Barcelona v. Argentina

The case involved a number of companies and their shareholders concerning their investments in a 30-year privatization concession for water distribution and wastewater treatment services in the city of Buenos Aires and its 10 million inhabitants.[726] This case is considered as a landmark investor-state dispute, not only because it dealt with complex international law questions, but also it presented the first instance in which an ICSID tribunal accepted to receive *amicus curiae* submissions, as mentioned above.

a. The facts

The concession granted to Suez, the French parent company and majority shareholder of the claimants,[727] was, back in 1993, the largest privatization concession of its kind.[728] The country's financial crisis starting in 2000 led Argentina to enact 'price-freezing' measures across a wide range of sectors, which included water distribution. The claimants alleged that Argentina's refusal to apply previously agreed incremental tariff adjustments, including the ensuing termination of their concession, essentially amounted to expropriation, and violations of their right to the full protection and security of their investments as well as fair and equitable treatment.[729] The case was regarded in the same vein as *Bechtel* as it raised fundamental issues in relation to human rights and access to

[724] Article 20(I). See *Constitución Política del Estado* (February 2009), *Gaceta Oficial del Estado Plurinacional de Bolivia*, available at: http://www.gacetaoficialdebolivia.gob.bo/normas/view/36208 (last accessed 15 December 2013).
[725] Article 20(III). Ibid.
[726] The claims were therefore made pursuant to the France, Spain and United Kingdom BITs entered into with Argentina. Sociedad General de Aguas de Barcelona v. The Argentine Republic, *Decision on liability of 30 July 2010*, *supra* note 544, at para 2.
[727] It is also noteworthy that Suez is the world's largest water distribution multinational and services water to more than 117 million persons worldwide. Suez Environnement services 117,350,000 persons worldwide. For further details regarding those statistics, see Pinsent Masons, Water Yearbook Report (2012-2013), *supra* note 667.
[728] A. Taithe, *supra* note 662, at 41.
[729] Ibid., at para 127.

water. Indeed, Argentina's responsibility and obligation to secure its citizens' right to access water was at issue.

b. Amicus allegations and arguments

Five civil society organizations,[730] 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'.[731] The *amici* clearly intended to put forward crucial issues related to, and arguments in favor of, Argentina's domestic and international obligations to uphold the human right to water. In their joint *amicus curiae* submission, the *amici* cited General Comment No. 15 and contended that the right to water is essential for sustaining human life and is protected under Article 11(1) of ICESCR.[732] They also cited the recommendation of the CESCR to the effect that water must at all times be available, of acceptable quality, and accessible in both the physical and economic sense. The *amici* then contended that Argentina has ratified most international human rights instruments covering the human right to water, including most notably the ICESCR. These were fully incorporated into, and conferred 'constitutional hierarchy' under, Argentine law. Argentina was, therefore, both domestically and internationally compelled to positively protect the right to water.[733]

c. The tribunal's response

In its decision on liability, the tribunal noted the *amici*'s contentions to the effect that Argentina's measures sought to secure its citizens' access to water as a human right:

> Human rights law…required that Argentina adopt measures to ensure access to water by the population, including physical and economic access, and that its actions in confronting the crisis fully conformed to human rights law. Since human rights law provides a rationale for the crisis

[730] 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*.
[731] Sociedad General de Aguas de Barcelona v. The Argentine Republic, *Order in Response to a Petition for Transparency and Participation as Amicus Curiae of 19 May 2005*, at para 2.
[732] Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v The Argentine Republic (ICSID Case no. ARB/03/19), *Amicus curiae submission of 04 April 2007*, at 4. See General Comment No.15, *supra* note 685.
[733] Ibid., at 10.

> measures, they argue that this Tribunal should consider that rationale in interpreting and applying the provisions of the BITs in question.[734]

Although noting that the Argentine financial crisis was 'undoubtedly one of the most severe in its history', the tribunal asserted that, however, the severity of a crisis, no matter the degree, is not sufficient to allow a plea of necessity to relieve a state of its treaty obligations, i.e. the applicable BITs.[735] The tribunal reiterated that customary international law on the matter, as enshrined by Article 25 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts, sets forth strict conditions in order for states to succeed in upholding a defense of necessity.[736] It also asserted that it was important for states to abide by such conditions; otherwise, violations of their international obligations risk destabilizing the 'very fabric of international law' and 'the system of international relations'. More specifically, and in looking at the conditions of Article 25 of the ILC Articles, the tribunal first found that Argentina had other available, and more flexible, means in order to safeguard an essential interest – i.e. the provision of water and sewage services to the metropolitan area of Buenos Aires, which was vital to the health and well-being of nearly ten million people – without violating the claimants' right to fair and equitable treatment. Because Argentina refused to abide by the tariff adjustment procedure set forth under its concession agreement with the claimants, forced the renegotiation of, and ultimately terminated, the latter, it violated the fair and equitable treatment standard it owes the claimants as protected foreign investors.[737] The legitimate expectations of the latter were key to the tribunal's analysis. The claimants had, according to the tribunal, the legitimate expectation that Argentina, and its organs, would exercise regulatory authority and discretion within the rules of the detailed legal framework that Argentina had itself established under the concession.[738] Second, it

[734] Sociedad General de Aguas de Barcelona v. The Argentine Republic, *supra* note 544, at para 256.
[735] Ibid., at para 257-258.
[736] Article 25 'Necessity' provides that: '1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) The international obligation in question excludes the possibility of invoking necessity; or (b) The State has contributed to the situation of necessity. See Ibid., at para 249, 259. See also ILC Articles on the Responsibility of States for Internationally Wrongful Acts, *infra* note 833.
[737] Ibid., at 246.
[738] Ibid., at 237.

concluded that Argentina had not violated the essential interests of other states, and that the applicable BITs concluded with France, Spain, and the UK did not explicitly exclude a defense on the basis of necessity; thereby, asserting Argentina's fulfilment of the second and third conditions of Article 25. However, with respect to the fourth condition, it was of the opinion that Argentina contributed to the financial crisis it faced, which – according to the tribunal – cannot be solely accounted on external factors.[739] It thus failed on the first and fourth tests, and was held responsible for violations of its respective BIT obligations but solely under the breach of the fair and equitable treatment.

Having said that, the tribunal's decision on damages is still not public and it remains unclear whether the human rights considerations might have any effect on issues of quantum.

iii. Biwater Gauff v. Tanzania

The *Biwater Gauff*[740] is important because it delved in quite significant detail into human rights questions in general, and extensively scrutinized *amicus* arguments in particular.

a. The facts

The case revolves around a concession granted to an Anglo-German consortium for the management and operation of a water supply and sanitation project in the Tanzanian capital Dar es Salam. The government of Tanzania subsequently revoked the concession due to numerous complications in the implementation of the project by Biwater Gauff (which claimed that those were directly or indirectly caused by the government of Tanzania), most notably including a decline in the availability of water in many parts of Dar Es Salam.[741] The case was regarded in the same vein as the *Bechtel*

[739] The tribunal cited the following factors as evidence of Argentina's contribution to the crisis: excessive public spending, inefficient tax collection, delays in responding to the early signs of the crisis, insufficient efforts at developing an export market, and internal political dissension and problems inhibiting effective policy making. See Ibid., at para 264.
[740] Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania, ICSID Case No. ARB/05/22.
[741] It is worthy to note that the appointment of a private operator was a condition to a World Bank, African Development Bank, and European Investment Bank funding of USD 140,000,000. Following the revocation of its concession, Biwater Gauff submitted a claim to ICSID pursuant to the United Kingdom-Tanzania BIT. See Ibid., at para 3.

and *Sociedad General de Aguas de Barcelona* cases since it raised fundamental issues in relation to human rights and access to water. *Amicus curiae* petitions were made by five civil society organizations[742] including renowned international civil society organizations such as the IISD, but also local Tanzanian grassroots organization such as the Tanzania Gender Networking Programme.

b. Amicus allegations and arguments

The *amici* argued that when engaging in activities that might entail serious risks for a given population at large, foreign investors then have the 'highest level of responsibility to meet their duties and obligations'. In this case, because of the subject matter of the dispute, human rights and sustainable development considerations impact the balance of rights and obligations between foreign investors and the host state. The alleged significant decline in the availability of water in many parts of Dar es Salaam originated in Biwater Gauff's lack of business competence, and ultimately amounted to a failure to uphold the human rights and sustainable development goals underlying to the implementation of the water distribution project.[743]

In concreto, the joint *amicus* brief first suggested that foreign investors have three main responsibilities consisting of the duty to (i) apply proper business standards to the investment process, including proper due diligence procedures that involve background checks and an adequate assessment of investment risks in developing country economies such as Tanzania's; (ii) observe the principle of *pacta sunt servanda*; and (iii) act in good faith both prior to and during the investment period.[744] Accordingly, the claimant's apparent strategy of making a low bid and then forcing concession renegotiation was a violation of these responsibilities. Biwater Gauff's business failure should only be attributed to it, and in this regard, the applicable UK-Tanzania BIT should not be resorted to by the claimant as an 'insurance policy'.[745] On the issue of access to water, the *amici* cited the objectives set forth under the Millennium Development Goals[746] and the World

[742] The Lawyers' Environmental Action Team, the Legal and Human Rights Center, the Tanzania Gender Networking, the Center for International Environmental Law, and the International Institute for Sustainable Development.
[743] Ibid., at para 379-383.
[744] Biwater Gauff v. Tanzania, *Amicus curiae submission of 26 March 2007*, at para 9.
[745] Ibid., at para 16.
[746] UN Millennium Development Goals, *supra* note 682.

Summit on Sustainable Development.[747] What is crucial here is that the *amici* provided evidence that Biwater Gauff itself explicitly represented its:

> willingness to work with all stakeholders to contribute to the achievement of the MDGs… Biwater is already working to increase provision of safe and affordable access to clean water and sanitation, which is not only a Millennium Development Goal – it's our core business.[748]

The *amici* then asserted that access to clean water is an independent basic human right as recognized by General Comment no. 15.[749] Again, a fact explicitly recognized by Biwater Gauff in its corporate publications in the following terms 'every man, woman and child has the right to a reliable system of clean water and good sanitation'. According to the *amici*, such international and corporate recognition should be afforded legal significance. Foreign investors operating in this sector have 'the highest level of responsibilities' because of risks associated with failures in the provision of water access, particularly with respect to vulnerable segments of the population including the poor, women, and children – both of which are also protected by specific treaties which mention access to water, as previously discussed.[750]

Although the *amici*'s arguments would lead to uphold Tanzania's termination of Biwater's concession in order to ensure that its affected citizens had access to water, the *amici* clearly emphasized that their arguments should not be construed as mitigating factors of host state liability if violations of BIT obligations are established. They rather suggest that human rights and sustainable development issues must be factors that 'condition the nature and extent' of the foreign investors' responsibilities, and equally, the balance of rights and obligations between foreign investors and host states.[751] Foreign investors should therefore ensure the abidance by the 'highest level of responsibilities' prior to seeking the protection of international law in front of investor-state tribunals.

c. The tribunal's response

[747] The Declaration of the Summit states that: 'We welcome the focus of the Johannesburg Summit on the indivisibility of human dignity and are resolved, through decisions on targets, timetables and partnerships, to speedily increase access to such basic requirements as clean water, sanitation, adequate shelter, energy, health care, food security and the protection of biodiversity'. See Johannesburg Declaration on Sustainable Development, dated 4 September 2002, UN Doc. A/CONF.199/20, available at: http://www.un-documents.net/jburgdec.htm (last accessed 06 October 2014).
[748] Ibid., at para 47.
[749] *General Comment No. 15: The Right to Water* , *supra* note 686.
[750] Ibid., at para 50. See also CEDAW, *supra* note 675; UN Convention on the Rights of the Child, *supra* note 673.
[751] Ibid., at para 51, and A. Kawharu, *supra* note 393, at 292.

The tribunal extensively revisited the *amici*'s contentions with respect to the human right to water, a right which was explicitly acknowledged by Biwater Gauff. The former mentioned as well the target set by the Millennium Development Goals to reduce by half the number of people without access to potable water.[752] Indeed, the tribunal extensively scrutinized the arguments raised by the *amici*.[753] It noted their contention as to foreign investors' duties in conducting due diligence, applying proper business standards, including a responsibility of carrying out proper risk assessments, to observe the principle of *pacta sunt servanda*, as well as to act in good faith.[754] It further reiterated that foreign investors are also bound by the highest level of responsibility to meet their duties and obligations as their investments carry 'very serious risks' to the population affected by their investments.[755] More fundamentally, the tribunal also mentioned the *amici*'s contention with respect to the failure by foreign investors to meet their contractual obligations – in a privatization context – puts the welfare of citizens at risk, which the privatization was actually mandated to enhance.[756] Although the tribunal found that Tanzania expropriated the claimant's investment, it nonetheless concluded that the latter failed to establish any of its claims on damages.[757]

4.4 Representing the under-represented: Civil society and indigenous groups

Issues related to indigenous peoples' and minority rights have been raised in investor-state disputes.[758] This section will primarily focus on the cases of *Glamis Gold v. the United States*, *Piero Foresti and others v. South Africa*, and more recently, *Chevron and Texaco v. Ecuador*. These were seminal and some of the first arbitrations directly dealing with issues related to indigenous peoples' rights and interests.

[752] See Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania, *supra* note 741, at para 379.
[753] It dedicated roughly 10 pages for a substantive analysis of those arguments. See Ibid., at para -370-392.
[754] Ibid., at para 374.
[755] Ibid., at para 380. See also T. Ishikawa, *supra* note 108, at 407.
[756] Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania, *supra* note 741, at para 377. Ibid., at para 377.
[757] Again in this case, the impact of the *amici* arguments on the tribunal's award will be discussed subsequently. See Part I – Section 5.2.
[758] J. Levine, 'The Interaction of International Investment Arbitration and the Rights of Indigenous Peoples' in F. Baetens (ed.), *Investment Law within International Law: Integrationist Perspectives* (2013), at 106-107.

4.4.1 Legal principles on the protection of indigenous peoples

Both municipal law [759] and international law are increasingly extending protections to indigenous peoples.[760] The landmark UN Declaration on the Rights of Indigenous Peoples (UNDRIP), recently entered into force following years of elaborate negotiations,[761] is an example of such robust international protections.[762] It is argued that the UNDRIP marks a 'tremendous advance in international human rights because collective rights of indigenous peoples are now recognized as human rights'.[763] It provides key provisions on – *inter alia* – land and resource rights, the protection of indigenous peoples' territorial integrity,[764] as well as their right to free, prior, and informed consent:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.[765]

The right to free, prior and informed consent is also emphasized in Article 6 of the ILO Convention concerning Indigenous and Tribal Peoples, which entered into force years prior to the UNDRIP.[766] This right is crucial because, in a foreign investment

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[759] Nicaragua is an example of such national jurisdiction recognizing indigenous rights at a constitutional level. Article 5 of the Political Constitution of Nicaragua (1995) stipulates that 'the state recognizes the existence of indigenous peoples, who have rights, duties and guarantees set forth in the Constitution, and especially those of maintaining and developing their identity and culture, having their own forms of social organization and managing their local affairs, as well as maintaining communal forms of ownership of their lands, and also the use and enjoyment of those lands, in accordance with the law. An autonomous regime is established in the Constitution for the communities of the Atlantic Coast'. See also L. Burgorgue-Larsen, and A. Úbeda de Torres, *supra* note 44, at 500-501, 503.

[760] J. Crawford, *supra* note 74, at 209-210. For an exhaustive survey of such protections, see J. Levine, *supra* note 758, at 111.

[761] According to Karen Engle, these negotiations elapsed over a period of two decades of preparatory work. Carried under the auspices of the UN Working Group on the Rights of Indigenous Populations, established in 1982, the negotiations involved indigenous peoples, their representatives (including civil society organizations), and states. See K. Engle, 'On Fragile Architecture: the UN Declaration on the Rights of Indigenous Peoples in Context of Human Rights', (2011) 22 European Journal of International Law 141, at 143.

[762] United Nations Declaration on the Rights of Indigenous Peoples, GA Res. 61/295, 13 Sept. 2007 (UNDRIP), available at: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (last accessed 06 October 2014).

[763] One of the first rights recognized, perhaps concomitantly the most pivotal and most controversial, is the right to self-determination (Article 3). Innovative provisions include the right not to be subjected to forced assimilation (Article 8), and the right to indigenous spirituality (Article 34). See also K. Engle, *supra* note 761, at 147-148.

[764] Respectively, Articles 26 and 10, UNDRIP. See also K. Engle, *supra* note 761, at 146.

[765] Article 32(2), UNDRIP.

[766] '1. In applying the provisions of this Convention, governments shall: (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration

context, the consent and approval of the host state may simply be insufficient.[767] Also in a foreign investment context, the environmental degradation resulting from natural resource exploitation could have potentially devastating effects on indigenous peoples' rights including the right to the enjoyment of the communal property of ancestral lands.[768]

That said, regional human rights instruments such as the Banjul Charter are hailed as granting extensive rights to indigenous peoples, such as the right of peoples to 'freely dispose of their wealth and natural resources'. [769] Indigenous peoples increasingly turn to regional human rights jurisdictions, not only to assert their rights to their lands, cultures, identity, and ultimately their survival, but also to safeguard their natural resources rights.[770] In fact, the ACHPR and IACtHR have articulated indigenous people's rights in

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is being given to legislative or administrative measures which may affect them directly; (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them; (c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose. 2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures'. *See* Article 6, International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, C169, 27 June 1989, C169, online at: http://www.unhcr.org/refworld/docid/3ddb6d514.html (last accessed 29 September 2012). See K. Sing'Oei, 'Engaging the Leviathan: National Development, Corporate Globalisation and the Endorois' Quest to Recover their Herding Grounds', (2011) 18 International Journal on Minority and Group Rights 515, at 520. It is worthy to note that the World Bank does no longer finance projects unless the state has engaged in 'free, prior, and informed consultation' with potentially affected indigenous communities. See Pasqualucci, *supra* note 46, at 87.

[767] The author cites the example of the World Bank's Operational Directive 4.10, which mandates the development of an indigenous peoples' development plan as a prelude to any investment in land occupied by an indigenous group. See K. Sing'Oei, *supra* note 766, at 537. This was also reflected by the case of *Burlington Resources Inc. v. Republic of Ecuador* where the claimant alleged that protests and threats by indigenous communities in opposition of its activities resulted in violations of Ecuador's BIT obligations. The tribunal did not extensively delve into the interplay between foreign investment protection and indigenous rights given that the part of the claim that was most relevant to indigenous opposition was dismissed on jurisdictional grounds. Burlington Resources Inc. v. Republic of Ecuador (ICSID Case No. ARB/08/5), *Decision on jurisdiction of 02 January 2010*, at paras 30-34; and *Decision on Liability of 14 December 2012*. See also J. Levine, *supra* note 758, at 113-114.

[768] G. Alfredsson, *supra* note 622, at 133; K. Sing'Oei, *supra* note 766, at 532-533.

[769] The Banjul Charter indivisibly recognizes rights such as the right to 'personal liberty and protection from arbitrary arrest' (Article 6), the right to 'freedom of association' (Article 10), the right of peoples to 'freely dispose of their wealth and natural resources' (Article 21), as well as the right of peoples to 'their economic development' (Article 22), and all of which are relevant to indigenous peoples. From a procedural standpoint, it has shown innovativeness by unprecedentedly allowing video-testimony, therefore, 'bringing the voices of an oppressed community many miles away to the halls of justice'. However, serious procedural impediments might arise that could affect the procedural integrity of the trial such as the impossibility of cross-examining a witness whose testimony was already recorded. See Ibid., at 531.

[770] L. Alvarado, 'Prospects and Challenges in the Implementation of Indigenous Peoples' Human Rights in International Law: Lessons from the Awas Tingni v. Nicaragua', (2007) 24 Arizona Journal of International and Comparative Law 609, at 609, 617.

the context of the degradation caused by oil and gas or mining activities.[771] A quick look at an example from the case law is merited directly below given that the *amici curiae* in *Glamis v. United States* and *Chevron and Texaco v. Ecuador* in fact referred to the practice of regional human rights jurisdictions on the matter.[772]

In the case of *CEMIRIDE and MRG on behalf of Endorois Welfare Council* v. *Kenya*, the ACHPR applied the UNDRIP's Article 26 ('recognition of indigenous peoples right to ancestral lands'), and Article 27 ('implementation by states of a fair process to adjudicate rights pertaining to these lands') in order to stress the importance of indigenous peoples participation as 'active stakeholders' in development processes.[773] The ACHPR found that the mining exploitation of red rubies severely affected the community's access to clean drinking water, and that such exploitation should have been preceded by prior and informed good faith-consultations, as well as ensuing compensation.[774] By also relying on the IACtHR's case law, the ACHPR found that with the eviction of the Endorois from the area of Lake Bogoria, and restricting their access to the same, Kenya had violated their right to freely dispose of their wealth and natural resources (Article 21)[775] as well as their right to development (Article 22).[776] This

[771] Indeed, cases at international human rights jurisdictions, including the ACHPR, adjudicating indigenous peoples' rights involved foreign investment activity. Now, this section looks at the inverse; i.e. cases adjudicating foreign investors' rights involving indigenous peoples' rights. See also L. Alvarado, *supra* note 770, at 614; K. Sing'Oei, *supra* note 766, at 532-533.

[772] The *amici* particularly referred to *The Mayagna (Sumo) Awas Tingni Community* v. *Republic of Nicaragua* case, *supra* note 955. See Glamis Gold Ltd v. United States, *infra* note 496; and Chevron and Texaco v. Ecuador, *supra* note 141. Indeed, the IACtHR has come up with criteria applicable to the facts of each case allowing it to judge on the exploitation of natural resources in indigenous lands. This has meant that the IACtHR has not simply and plainly chosen to trump indigenous or human rights over trade, investment, or property rights of foreign investors. See *Saramaka People* v. *Suriname*, *supra* note 776. J. Pasqualucci states that 'the right to property under the American Convention is not absolute', see Pasqualucci, *supra* note 46, at 82, 84.

[773] The evidence presented by civil society to the ACHPR includes reports that mining activities caused heavy pollution to the Wasseges River, an important source of fresh water to the Endorois, due to the heavy metals and chemicals used to treat the extracted minerals, which allegedly caused widespread sickness, vomiting, and diarrhea. *CEMIRIDE* and *MRG on behalf of EWC* v. *Kenya* case, *supra* note 608, para. 283. See also K. Sing'Oei, *supra* note 766, at 522.

[774] Ibid., at 534.

[775] The ACHPR was of the view that indigenous peoples have the right to natural resources contained within their traditional lands, and therefore the Endorois can claim the protection provided by Article 21. This right is not absolute. States benefit from the exception provided under Article 14, which states that: 'The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws'. See *CEMIRIDE* and *MRG on behalf of EWC* v. *Kenya* case, *supra* note 608, para 267.

[776] In deciding on this issue, the ACHPR referred to the IACtHR's landmark decision in *Saramaka* v. *Suriname*, and applied its three-pronged test on state exploitation of natural resources on indigenous peoples' ancestral lands: 'that the specific natural resource falls outside the traditional and cultural use of the indigenous community; that the exploitation and exploration does not imperil the survival, development and continuation of

decision incidentally makes the ACHPR the first international jurisdiction to decide on the right to development and its violation.[777]

4.4.2 'Extracting the sacred' – Examples of the dilemma of protecting indigenous peoples in the wake of investments in extractive industries

i. Glamis Gold v. United States

Glamis Gold[778] is a NAFTA Chapter XI dispute involving an apparent conflict between mining activities conducted by foreign investors and indigenous cultural rights. It opposed Glamis, a Canadian mining company and a subsidiary of Goldcorp, a major Canadian mining multinational, and the US.

a. The facts

Glamis challenged legislation and regulations adopted by California that required, *inter alia*, financially burdensome backfilling of all open pits and recontouring of the land following the cessation of mining activities. It alleged that these measures constituted a violation of the fair and equitable treatment (Article 1105) and amounted to expropriation (Article 1110). The US argued that these measures were intended to: (a) ensure that mined lands are returned to a usable condition and pose no danger to public health and safety; and (b) provide protection to Native American sacred sites. The Quechan Indian Nation, which is a federally recognized tribe in the US, sought to intervene in the dispute as *amicus curiae*. Friends of the Earth, the National Mining Association, and Sierra Club and Earthworks also made submissions.

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an indigenous groups' way of life; and where the natural resources are not relevant to traditional livelihoods their exploitation within indigenous territories may negatively affect the integrity of and access to other resources that are significant to the cultural life and survival of the community'. See Ibid., at 534 citing *Saramaka People* v. *Suriname*, Judgement of 28 November 2007, Inter-American Court of Human Rights (series C) No. 72 (2007), para 120-126.

[777] The ACHPR found that: 'the right to development is a two-pronged test, that it is both constitutive and instrumental, or useful as both a means and an end. A violation of either the procedural or substantive element constitutes a violation of the right to development. Fulfilling only one of the two prongs will not satisfy the right to development. The African Commission notes the Complainants' arguments that recognising the right to development requires fulfilling five main criteria: it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes in the right to development'. Also, the ACHPR cited Article 22 of the Banjul Charter which provides that: '1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development'. See Ibid., para. 277. See also G. Lynch, *supra* note 910, at 26.

[778] Glamis Gold Ltd v. United States, *infra* note 496.

b. Amicus allegations and arguments

The Nation, Friends of the Earth, the Sierra Club and Earthworks submitted three separate *amicus* briefs. The first, and most relevant here, put forward two main arguments to the effect that (i) the preservation and protection of indigenous rights in ancestral land is an obligation under customary international law which must be observed, by both the NAFTA parties and the arbitral tribunal, in accordance with the principle of good faith; and (ii) NAFTA investors seeking compensation for an alleged expropriation of property cannot rely upon a claim to acquired rights in which no legitimate expectation to enjoy such rights existed.[779] Indeed, the Nation alleged that Glamis had ample notice of the presence of sacred sites in question. It even commissioned its own cultural surveys, which confirmed the sacred character of this land; and thereby, cannot possibly claim that its legitimate expectations were breached as a result of the US measures. Indeed, the Nation asserted that expropriation requires:

> only vested rights, for which a legitimate expectation of the enjoyment of property exists, are capable of expropriation, whether direct or indirect. An expectation to enjoy the profits of a mining development that endangers or destroys sacred indigenous land controlled by a State — where that State is obligated under international law to safeguard that land for the benefit of the indigenous peoples — is not per se "reasonable" under international law.[780]

It thus contended that Glamis could not possibly claim a legitimate expectation that would allow it to, *grosso modo*, destroy or damage those sites, deny the Nation access to them, or prohibit the Nation from engaging in its longstanding cultural, spiritual or religious practices related to those sites.

The Nation then argued that customary international law norms with respect to indigenous rights should be held as relevant in the interpretation of NAFTA pursuant to Article 38(1) of the ICJ Statute.[781] Although acknowledging that a great deal of those norms concerning the protection of indigenous peoples and their cultural rights are set forth under non-binding declarations, e.g. the UNDRIP, the Nation argued that they may nonetheless constitute international practice that contributes to the generation of custom which is expressive of international law principles.[782] Indeed, in asserting the need to

[779] Glamis Gold Ltd v. United States, *Submission of the Quechan Indian Nation of 16 October 2006*.
[780] Ibid., at 10.
[781] See Article 38 of the ICJ Statute, *supra* note 94.
[782] Ibid., at 2.

protect indigenous sacred sites, cultural, and land rights, the Nation namely cited the UNDRIP as well as various international instruments such as – *inter alia* – the UN Universal Declaration of Human Rights, ICCPR, ILO Convention concerning Indigenous and Tribal Peoples and UNESCO Convention.[783] The Nation also referred to the World Bank and the International Finance Corporation's various policies and standards to that effect. In addition, it referred to the IACtHR's practice on the matter.[784] The Nation posited that NAFTA tribunals are required to settle NAFTA Chapter XI provisions in accordance with NAFTA rules and applicable rules of international law.[785] Therefore, in their interpretation of NAFTA provisions on the fair and equitable treatment (Article 1105) and expropriation (Article 1110), NAFTA tribunals should give careful consideration to other international norms. This would avoid requiring certain host state conduct that could conflict with international norms on the protection of indigenous peoples in general, and the Quechan Tribe in particular.

c. The tribunal's response

The tribunal did not revisit the *amici*'s arguments. It did note, however, that the Nation had repeatedly raised concerns regarding the potential adverse effects of gold mining on the tribe itself, its cultural resources and beliefs (including the network of sacred trails running through the project area), wildlife habitats, groundwater and air quality.[786] Having said that, the tribunal found that California's various acts and measures affecting Glamis were not egregious and shocking, a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons. It asserted that a violation of NAFTA Article 1105 on the fair and equitable treatment requires the establishment of host state acts that exhibit a high level of shock, arbitrariness, unfairness or discrimination.[787] As to the expropriation claim under Article 1110, the tribunal undertook an extensive valuation analysis in order to assess the impact of the backfilling measures on Glamis' project and found that a post-

[783] Articles 18 and 27 of the ICCPR, *supra* note 93; Article 11, 25 and 26 of the UNDRIP, *supra* note 762; Article 5(d) of the UNESCO Convention, *supra* note 624; and Article 5 of the ILO Convention concerning Indigenous and Tribal Peoples, *supra* note 766.
[784] The *amici* particularly referred to *The Mayagna (Sumo) Awas Tingni Community* v. *Republic of Nicaragua* case, *infra* note 955.
[785] Article 1131(1) of NAFTA, *supra* note 170.
[786] Glamis Gold Ltd v. United States, *infra* note 496, at 48.
[787] Ibid., at 353.

backfilling valuation exceeded $20 million. It found that Glamis could not claim that those measures had a sufficiently adverse impact on its investments that would amount to expropriation and require compensation.[788] In sum, the tribunal dismissed the entirety of Glamis' claims.

ii. Piero Foresti et al. v. South Africa

The *Piero Foresti*[789] case involved a claim for expropriation by a number of Italian foreign investors and a Luxembourg-incorporated entity against the Republic of South Africa.[790] Both the Italy-South Africa and Belgium Luxembourg Economic Union (BLEU) South Africa BITs governed the dispute. The case was eventually discontinued, however, it remains nonetheless important in reflecting some of the key issues discussed in this research.

a. The facts

The claimants[791] alleged that the effects of the 'affirmative action measures' contained in the South African Mineral and Petroleum Resources Development Act (MPRAD) and the Broad-Based Black Economic Empowerment (BEE) objectives of the Mining Charter ultimately led to the expropriation of their existing mineral rights and their replacement with less valuable rights.[792]

b. Amicus allegations and arguments

[788] Ibid., at 230.
[789] It is worthy to note nonetheless that the parties agreed that the dispute be governed by the ICSID Additional Facility Rules as South Africa is not a party to the ICSID Convention, the ICSID Arbitration Rules were therefore not applicable. See Piero Foresti, Laura de Carli and others v. Republic of South Africa (ICSID Case No. ARB(AF)/07/1), *Award of 04 August 2010*.
[790] The claim was therefore filed pursuant to both the Italy-South Africa BIT and the Belgo-Luxembourg Economic Union-South Africa BIT. The claimants alleged expropriation by the Republic of South Africa through the Mineral and Petroleum Resources Development Act 28 of 2002 on 1 May 2004, which extinguished certain putative old order mineral rights allegedly held by the claimants; and secondly, by the coming into effect of the MPRDA, when combined with the Mining Charter dated 13 August 2004, which introduced compulsory equity divestiture requirements with respect to the claimants' shares in their operating companies. See Ibid., at para 53.
[791] Although not representing a major multinational mining company, the claimants are a group of individual foreign investors who were believed to control – at the time of the dispute – around 80% of South Africa's stone exports. See M. Wells-Sheffer, *supra* note 206, at 498.
[792] J. Brickhill and M. Du Plessis, *supra* note 427, at 156.

Four civil society organizations sought to intervene as *amici curiae*, including two organizations based in South Africa – the Legal Resources Centre and the Centre for Applied Legal Studies.[793]

By highlighting the permissibility of 'special measures' under international human rights law, the *amicus* petition aimed to emphasize the public importance of the MPRDA, the validity of which was being challenged by the claimants, for the following over-arching reasons:

> human rights advancement, and in particular the pursuit of substantive equality; sustainable development; environmental protection; sound and prudent stewardship of the nation's natural resources; and the need proactively to redress the apartheid history of exploitative labour practices, forced land deprivations, and discriminatory ownership policies which previously characterised South Africa's mining sector for decades.[794]

More specifically, the *amici* alleged that the government operates under constitutional obligations to bring about the realization of substantive equality in South Africa, including through the enactment of the MPRDA.[795] They further noted that such 'special measures' solely aimed at securing adequate advancement of certain racial or ethnic groups or individuals, i.e. without discrimination, was recognized by international treaties such as the Convention on the Elimination of all Forms of Racial Discrimination – to which South Africa is a contracting party.[796] In the same vein, the *amici* also cited references to the ICCPR, the ICESCR, the CEDAW, and the Banjul Charter with respect to states' duties in undertaking affirmative action measures. [797]

The *amici* posited that human rights law is relevant in determining whether South Africa breached its fair and equitable treatment obligation and the expropriation claims

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[793] The remaining two are renowned organizations: the International Centre for the Protection of Human Rights and the Centre for International Environmental Law.
[794] J. Brickhill and M. Du Plessis, *supra* note 427, at 157.
[795] Piero Foresti, Laura de Carli and others v. Republic of South Africa, *Petition for Limited Participation as Non-Disputing Parties of 17 July 2009*, at para 4.6.
[796] Article 1.4 of the Convention states that 'Special Measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved'. See UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, available at: http://www.refworld.org/docid/3ae6b3940.html (last accessed 06 October 2014).
[797] See Article 1(2) of the ICCPR, *supra* note 93; Article 2 of the ICESCR, *supra* note 672; Article 4 of the CEDAW, *supra* note 675; and Article 14 of the Banjul Charter, *infra* note 845.

made by the foreign investors. A consideration of South Africa's legal obligations under human rights law – both domestic and international – is directly pertinent to the question of whether the regulatory scheme promulgated by the MPRDA may be considered to have been enacted arbitrarily, in bad faith, or in a discriminatory fashion – which are essential in determining BIT violations.[798] Finally, the *amici* called on the tribunal to adopt an 'interconnected approach' to international law aimed at avoiding irreconcilable conflict between the relevant BITs and South Africa's constitutional and human rights obligations.[799]

These arguments were never put to the test as the case was discontinued and an actual *amicus* brief was not submitted. The tribunal's final award essentially covered the issue of costs. The discontinuance of the case is in several ways a source of lament since it could have provided a clear example of the interplay between international human rights law and international investment law.[800]

iii. Chevron and Texaco v. Ecuador

The case of *Chevron and Texaco v. Ecuador* is a highly complex investor-state dispute governed by the US-Ecuador BIT.[801]

a. The facts

Chevron's claims against Ecuador most notably relate to contesting Ecuadorian court decisions in the Lago Agrio litigation, and their enforcement, on nearly $18 billion of damages to be paid by Texaco (acquired by Chevron, both US-based multinationals) to indigenous groups inhabiting the Oriente region in Ecuador, as well as others inhabiting the downstream area in Peru. These damages relate to environmental and personal injuries that allegedly resulted from Texaco's exploitation, through a consortium involving the Ecuadorian oil state company, of the Lago Agrio site from 1964 to 1992.

[798] Ibid., at 4.13.
[799] Ibid., at 4.14-15.
[800] B. Simma, note 196, at 585.
[801] Chevron and Texaco v. Ecuador, *supra* note 141.

The case is also heavily influenced by developments in other related cases in front of US, Argentine, and Brazilian courts in which decisions on enforcement are still pending.[802]

Two civil society organizations, IISD and *Fundación Pachamama*, jointly submitted an *amicus curiae* brief that was dismissed in light of the early stage of the proceedings.[803] Various admissibility, jurisdictional, and interim measure awards have been rendered to date, however, a final award and settlement of the dispute is still pending.[804]

b. Amicus allegations and arguments

The *amici* started by summarizing some of the key orders sought by the claimants, which most notably include a request for the arbitral tribunal to declare that, pursuant to a settlement agreement entered into with Ecuador, the claimants have:

> no liability or responsibility for environmental impact, including but not limited to any alleged liability for impact to human health, the ecosystem, indigenous cultures, the infrastructure, or any liability for unlawful profits, or for performing any further environmental remediation arising out of the former Consortium.[805]

The *amici*'s arguments essentially focused on jurisdictional issues and the justiciability of the claim. They contended that the claimants' were seeking interference on the part of the arbitral tribunal in the Lago Agrio litigation in front of Ecuadorian courts, in which the government of Ecuador was not party to; and to preempt the enforcement of any resulting decisions in other jurisdictions.[806] The *amicus* submission raised important issues with respect to human rights and indigenous rights that were directly linked to Chevron's claim. By referring to the increasing recognition in international law of the need to protect indigenous peoples from the 'disproportionate losses and damages' caused by oil and gas, mining, and other extractive activities, and including some of the landmark IACtHR decisions;[807] the *amici* requested the tribunal to

[802] See Jota v. Texaco, *supra* note 141, at para 156; and Ashanga v. Texaco Inc., *infra* note 1336.
[803] Chevron and Texaco v. Ecuador, *Submission of amici of 05 November 2010*.
[804] The latest award was rendered in 27 September 2013. For further details on the successive awards rendered to date, see the Investment Treaty Arbitration Website Portal, available at: http://www.italaw.com/cases/257 (last accessed 06 October 2014).
[805] Ibid., at para 2.1.
[806] Ibid., at para 2.2-2.3.
[807] The *amici* particularly referred to *The Mayagna (Sumo) Awas Tingni Community* v. *Republic of Nicaragua* case, *infra* note 955.

respect indigenous groups' right to access justice in front of Ecuadorian courts, and to uphold Ecuador's duty to fulfill such right by not undermining in the Lago Agrio litigation.[808] The *amici* also cited relevant international instruments on the right to access justice including the Universal Declaration of Human Rights, the ICCPR, and the IACHR.[809] They referred to the ILO Convention concerning Indigenous and Tribal Peoples[810], and particularly to Article 40 of the UNDRIP which provides that:

> indigenous peoples have the right of access to and to prompt decision through just and fair procedures for the resolution of conflicts and disputes…as well as to effective remedies for all infringements of their individual and collective rights.[811]

Ecuador would thus be under a clear obligation – both domestic and international – to afford its indigenous citizens meaningful avenues to secure remedies and relief for violations of their rights. Accordingly, the *amici* plainly argued that if the *Chevron* tribunal accepted jurisdiction, and affords the claimants the remedies sought, it would be effectively removing the rights of indigenous citizens to have their own case heard in Ecuador, i.e. accepting jurisdiction would conflict with Ecuador's domestic and international law obligations with respect to the protection of its indigenous citizens.[812]

c. The tribunal's response

As mentioned, a final award has not been rendered yet where the bulk of substantive human rights issues are likely to be addressed in more detail. Again, the *amici*'s brief was not taken into account by the tribunal in its decision on jurisdiction for a variety of reasons that were previously discussed.[813] The main premise for such dismissal, however, was the fact that the tribunal had been looking into jurisdictional issues – which, as will be shown below, is generally understood to be out of the scope of *amicus curiae* involvement.

[808] Collective rights of indigenous peoples in Ecuador had only been constitutionally recognized in 1998. Ibid., at para 4.8.
[809] Those provisions will be further detailed within the discussion over civil society's access to justice in Part III – Section 2.1.
[810] ILO Convention concerning Indigenous and Tribal Peoples, *supra* note 766.
[811] Article 40 of the UNDRIP, *supra* note 762.
[812] Chevron and Texaco v. Ecuador, *supra* note 803, at 4.13, 5.20.
[813] See Part I – Section 3.1

5. An appraisal of civil society's *amicus curiae* role

Having looked at a significant number of rules and cases, it is worthy at this stage to provide an assessment – from this research's perspective – on the possible impact civil society might have had on investor-state tribunals' decisions. This impact shall be considered from both procedural (**Section 5.1**) and substantive (**Section 5.2**) standpoints. The aim of this section is thus to explore whether civil society has had any effects on the decisions discussed hitherto.

5.1 Procedural developments: *Amicus curiae* intervention crystallized

Part I has shown that international commercial arbitration typically covered disputes arising from international relationships of a commercial nature, which include investment activities.[814] As previously mentioned, concerns regarding the *amicus curiae* procedure often stem from those preoccupied with the consensual nature of arbitration and other fundamental principles of international commercial arbitration, which in essence could be credited to the receding practice of the diplomatic protection of foreign investors, and thus, the de-politicization of investor-state disputes.

However, the rules and cases examined hitherto show that there exists a relative departure from the international commercial arbitration model appearing as a *fait accompli* with (i) the increasing recognition by arbitral tribunals for a shift in procedure where the public interest is at stake; (ii) both ICSID and UNCITRAL amending existing, or adopting new, arbitration rules; (iii) NAFTA parties setting out new guidelines to increase third-party participation and transparency under Chapter XI disputes; and (iv) newly negotiated BITs adhering to similar principles. In fact, numerous arbitration practitioners have not welcome greater transparency and third party involvement.[815]

The *Methanex* case was the starting point for civil society actors to solicit arbitral tribunals in that regard. The IISD, the Communities for a Better Environment and the Earth Island Institute had successfully submitted petitions for leave to file *amicus curiae* briefs 'on the basis of the immense public importance of the case'. The tribunal explicitly

[814] See *supra* note 110.
[815] For an overview, see A. Kawharu, *supra* note 393, at 281.

referred to arguments raised by the *amici* on the public importance of the case. The *Methanex* tribunal upheld these arguments as it ultimately acknowledged its authority to accept *amicus curiae* submissions. This triggered NAFTA parties to issue the FTC Statement notwithstanding their apparent reluctance to amend Chapter XI. The Statement is considered as compelling guidance as shown by the *Glamis* tribunal as well as others.[816] The acceptance by *Methanex* of the *amicus curiae* practice is clearly portrayed as a procedural novelty.[817] Resorting to similar arguments in the case of *Sociedad General de Aguas de Barcelona, S.A. v Argentina*,[818] civil society actors succeeded in convincing ICSID tribunals to accept *amicus curiae* submissions prior to the amendment of the ICSID Arbitration Rules. Civil society actors should be credited to a large extent for the acceptance of the *amicus curiae* procedure. It has allowed third parties such as the Quechan Indian Nation to make its voice heard.[819] Without the *amicus* procedure, the Nation would not have had any access to the *Glamis* tribunal.[820]

That said, the acceptance of *amici curiae* does not amount to the recognition of any third party right. Rather, it is a matter of procedural discretion. This was once more confirmed recently in the highly sensitive *Philip Morris v. Uruguay* arbitration. While accepting the submission of an *amicus* brief by the Pan American Health Organization, the tribunal emphasized that 'the need to safeguard the integrity of the arbitral process requires in fact *that no procedural rights or privileges of any kind be granted to the non-disputing parties*'.[821]

Moreover, investor-state tribunals do not shy away from rejecting *amicus curiae* petitions based on their procedural discretion – even if there is a close nexus between the subject matter of a dispute and public interest and/or human rights issues. The previously

[816] Following the *Glamis* arbitration, the *Merrill & Ring* tribunal accepted *amicus* submissions by Communications, Energy and Paperworkers Union of Canada, the United Steelworkers, and the British Columbia Federation of Labour without much controversy. Merrill & Ring Forestry L.P. v. Government of Canada, *supra* note 135, at paras 22, 50.
[817] A. Van Duzer, *supra* note 171, at 685.
[818] Sociedad General de Aguas de Barcelona v. The Argentine Republic, *supra* note 544.
[819] Glamis Gold Ltd v. United States, *supra* note 496.
[820] E. De Brabandere, *infra* note 852, at 105.
[821] The tribunal stated that 'under the terms of Rule 37(2), the Tribunal has discretion whether to accept a written submission by a non-disputing party. Acceptance of a submission shall confer to the petitioner neither the status of a party to the arbitration proceeding nor the right to access the file of the case or to attend hearings. The need to safeguard the integrity of the arbitral process requires in fact that no procedural rights or privileges of any kind be granted to the non-disputing parties'. See Philip Morris v. Uruguay, *Procedural Order No. 4 of 24 March 2015*, at para 24 (our emphasis).

discussed *Aguas Provinciales de Santa Fe* decision.[822] The more recent *Bernhard von Pezold v. Republic of Zimbabwe* decision clearly manifest this.[823] Although the tribunal in this last case did recognize that proceedings may well have an impact on the interests of indigenous communities, it dismissed an *amicus* petition made by the European Center for Constitutional and Human Rights as well as four Zimbabwean indigenous communities citing doubts over the petitioners' independence and neutrality vis-à-vis Zimbabwe.[824] As previously mentioned, petitioners' independence and neutrality is a *sine qua non* condition under Article 37(2) of the ICSID Arbitration Rules.[825] The fulfilment of such condition is subject to tribunals' assessment and appraisal of civil society petitioners. The tribunal's rejection in *Bernhard von Pezold v. Republic of Zimbabwe* sheds light on a recurring and fundamental point for the purposes of this research, i.e. the adequacy of civil society participation as *amicus curiae* heavily depends on the facts and circumstances of each case. In this light, and as previously mentioned, investor-state tribunals do not, and should not, shy away from determining the adequacy of *amicus* petitions and dismissing them if need be.[826]

5.2 'Mixed results' – Do investor-state tribunals consider *amici*'s substantive arguments?

Notwithstanding the procedural developments mentioned above, numerous commentators doubt the substantive impact of *amicus curiae* submissions on arbitral

[822] Aguas Provinciales de Santa Fe S.A et. al. v. The Argentine Republic, *supra* note 555.
[823] Bernhard von Pezold and Others v. Republic of Zimbabwe, (ICSID Case No. ARB/10/15), *Procedural Order No. 2 of 26 June 2012.*
[824] Those were the: Chikukwa, Ngorima, Chinyai and Nyaruwa peoples who inhabit the region of Chimanimani, in South-Eastern Zimbabwe, on which the claimant's properties are located. Ibid., at para 18, 62.
[825] See also Article 37(2), ICSID Arbitration Rules, *supra* note 411.
[826] More recently, although not related to an *amicus* submissions by civil society, the tribunal in *Apotex v. the United States* dismissed two *amicus* petitions submitted by (i) an individual – Mr. Barry Appleton, which was denied in part because Mr. Appleton was vested in a 'particular and professional interest and not a "public interest" affecting him personally'; as well as (ii) the Study Center for Sustainable Finance, which was essentially denied because 'the Tribunal considers that while BNM seems to have a general interest in the Tribunal adopting interpretations of NAFTA that support its apparent interest in narrowing the scope of drug manufacturers' intellectual property protection, BNM has not demonstrated its significant interest'; see Apotex v. the United States, *supra* note 56, at 43-44 and note 59, at 33, 37 respectively. Another tribunal adjudicating the same dispute in parallel proceedings under the UNCITRAL Arbitration Rules had come to the same conclusion, see *Apotex Inc. v. the United States, Procedural Order No.2 On the Participation of a Non-Disputing Party of 11 October 2011*. In both cases the tribunal found that the *amicus* submissions would unduly burden the proceedings and prejudice the disputing parties.

tribunals' final awards. It is indeed argued that the extent to which *amicus* submission has influenced, or even may influence, arbitral tribunals' final awards is not clear.[827] In a similar vein, others argue that arbitral tribunals rarely quote or refer to *amici*'s legal arguments, and thereby their overall relevance might be put into question.[828] This is perhaps reflected in *UPS v. Canada*, where aside from one descriptive paragraph, the substantive issues raised by the *amicus curiae* briefs were not addressed in the tribunal's final award.[829] A look back below at some of the other key decisions mentioned in this Part I is thus merited to put these arguments to the test.

In *Methanex v. the United States*, the tribunal did not revisit procedural aspects nor summarize the content of the *amici*'s submission but noted the IISD's arguments against Methanex's contention that 'trade law approaches can simply be transferred to investment law'. Methanex had also argued that there was no valid environmental, health, or safety justification for the MTBE ban and that it aimed at protecting and promoting 'local interests' in a protectionist manner to the disadvantage of 'foreign competitors'.[830] In addition, the tribunal emphasized the validity of the legitimate exercise of sovereignty as a host state defence against foreign investors' claims, i.e. it found that government measures (i) aimed at ensuring a public purpose; (ii) that are non-discriminatory; and (iii) enacted 'in accordance with due process', are in principle not deemed as expropriatory and compensable – which is a finding that was in line with the IISD's *amicus curiae* arguments.[831] Ultimately, Methanex's claim was rejected and the decision was hailed by civil society organizations such as the IISD.[832]

In *Sociedad General de Aguas de Barcelona, S.A. v Argentina*, the *amici*'s arguments did not seem to alter the tribunal's position in terms of determining Argentina's liability towards the claimants. It relied on the criteria set forth by Article 25

[827] F. Francioni, *infra* note 847, at 741.
[828] A. Moore, *infra* note 1040, at 269; See also T. Ishikawa, *supra* note 108, at 404; N. Blackaby and C. Richard, 'Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration', in M. Waibel et al. (eds), *The Backlash against Investment Arbitration*, at 270; J. Maupin, *supra* note 48, at 29.
[829] United Parcel Service v Canada , *supra* note 515. See also T. Ishikawa, *supra* note 108, at 406.
[830] Methanex Corporation v. United States (Final award on jurisdiction and merits of 03 August 2005), at 13.
[831] See also A. Martinez, *supra* note 181, at 331.
[832] H. Mann, 'The Final Decision in Methanex v United States: Some New Wine in Some New Bottles', International Institute for Sustainable Development, August 2005, available at: http://www.iisd.org/pdf/2005/commentary_methanex.pdf (last accessed 06 October 2014).

of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts[833], indicating that 'the severity of a crisis, no matter the degree, is not sufficient to allow a plea of necessity to relieve a state of its treaty obligations.'[834] Ultimately, it did not consider that Argentina expropriated the claimants' investments, nor did Argentina violate the claimants' right to full protection and security. It did however find that they were not afforded fair and equitable treatment. A decision on quantum is still not public; therefore, it remains to be seen whether *amicus* arguments might have been further considered.

In *Glamis Gold v. the United States*, the Quechan Indian Nation, Friends of the Earth, the National Mining Association, and Sierra Club and Earthworks made *amicus* submissions.[835] The tribunal acknowledged but did not address human rights arguments that were particularly raised by the Quechan Indian Nation. The tribunal focused on factual issues and California's treatment of Glamis Gold. It nonetheless concluded the case by denying Glamis Gold's claims under both NAFTA Articles 1110 on expropriation and 1105 on the fair and equitable treatment.

Perhaps the case where civil society actors seemed to have caused most impact is the *Biwater Gauff v. Tanzania* case.[836] This is paradoxical given that, as mentioned previously, the *amici* particularly lamented not having had access to the arbitral record; and therefore, claimed they could not adequately scrutinize the arguments or facts alleged by the parties. While citing the *Methanex* precedent, the tribunal acknowledged the wider public interest that is relevant to the dispute in the following terms: 'this arbitration raises a number of issues of concern to the wider community in Tanzania'.[837] As mentioned above, the tribunal extensively summarized the *amici*'s contentions with respect to the human right to water, and noted that Biwater Gauff explicitly acknowledged such right prior to the dispute. It also mentioned the target set by the Millennium Development

[833] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (November 2001), available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last accessed 01 September 2013) ('ILC Articles on the Responsibility of States for Internationally Wrongful Acts').
[834] See Sociedad General de Aguas de Barcelona v. The Argentine Republic, *supra* note 544, at para 249, 259.
[835] Glamis Gold Ltd v. United States, *supra* note 496.
[836] Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania, *supra* note 741.
[837] Ibid., at para 358.

Goals to reduce by half the number of people without access to potable water.[838] It ultimately found that Tanzania had indeed expropriated Biwater Gauff's investment, and therefore violated the United Kingdom-Tanzania BIT. However, it considered that the claimant failed in sustaining any of its claims for damages.[839]

In *Piero Foresti et. al v. South Africa*, the South African Legal Resources Centre and the Centre for Applied Legal Studies' – acting amongst others as *amicus* petitioners[840] – presented quite extensive and robust arguments on South Africa's human rights obligations in implementing, *inter alia*, affirmative action measures aimed at promoting the economic welfare of African-descendant citizens that were being contested by the claimants. The *Piero Foresti* tribunal was the first ICSID tribunal to have partially accepted the *amicus* petitioners' request to access certain case materials – which were then redacted by the disputing parties.[841] However, the case was discontinued. It is therefore not possible to draw any conclusions on civil society's impact in this particular case.

In sum, while looking back at the arguments raised by civil society, it undoubtedly appears that civil society benefited from a unique opportunity as *amicus curiae* to raise a plethora of environmental protection and human rights arguments in front of investor-state tribunals. However, although it appears as a seemingly a limited one, it is difficult to accurately assess the degree of influence these arguments might have had on investor-state tribunals' final awards. What is clear is that investor-state tribunals focus on the respective parties' arguments in great detail and that the same cannot be said about *amicus* arguments, which is in line with the limited role of *amici* as non parties. More fundamentally, for the purposes of this research, it is also clear that investor-state tribunals have systematically asserted that *amici curiae* are *not* additional parties to disputes. This is a fundamental limitation that merits further elaboration in Part III.

[838] 'BGT itself has acknowledged the existence and importance of this right, stating that "every man, woman and child has the right to reliable system of clean water and good sanitation" (the tribunal had cited material from the company's website). See Ibid., at para 379.
[839] Ibid., at para 812.
[840] The remaining two other petitioners are renowned organizations: the International Centre for the Protection of Human Rights and the Centre for International Environmental Law.
[841] Piero Foresti, Laura de Carli and others v. Republic of South Africa, *supra* note 575. See also J. Brickhill and M. Du Plessis, *supra* note 427, at 160.

6. Concluding remarks

Depending on the facts and circumstances of each case, civil society may have the capacity to act as *amicus curiae* in front of investor-state tribunals. This position is no longer in doubt and seems to be confirmed not only by arbitral precedents, but also through the amendment of the ICSID Arbitration Rules and the adoption of the UNCITRAL Rules on Transparency, as well as under several recently signed BITs. This is a benchmark position, a no-turning-back point. Indeed, this is well-reflected in Francioni's argument to the effect that:

> … *amicus curiae* participation has become and will remain in the foreseeable future an important feature of the administration of justice in the field of foreign investment.[842]

The background to this procedural development is arguably substantive. It comes as a recognition that the subject matter of investor-state arbitration could potentially (i) affect the public's broader interest; and, in some cases, (ii) closely relate to environmental protection, public health, human rights or other public policy issues that could affect the direct interests of certain communities or groups who are third parties to arbitration proceedings. Indeed, the adjudication of host state responsibility vis-à-vis foreign investors has, in numerous cases, required tribunals to apprehend facts and norms that relate to 'non-investment concerns' such as sustainable development or the human right to access water. These inherently transcend the narrow scope of the law on foreign investment protection, which enticed tribunals wary of getting a complete understanding of the subject matter to accept 'assistance' in this respect from third parties.

As opposed to international human rights jurisdictions where civil society is entitled to adopt three different procedural roles, i.e. that of a victim/claimant, a representative of victims of human rights violations, or an *amicus curiae* in on-going proceedings; its role in investor-state disputes has been until now solely confined to the status of an *amicus curiae*, i.e. that of an 'assistant'. This role entails procedural functions that are far less extensive from those of a party to the dispute. Indeed, a salient and recurring feature of this procedure is that its sole and unique purpose is the assistance of the tribunal by bringing arguments, perspectives, and expertise other than those of the

[842] F. Francioni, *infra* note 847, at 740.

disputing parties. More fundamentally, *amici curiae* – whether represented by civil society actors or not – do not benefit from the *right* to take part in proceedings, or in other words, the *right to be heard* by investor-state tribunals. They cannot act as litigants. In other words, they cannot challenge arguments or evidence put forward by disputing parties. This constitutes a limited access to justice that has nevertheless allowed civil society organizations to raise factual and legal arguments aimed at advancing environmental and human rights issues and ultimately influencing arbitral tribunals' interpretation of international investment law – even if the degree of such influence remains unclear.

Having said that, BITs are construed in a manner that solely provides foreign investors the right to file claims against host states. There is no opportunity really for civil society actors to access arbitral tribunals other than via the *amicus curiae* procedure under the current regime. Against this background, it is now merited to shift onto Part II, which considers the procedural modalities that may be available to civil society before other jurisdictions. Part III then questions whether civil society could benefit from other procedural avenues that would allow it to enhance its participation before investor-state tribunals.

PART II: THE FUNCTION AND MODALITIES OF CIVIL SOCIETY PARTICIPATION BEFORE OTHER JURISDICTIONS: FOUR MODELS

Introductory remarks

Part II provides a comparative analysis of the role of civil society in international adjudication. It looks at the procedural rules and practice of a number of international forums and jurisdictions allowing for the access of civil society. Attention is particularly given to the ICJ, the WTO dispute settlement system, and the following international human rights jurisdictions: the ECtHR, IACtHR (and the Commission), and ACHPR.

Unlike the ICJ and the WTO dispute settlement system, which are limited by a solely inter-state procedure, the ECtHR, IACtHR, and ACHPR grant access to *any person* in general, and open their doors *de facto* to civil society organizations. Article 44 of the IACHR[843] and Article 34 of the ECHR[844] specifically entitle 'any person' to file a complaint to the Inter-American Commission or an application to the ECtHR against a state-party to the treaty in question. As for the Banjul Charter, Article 55 separates communications into two categories, those emanating from states parties to the Charter and those who are made by 'other than those of States parties to the present Charter'.[845]

A closer understanding of the rules governing civil society's access is necessary. The main question to be addressed here is what are the modalities for civil society's access to justice in front of each of those jurisdictions. The aim of Part II is to look at those rules governing civil society access in general, and the regulation of third party

[843] Article 44 states that: 'Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party'. See American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S.123, entered into force 18 July 1978 (the 'IACHR').
[844] Article 34 states that: 'The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right'. See European Convention for the Protection of Human Rights and Fundamental Freedoms (the 'ECHR'), entry into force 04 November 1950, 213 U.N.T.S. 221.
[845] Article 55 states that: '1. Before each Session, the Secretary of the Commission shall make a list of the communications other than those of States parties to the present Charter and transmit them to the members of the Commission, who shall indicate which communications should be considered by the Commission'. See Organization of African Unity, African Charter on Human and Peoples' Rights (the 'Banjul Charter'), entry into force 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

intervention in particular, in order to better understand civil society's petitions for third party intervention in investor-state proceedings and place them into perspective – as will be further elaborated in Part III.

At the heart of this discussion is the principle of access to justice.[846] In essence, access to justice[847] entails a *right* to initiate, *or take part in*, proceedings.[848] Civil society's access to international justice falls under four different roles: that of indirect participation, which solely concerns the ICJ (**Section 1**), standing as a victim/claimant (**Section 2**), a representative of victims of human rights violations (**Section 3**), or *amicus curiae* in on-going proceedings (**Section 4)**. The last, and most relevant, category of procedural modalities is third party intervention, which is incidentally unavailable to civil society in international jurisdictions but is available to civil society before domestic jurisdictions such as US and Canadian courts (**Section 5**).

1. Absent, but not entirely: Indirect participation at the ICJ

The ICJ plays a central role in the application and interpretation of international law.[849] It was established for the purposes of resolving disputes amongst states pursuant to Articles 93 and 94 of the UN Charter. It has a contentious function and an advisory one. The ICJ's Statute and the Rules of Court do not envisage a role for *persons* in general, including individuals, civil society, or corporations, as is the case in international human rights jurisdictions for instance.[850] The main reason for such absence lies in the quintessentially inter-state nature of proceedings at the ICJ. This applies to both contentious and advisory proceedings. The aim of this section is to consider whether civil

[846] This principle will be extensively discussed at a later stage of this research in Part III – Section 2.1.
[847] Francioni defines access to justice as: 'the individual's right to obtain the protection of the law and the availability of legal remedies before a court or other equivalent mechanism of judicial or quasi-judicial protection'. See F. Francioni, 'Access to Justice, Denial of Justice and International Investment Law', (2009) 20 European Journal of International Law 729, at 729.
[848] T. Meron, *The Humanization of International Law* (2006), at 318.
[849] While referring to the ICJ's formulation of the 'effective control' test for the attribution of state conduct, particularly in light of its judgement in the *Bosnian Genocide* case, Crawford opines that 'despite the lack of formal hierarchy between international courts and tribunals, the pronouncements of the [ICJ], the only permanent tribunal of general jurisdiction, carry particular weight'. See J. Crawford, *supra* note 74, at 291; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement of 26 February 2007; ICJ Rep. 1997, at para 399 (the 'Bosnian Genocide' case).
[850] E. Valencia-Ospina, 'Non-Governmental Organizations and the ICJ', in Treves, T., et al. (eds.), *Civil Society, International Courts, and Compliance Bodies* (2005), at 227. See also P. Sands and R. Mackenzie, *supra* note 55, at para 6.

society has had any participation at ICJ contentious (**Section 2.1**) or advisory proceedings (**Section 2.2**), and whether it may have a potential for broader participation therein.

1.1 Contentious proceedings

Contentious proceedings are solely accessible to states. Article 34 of the ICJ' Statute provides that:

> 1. Only states may be parties in cases before the Court.
> 2. The Court, subject to and in conformity with its Rules, may request of *public international organizations* information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative…[851]

Is it plausible to consider that article 34(2) paves the way for civil society organizations to file *amicus curiae* briefs if they are considered as 'public international organizations'? The prevalent understanding is that this category only includes 'international organizations of states' as defined by article 69(4) of the Rules of Court.[852] In the *Aerial Incident of 3 July 1988 Case* for instance, the ICJ invited the International Civil Aviation Organization (ICAO) to provide certain information regarding ICAO council proceedings.[853] It seems clear that article 34 of the ICJ's Statute does not open the door to civil society in contentious proceedings.[854] The Court has previously confirmed this position in the *Asylum Case* by rejecting a petition of the International League for the Rights of Man – an NGO with consultative status at the ECOSOC – for it to be considered as a 'public international organization' in the sense of article 34(2) of the Statute.[855]

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[851] Article 34, ICJ Statute, *supra* note 94.
[852] Article 69(4) states that: 'In the foregoing paragraph, the term "public international organization" denotes an international organization of States.' See ICJ Rules of Court, entered into force 01 July 1978. See also E. De Brabandere, 'NGOs and the "Public Interest": the Legality and Rationale for Amicus Curiae Interventions in International Economic and Investment Disputes', (2011) 12 Chicago Journal of International Law 85, at 92.
[853] *Aerial Incident of 3 July 1988, Iran v United States*, [1996] ICJ Rep 9, ICGJ 93. Similar invitations were made in: *Aerial Incident of 27 July 1955 (Israel v. Bulgaria)*, Judgment (Provisional measures) of 26 May 1959, ICJ Rep. 1959; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Judgment (Preliminary Objections), ICJ Rep. 1988; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Judgment (Preliminary Objections) of 27 February 1998, ICJ Rep. 1998. See also P. Sands and R. Mackenzie, *supra* note 55, at para 6.
[854] P. Sands and R. Mackenzie, *supra* note 55, at para 6.
[855] See *Asylum Case (Colombia v. Peru)*, Judgements of 20 and 27 November 1950, [1950] ICJ Reports, Vol II, Part IV Correspondence, at 228. And see also, E. Valencia-Ospina, 'Non-Governmental Organizations and the ICJ', in Treves, T., et al. (eds.), *Civil Society, International Courts, and Compliance Bodies* (2005), at 228.

It is precisely in this light that investor-state tribunals could not refer to the ICJ's practice for potential guidance or precedents with regards to allowing access to third parties in general, and civil society organizations in particular. Indeed, in the *UPS v. Canada* case, the tribunal noted that:

> it is true that in contentious cases in the International Court of Justice only states and in certain circumstances public international organisations may have access to the Court (the latter only to provide information relevant to cases before it). However, that limit appears to result directly from the wording of Articles 34, 35 and 61-64 of the Statute of the Court which carefully regulate those matters as well as from the practice under them extending over several decades.[856]

The *UPS* tribunal highlighted the stark contrast between the ICJ's strictly inter-state dispute settlement process with the one contemplated under NAFTA Chapter XI, which involves private persons (NAFTA investors) acting as claimants against states (NAFTA parties). This fundamental difference allowed the tribunal to part with ICJ practice, and ultimately accept *amicus* intervention by two civil society organizations – the Canadian Union of Postal Workers and the Council of Canadians.

Finally, some question whether article 50 of the ICJ Statute could be 'mooted as a possible vehicle for *amicus curiae* participation in contentious cases upon the initiative of the Court'.[857] The article provides that 'the Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion'.[858] That said, article 50 has not yet been utilized for such purpose.

1.2 Advisory proceedings

The same principles apply to advisory proceedings. No express provision on *amicus curiae* participation exists.[859] Yet, article 66(2) of the ICJ Statute states that:

> The Registrar shall also, by means of a special and direct communication, notify any state entitled to appear before the Court or *international organization* considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question.[860]

[856] UPS v. Canada, *infra* note 517, para 64.
[857] See P. Sands and R. Mackenzie, *supra* note 55, at para 6.
[858] Article 50, ICJ Statute, *supra* note 94.
[859] See P. Sands and R. Mackenzie, *supra* note 55, at para 7.
[860] Article 66, ICJ Statute, *supra* note 94. (our emphasis).

The term used is 'international organization' as opposed to 'public international organization' as in Article 34(2) of the Statute. The difference in wording has indeed caused ambiguity.[861]

In practice, the ICJ has for instance solicited information from ICAO, which is clearly an inter-state international organization.[862] The ICJ has only once accepted to receive a written submission by a civil society organization, the International League of the Rights of Man, in the *International Status of South-West Africa* advisory opinion.[863] As mentioned above, the ICJ did not consider the League to be a 'public international organization' in the *Asylum Case*, and this meant that the ICJ had shown flexibility by opening a window for non-state actors in its advisory proceedings.[864] The ICJ has in fact accepted submissions by other non-state actors.[865] Could the ICJ's acceptance of submissions by non-state actors be considered as a sign of flexibility in advisory proceedings? There are no clear indications that could reinforce such a contention at the moment. The ICJ has been, in any event, adopting a limited approach to *amici curiae* in general, even when filed by states.[866] It does not indeed object to *amicus* briefs so long as they are appended to the disputing parties' submissions.[867]

Conscious of the challenge posed by unsolicited *amicus* submissions, the ICJ has nevertheless clarified its position on unsolicited submissions in advisory proceedings through the adoption of Practice Direction XII in 2004. The Direction reads as follows:

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[861] E. Valencia-Ospina, *supra* note 850, at 230.
[862] See *Aerial Incident of 3 July 1988* (Islamic Republic of Iran v. United States of America), Observations of the International Civil Aviation Organization of 4 December 1992, [1989].
[863] The League did not however submit its statement to the Court within the prescribed time limit. See *South-West Africa Cases; Advisory Opinion Concerning the International Status*, Judgment of 11 July 1950, [1950] ICJ Reports, at 130.
[864] E. Valencia-Ospina, *supra* note 850, at 230.
[865] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Order of 19 December 2003, [2003] ICJ Reports, at 429; and *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Order of 17 October 2008, [2008] ICJ Reports, at 409-410. See also E. De Brabandere, *supra* note 852, at 91. Although both Palestine and Kosovo are now widely recognized as states. See also J. Crawford, *supra* note 74, at 196-200.
[866] It is even argued that the ICJ should be more open to *amicus* submissions by states as an alternative to the more burdensome third state intervention. See in general P. Palchetti, *infra* note 1153 and the discussion on third state intervention at the ICJ under Part II – Section 4.2.1.
[867] Gabčikovo-Nagymaros Project, Hungary v. Slovakia, *infra* note 875. See also A. Von Bogdandy and I. Venzke, *supra* note 162, at 62.

> 1. Where an international non-governmental organization submits a written statement and/or document in an advisory opinion case on its own initiative, such statement and/or document is not to be considered as part of the case file.
> 2. Such statements and/or documents shall be treated as publications readily available and may accordingly be referred to by States and intergovernmental organizations presenting written and oral statements in the case in the same manner as publications in the public domain.
> 3. Written statements and/or documents submitted by international non-governmental organizations will be placed in a designated location in the Peace Palace…[868]

Prior to its adoption, the ICJ Registrar had placed the numerous documents and statements it received from NGOs and other civil society organizations in the wake of the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion at the Court's library without considering them as *amicus curiae* submissions.[869] Practice Direction XII confirms this practice and reasserts the Registrar's position for not considering unsolicited information or briefs as *amicus curiae* submissions.

Against this backdrop, the ICJ's acceptance of submissions by non-state actors in a limited number of advisory proceedings and the adoption of Practice Direction XII are indeed noteworthy. However, the practice of the Court still does not show any signs of a material change. Access to non-state actors in general, and to civil society in particular is significantly restrictive. It is generally understood, as a consequence, that civil society organizations including NGOs have had little impact on the Court's proceedings to date.[870] The prevalent view is that the ICJ remains committed to its strictly inter-state character both under its contentious and advisory functions.[871] The ICJ's commitment to its inter-state dispute settlement process is well-reflected in Judge Guillaume's widely quoted words in *The Legality of the Threat or Use of Nuclear Weapons* advisory opinion:

> … I dare to hope that Governments and inter-governmental institutions still retain sufficient independence of decision to resist the powerful pressure groups which besiege them today with the support of the mass media.[872]

That said, the ICJ also acknowledges the existence of wider common concerns and interests, which – although not explicitly mentioned by the ICJ – *de facto* transcend states

[868] Practice Direction XII, International Court of Justice.
[869] E. Valencia-Ospina, *supra* note 850, at 231.
[870] D. Shelton, 'The International Court of Justice and Non-Governmental Organizations', (2007) 9 International Community Law Review 139, at 143.
[871] Ibid., at 232.
[872] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (Separate Opinion of Judge Guillaume), [1996] ICJ Reports 66, at 287.

as they relate to each individual member of society as a whole.[873] This is echoed in the ICJ's position on the environment in the *Legality of the Threat or Use of Nuclear Weapons* opinion when it stated that 'the environment is not an abstraction but represents a living space, the quality of life and the very health of human beings, including generations unborn'. [874] In the same vein, in his separate opinion in the *Gabcikovo/Nagymaros* case, Judge Weeramantry stated that:

> … we have entered an era of international law in which international law subserves not only the interests of individual States, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare … International environmental law will need to proceed beyond weighing the rights and obligations of parties within a closed compartment of individual State self-interest, unrelated to the global concerns of humanity as a whole.[875]

Whilst Judge Guillaume's remarks explicitly signal a concern to safeguard the ICJ's inter-state ethos, Judge Weeramantry comes as a refreshing reminder that contemporary international law transcends inter-state interests.[876] A closer look subsequently below at WTO case law, where civil society actors sought to promote environmental protection, echoes Judge Weeramantry's remarks that international law cannot be 'unrelated to the global concerns of humanity as a whole'.[877]

2. Standing for civil society – A look at international human rights jurisdictions

Civil society acts as a directly affected applicant in cases where it has been itself the victim of a human rights violation. In such cases, international human rights jurisdictions afford civil society, as they do to '*any person*', standing as a disputing party. There are indeed two ways through which civil society may be afforded standing before international human rights jurisdictions. In the event a civil society organization is (a) a victim of a human rights violation and (b) a representative of victims of human rights violations.[878]

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[873] D. Shelton, *supra* note 400, at 34.
[874] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Reports 66, at para 29. See also Ibid., at 34.
[875] Gabčikovo-Nagymaros Project, Hungary v. Slovakia, Judgement, Merits (Separate Opinion of Vice-President Weeramantry), [1997] ICJ Rep 88, at 115. See also Ibid., at 33.
[876] See also Ibid., at 33.
[877] See Part II – Section 3.2.
[878] As will be shown, the representation of victims is still not permissible – in principle – before the ECtHR.

Access to justice to civil society at international human rights jurisdictions is guaranteed by virtue of relevant treaties and conventions.[879] This reflects the increasing recognition of the *individual* as a subject of international law, and the underlying emphasis of international law on the protection of individuals' human rights and fundamental freedoms.[880] It is argued against this backdrop that 'the key participant in each international community is the individual … the individual is the true basic unit for the international system'.[881] This fits within a broader scheme of progressive development of international human rights law – as explained by Francioni:

> The progressive development of international human rights law has endowed *every person* with the abstract capacity to invoke international law, customary law, and treaty law against a state, including the national state, which is responsible for an abusive exercise of its governmental powers.[882]

As will be shown in Part III, civil society petitioners requested '*standing*' in investor-state proceedings as '*third party intervenors*'. Unlike international human rights conventions such as the ECHR, IIAs or BITs do not enunciate any procedural rights with respect to persons other than foreign investors and contracting states, let alone third parties – this difference is essential in understanding the limited procedural modalities that may be available to civil society before investor-state tribunals.

2.1 Civil society as a victim of human rights violations before the ECtHR

The European human rights system is portrayed as 'the most effective international system of human rights protection ever developed'.[883] The direct access of individuals to the ECtHR was not granted upon the implementation of the ECHR in 1950. It was rather acquired progressively through numerous amendments and developments.

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[879] See Hitoshi Mayer's empirical survey of NGO involvement in international human rights jurisdictions. See L. Hitoshi Mayer, *infra* note 911.

[880] On the increasing importance of human rights, see V. Gowlland-Debbas, *supra* note 118, at 248.

[881] S. Charnovitz, *supra* note 36, at 910. For further analysis on the impact of the position of individuals, and ultimately individualism, on international law, see also M. Majlessi, *supra* note 110, at 80-81.

[882] F. Francioni, 'The Rights of Access to Justice under Customary International Law', in F. Francioni (ed.), *Access to Justice as a Human Right* (2007), at 6-7 (our emphasis).

[883] Citing judge Wildhaber, former president of the ECtHR, in D. Popović, *The Emergence of the European Human Rights Law* (2011), at 15. It is particularly crucial in granting access to international justice to individuals where the credibility of domestic justice may be questioned. For instance, up to 2010, there were 34,000 pending applications at the ECtHR against the Russian Federation. Figures are provided up to 31 March 2010, and represented 27.7% of the backlog of applications at the ECtHR. See K. Koroteev, 'Approches nationales: Russie', in P. Dorneau-Josette, and E. Lambert Abdelgawad (eds.), *Quel filtrage des requêtes par la Cour européenne des droits de l'homme?* (2011), at 471.

Initially, individuals and civil society organizations did not have direct access; it was only the European Commission of Human Rights or a state-party that could submit cases to the ECtHR.[884] Admitting the victims' attorneys to the proceedings modified this practice, victims were later allowed to sit with the European Commission of Human Rights; they were then allowed to file written statements, and finally, they were permitted to directly address the ECtHR subsequent to the entry into force of Protocol 11 in 1998 and Article 34.[885]

2.1.1 Standing as a redress for violations of ECHR *rights*

Article 34 is the bedrock of standing under the ECHR. It opens the door to 'any person' to stand before the ECtHR in the following terms:

> The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.[886]

The article forms the basis on which individuals or 'any person', including civil society organizations, may file claims against states for violations of the rights guaranteed to them under the ECHR. As is clear from the drafting of Article 34, it sets out both a *ratione personae* and *sine qua non* condition in relation to the status of a 'victim'; i.e. solely victims may submit claims to the ECtHR.[887] This would typically mean that *actiones populares* are excluded from the scope of Article 34.[888] That said, there is a need to consider the extent to which Article 34 may or may not close the door in front of the representation of victims by civil society organizations that are not themselves victims *per se*. A first look at how Article 34 is applied by the ECtHR's case law is thus merited, which will be followed by a consideration of whether the ECtHR may be opening the door for such representation in practice.

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[884] T. Meron, *supra* note 846, at 339-340.
[885] Ibid., at 339-340.
[886] ECHR, *supra* note 844.
[887] *Conka and others* v. *Belgium*, Decision on admissibility of 13 Mars 2001, [2001] ECtHR (51564/99), at 11.
[888] M. Frigessi di Rattalma, 'NGOs before the European Court of Human Rights: Beyond *Amicus Curiae* Participation?', in Treves, T., et al. (eds.), *Civil Society, International Courts, and Compliance Bodies* (2005), at 57; N. Vajic, *supra* note 36, at 94.

2.1.2 Representation on the basis of *rights* and not *interests* – Examples from the case law

The landmark case of *Association Ekin* v. *France* illustrates a situation where civil society acts in international adjudication as a 'victim' pursuant to Article 34.[889] Ekin sought redress for violations of its *own* right to freedom of expression under the ECHR.[890] Ekin published a book entitled 'Euskadi at War'[891] which was censored and prohibited from circulation by French authorities. They portrayed Ekin as a *porte-parole* for ETA,[892] thus as an association supporting terrorism.[893] As per the requirements of Article 34 of the ECHR, in order for Ekin to successfully submit a claim against France, it had to justify its status as a 'victim' of a violation of a right guaranteed by the ECHR under the same test that applied to individuals.[894] The ECtHR's jurisprudence is clear on the matter: only persons who are actually affected by state measures, which could potentially amount to violations of the ECHR, may file claims as 'victims' under Article 34.[895] In this light, the ECtHR found, *inter alia*, that Ekin maintained its status as a victim of a violation of Article 10 on freedom of expression since state redress took place only nine years following the prohibition in question.[896]

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[889] See numerous other examples in Ibid., at 94.

[890] Ekin is a Basque association dedicated to the preservation of Basque culture and identity. Indeed, the Basque conundrum has for long triggered vigorous debates over minority-rights in Europe in general, and in Spain and France in particular. See *Association Ekin* v. *France*, Decision on admissibility of 18 January 2000, [2000] ECtHR (n°39288198) ('Ekin case').

[891] Translation of the term 'Euskadi' is 'Basque country'.

[892] 'ETA' stands for *Euskadi Ta Askatasuna* – which means 'Basque Homeland and Freedom' in Euskera. ETA is designated as a terrorist organization by the EU and US, amongst other states.

[893] Ibid., at 12.

[894] The French government contended that Ekin could no longer claim the status of a victim in light of a decision by Conseil d'Etat invalidating the government's prohibitive decision with retroactive effect. See *Association Ekin* v. *France* case, *supra* note 890, at 10.

[895] Ibid., at 11.

[896] The Court noted in addition that a risk of a similar prohibition in the future was real and effective; which altogether was reinforced by the fact that France had recently rejected the legal registration of the association. Article 10 provides that : '(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary'. See ECHR, *supra* note 844, as well as E. Lambert Abdelgawad, 'La perte de la qualité de victime', in P. Dorneau-Josette, and E. Lambert Abdelgawad (eds.), *Quel filtrage des requêtes par la Cour européenne des droits de l'homme?* (2011), at 41.

Had it not been recognized as a victim, Ekin would not have been able to benefit from the direct access set forth under Article 34. The only opportunity Ekin would have had in terms of standing in front of the ECtHR would have been via the procedure set forth under Article 36(2), which allows *amicus curiae* submissions to be filed in on-going proceedings. Resorting to Article 36(2) essentially means that Ekin would not be considered as a victim. In such a hypothetical scenario, there would have been another claimant, which would be exclusively considered as the party claiming to be the victim in the case. This claimant would have initiated the proceedings independently and Ekin would have only intervened once proceedings would have commenced. Ekin as a third-party would have no role in initiating or controlling proceedings. This highlights the limitations of the *amicus curiae* procedure – which will be discussed in further detail in the next section below.

In *Conka and others* v. *Belgium*,[897] the ECtHR did not accept the *Ligue des droits de l'homme*'s argument that it should be considered as an 'indirect victim'. The Court upheld Belgium's objection to the effect that the organization did not have adequate standing as it was not a victim of the alleged violations. The Conka family members, who are Rom of Slovak nationality, had essentially alleged violations to Articles 3 ('Prohibition of torture')[898] and 5 ('Right to liberty and security'). This made the ECtHR come to the conclusion that the *Ligue* – an NGO based in Belgium – could not possibly claim to be a victim of such alleged violations.[899] Here, although the *Ligue* undoubtedly had an *interest* as a civil society group to uphold the Conka family's ECHR rights, this was found to be insufficient for justifying standing on the basis of article 34. Several precedents at the ECtHR do in fact confirm the position adopted in the *Conka* case.[900]

In *Gorraiz Lizarraga v. Spain*, five individuals as well as an association, the *Coordinadora de Itoiz*, filed a claim against Spain.[901] The dispute revolved around the construction of a dam in Itoiz, the area inhabited by the claimants, the expropriation of

[897] *Conka and others* v. *Belgium*, *supra* note 887.
[898] Article 3 is inherently aimed at individuals or groups of individuals, and indeed may be difficult to apply to a civil society organization such as the *Ligue*. It states that: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. See ECHR, *supra* note 844.
[899] Ibid., at 11.
[900] Such as *Asselbourg and others* and *Greenpeace-Luxembourg* v. *Luxembourg*, Judgment of 29 June 1999, [1999] ECtHR (29121/95). See also the analysis by N. Vajic, *supra* note 36, at 94.
[901] *Gorraiz Lizarraga and others* v. *Spain*, Final judgement of 27 April 2004, [2004] ECtHR (62543/00) ('Itoiz case').

their property and ensuing proceedings in front of Spanish courts. The claimants were members of the *Coordinadora* since its inception in 1988. It was created for 'the defence of their civil rights and interests' and had in fact been leading related proceedings before Spanish courts. The ECtHR found that the *Coordinadora* may therefore allege violations to Article 6 ('Right to a fair trial').[902]

The ECtHR's positive decision in *Gorraiz Lizarraga* is a precedent for the representation of victims by civil society at the ECtHR. Yet, the facts particular to this case makes it difficult to speculate on potential jurisprudential developments.[903] The ECHR did not envisage representation of victims by civil society. The practice of the ECtHR has not bypassed the principle enshrined in Article 34. Civil society organizations clearly do have standing so long as they claim to be victims of violations of rights guaranteed by the ECHR; thus, a civil society organization would be able to represent victims if it may be deemed as a victim itself as well as manifested in both the *Ekin* and *Itoiz* cases.[904] Alternatively, Article 36(2) allows them to partially access the ECtHR through the *amicus curiae* procedure – as examined in further detail subsequently.[905] With that being said, it is questioned whether the ECtHR would ultimately need to adopt a more liberal approach, similar to that of the IACtHR or the ACHPR, given the tremendous and ever-increasing backlog of cases it is currently facing. Indeed, in a recent case, *Association for the Defence of Human Rights in Romania – Helsinki Committee on Behalf of Ionel Garcea v. Romania*, the ECtHR noted that

> …the Court has recently established that in exceptional circumstances and in cases of allegations of a serious nature, it should be open to associations to represent victims, in the absence of a power of attorney and notwithstanding that the victim may have died before the application was lodged under the Convention. It considered that to find otherwise would amount to preventing such serious allegations of a violation of the Convention from being examined at an international level, with the risk that the respondent State might escape accountability under the Convention.[906]

[902] The Court also found that the five applicants can claim to be 'victims' although they were not part of the domestic proceedings. See Ibid., at 12, 14.
[903] N. Vajic, *supra* note 36, at 104.
[904] D. Popović, *The Emergence of the European Human Rights Law* (2011), at 139.
[905] See Part II – Section 3.3.
[906] *Case of Association for the Defence of Human Rights in Romania – Helsinki Committee on Behalf of Ionel Garcea v. Romania*, Final judgment of 24 June 2015, [2015] ECtHR (2959/11), at para 42 citing *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, Judgement of 17 July 2014, [2014] ECtHR (47848/08), at para 112.

This decision has been welcomed by civil society groups.[907] Developments in that respect at the ECtHR will have to be monitored closely. In any event, the fact remains that, for the purposes of this research, the ECtHR's practice sheds light on the importance of the nexus between the violation of ECHR-recognized human rights and civil society's standing – a crucial point to recall when the issue of the adequacy of civil society's standing before investor-state tribunals will be discussed subsequently.[908]

2.2 Representation of victims of human rights violations before the IACtHR and ACHPR

Civil society has the capacity to act as a representative of victims before the IACtHR (and the Commission)[909] as well as the ACHPR.[910] In such cases, the civil society organization involved is not personally or directly prejudiced by the contested violation, it is not a victim *per se*, nor does it act as the legal counsel of victims; rather, it is representing a group of individuals or communities that have been themselves the

[907] Mental Disability Advocacy Center, 'European Court Reaffirms NGOs Standing to Secure Justice for Victims of State Abuse', 25 March 2015, available at: http://www.mdac.info/en/news/european-court-reaffirms-ngos-standing-secure-justice-victims-state-abuse (last accessed 1 February 2016).

[908] See Part III – Section 2.

[909] The function of representation of victims is clearly defined in Article 23 of the revised Rules of Procedure of the Inter-American Commission, which provides the right to civil society organizations to act on behalf of third parties (i.e. victims) in front of the Commission. It states the following: 'Any person or group of persons or *nongovernmental* entity legally recognized in one or more of the member States of the OAS *may submit petitions* to the Commission, on their behalf or *on behalf of third persons*, concerning alleged violations of a human right…' (our emphasis). See Rules of Procedure of the Inter-American Commission on Human Rights, Article 23, available at: http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp (last accessed 10 July 2012) (our emphasis).

[910] The ACHPR was inaugurated as a supervisory body – although it does not monitor state compliance – of the Banjul Charter, which entered into force in 1986 after being adopted in 1981, and has been ratified by all 52 African Union state-members. The ACHPR is considered as unique for creating an adjudication system combining civil and political rights on the one hand; and socio-economic and cultural rights on the other. The ACHPR has the functions of a quasi-judicial body with protective and promotional mandates. The ACHPR's decisions are only binding once confirmed by the African Union, and cases of non-compliance could be referred to the African Court on Human and Peoples' Rights – the decisions of which are final and not subject to appeal or political confirmation. The Court's first judges were sworn in on 2 July 2006 and, up to now; it has issued 22 final decisions. See G. Lynch, 'Becoming Indigenous in the Pursuit of Justice: the African Commission on Human and People's Rights and the Endorois ', (2011) 111 *African Affairs* 24, at 36; A. Boyle, *infra* note 622, at 631; K. Sing'Oei, *supra* note 766, at 526. See also Article 28(2) of the Protocol establishing the Court states that: 'The judgment of the Court decided by majority shall be final and not subject to appeal'. See Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, entry into force June 9 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), available at: http://www.african-court.org/en/index.php/about-the-court/court-establishment (last accessed 06 October 2014); and African Court on Human and Peoples' Rights's website: http://www.african-court.org/en/index.php/2012-03-04-06-06-00/finalised-cases-closed/22-recient-judgements/250-recent-dec (last accessed 06 October 2014).

victims of that violation by acting *on their behalf*.[911] This is possible before the IACtHR and the ACHPR.

2.2.1 Flexible *ratione personae* and exacting *ratione materiae* criteria

At the ACHPR, the distinction between filing a complaint and representing victims can seem quite elusive. This is because Articles 55 to 59 of the Banjul Charter on 'Other Communications' do not address the issue of the identity of complainants and do not set any *ratione personae* criteria. The only indication that is given is that persons other than state parties to the Charter may also submit communications to the ACHPR. Article 55 reads as follows:

> 1. Before each Session, the Secretary of the Commission shall make a list of *the communications other than those of States parties to the present Charter* and transmit them to the members of the Commission, who shall indicate which communications should be considered by the Commission.
> 2. A communication shall be considered by the Commission if a simple majority of its members so decide.[912]

Instead the Charter sets exhaustive *ratione materiae* criteria on the requirements for, and content of, such communications.[913]

The most extensive and detailed provisions on the representation of victims are on the other hand set out in the IACHR. [914] Article 44 of the IACHR is broad in scope. Not

[911] L. Hitoshi Mayer, 'NGO Standing and Influence in Regional Human Rights Courts and Commissions', (2011) 36 *Brooklyn Journal of International Law* 911, at 913.
[912] Banjul Charter, *supra* note 845, Article 55 (our emphasis).
[913] Article 56 states that: 'Communications relating to human and peoples' rights referred to in 55 received by the Commission, shall be considered if they: 1. Indicate their authors even if the latter request anonymity, 2. Are compatible with the Charter of the Organization of African Unity or with the present Charter, 3. Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity, 4. Are not based exclusively on news discriminated through the mass media, 5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged, 6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and 7. Do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter'.
[914] The IACtHR intervenes only if a state decides to challenge the Inter-American Commission's conclusions. Unlike the European human rights system, a commission – the Inter-American Commission – still exists. It receives complaints, engages in fact finding, attempts to bring about friendly settlements, and if it attributes the human rights violation to the state, it may make recommendations as per Article 50(3) of the IACHR. Article 50 of the IACHR provides that: '(1) If a settlement is not reached, the Commission shall, within the time limit established by its Statute, draw up a report setting forth the facts and stating its conclusions. If the report, in whole or in part, does not represent the unanimous agreement of the members of the Commission, any member may attach to it a separate opinion. The written and oral statements made by the parties in accordance with paragraph 1.e of Article 48 shall also be attached to the report. (2) The report shall be transmitted to the states concerned, which shall not be at liberty to publish it. (3) In transmitting the report, the Commission may make such proposals and recommendations as it sees fit'. The Inter-American Commission may submit a case to the

only does it allow victims or their family members to file complaints, but also any person, group of persons or non-governmental entity that is legally recognized in a member state who could allege that an individual's, or group's, rights have been violated. The Article reads as follows:

> Any person or group of persons, *or any nongovernmental entity* legally recognized in one or more member states of the Organization, *may lodge petitions* with the Commission containing denunciations or complaints of violation of this Convention by a State Party. [915]

In the same vein as Article 34 of the ECtHR, Article 44 opens the door as well for civil society organizations to file complaints if they were themselves victims of violations of rights guaranteed by the IACHR. This is indeed confirmed by Article 23 of the revised Rules of Procedure of the Inter-American Commission, which allows victims to participate directly and autonomously in all phases of the proceedings. It explicitly provides the right to civil society organizations to act *'on their behalf'* or *'on behalf of third parties'* (i.e. victims) in front of the Commission. It states the following:

> Any person or group of persons or nongovernmental entity legally recognized in one or more of the member States of the OAS may submit petitions to the Commission, *on their behalf or on behalf of third persons*, concerning alleged violations of a human right…[916]

The 'non-governmental entity' subject to both Articles 44 and 23, i.e. the civil society organization involved, is not merely acting as the legal counsel of victims; rather, it is representing a group of individuals or communities that have been themselves the victims of that violation by acting *'on their behalf'*. Once proceedings have reached the IACtHR, victims and their representatives still benefit from the standing they were entitled to in front of the Inter-American Commission by virtue of Article 25 of the Rules of Procedure

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IACtHR contingent, however, on the state's acceptance of the IACtHR's jurisdiction as per Article 62 of the IACHR. See the IACHR on Human Rights, *supra* note 843. For a further analysis on the Commission's procedure, see J.M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2003), at 25. The IACtHR's decisions are final, and Article 65 provides the IACtHR with a function of monitoring and supervising compliance with its judgements as it can refer to the OAS General Assembly cases of non-compliance and can make recommendations to that effect. See Article 65 states that: 'To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations'. See the IACHR on Human Rights, *supra* note 843.

[915] Ibid.

[916] Rules of Procedure of the Inter-American Commission on Human Rights, Article 23, available at: http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp (last accessed 10 July 2012) (our emphasis).

of the IACtHR.[917] The general formulation of these rules even open the door for other organizations such as national human rights committees and ombudsmen to file petitions against their own states. [918]

2.2.2 Access to justice on the basis of *actio popularis* – A look at the case law

In *Zimbabwe Human Rights NGO Forum* v. *Zimbabwe*,[919] a coalition of twelve human rights NGOs submitted a complaint against Zimbabwe alleging grave violations to the Banjul Charter as a result of the violence that ensued the rejection of the constitutional referendum of February 2000 – then considered as a no-confidence vote to President Robert Mugabe's rule. Zimbabwe contested the communication on the basis that (i) it was solely based on facts circulated by the media; and (ii) local remedies had not been exhausted. The ACHPR delved straight into the details of the requirements to the communication's admissibility without going into the details of who exactly were the victims represented by the Forum, nor did Zimbabwe seem to object to such representation.[920] The ACHPR ruled that the communication was admissible and then shifted onto substantive matters. It noted that the Zimbabwean state had passed Clemency Order 1 of 2000, which was an order prohibiting prosecution and setting free perpetrators of 'politically motivated crimes, including alleged offences such as abductions, forced imprisonment, arson, destruction of property, kidnappings and other human rights

[917] It is worthy to mention here the illustrative heading of Article 25 – 'Participation of the Alleged Victims or their Representatives'. The Article reads as follows: '(1) Once notice of the brief submitting a case before the Court has been served, in accordance with Article 39 of the Rules of Procedure, the alleged victims or their representatives may submit their brief containing pleadings, motions, and evidence autonomously and shall continue to act autonomously throughout the proceedings'. See Rules of Procedure of the Inter-American Court of Human Rights, Article 25, available at: http://www.corteidh.or.cr/reglamento/regla_ing.pdf (last accessed 10 July 2012) (our emphasis).

[918] Nonetheless, there are formalistic restrictions such as the submittal of a power of attorney signed by the victim or the family of the victim, and issues regarding the validity of representation of victims have arisen before – as reflected by the *Castillo Petruzzi* case below. See Article 23(1) of the Rules of Procedure of the IACtHR. See also the analysis of J.M. Pasqualucci, *supra* note 914, at 102. See also J. Anaya, and C. Grossman, 'The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples', (2002) 19 Arizona Journal of International and Comparative Law 1, at 1 and 8.

[919] *Zimbabwe Human Rights NGO Forum* v. *Zimbabwe*, Decision of 11 May 2006, ACHPR (128/2006).

[920] The Commission acknowledged nonetheless the fact that the claimant consisted of a coalition of twelve NGOs, and noted the deaths of 82 individuals including those of prominent political dissidents, but no additional details were noted as to exactly which victims were represented.

violations'.[921] This constituted a violation of the victims' right to judicial protection and to have their cause heard pursuant to Article 7(1) of the Banjul Charter.[922]

In *CEMIRIDE and MRG on behalf of Endorois Welfare Council* v. *Kenya*,[923] the Endorois, an indigenous community, complained of displacement from the area of Lake Bogoria, which became a location for a wildlife reserve, hotels, universities, and energy and mining companies.[924] The Endorois called on MRG, which espoused their claim by accepting to act as their representative/claimant. Again, the fact that two civil society organizations were representing the Endorois did not seem to stir any debate, nor did Kenya seem to object to such representation, and the ACHPR has not dealt with this issue in its final decision.[925] Instead, the ACHPR focused on the substantive matters raised by the claimants, who argued that the Endorois' displacement violated collective rights guaranteed by the Banjul Charter, namely the right to religious practice (Article 8) and culture (Article 17), property (Article 14), free disposition of natural resources (Article 21),[926] development (Article 22), and that it jeopardized a 'sustainable way of life which

[921] It was ultimately of the view that by issuing Clemency Order 1, Zimbabwe encouraged impunity and denied victims the right to seek the investigation of, and redress from, the alleged human rights violations that were committed. See Ibid., para 211.

[922] Article 7(1) of the Banjul Charter 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 also *Zimbabwe Human Rights NGO Forum* v. *Zimbabwe* case, *supra* note 919, para 212.

[923] The title of the case, including the term *'on behalf of'* is indeed illustrative and self-explanatory. See *CEMIRIDE* and *MRG on behalf of EWC* v. *Kenya* case, *supra* note 608.

[924] The Endorois constitute an indigenous community made up of roughly 6,000 people inhabiting the area of Lake Bogoria, Rift Valley Province in Kenya, which was regarded during the British colonial era as one of the most backward and desolate in the region. Kenya gained independence in 1963 and the Endorois remained marginalized, they were displaced by the state between 1973 and 1986 due to the establishment of the Lake Bogoria Game Reserve, and their disenfranchisement allegedly persisted thereafter. The Endorois' cultural and economic pastoralism was side-lined in favour of more capital and labour intensive economic sectors such as tourism, mining and energy. G. Lynch, *supra* note 910, at 43; K. Sing'Oei, *supra* note 766, at 515, 521.

[925] The complaint initially originated when Minority Rights Group (MRG), a UK-based NGO, solicited groups or communities potentially interested in African human rights litigation by launching a 'call for cases'. See G. Lynch, *supra* note 910, at 35.

[926] It is worthy here to quote Article 21, which states that: '(1) All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it. (2) In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation. (3) The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law. (4) States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity. (5) States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable

was inextricably linked to their ancestral land'.[927] This in a way reflects the ACHPR's, and also the disputing parties', concern in dealing primarily with substantive matters given that the underlying procedural rules afford significant flexibility for civil society representation. The ACHPR's decision in *CEMIRIDE and MRG on behalf of Endorois Welfare Council v. Kenya* was in fact particularly influenced by the newly-adopted UN Declaration on the Rights of Indigenous Peoples, and the IACtHR's decision in *Saramaka People* v. *Suriname*.[928] As previously mentioned, with this case, the ACHPR became with this case the first international jurisdiction to deal with the right to development; it thus tackled the notions of 'capabilities' and 'choices' put forward by development experts such as Amartya Sen.[929] The ACHPR also cited the UN Declaration on Development in clarifying that the right of development includes 'active, free and meaningful participation in development'.[930]

Similarly, in *SERAC v Nigeria*,[931] SERAC, which describes itself as a NGO concerned with the promotion and protection of economic, social and cultural rights in Nigeria, along with the Center for Economic and Social Rights, an American-based NGO, filed a communication to the ACHPR seeking to hold Nigeria accountable for human rights violations suffered by the Ogoni. The latter are an ethnic group inhabiting the oil-rich Niger Delta region, which were prejudiced by the operations of the Nigerian National Petroleum Company (a state-owned company), the majority shareholder in a consortium with Shell Petroleum (an Anglo-Dutch multinational). Specifically, environmental degradation and health problems allegedly resulted from systematic oil contamination. The complainants alleged that Nigeria violated, *inter alia*, the following Banjul Charter rights: the right to life (Article 4), property (Article 14), best attainable

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their peoples to fully benefit from the advantages derived from their national resources'. See Banjul Charter, *supra* note 845.

[927] *CEMIRIDE* and *MRG on behalf of EWC* v. *Kenya* case, *supra* note 608, para. 283. See also G. Lynch, *supra* note 910, at 25.

[928] *Saramaka People* v. *Suriname*, *supra* note 776. See also G. Lynch, *supra* note 910, at 39; A. Nienaber, 'The African Human Rights System and HIV-Related Human Experimentation: Implications of Zimbabwe Human Rights NGO Forum v Zimbabwe', (2009) 9 African Human Rights Law Journal 524, at 541.

[929] See A. Sen, 'Development As Freedom' (1999).

[930] *CEMIRIDE* and *MRG on behalf of EWC* v. *Kenya* case, *supra* note 608, para. 283 citing Article 2.3, U.N. Declaration on the Right to Development, U.N. GAOR, 41st Sess., Doc. A/RES/41/128 (1986).

[931] SERAC and Center for Economic and Social Rights v. Nigeria, *Decision of 13 October 2001*, ACHPR (60/2001).

state of physical and mental health (Article 16), free disposition of their wealth and natural resources (Article 21), and a general satisfactory environment (Article 24).[932]

From a procedural standpoint, as in the previously discussed *Endorois Welfare Council*[933] and *Zimbabwe Human Rights NGO Forum*[934] cases, the issue of representation by civil society organizations – rather than a communication submitted by members of the Ogoni community, i.e. the direct victims of the alleged human rights abuses – did not seem to stir any legal debates given that Nigeria did not object to such representation (nor to any of the allegations for that matter).[935] The ACHPR's only commentary in such regard was as follows:

> The Commission thanks the two human rights NGOs who brought the matter under its purview: the Social and Economic Rights Action Center (Nigeria) and the Center for Economic and Social Rights (USA). Such is a demonstration of the usefulness to the Commission and individuals of *actio popularis*, which is wisely allowed under the African Charter.[936]

This passage clearly reflects the ACHPR's liberalism in openly accepting communications from civil society on human rights abuses.

On the substantive issues of the case, the ACHPR recognized Nigeria's right to exploit oil resources by stating that 'undoubtedly and admittedly, the Government of Nigeria … has the right to produce oil, the income from which will be used to fulfil the economic and social rights of Nigerians'.[937] Notwithstanding such recognition, it found that this should not have led to the alleged violations.[938] Environmental degradation,

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[932] In further detail, it is alleged that the consortium disposed toxic wastes into the environment and local waterways, neglected and/or failed to maintain its facilities causing numerous avoidable spills in the proximity of villages, and that the resulting contamination of water, soil and air has had serious short and long-term health impacts, including skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems. See Ibid., para 2, 10.

[933] *CEMIRIDE* and *MRG on behalf of EWC* v. *Kenya* case, *supra* note 608.

[934] *Zimbabwe Human Rights NGO Forum* v. *Zimbabwe* case, *supra* note 919.

[935] Nigeria indeed admitted the allegations and provided the Commission with a list of remedial measures it has taken since the return of a civil government, which included: the establishment of a ministry for the environment to address environmental related issues prevalent in Nigeria and as a matter of priority in the Niger delta area inhabited by the Ogoni; as well as a Niger Delta Development Commission to address the environmental and social related problems of the Niger delta area and other oil producing areas of Nigeria; and the inauguration of judicial commission to investigate human rights violations committed against the Ogoni. SERAC and Center for Economic and Social Rights v. Nigeria, *supra* note 931, para 30.

[936] Ibid., para 44.

[937] The richness of their region, the Ogoni-land in the Niger Delta, has effectively plagued it and the Ogoni have resorted a number of times to foreign courts and international jurisdictions. Ibid., para 54; G. Akpan, *supra* note 596, at 74-75.

[938] The ACHPR indeed concluded that Nigeria violated all of the previously mentioned Banjul Charter rights. It further 'appealed' to the government of Nigeria, *inter alia*, to (i) stop all attacks on Ogoni communities and leaders and permit citizens and independent investigators free access to the territory; (ii) conduct an investigation

marginalization, and grave human rights abuses[939] were also key factors that lead the Ogoni to assert their distinctive identity.[940] The ACHPR's decision is thus perceived as an extreme example of the clash between economic, and foreign investment, activity on the one hand; and human rights and environmental protection on the other.[941] Equally, it reflects the recognition of the need for a balance between both under the umbrella of sustainable development rather than the trumping of one over the other.[942]

The *Castillo Petruzzi* case[943] provides an example of the IACtHR's liberal approach on standing criteria. A Chilean civil society organization, the *Fundación de Ayuda Social de las Iglesias Cristianas*, filed a petition on behalf of four Chilean prisoners who were sentenced to life imprisonment in Peru by a military tribunal.[944] The Inter-American Commission endorsed the case and raised it in front of the IACtHR by alleging that Peru violated – *inter alia* – the prisoners' rights to humane treatment and a fair trial (Articles 5 and 8 respectively of the IACHR).[945] In this case, the *Fundación* clearly aimed to represent individuals who were not in a position to submit a claim themselves. Peru objected to the *Fundación*'s representation and argued that the organization lacked legal capacity and standing since it was not recognized as a non-

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into human rights violations and prosecuting officials, most notably of the security forces and the Nigerian National Petroleum Company; (iii) ensure adequate compensation to victims of the human rights violations; and (iv) provide information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations. See Ibid., at para 70.

[939] For instance, the ACHPR noted that: 'The government has destroyed Ogoni houses and villages and then, through its security forces, obstructed, harassed, beaten and, in some cases, shot and killed innocent citizens who have attempted to return to rebuild their ruined homes.'. See Ibid., at 62.

[940] The ACHPR recognized the Ogoni people 'as a people' enabling them to claim a wider array of rights under the Banjul Charter. Indeed, a working group of the ACHPR concluded that indigenous rights recognized how 'certain marginalized groups are discriminated in particular ways because of their particular culture, mode of production and marginalized position within the state' with collective rights to land, territory, and natural resources. See G. Lynch, *supra* note 910, at 37.

[941] A. Boyle, *supra* note 622, at 631.

[942] R. Klager, *infra* note 1252, at 202.

[943] *Castillo Petruzzi et al.* v. *Republic of Peru*, Final judgement of 30 May 1999, Inter-American Court of Human Rights (series C) No. 52 (1999).

[944] Those were: Mr. Jaime Francisco Sebastián Castillo Petruzzi, Mrs. María Concepción Pincheira Sáez, Mr. Lautaro Enrique Mellado Saavedra and Mr. Alejandro Luis Astorga Valdez. It is worthy to note that the prisoners were linked to the Túpac Amaru Revolutionary Movement – which was long considered as a terrorist organization by the Peruvian government.

[945] Article 5(1) states that: 'every person has the right to have his physical, mental, and moral integrity respected'. While Article 8(1) provides that: 'every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature'. See American Convention on Human Rights, *supra* note 843.

governmental organisation in Chile.[946] The foundation of Peru's arguments lies in a strictly positivist interpretation of Article 44 of the IACHR which stipulates that 'any nongovernmental entity *legally recognized* in one or more member states of the Organization, may lodge petitions'.[947]

The IACtHR dismissed the objection succinctly and came to the conclusion that, under Article 44, any 'group of persons' may lodge petitions, that the legal recognition of the organization is irrelevant, and more fundamentally, that 'this broad authority to make a complaint is a characteristic feature of the system for the international protection of human rights'.[948] Indeed, the Court did not proceed to an examination of the credentials of the *Fundación*. It regarded this as a question of form rather than substance, which is translated here in the priority of ensuring that alleged victims can seek redress to human rights violations.[949] The *Castillo Petruzzi* case thus highlights the IACtHR's liberalism in allowing unrelated parties to complain of human rights violations. This may prove to be particularly effective whenever access to justice is impeded by poverty, lack of education, scarce legal assistance, and resources to hire lawyers, who are often themselves the targets of reprisals and the same intimidation and retaliation as the victims and their families.[950]

On the more substantive issues raised by the case, the IACtHR most notably found that Peru indeed violated both Articles 5 and 8 of the IACHR. The IACtHR noted that the military tribunal in question should have been competent, independent and impartial as required under Article 8(1) of the IACHR. However, this was not the case given that the Peruvian armed forces, fully engaged in the counter-insurgency struggle, were also prosecuting persons associated with insurgency groups; as well as in light of the fact that the judges who presided over the treason trials were 'faceless' – in contravention to internationally recognized standards against such practice,[951] making it

[946] Ibid., at para. 35.
[947] American Convention on Human Rights, *supra* note 843, Article 44 (our emphasis).
[948] *Castillo Petruzzi et al.* v. *Republic of Peru*, *supra* note 943, at para. 77.
[949] J.M. Pasqualucci, *supra* note 914, at 101.
[950] Ibid., at 102.
[951] In fact, it is worthy to note that Principle 12 of the UN Draft Principles Governing the Administration of Justice Through Military Tribunals on the 'Right to a competent, independent, and impartial tribunal' provides that: 'The organization and operation of military courts should fully ensure the right of everyone to a competent, independent and impartial tribunal at every stage of legal proceedings from initial investigation to trial. The persons selected to perform the functions of judges in military courts must display integrity and competence and

impossible for defendants to identify the judges and, therefore, to assess their competence.[952]

The *Awas Tingni* case is also relevant in relation to the representation of victims in front of the IACtHR. It is also a jurisprudential authority on international principles of indigenous property rights and their protection.[953] The case involved the Awas Tingni, a community made up of around 208 families totaling 1,016 individuals who inhabit the North Atlantic Autonomous Region of Nicaragua; and Solcarsa, a forest management and timber exploitation company (which is a subsidiary of a Korean-based multinational).[954] Nicaragua had granted Solcarsa a logging concession comprising ancestral lands of the community. Although they were unable to obtain official title, the Awas Tingni claimed the communal property to their ancestral land, and contested the validity of the concession, which was granted without their prior consent.[955]

The head and representative of the Awas Tingni community, Jaime Castillo Felipe, initially filed the complaint to the Inter-American Commission in 1995, which later decided to take the case to the IACtHR in 1998.[956] The community's and the Inter-American Commission's main objective was to seek the IACtHR's recognition of indigenous peoples' rights to the communal property and natural resources of their ancestral lands.[957] This position was further reinforced with the substantial number of favourable *amicus curiae* submissions that were received by the IACtHR, which any non-disputing party may file under Article 44(1) of the Rules of Procedure of the IACtHR (as

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show proof of the necessary legal training and qualifications. Military judges should have a status guaranteeing their independence and impartiality, in particular vis-à-vis the military hierarchy. *In no circumstances should military courts be allowed to resort to procedures involving anonymous or "faceless" judges and prosecutors*'. See Draft Principles Governing the Administration of Justice Through Military Tribunals, U.N. Doc. E/CN.4/2006/58 at 4 (2006), available at: http://www2.ohchr.org/english/bodies/subcom/57/docs/ecn4sub2-2005-9-E-final.doc (last accessed 06 October 2014).

[952] The IACtHR also found that the terms of confinement that the military tribunal imposed upon the victims constituted cruel, inhuman and degrading forms of punishment thereby constituting violations of Article 5 of the IACHR; which was reinforced by the fact that the prisoners' statements were taken in the preliminary proceedings while they were either blindfolded or hooded, and either in restraints or handcuffs. See *Castillo Petruzzi et al.* v. *Republic of Peru*, *supra* note 943, at para 130, 133, 192, 198.

[953] N. Boecher, *supra* note 43, at 58.

[954] L. Burgorgue-Larsen, and A. Úbeda de Torres, *supra* note 44, at 502.

[955] *The Mayagna (Sumo) Awas Tingni Community* v. *Republic of Nicaragua*, Judgment of 31 August 2001, Inter-American Court of Human Rights (series C) No. 79 (2001), para. 2. Also, it is worthy to note that the Awas Tingni have been struggling to protect their ancestral land. They were assisted in the past by the World Wildlife Fund (WWF) to obtain the suspension of a similar large scale logging concession that was granted to a Dominican company. See J. Anaya, and C. Grossman, *supra* note 918, at 3.

[956] Ibid., para 6.

[957] *The Mayagna (Sumo) Awas Tingni Community* v. *Republic of Nicaragua* case, *supra* note 955, para. 140.

detailed further below). The decision did not raise any procedural issues with respect to representation of victims.[958] Instead, the IACtHR delved straight into substantive matters, and found that Nicaragua had violated Article 21 of the IACHR by not granting title to the Awas Tingni to their ancestral land. The right to property as recognized by Article 21 was the basis for the IACtHR's reasoning in asserting the protection of indigenous land, making it the first international tribunal to recognize the collective property rights of indigenous peoples.[959]

2.2.3 Rationale for admissibility of *actio popularis*

The practice of the IACtHR and ACHPR generally shows that civil society groups can easily represent victims.[960] Broad representation, or *actio popularis*, may turn out to be crucial when entire communities claim to be victims of human rights violations.[961] Victims can be often vulnerable due to domestic socio-political dynamics, and more particularly, the limitations of their resources, lack of not only legal, but also technical and scientific knowledge or experience.[962] In such cases, any potential international judicial proceeding might pose substantial complexities and costs that could be mitigated when a 'representative group of the host populations' is afforded standing instead.[963] Civil society groups are often in a better position to file a complaint rather than

[958] L. Alvarado, 'Prospects and Challenges in the Implementation of Indigenous Peoples' Human Rights in International Law: Lessons from the Awas Tingni v. Nicaragua', (2007) 24 Arizona Journal of International and Comparative Law 609, at 609.

[959] The IACtHR referred to the *travaux préparatoires* of the IACHR, as well as recent developments in international law, to resort to 'an evolutionary interpretation of international instruments for the protection of human rights'. It also took into account Article 29 of the IACHR which prohibits restrictive interpretations of rights guaranteed under the Convention, to deduce that 'Article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua'. Most notably, the IACtHR underlined the fact that indigenous claims to the land transcend the mere possessive and productive elements, such as a real officially recognized title to property, but comprise a spiritual one related to their religious and cultural legacy, and thus the IACtHR asserted that the *Awas Tingni* saw themselves as 'persons responsible for the forest'. See *The Mayagna (Sumo) Awas Tingni Community* v. *Republic of Nicaragua* case, *supra* note 955, para. 148.L. Alvarado, *supra* note 770, at 609; L. Burgorgue-Larsen, and A. Úbeda de Torres, *supra* note 44, at 612.

[960] See also S. Charnovitz, *supra* note 36, at 906; and N. Boecher, *supra* note 43, 58.

[961] At the ECtHR, a mechanism for ensuring *actio popularis* through the Council of Europe Commissioner had been proposed by the Parliamentary Assembly of the Council of Europe. This proposal was ultimately rejected. See Parliamentary Assembly, Recommendation 1606 (2003), 'Areas where the European Convention on Human Rights cannot be implemented', 23 June 2003, available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17112&lang=en (last accessed 1 February 2016).

[962] D. Barstow Magraw and L. Baker, 'Globalization, Communities and Human Rights: Community-Based Property Rights and Prior Informed Consent', (2007) 35 Denver Journal of International Law 413, at 414.

[963] On the benefits of group representation in international litigation, see G. Akpan, *supra* note 596, at 57.

individuals themselves, particularly given that they are less prone to succumb to pressures on abandoning the litigation and can gather more resources to undertake it until it is completely adjudicated. The *actio popularis* in the landmark IACtHR decision in *Awas Tingni v. Nicaragua* has for instance propelled the problems of indigenous land demarcation and rights to natural resources 'into the forefront of regional and national politics in Nicaragua' – as shown above.[964]

Civil society's representation in front of international human rights jurisdictions is ultimately subject to the IACtHR or ACHPR's decision on whether a complaint of human rights violations merits to be heard or not; regardless of civil society's role in bringing the matter to the court's attention – as clearly mentioned in the previously discussed *Castillo Petruzzi v. Peru*[965] and *SERAC v. Nigeria*[966] decisions.

3. What is a *'friend of the court'*? – A cross-jurisdictional perspective outside the realm of investor-state arbitration

When civil society acts as *amicus curiae,* it is in such cases concerned by, or self-interested in, the dispute without having its rights affected, and thus it solely aims to intervene in on-going proceedings – that it has not initiated – in order to assist the tribunal in reaching a final decision. The *amicus curiae* procedure is largely inspired by US law. Because an *amicus* may be in principle 'any person', a potential *amicus* will generally be required to seek permission to make a submission as a 'volunteer', an 'assistant of the court' and will be required to provide certain information in support of its petition, for example as to its identity, expertise, interest in the dispute, as well as funding. [967] It will be then for the court or tribunal to decide whether a particular submission should be received. These elements will be discussed below through the

[964] L. Alvarado, *supra* note 770, at 609. Helton mentions several positive developments that ensued following the IACtHR's landmark decision in *Awas Tingni* v. *Republic Nicaragua*. See T. Helton, 'Introduction to the IACtHR Report on Indigenous and Tribal Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System', (2010) 35 American Indian Law Review 257, at 262.
[965] *Castillo Petruzzi et al.* v. *Republic of Peru*, *supra* note 943, at para 77.
[966] It is worthy to recall once more that in this case the ACHPR actually thanked the civil society groups who submitted the complaint against Nigeria. See *SERAC and Center for Economic and Social Rights v. Nigeria*, *supra* note 931, para 44.
[967] P. Sands and R. Mackenzie, *supra* note 55, at para 2.

prism of US court practice (**Section 4.1**), WTO Panels and Appellate Body (**Section 4.2**), and international human rights jurisdictions (**Section 4.3**). Given that the *amicus* procedure has been previously discussed in an investor-state arbitration context, the aim of this section is to identify the features of such procedures from a comparative approach in order to better understand its potential and limitations.

3.1 The *amicus curiae* procedure – A *common law* inspiration

The *amicus curiae* procedure is a common law notion as previously mentioned.[968] It exists in the English judicial system where the procedure is generally associated to, and referred as, 'third party intervention'.[969] It exists as well in the Canadian legal system.[970]

[968] Yet, the UK approach to the *amicus curiae* is slightly different than the American or Canadian one. In its glossary, the UK Ministry of Justice defines it as 'a neutral party who does not represent any individual party in the case who will be asked by the Court to make representations from an independent viewpoint' – thereby emphasizing the non-adversarial aspect of the procedure. From a UK standpoint, an *amicus curiae* – as opposed to a third party intervenor – typically refers to the appointment of an 'official figure, usually the Attorney-General, Official Solicitor or Counsel from a list maintained by the Treasury Solicitor and has regularly been used in the Family Division'. See C. Harlow, *infra* note 1083, at 7; UK Ministry of Justice, 'HM Courts & Tribunals Service Glossary of terms – Latin', available at: http://www.justice.gov.uk/courts/glossary-of-terms (last accessed 06 October 2014).

[969] There are no explicit procedural rules governing *amicus curiae* interventions under the Civil Procedure Rules ('CPR') (governing the High Court). However, CPR Rule 54.7 on the 'Court's Power to hear any person' provides that: '(1) Any person may apply for permission – (a) to file evidence; or (b) make representations at the hearing of the judicial review. (2) An application under paragraph (1) should be made promptly.' See CPR, *infra* 1072. In its Practice Directions, the House of Lords does however state in Article 37 that: 'A person who is not a party to an appeal may petition the House for permission to intervene... Petitions for permission to intervene orally or in writing or both must be lodged with the Judicial Office at least six weeks before the date of hearing of the appeal'. It is noteworthy that the main 'informal' requirement assessed by English courts is whether the proposed intervention would provide the court with some information, expertise or perspective not already provided by the parties. See Practice Directions and Standing Orders applicable to civil appeals, approved 8 October 2007, available at: http://www.publications.parliament.uk/pa/ld199697/ldinfo/ld08judg/bluebook/bluebk-1.htm (last accessed 06 October 2014). The UK Supreme Court has a similar provision, Article 15 states that: '(1) Any person and in particular— (a) any official body or non-governmental organization seeking to make submissions in the public interest or (b) any person with an interest in proceedings by way of judicial review, may make written submissions to the Court in support of an application for permission to appeal and request that the Court takes them into account'. See Rules of the Supreme Court of the UK, entered into force 01 October 2009, available at: http://supremecourt.uk/docs/uksc_rules_2009.pdf (last accessed 06 October 2014). See also E. Metcalfe, *infra* note 1074, 14-15, and C. Harlow, *infra* note 1083, at 7.

[970] It is noteworthy that the Rules of the Supreme Court of Canada allow *amicus curiae* submissions. Article 92 states that: 'The Court or a judge may appoint an *amicus curiae* in an appeal'. See Rules of the Supreme Court of Canada (SOR/2002-156), last amended 01 January 2014, available at: http://laws-lois.justice.gc.ca/eng/regulations/SOR-2002-156/index.html (last accessed 01 March 2014).

It has been most extensively developed under US law, and it is for such reason that it is worthy to take a closer look at the practice from a US law perspective.[971]

The Supreme Court adopted its first rule on *amicus curiae* in 1937.[972] Historically, the procedure was instrumental in public interest litigation, which most notably included civil and minority rights as well as environmental law cases.[973] It has allowed American civil society and advocacy groups such as the National Association for the Advancement of Colored People (the 'NAACP') to engage in judicial advocacy.[974] It has now become inherent to US litigation in general, and public interest cases in particular.[975]

Under US law, an *amicus* is a *bystander*, who of his own knowledge makes a suggestion on a point of law or of fact for the information of the court.[976] Inherently, an *amicus* cannot offer direct and rebuttal evidence, present oral arguments (unless otherwise authorized), and does not have the right to take an appeal – in stark contrast to intervenors or disputing parties.[977]

This is well-reflected in *Newark Branch, NAACP v. Town of Harrison*, a case regarding alleged employment discrimination by the Harrison municipality against African American citizens. Whilst commenting on an *amicus* brief submitted by seven Harrison residents, the Court of Appeal stated that an *amicus curiae* is not a disputing party in the following terms:

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[971] For instance, the first *amicus curiae* submission by a civil society group to be accepted at the US Supreme Court was in Ah How v. United States, 193 U.S. 65 (1904), where the Chinese Charitable and Benevolent Association of New York made an *amicus curiae* submission of favour of the appellant who was contesting the decision of his deportation; whereas, the UK House of Lords had only done so in the case of Regina v. Khan [1996] 3 WLR 162 when it accepted a submission by Liberty, a UK-based NGO. See also E. Metcalfe, *infra* note 1074, at 5, 46. See also S. Krislov, 'The Amicus Curiae Brief: From Friendship to Advocacy', (1963) 72:04 The Yale Law Journal 694, at 707.

[972] The Supreme Court rules constitute the first formalistic regulation of the practice. However, Krislov traces back the first formal use of the *amicus* procedure to a 1821 case - Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823). See R. Garcia, 'A Democratic Theory of Amicus Curiae', (2008) 35 Florida State University Law Review 315, at 321, and S. Krislov, *supra* note 971, at 694, 700.

[973] S. Krislov, *supra* note 971, at 694, 700, and more generally P. Appel, *infra* note 1095.

[974] For instance, the NAACP acted as *amicus* in the landmark case of Westminster School District of Orange County v. Mendez, which revolved around the segregation of Mexican-American schoolchildren. Westminster Sch. Dist. of Orange County v. Mendez, 161 F.2d 774, 775 (9th Cir. 1947). See also R. Garcia, *supra* note 972, at 341.

[975] For instance, empirical research shows that *amicus briefs* were filed in 83% of US Supreme Court cases between 1986 to 1997. It is suggested that this figure has not substantially changed in recent years. See R. Garcia, *supra* note 972, at 315.

[976] T. Ishikawa, *supra* note 108, at 377 citing B. Abbott, *Dictionary of Terms and Phrases used in American or English Jurisprudence* (1879).

[977] G. Hazard et al., *Pleading and Procedure: State and Federal Cases and Materials* (1999), at 770.

> Amicus curiae is a latin phrase for "friend of the court" as distinguished from an advocate before the court. It serves only for the benefit of the court, assisting the court in cases of general public interest by making suggestions to the court, by providing supplementary assistance to existing counsel, and by insuring a complete and plenary presentation of difficult issues so that the court may reach a proper decision. *An amicus curiae is not a party to the litigation* and therefore does not necessarily represent the views or interests of either party. Since an amicus does not represent the parties but participates only for the benefit of the court, *it is solely within the discretion of the court to determine the fact, extent, and manner of participation by the amicus*.[978]

The preceding passage is instrumental as it succinctly flags both the opportunities and limitations of *amici curiae*. Relevant in particular to public interest cases, courts typically consider the *amicus* as *an assistant* that plays a much more limited role than litigating parties; it provides specific information to the court solely through written submissions, and cannot control procedural developments.[979] It cannot act as a litigant and is therefore not entitled to counter arguments raised by any of the litigating parties. More fundamentally, as outlined by the Court of Appeal, 'the fact, extent, and manner of participation by the *amicus*' is solely grounded on the court's discretion; as such, it does not benefit from any substantive right enabling it to file briefs outside the court's permission.[980] It has been argued nonetheless that *amicus* petitioners should benefit from the same rights granted to parties under the US Constitution, in particular the right 'to petition the Government'; however, no federal court has confirmed such position to date.[981] This understanding is echoed in the relevant procedural rules – discussed below.

Rule 29 of the Federal Rules of Appellate Procedure[982] and Rule 37 of the Rules of the Supreme Court regulate the *amicus* procedure. State and federal courts do not have

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[978] Newark Branch, NAACP v. Town of Harrison, 940 F.2d 792 (3d Cir. 1991), at para 808. See also G. Castanias, and R. Klonoff, *infra* note 985, at 154.

[979] D. Shelton, 'The International Court of Justice and Nongovernmental Organizations', (2007) 09 International Community Law Review 139, at 150.

[980] R. Garcia, *supra* note 972, at 348.

[981] It is argued that the right to file a lawsuit in the US is constitutionally protected under the First Amendment, which states that: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, *and to petition the Government for a redress of grievances'*. (our emphasis). Having said that, it is also recognized that the text of the First Amendment aims to protect aggrieved citizens, i.e. petitioners who seek a 'redress of grievances'. A narrow interpretation of this rule would therefore exclude *amici curiae* who by definition may only in ongoing petitions (or in other words – litigation). See First Amendment to the US Constitution, ratified 15 December 1791, available at: http://www.law.cornell.edu/constitution/first_amendment (last accessed 06 October 2014). For further analysis, see also R. Garcia, *supra* note 972, at 336.

[982] Rule 29 states that: '… Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing. (b) The motion must be accompanied by the proposed brief and state: (1) the movant's interest; and (2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case. (c) Contents and Form. An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate

specific *amicus* procedural rules but generally refer instead to the Rules of Appellate Procedure.[983] Rule 37 of the Rules of the Supreme Court provides that:

> 1. An amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. *An amicus curiae brief that does not serve this purpose burdens the Court, and its filing is not favored*…[984]

Essentially, it is argued that most courts are fairly liberal in permitting the filing of *amicus* briefs, in particular when these do not simply duplicate the briefs of the parties but instead provide the court useful arguments or information.[985] However, the potential burden it might cause to the proceedings is also a factor taken into account by courts – as discussed below.

US judges are in general fairly receptive to *amicus* briefs and liberally apply Rule 29 of the Federal Rules of Appellate Procedure and Rule 37 of the Supreme Court Rules.[986] Yet, as is the case in other jurisdictions of interest, discussions over *amicus*' interest, independence vis-à-vis disputing parties, and the additional burden it may potentially cause are also relevant to the US litigation context – as is reflected in Rule 37(1) of the Rules of the Supreme Court.

For instance, in *National Organization for Women Inc. v. Scheidler*, a case involving abortion rights and access to abortion clinics, Priests for Life, Life Legal Defense Foundation, and the Southern Christian Leadership Conference were denied a permission to file *amicus curiae* briefs in support of the appellants. The Court of Appeal explained its decision namely by noting that '*amicus curiae briefs can be a real burden on the court system*' as well as on the disputing parties, and that they '*are more often than*

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whether the brief supports affirmance or reversal. An amicus brief need not comply with Rule 28, but must include the following: (1) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1… (4) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file; (5) unless the amicus curiae is one listed in the first sentence of Rule 29(a), a statement that indicates whether: (A) a party's counsel authored the brief in whole or in part; (B) a party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and (C) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person; (6) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review… (f) Except by the court's permission, an amicus curiae may not file a reply brief. (g) An amicus curiae may participate in oral argument only with the court's permission. See Federal Rules of Appellate Procedure, available at: http://www.law.cornell.edu/rules/frap/rule_29 (last accessed 06 October 2014).

[983] R. Garcia, *supra* note 972, at 323.

[984] See Rules of The Supreme Court of The United States, adopted April 19, 2013, available at: http://www.law.cornell.edu/rules/supct (last accessed 06 October 2014) (our emphasis).

[985] See also G. Castanias, and R. Klonoff, *Federal Appellate Practice and Procedure* (2008), at 250.

[986] G. Castanias, and R. Klonoff, *supra* note 985, at 251; See also A. Asteriti, and C. Tams, *infra* note 402, at 802.

not sponsored or encouraged by one or more of the parties'.[987] In the same vein, the Court stated that it shall not accept *amicus curiae* briefs that 'merely duplicate' the arguments of a disputing party.[988]

The following case law-developed criteria are aimed at curbing the often excessive and equally unhelpful flow of *amicus curiae* briefs, particularly from interest groups.[989] These would be solely accepted if (i) a party is not adequately represented or is not represented at all; or (ii) the petitioner has a 'direct' interest in another case, and the case in which he seeks permission to file an *amicus curiae* brief may, by operation of *stare decisis* or *res judicata*, materially affect that interest; or (iii) the petitioner has a unique perspective, or information, that can assist the court of appeals beyond what the parties are able to do.[990] In a similar vein, seemingly detracting judges refused to afford *amicus* arguments a weight equivalent to that of the disputing parties.[991]

[987] National Organization for Women, Inc., on behalf of itself and others, et al., v. Joseph M. Scheidler, et al., 223 F.3d 615 (7th Cir. 2000), at para 3-6 (our emphasis). See also, G. Castanias, and R. Klonoff, *supra* note 985, at 250. Other landmark abortion cases include the Supreme Court case of Webster v Reproductive Health Services (1989) 492 US 490, where the constitutionality of a Missouri statute regulating the performance of abortions. The case attracted numerous *amicus* submissions including by the American Psychological Association which argued against the statute.

[988] Ibid., para 6.

[989] A Court of Appeal judge, Judge Posner, made the following somewhat unfavourable statement on *amicus curiae* briefs: 'We court of appeals judges have heavy caseloads requiring us to read thousands of pages of briefs annually, and we wish to minimize extraneous reading. It would not be responsible for us to permit the filing of a brief and then not read it (or at least glance at it, or require our law clerks to read it), at least when permission is granted before the brief is written, and so reliance on our reading it invited'. See Ibid., para 3. In another case, Ryan v. Commodity Futures Trading Commission, Judge Posner denied a petition by the Chicago Board of Trade to file an *amicus curiae* brief, and stated that: 'after 16 years of reading amicus curiae briefs the vast majority of which have not assisted the judges, I have decided that it would be good to scrutinize these motions in a more careful, indeed a fish-eyed, fashion'. See Ryan v. Commodity Futures Trading Commission, 125 F.3d (7th Cir. 1997), at para 1063. See also R. Garcia, *supra* note 972, at 317, 326.

[990] Ibid., para 6.

[991] This is well-reflected in Eldred et al. v. Ashcroft, concerning the constitutionality of the Sonny Bono Copyright Term Extension Act which extended existing copyright terms by an additional 20 years, where the Court of Appeal set forth the reasons why it had previously found it 'particularly inappropriate' to entertain a constitutional argument pressed by amicus but not by the parties. Indeed, the Court noted that it 'deems it "particularly inappropriate" in this case to reach the merits of the amicus's position'. See Eldred et al. v. Ashcroft, 255 F.3d (D.C. Cir. 2001), at para 849. See also, G. Castanias, and R. Klonoff, *supra* note 985, at 154. Another example of a restrictive approach would be Boumediene v. Bush where a group of former judges petitioned to file an *amicus* brief in support of greater due process for Guantanamo Bay detainees. The Appellate Court denied petitioners' leave because they identified themselves as judges – citing a previous opinion which restricts the use of the title 'judge' in the courtroom or litigation documents to designate a former judge. See Boumediene v. Bush, 476 F.3d (D.C. Cir. 2006), at para 934-935. See also R. Garcia, *supra* note 972, at 330.

3.2 WTO Panels and the Appellate Body's restrictive approach

Since its inception, civil society organizations have been active at the WTO. Their action has not been solely restricted to policy matters, but it has also covered dispute settlement amongst WTO member states. This section gives a succinct look at the WTO from an institutional perspective, the public interest issues and non-trade concerns that the WTO is increasingly addressing, followed by a more detailed analysis of some of the landmark cases involving civil society. These cases in fact served as an important precedent to investor-state tribunals.

3.2.1 Brief background to WTO dispute settlement

The end of the Second World War marked a series of international conferences aimed essentially at orchestrating the reconstruction of war-torn Europe as well as the regulation of the global monetary and financial order, particularly in light of the looming effects of the Great Depression of 1929. The 1944 Bretton Woods Conference created the IMF, the International Bank for Reconstruction and Development (commonly referred to as the World Bank). Four years later, the Havana Charter established the International Trade Organization (ITO).[992] A global economic governance framework thus emerged. However, the establishment of the ITO never materialized, and the General Agreement on Tariffs and Trade (GATT),[993] a multilateral framework rather than an international organization, became a *de facto* alternative to the ITO.[994] Nearly half a century following the signature of the Havana Charter establishing the ITO, the WTO came into existence with the signature of the Marrakech Agreement in 1994.[995] Member states resort to the

[992] Havana Charter for an International Trade Organization, signed 24 March 1948, 1948 CAN. T.S. No. 32, available at http://www.wto.org/english/docse/legal-e/havanae.pdf (last accessed 06 October 2014) (the 'Havana Charter'); M. Majlessi, *supra* note 110, at 28.
[993] General Agreement on Tariffs and Trade (GATT 1947), entry into force 01 January 1948, 55 UNTS 194; 61 Stat. pt. 5; TIAS 1700.
[994] The ITO never came into existence due to opposition from the US Senate. See Ibid, at 29.
[995] It is now recognized that both the GATT and the WTO have effectively set forth the regulatory framework for a significant proportion of global trade and have become symbols of global interconnectedness. The WTO currently has 159 member states and 25 others with observer status. See Marrakesh Agreement Establishing the World Trade Organization, entry into force 15 April 1994, 1867 U.N.T.S. 154; 33 I.L.M. 1144 (1994), available at: http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm (last accessed 02 October 2013); J. Kagan, 'Making Free Trade Fair: How the WTO Could Incorporate Labor Rights and Why It Should', (2011) 43 Georgetown Journal of International Law 195, at 195; and WTO, 'members and Observers' (2013), available at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last accessed 06 October 2014).

WTO to settle their trade-related disputes.[996] A crucial aspect of the organization is that it comprises a binding dispute settlement mechanism that has as primary objective to enforce the organization's intricate regulatory framework.[997] Given that WTO disputes relate to inter-state obligations and rights, non-state actors, including civil society and corporations, have remained essentially absent from the process. The WTO's Dispute Settlement Understanding (DSU) does not provide for any sort of procedural rules allowing non-member state actor access.[998] Whereas other international jurisdictions, notably through the creation of arbitration institutions to settle mixed disputes such as ICSID, have opened up to non-state actors, WTO members chose to maintain the inter-state character of the dispute settlement mechanism set forth under the DSU – which can only be amended by consensus (as is the case for all WTO agreements).[999] This strictly inter-state framework might seem anomalous since disputes amongst states are ultimately the result of diverging interests amongst corporations and other non-state actors.[1000]

3.2.2 Non-trade concerns as the substantive context

Both WTO policy-making, rules, and dispute settlement have had ramifications beyond the trade and economic spheres by increasingly touching upon environmental, public health, and other public interest-related issues.[1001] This has brought the WTO both attention and pressure. It has been called upon to address such issues for the sake of balancing the global trade concerns it actively promotes.[1002] Given that the WTO is a trade-centered organization, these issues have been branded under the notion of 'non-trade concerns' when raised within the WTO context.[1003] This term was in fact initially

[996] Those cover a wide array of international obligations and rights that are guaranteed by WTO agreements such as the GATT, General Agreement on Trade in Services (GATS), the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) or the agreement on Technical Barriers to Trade (TBT).
[997] The WTO has more than 60 legal texts in place, see WTO website, available at: http://www.wto.org/english/docs_e/legal_e/legal_e.htm (last accessed 02 April 2013).
[998] Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the Marrakesh Agreement Establishing the WTO, 33 ILM 1197 (1994) ('DSU').
[999] R. Buckley, and P. Blyschak, 'Guarding the Open Door: Non-party Participation Before the International Centre for Settlement of Investment Disputes', (2007) 22 Banking and Financial Law Review 353, at 362.
[1000] E. De Brabandere, *supra* note 852, at 96.
[1001] C.E. Côté, *La participation des personnes privées dans le règlement des différends internationaux économiques : L'élargissement du droit de porter plainte à l'OMC* (2007), at 405.
[1002] J. Kagan, *supra* note 995, at 202.
[1003] The WTO Glossary defines it as: 'similar to multifunctionality. The preamble of the Agriculture Agreement specifies food security and environmental protection as examples. Also cited by members are rural development

used in the preamble of the Agreement on Agriculture and included 'food security and the need to protect the environment'.[1004] It may also include labor conditions, which were indeed set forth in the non-ratified Havana Charter but were never included in the texts of neither the GATT nor WTO agreements.[1005] Since its inception, civil society has pressured the WTO to allow it to further non-trade concerns, as well as to enhance transparency, within its fora.[1006] The WTO has been opening up to non-state actors in general, including to civil society, namely through the annual WTO Forum.[1007] In fact, the Marrakech Agreement explicitly affords the organization's General Council the right to 'make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO' – which not only include civil society organizations, but also business and industry associations.[1008]

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and employment, and poverty alleviation'. See WTO Glossary, available at: http://www.wto.org/english/thewto_e/glossary_e/non_trade_concerns_e.htm (last accessed 10 August 2013).

[1004] 'Noting that commitments under the reform programme should be made in an equitable way among all members, having regard to non-trade concerns, including food security and the need to protect the environment'. See preamble of the WTO Agreement on Agriculture, entry into force 15 April 1994, Marrakech Agreement Annex 1A, available at: http://www.wto.org/english/docs_e/legal_e/14-ag_01_e.htm (last accessed 10 August 2013).

[1005] Article 7(1) of the Havana Charter states that '1. The members recognize that measures relating to employment must take fully into account the rights of workers under inter-governmental declarations, conventions and agreements. They recognize that all countries have a common interest in the *achievement and maintenance of fair labour standards* related to productivity, and thus in the improvement of wages and working conditions as productivity may permit. The members recognize that unfair labour conditions, particularly in production for export, create difficulties in international trade, and, accordingly, each member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory.' (our emphasis). See Havana Charter, *supra* note 992. The WTO does recognize nonetheless that its member-states are committed to core labour standards which include the freedom of association, the prohibition of forced and child labour, as well as discrimination. These rights are indeed recognized by the ILO Declaration of Fundamental Principles and Rights at Work. See WTO Website, 'Labour standards: consensus, coherence and controversy', available at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm (last accessed 06 October 2014). See also J. Kagan, *supra* note 995, at 198-199. See ILO Declaration on Fundamental Principles and Rights at Work, dated June 1988, available at: http://www.refworld.org/docid/425bbdf72.html (last accessed 28 February 2014).

[1006] C.E. Côté, *supra* note 1001, at 418.

[1007] The WTO Public Forum is an annual conference held since 2001 bringing together 'civil society, academia, business, the media, governments, parliamentarians and inter-governmental organizations'. More than 8,000 participants attended the 2013 edition (compared to 450 in 2001). See P. Lamy, *supra* note 30.

[1008] See Article V(2) of the Marrakech Agreement, *supra* note 995. The WTO's General Council also adopted a set of guidelines aimed at clarifying the framework for cooperation with civil society, in which 'members recognize the role NGOs can play to increase the awareness of the public in respect of WTO activities and agree in this regard to improve transparency and develop communication with NGOs'. See WTO General Council, 'members recognize the role NGOs can play to increase the awareness of the public in respect of WTO activities and agree in this regard to improve transparency and develop communication with NGOs', 18 July 1996, available at: http://www.wto.org/english/forums_e/ngo_e/guide_e.htm (last accessed 10 August 2013).

In turn, the WTO has increasingly addressed non-trade concerns. The waiver to the GATT in relation to conflict diamonds and the Kimberley Process[1009] called the 'Kimberley Waiver'; as well as the TRIPS waiver, namely aimed at allowing developing nations to have an enhanced access to HIV/AIDS drugs, bear witness to the WTO's endeavors in advancing, or at least, taking into account non-trade concerns.[1010] The Kimberley Waiver was initially granted in 2003, and then subsequently renewed in 2006 and 2012 by the WTO General Council.[1011] It consists of excepting trade measures provided under the Kimberly Process from the application of a number of GATT obligations and prohibitions including – *inter alia* – quantitative restrictions (Article XI(1)), and most-favoured nation treatment (Article I(1)). As to the TRIPS waiver, it was first implemented in 2003 and was extended for the third time in 2011.[1012] It originated during the Doha Ministerial Conference in 2001 where member States passed a declaration in which they recognized the gravity of the public health problems afflicting many states, 'especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics'.[1013] The General Council's waiver essentially creates a compulsory license system that enables the use of patents predominately for the supply of a given domestic market, subject to an obligation to pay adequate remuneration to right holders, in limited cases including 'national emergency or other circumstances of extreme urgency or in

[1009] Kimberly Protocol Certification Scheme has 54 participants including the European Union. It aims at curbing the trade in 'conflict diamonds' by establishing a certification system essentially to attest that transacted raw diamonds were 'conflict free'. General Assembly resolution 55/56 defines 'conflict diamonds' as 'rough diamonds which are used by rebel movements to finance their military activities, including attempts to undermine or overthrow legitimate Governments'. See UN General Assembly, Resolution 55/56, 'The role of diamonds in fuelling conflict', dated 29 January 2001, available at: (last accessed 01 September 2013). See also the Kimberly Protocol Certification Scheme Core Document, entry into force 01 January 2003, available at: http://www.kimberleyprocess.com/en/kpcs-core-document (last accessed 10 August 2013).

[1010] The Ministerial Conference of the WTO is the organ in charge of lawmaking and may enact waivers to existing WTO agreements pursuant to Article IX(3) of the Marrakech Agreement. However, most measures are often taken by the General Council, comprised of member States' representatives based in Geneva, which undertakes the functions of the Ministerial Conference in the interval between meetings pursuant to paragraph 2 of Article IV of the Marrakesh Agreement.

[1011] General Council, 'Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds', Decision of 14 December 2012, WT/L/876. See also I. Feichtner, *supra* note 597, at 616.

[1012] See General Council, 'Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health', Decision of 30 August 2003, WT/L/540, and General Council, 'Amendment of the Trips Agreement – Third Extension of the Period For The Acceptance By members Of The Protocol Amending the Trips Agreement', Decision of 05 December 2011, WT/L/829.

[1013] Ministerial Conference, 'Doha Declaration on the TRIPS Agreement and Public Health', adopted on 14 November 2001, WT/MIN(01)/DEC/2, available at: http://www.wto.org/english/tratop_e/trips_e/ta_docs_e/3_wtmin01dec2_e.pdf (last accessed 10 August 2013).

cases of public non-commercial use'.[1014] Such measures come as a reaction to detractors of the world trade regime who criticize a trade-centred approach to WTO law that could lead to the neglect of other international human rights and values, e.g. the human right to health care or the protection of indigenous traditional knowledge, which are arguably relevant to the international rights and obligations set forth under TRIPS for instance.[1015] In the same vein, Pascal Lamy, ex-director general of the organisation, declared that WTO law is, and should be, interpreted in light of other international law norms including those pertaining to human rights and environmental protection.[1016] As will be examined directly below, the role of civil society – as *amicus curiae* – within WTO disputes has been effectively perceived as a means to potentially conciliate wider international law norms with WTO law.[1017]

3.2.3 *Amicus* authorities: *Shrimps* and *Asbestos*

The issue of civil society's involvement in WTO disputes has first arisen in the *Shrimps*[1018] case, and the criteria governing its intervention were further articulated in the *Asbestos* case. These two cases effectively constitute the most significant Appellate Body decisions on the matter, and thus merit further analysis. Numerous decisions later followed the position adopted in the *Shrimps* and *Asbestos* precedents.[1019]

[1014] This effectively constitutes a waiver to Articles 31(f) and (h) of TRIPS which state that: 'Where the law of a member allows for other use of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected (f) any such use shall be authorized predominantly for the supply of the domestic market of the member authorizing such use; (h) the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization'. See section 1(b), General Council, 'Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health', *supra* note 1012. See also I. Feichtner, *supra* note 597, at 628.

[1015] The TRIPS agreement has been systematically associated with the promotion of strictly corporate interests, particularly the pharmaceutical industry. Indeed, it is argued that the Intellectual Property Committee, an international corporate-based organization, developed the basis for the TRIPS agreement. For a further analysis, see M. Majlessi, *infra* note 110, at 106, 120. See also I. Feichtner, *supra* note 597, at 616.

[1016] P. Lamy, '*La place et le rôle du droit de l'OMC dans l'ordre juridique international'*, 19 May 2006, available at: http://www.wto.org/french/news_f/sppl_f/sppl26_f.htm (last accessed 10 August 2013).

[1017] C.E. Côté, *supra* note 1001, at 419.

[1018] WTO, Report of the Panel, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58, (15 May 1998) ('*Shrimps* case').

[1019] See for instance the following Appellate Body reports: *Australia — Measures Affecting Importation of Salmon*, WT/DS18/AB/R (20 October 1998), *European Communities — Trade Description of Sardine*, WT/DS231/AB/R, (23 October 2002); *Thailand — Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland*, WT/DS122/AB/R (5 April 2001); *United States — Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada*, WT/ DS257/AB/R (17 February 2004); *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WT/DS30824 /AB /R (6

i. The Shrimps case

The *Shrimps* case arose out of a complaint lodged by several Asian countries against the US, alleging the inconsistency of a ban on the imports of shrimps, and shrimp-related products, from those countries with WTO law.[1020] At issue were a series of US laws, regulations, and measures aimed at protecting certain sea turtles – which were recognized as endangered species – from harmful shrimp fishing practices allegedly adopted in those countries through an import ban on the shrimp produce of such fishing.[1021] The matter was in fact addressed in US courts, prior to its adjudication at the WTO, as a result of a lawsuit filed by environmental groups, including the Earth Island Institute and others, against the US government.[1022] It is worthy to mention here that a substantially similar dispute, although resulting in a different outcome, arose in the wake of the *Tuna-Dolphin* cases at the GATT – prior to the establishment of the WTO and its dispute settlement mechanism.[1023]

Three NGOs – the Center for Marine Conservation, the Center for International Environmental Law and the WWF – directly requested the Panel to allow them to intervene in the dispute as *amicus curiae*. Their objective was to address environmental issues relevant to the dispute, and to put forward an interpretation of the GATT that

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March 2006); *Brazil — Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (3 December 2007). See also C.E. Côté, *supra* note 1001, at 218.

[1020] Those were: India, Malaysia, Pakistan and Thailand.

[1021]The US justified its prohibition under its Endangered Species Act (in addition to related regulations and judicial rules). In addition, as mentioned previously, the US argued that the need for the use of turtle excluder devices (TEDs) – aimed at protecting sea turtles from harmful shrimp fishing – was consistent with the international community's recognition to protect endangered species pursuant to Agenda 21. See Ibid., at para. 7.57, and Agenda 21, *supra* note 99, para 17.46(c).

[1022] Those were: the American Society for the Prevention of Cruelty to Animals, the Humane Society of the United States, the Sierra Club, and the Georgia Fishermen's Association. See Earth Island Institute v. Warren Christopher, 913 F. Supp. 559 (CIT 1995).

[1023] At issues was the US import ban on tuna from GATT-members whose fishing standards were not aligned to the US Marine Mammal Protection Act, which is a US federal statute that sets dolphin protection standards. More specifically, an import ban would be triggered if dolphin deaths from tuna fishing exceeded deaths from U.S. tuna fishing by more than 25 per cent. It resulted in the ban of tuna imports from exporting states including Mexico, Venezuela, Panama, Ecuador, and the tiny Pacific island of Vanuatu; as well as other 'intermediary' states, i.e. which handle the banned tuna, such as Costa Rica, Italy, Japan, and Spain, and earlier France, the Netherlands Antilles, and the United Kingdom. A lengthy legal saga ensued, it is worthy to note, however, that in its first decision the GATT Panel essentially found that (i) the US could not embargo imports of tuna products from Mexico simply because Mexican regulations on the way tuna was produced did not satisfy US regulations; and (ii) GATT rules did not allow one country to take trade action for the purpose of attempting to enforce its own domestic laws in another country (extraterritorially) — even to protect animal health or exhaustible natural resources. The Panel's decision was ultimately perceived as lacunary by environmental groups. See United States - Restrictions on Imports of Tuna, GATT Panel Report, 3 September 1991, unadopted, BISD 39S/155; and United States — Restrictions on Imports of Tuna, GATT Panel Report, 16 June 1994, unadopted, DS29/R.

would favour the protection of sea turtles from harmful shrimp fishing practices. Environmental groups perceived the GATT Panel's first decision in the *Tuna-Dolphin* case as unsatisfactory as a result of its failure to adequately balance environmental concerns. It is thus argued that there was a need for them to actively participate in WTO disputes in general, and the *Shrimps* case in particular, in order to 'enlighten' WTO Panels on the environmental issues at stake, in what cannot be merely perceived – so it was argued – as strict international trade law disputes between WTO member-states.[1024]

The Panel rejected the NGOs' request and based its decision on Articles 13.1 and 13.2 of the DSU, which state that:

> 13.1 - Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate...
> 13.2 - Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter…[1025]

The Panel interpreted this rule as vesting it with an authority to seek information but not to accept it via unsolicited submissions such as the ones made by the WWF and others.[1026] It made nonetheless a recommendation to the disputing parties, i.e. member states, to put forward any documents or information submitted by the *amici curiae* petitioners as part of their own submissions.

The Panel's decision was appealed, and the Appellate Body rejected the Panel's interpretation of Articles 13.1 and 13.2 of the DSU. It found that the Panel's authority to 'seek information' should not be equated with a prohibition on accepting non-solicited information. It was thus decided that Panels have a discretionary authority to accept such non-solicited information so long as it remains pertinent to the dispute; and more fundamentally, without '*unduly delaying the panel process*' pursuant to Article 12.2 of the DSU.[1027] The fact that the information was or was not requested by the Panel itself

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[1024] Charnovitz indeed argues that: 'An impetus behind NGOs' desire to participate in WTO dispute resolution is that GATT panels have not performed well in adjudicating environmental disputes, particularly in the tuna dolphin controversy. The tuna panel decisions were neither thorough nor entirely logical. *The low quality of these environmental decisions* - as compared to typically high quality GATT decisions in the more common commercial disputes - *suggests a need to improve the information provided to a WTO panel*'. See S. Charnovitz, 'Participation of Non Governmental Organizations in the World Trade Organization', (1996) 17 University of Pennsylvania Journal of International Economic Law 331, at 352 (our emphasis).
[1025] DSU, *supra* note 998, Article 13.1 and 13.2.
[1026] Report of the Panel, *Shrimps* case, *supra* note 1018, para 7.8.
[1027] Article 12.2 of the DSU states that: 'Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process'. See WTO, Report of the Appellate

should not be relevant. Conversely, Panels are not bound to accept nor consider information submitted by non-disputing parties even in cases where it has *propio motu* requested such information.[1028] The Appellate Body confirmed the Panel's recommendation by allowing disputing parties to attach to their own submissions entire, or parts of, briefs prepared by non-disputing parties such as the WWF or the Center for International Environmental Law.[1029]

ii. The Asbestos case

Another key decision is the *Asbestos* case,[1030] a dispute between Canada and France (represented by the European Communities) that was triggered by a French ban on asbestos fibres and asbestos-based products on public health grounds in line with the exception set out under Article XX(b) of the GATT.[1031]

The public interest issues at stake drew significant attention to the dispute, and the Appellate Body initially received applications for leave to submit *amicus* briefs from 13 different NGOs and other non-state actors most notably including trade and business groups or associations from the asbestos industry.[1032] 17 applications were later filed following the adoption of the Additional Procedure (discussed below) submitted by a wide array of applicants including Greenpeace International, the WWF, and the European Chemical Industry Council.[1033] What is fundamental to note here is that the Appellate

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Body, *United States: Import Prohibitions of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (12 October 1998), para. 107-108 (our emphasis).

[1028] Ibid., para. 108.

[1029] Ibid., para. 110.

[1030] WTO, Report of the Appellate Body, *European Communities: Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (12 March 2011) ('Asbestos case').

[1031] Article XX(b) of the GATT reads as follows: 'Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (b) necessary to protect human, animal or plant life or health…'. See GATT, *supra* note 993.

[1032] These were: Asbestos Information Association (United States); HVL Asbestos (Swaziland) Limited (Bulembu Mine); South African Asbestos Producers Advisory Committee (South Africa); J & S Bridle Associates (United Kingdom); Associação das Indústrias de Produtos de Amianio Crisótilo (Portugal); Asbestos Cement Industries Limited (Sri Lanka); The Federation of Thai Industries, Roofing and Accessories Club (Thailand); Korea Asbestos Association (Korea); Senac (Senegal); Syndicat des Métallos (Canada); Duralita de Centroamerica, S.A. de C.V. (El Salvador); Asociación Colombiana de Fibras (Colombia); and Japan Asbestos Association (Japan). Ibid., para 53.

[1033] These were: Professor Robert Lloyd Howse (United States); Occupational & Environmental Diseases Association (United Kingdom); American Public Health Association (United States); Centro de Estudios Comunitarios de la Universidad Nacional de Rosario (Argentina); Only Nature Endures (India); Korea Asbestos Association (Korea); International Council on Metals and the Environment and American Chemistry Council

Body referred to those potential *amici* as 'persons' or 'non-governmental associations' – notwithstanding the intricate diversity of such actors, and more particularly, the manifest dominance of trade and business groups from the asbestos industry.[1034] Indeed, the proliferation of these groups increased developing states' wariness of 'NGO involvement at the WTO' – as will be discussed further below.

In the wake of overwhelming interest by third parties to submit *amicus* briefs, the Appellate Body established an 'Additional Procedure' setting out the *ratione materiae* and *ratione personae* requirements for accepting *amicus* briefs.[1035] These requirements included (a) information on the applicants' interest in the dispute, (b) a description of their relations to the parties and their funding sources, (c) the extent to which they might 'make a contribution to the resolution' of the dispute, and (d) the specific issues of law covered in the Panel report they would like to address.[1036] The Appellate Body added that:

> [it] will review and consider each application for leave to file a written brief and will, without delay, render a decision *whether to grant or deny such leave*…The grant of leave to file a brief by the Appellate Body does not imply that the Appellate Body will address, in its Report, the legal arguments made in such a brief.[1037]

Furthermore, the Appellate Body has set out additional conditions that are applicable in the event leave is granted to an applicant. These regulate both the form and scope of the written *amicus curiae* brief and essentially require that briefs should be concise and not exceed 20 pages; and to:

> set out a precise statement, *strictly limited to legal arguments*, supporting the applicant's legal position on the issues of law or legal interpretations in the Panel Report with respect to which the applicant has been granted leave to file a written brief.[1038]

(United States); European Chemical Industry Council (Belgium); Australian Centre for Environmental Law at the Australian National University (Australia); Associate Professor Jan McDonald and Mr. Don Anton (Australia); and a joint application from Foundation for Environmental Law and Development (United Kingdom), Center for International Environmental Law (Switzerland), International Ban Asbestos Secretariat (United Kingdom), Ban Asbestos International and Virtual Network (France), Greenpeace International (The Netherlands), World Wide Fund for Nature, International (Switzerland), and Lutheran World Federation (Switzerland). See Ibid., para 56.

[1034] Ibid., para 53-56.

[1035] Article 16.1 of the WTO - Working Procedures for Appellate Review provide that: '[i]n the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a division may adopt an appropriate procedure for the purposes of that appeal only, provided that it is not inconsistent with the DSU, the other covered agreements and these Rules…'.

[1036] Report of the Appellate Body, *Asbestos* case, *supra* note 1030, para. 52(3).

[1037] Ibid., at para. 52(4)(5) (our emphasis).

[1038] Report of the Appellate Body, *Asbestos* case, *supra* note 1030, para. 52(7) (our emphasis).

The Appellate Body clearly asserted its discretion in accepting or rejecting *amicus curiae* submissions, and it eventually rejected all 17 of them simply because it was of the view that accepting them brought it no benefits.[1039] However, it opened the door to disputing member states to append *amicus* briefs as an integral part of their own submissions – as also accepted by the ICJ. The Appellate Body's conclusion in the *Asbestos* case is not inconsistent with the general legal understanding of what *amicus curiae* should and should not do. Indeed, the primary function of, and rationale behind, the *amicus curiae* procedure is the assistance of the court.[1040] If a court deems that such assistance is not beneficial to it, then the whole idea of an *amicus curiae* submission becomes altogether obsolete.

It is questioned whether civil society, through the *amicus curiae* procedure, caused any impact on Panels' or the Appellate Body's interpretation of WTO law. A breakdown both from procedural and substantive standpoints is therefore merited, as it shall also provide an *état des lieux* of the WTO dispute settlement mechanism's position concerning civil society involvement.

iii. Final remarks

The Appellate Body has repeatedly asserted both its right, as well as Panels' right, to accept non-solicited *amicus curiae* submissions. This is a procedural development *in se* that was triggered by civil society actors who solicited WTO Panels to open the door for their intervention in disputes through the *amicus curiae* procedure. The WTO's official position is that *amici curiae* do not benefit from any substantive rights. The acceptance of civil society as *amicus curiae* has been made possible through a favourable interpretation of the DSU by the Appellate Body, which asserted Panels' discretionary authority in deciding on the matter by virtue of Article 13 of the DSU. Having said that, civil society's role at the WTO dispute settlement system has been nonetheless significantly limited.[1041] It is clear that non-member states in general do not benefit from

[1039] Although 6 of those applications were rejected having not been submitted in a timely manner. See Ibid., para 55. See also R. Buckley, and P. Blyschak, *supra* note 999, at 363.
[1040] A. Moore, 'Are Amici Curiae the Proper Response to the Public's Concerns on Transparency in Investment Arbitration?', (2006) 5 The Law and Practice of International Courts and Tribunals 257, at 268.
[1041] C.E. Côté, 'Obstacles et ouvertures processuelles pour les acteurs privés défendant des intérêts non commerciaux dans l'interprétation des accords de l'OMC', (2009) 50 Les Cahiers de droit 207, at 217.

a substantive right to submit *amicus curiae* briefs under the DSU notwithstanding the public interest issues that are potentially at stake. This applies to civil society and trade or business groups for that matter. It is in this light that in the *Hot-Rolled Lead* case, the Appellate Body poignantly reiterated its position in the *Shrimps* case in the following words:

> *Individuals and organizations, which are not members of the WTO, have no legal 'right' to make submissions or to be heard by the Appellate Body*. The Appellate Body has no legal 'duty' to accept or consider unsolicited amicus curiae briefs submitted by individuals or organizations, not members of the WTO…[1042]

The *right* to make *amicus curiae* submissions can only be secured through a reform to the DSU by WTO members, which was due to take place at the then-stalled Doha Round of negotiations.[1043] Some states are in favour of substantiating the *amicus curiae* practice under the DSU in order to enhance transparency in public interest-related disputes.[1044] Several developing states are, however, wary of such a prospect as this might entail the proliferation of submissions from trade lobbies or pressure groups from industrialized states (who all fall under the category of non-state actors).[1045] This was manifestly reflected not only in the *Asbestos* case, but also in the *Hot-Rolled Lead* case where the American Iron and Steel Institute and the Speciality Steel Industry of North America association made *amicus curiae* submissions.[1046] As such, the DSU has not been amended to date and the *amicus curiae* practice at the WTO remains the sole product of jurisprudential development. In turn, it has benefited other international jurisdictions such as ICSID and UNCITRAL-constituted investor-state tribunals.[1047]

[1042] See WTO, Report of the Appellate Body, *United States: Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismut Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R (10 May 2000), para. 41 ('*Hot-Rolled Lead* case') (our emphasis).
[1043] C.E. Côté, *supra* note 1001, at 223.
[1044] This is the case of the United States for instance. The US delegation at Doha claimed that 'the public has a legitimate interest in the proceedings'. See IISD, *Doha Briefing Series: Developments Since the Fourth WTO Ministerial* Conference, February 2003, online at: http://www.ictsd.org/pubs/dohabriefings/doha8-review-dispute.pdf (last accessed 15 July 2013).
[1045] R. Buckley, and P. Blyshak, *supra* note 999, at 371. Developping states are also weary of 'New Wave Protectionism', the modern corollary of 'Grandfather Protectionism'. The latter included discriminatory customs and tariff barriers with the aim of controlling the influx of foreign products into domestic markets. In fact, one of the GATT's objectives was to eliminate such barriers. New Wave Protectionism on the other hand refers to state practices involving environmental or labour measures indirectly but ultimately aim at restricting foreign products. See R. Ricupero, 'Trade and Environment: Strengthening Complementarities and Reducing Conflicts', in G. Sampson, and W. Bradnee Chambers (eds.), *Trade, Environment, and the Millennium* (2002), at 32.
[1046] Report of the Appellate Body, *Hot-Rolled Lead* case, *supra* note 1042.
[1047] Ibid., at 361.

That said, the *Shrimps* decision was perceived as a turning point in international law as it paved the way for non-state actor access in general, and civil society in particular, in an inter-state dispute settlement jurisdiction.[1048] It also dedicated environmental law questions a considerable portion of its analysis, namely by looking at the concept of sustainable development[1049] and the precautionary principle, as well as citing other international environmental law instruments such as the 1992 UNCED Rio Declaration on Environment and Development, thereby effectively taking into account other international law norms when scrutinizing member state compliance to WTO law.[1050] In particular, it did so in order to interpret the notion of 'exhaustible natural resources' cited in Article XX(b) of the GATT. This approach is consistent with Article 31(3)(c) of the Vienna Convention, which opens the door for treaty interpretation in light of 'any relevant rules of international law'.[1051] It can be generally argued that civil society organizations precisely aimed to influence Panels' or the Appellate Body's decisions towards a more favourable position on environmental protection. Yet, it remains unclear whether either has ever considered arguments contained in *amicus curiae* submissions in their decisions. This indeed echoes the WTO dispute settlement mechanism's restrictive position towards civil society involvement, which is in fact

[1048] See P. Sands, 'Turtles and Torturers: the Transformation of International Law', (2001) 33 New York Journal of International Law and Politics 527.

[1049] The Appellate Body in the *Shrimps* case noted that sustainable development was recognized as an objective *in se* by the WTO Agreement, and allowed it to adopt an evolutionary interpretation of the concept of 'exhaustible natural resources' under XX(g) of the GATT. See Report of the Appellate Body, *Shrimps* case, *supra* note 1027, at para 129.

[1050] It cited Principle 12 in support of state multilateralism when enacting environmental measures, which states that: 'States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus'. See Rio Declaration, *supra* note 96. See also Report of the Appellate Body, *Shrimps* case, *supra* note 1027, at para 41, 68.

[1051] Article 31 states that: '(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose…(3). There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties'. See United Nations, Vienna Convention on the Law of Treaties, entered into force 27 January 1980, United Nations, Treaty Series, vol. 1155, at 331 ('Vienna Convention'). See also D.A., Dam-De Jong, *supra* note 99, at 30.

further substantiated by the unwillingness of most member states to amend the DSU in order to formalize, and thus confirm the validity and relevance, of the *amicus* procedure.

3.3 International human rights jurisdictions' liberalism

International human rights jurisdictions accept in a liberal fashion *amicus curiae* submissions. Yet, the rules governing such access do not substantially differ from the ones discussed hitherto as will be shown below when delving into the practice of the ECtHR, IACtHR, and ACHPR.

The ECtHR has for long had a liberal approach regarding the acceptance of *amicus curiae* submissions.[1052] Having said that, prior to the entry into force of Protocol 11 in 1998, there was no explicit reference to the *amicus curiae* procedure under the Court's relevant procedural rules. Article 36(2) 'Third Party Intervention' now governs the procedure,[1053] which reads as follows:

> The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.[1054]

Rule 44(2)(a) of the ECtHR Rules of Court further provides that:

> Once notice of an application has been given to the respondent Contracting Party under Rule 51 § 1 or Rule 54 § 2 (b), the President of the Chamber may, in the interests of the proper administration of justice, as provided in Article 36 § 2 of the Convention, invite, or grant leave to, any Contracting Party which is not a party to the proceedings, *or any person concerned who is not the applicant*, to submit written comments or, in exceptional cases, to take part in a hearing'.[1055]

[1052] Laura van den Eynde's empirical research shows that, up to 2013, NGOs have submitted *amicus* briefs in over 237 cases, i.e. 1.37 per cent of the ECtHR's proceedings. However, in 307 of the total judgements delivered by the Grand Chamber up to that date, NGOs have intervened in 65 of them, i.e. in 21 per cent of the Grand Chamber's cases. See L. van den Eynde, *supra* note 72, at 280. Indeed, *amicus* submissions were made in many seminal cases, most notably including: *Malone v. United Kingdom*, Judgment of 02 August 1984, [1984] ECtHR (8691/79); *Ashingdane v. United Kingdom*, Judgment of 28 May 1985, [1985] ECtHR (8225/78); *Lingen v. Austria*, Judgment of 08 July 1986, [1986] ECtHR (9815/82); *Monell and Morris v. United Kingdom*, Judgment of 2 March 1987, [1987] ECtHR (9562/81; 9818/82); *Soering v. United Kingdom*, Judgment of 07 July 1989, [1989] ECtHR (14038/88); *Brannigan and McBride v. United Kingdom*, Judgment of 25 May 1993, [1993] ECtHR (14553/89; 14554/89); and more recently for instance - *Opuz v. Turkey*, Judgment of 9 June 2009, [2009] ECtHR (33401/02). See also E. Metcalfe, *infra* note 1074, at 23.

[1053] The ECHR refers to the *amicus curiae* procedure as 'Third Party Intervention'. However, the term should not be confused with how third party intervention is conceptualized under the present research. See Introduction.

[1054] ECHR, *supra* note 844, Article 36.

[1055] Other more technical conditions are also set forth: '(b) Requests for leave for this purpose must be duly reasoned and submitted in writing in one of the official languages as provided in Rule 34 § 4 not later than twelve weeks after notice of the application has been given to the respondent Contracting Party. Another time-limit may be fixed by the President of the Chamber for exceptional reasons… 5. Any invitation or grant of leave

Essentially, it is generally understood that the key conditions to the acceptance of an *amicus* submission are the following: (i) the participation by an intervener who is interested in the outcome of the proceedings; and (ii) the intervention is in the interests of the proper administration of justice.[1056]

There are numerous ECtHR cases involving *amicus curiae* submissions by civil society. However, as an over-arching rule, it is argued that 'the likelihood of an NGO participating in litigation depends, at least in part, on the case in question having a potential importance that extends beyond securing the rights of an individual applicant'.[1057]

One of such cases is *Muñoz Díaz* v. *Spain*. María Luisa Muñoz Diaz – a Rom of Spanish nationality – filed a case against Spain under Article 34 of the ECHR for violations of her right against discrimination primarily because the civil effects of her Roma marriage were not recognized by the social security authorities.[1058] The applicant exhausted local remedies when Spain's Constitutional Court had rendered an unfavorable decision.[1059] The ECtHR allowed Union Romaní – a Spanish Roma association – to file an *amicus* brief pursuant to Article 36(2) of the ECHR and Rule 44(2)(a) of the ECtHR's Rules of Court[1060] – without providing any justification for its acceptance.[1061] The association acted as an interested third party to the dispute, and as a provider of information to the ECtHR on the solemnization of marriage under the rites of the Roma community. The submission of Union Romaní's brief did not seem to stir any procedural

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referred to in paragraph 3 (a) of this Rule shall be subject to any conditions, including time-limits, set by the President of the Chamber. Where such conditions are not complied with, the President may decide not to include the comments in the case file or to limit participation in the hearing to the extent that he or she considers appropriate.' . See ECtHR Rules of Court, entered into force on 1 January 2014, available at: http://www.echr.coe.int/documents/rules_court_eng.pdf (last accessed 06 October 2014).

[1056] Ibid., at 98.

[1057] L. Hodson, *NGOs and the Struggle for Human Rights in Europe* (2011), at 63.

[1058] The applicant was claiming, *inter alia*, her right against discrimination under Article 14 of the ECHR had been violated when the National Institute of Social Security refused to pay her a survivor's pension following her husband's death on the grounds that her marriage solemnised under the rites of the Roma community had no civil effects. *See Muñoz Díaz v. Spain*, Judgment of 8 December 2009, [2009] ECtHR (49151/07), at 3.

[1059] Ibid., at 5-6.

[1060] The Court merely stated that: 'The parties filed their observations. In addition, third-party comments were received from Unión Romaní which had been given leave by the President to intervene in the written procedure as amicus curiae (Article 36 § 2 of the Convention and Rule 44 § 2 of the Rules of Court)'. Ibid., at 5.

[1061] This was also the case in *Opuz v. Turkey*, where the Court merely acknowledged the fact that an *amicus* submission was made, and then delved onto the arguments raised therein: 'Third-party comments were received from Interights, which had been given leave by the President to intervene in the procedure (Article 36 § 2 of the Convention and Rule 44 § 2 of the Rules of Court). The Government replied to those comments (Rule 44 § 5)'. See *Opuz v. Turkey*, *supra* note 1052, at 5.

debates, and the Court rather focused on the substantive matters of the case. Union Romaní had also clearly taken the side of the claimant by submitting arguments in its favour. It most notably claimed that the Spanish government's refusal to pay the claimant's survival's pension was 'disproportionate' – an argument that was noted by the Court.[1062]

This case merely reflects the ECtHR's liberal practice in relation to the acceptance of *amicus curiae* submissions, which is no different than what is adopted by other international human rights jurisdictions, i.e. there are no cases which set out extensive *ratione materiae* and *ratione personae* criteria such as the *Asbestos* case at the WTO for instance – as will be shown further below.[1063]

There is an extensive practice for *amicus curiae* participation in contentious cases at the IACtHR, as well as in advisory proceedings where human rights organizations tend to advocate liberal interpretations of the IACHR. [1064] This procedure is covered by Article 44(1) of the Rules of Procedure of the IACtHR and it therefore opens the door to individuals or organizations to file submissions. The Article reads as follows:

> 1. Any person or institution seeking to act as amicus curiae may submit a brief to the Tribunal, together with its annexes, by any of the means established in Article 28(1) of these Rules of Procedure, in the working language of the case and bearing the names and signatures of its authors […].[1065]

The *Awas Tingni* v. *Nicaragua* case involved quite a substantial number of *amici curiae* and is therefore a suitable example. In this case, the IACtHR received *amicus* briefs submitted by various organizations such as the International Human Rights Law Group, the Assembly of First Nations of Canada – the national representative organization of Canada's indigenous peoples, the Organization of Indigenous Syndics of

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[1062] *Muñoz Díaz v. Spain* case, *supra* note 1059, at 14. Cichowski points to other examples where the ECtHR quoted *amicus* briefs in its judgments and, therefore, argues that civil society has at times shaped the Court's decisions. This includes most notably *Soering v. United Kingdom*, where the Court cited Amnesty International's brief. The Court stated that: 'This "virtual consensus in Western European legal systems that the death penalty is, under current circumstances, no longer consistent with regional standards of justice", to use the words of Amnesty International, is reflected in Protocol No 6 to the Convention, which provides for the abolition of the death penalty in time of peace'. See *Soering v. United Kingdom*, Judgment of 7 July 1989, [1988] ECtHR (14038/88), at para 102. See also generally R. Cichowski, 'Civil Society and the European Court of Human Rights', in J. Christoffersen and M. Rask Madsen (eds.), *The European Court of Human Rights between Law and Politics* (2011).

[1063] Report of the Appellate Body, *Asbestos* case, *supra* note 1030.

[1064] J.M. Pasqualucci, *supra* note 914, at 74.

[1065] Rules of Procedure of the Inter-American Court of Human Rights, Article 44, available at: http://www.corteidh.or.cr/reglamento/regla_ing.pdf.

the Nicaraguan Caribbean, the Mohawks Indigenous Community of Akewsasne, and the National Congress of American Indians.[1066] The Court accepted the briefs without the need to raise any issues relating to their admissibility. Conversely, the IACtHR has rarely quoted from or cited *amicus* briefs; yet, there is evidence that the Court has relied on the research and analysis provided by the briefs.[1067] It is worthy to note nonetheless that the recognition of the Awas Tingni's communal rights may be regarded as a positive reception by the IACtHR of the *amici curiae*'s arguments.

As far as the ACHPR is concerned, article 99(16) of the ACHPR's Rules of Procedure states that:

> The Commission may receive *amicus curiae* briefs on communication. During the hearing of a Communication in which an *amicus curiae* brief has been filed, the Commission, where necessary shall permit the author of the brief or the representative to address the Commission. [1068]

The ACHPR's *amicus* practice is reflected in *CEMIRIDE and MRG on behalf of Endorois Welfare Council* v. *Kenya*, a Kenyan NGO called the Centre on Housing Rights and Evictions (COHRE) filed an *amicus curiae* brief that the ACHPR plainly considered as an integral part of the claimants arguments against Kenya.[1069] Again, COHRE's *amicus* submission did not seem to have stirred any legal debates nor did Kenya object to it. The ACHPR did not make explicit reference to it in its final decision either. This case reflects the ACHPR's liberal practice in relation to *amicus curiae* submissions, which is similar to the approach adopted by other international human rights jurisdictions.

4. The peculiar case of third party intervention

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

[1066] J.M. Pasqualucci, , *supra* note 914, at 215; *The Mayagna (Sumo) Awas Tingni Community* v. *Republic of Nicaragua*, Judgment of 31 August 2001, Inter-American Court of Human Rights (series C) No. 79 (2001), para. 29-62.
[1067] Ibid., at 75.
[1068] Rules of Procedure of the African Commission on Human and Peoples' Rights, Article 99(16), available at: http://www.achpr.org/files/instruments/rules-of-procedure-2010/rules_of_procedure_2010_en.pdf.
[1069] *CEMIRIDE* and *MRG on behalf of EWC* v. *Kenya* case, *supra* note 608, at 31.

Aguas del Tunari v. Bolivia cases in Part III[1070] where both petitions were premised on the '*direct interests*' at stake.[1071]

4.1 Third party intervention before *common law* courts

Third party intervention is extensively regulated under common law. As previously pointed out, in the UK, the term 'third party intervention' generally refers to the *amicus curiae* procedure.[1072] A notion similar to 'intervention of right' – as it is called in US federal civil procedure law – does however exist under English law.[1073] Having said that, intervention in public interest litigation, as known under US law, is far from similar under English law and jurisprudence, where such cases primarily involve to a lesser degree the *amicus* procedure.[1074] Canadian law on the other hand is more similar to US law where both its rules[1075] and practice[1076] clearly distinguish between the *amicus*

[1070] See Part III – Section 1.3.1.
[1071] UPS v Canada, *infra* note 1241, para 22 and Aguas del Tunari, S.A. v. The Republic of Bolivia, *supra* 716, at para 2.
[1072] This is also the case of the ECHR, which refers to the *amicus curiae* procedure as 'Third Party Intervention'. As previously suggested, the term should not be confused with how third party intervention is conceptualized under the present research. See ECHR, *supra* note 844, Article 36. See also Introduction .
[1073] English courts have the power to 'try two or more claims on the same occasion' by virtue of Article 3.1 (2)(h) of the Civil Procedure Rules (CPR). In addition, Article 19.1 CPR indicates that any number of claimants or defendants may be joined as parties to a claim. It states that: '(2) The court may order a person to be added as a new party if – (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or (b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue.' See Civil Procedure Rules, entry into force 13 November 2013, available at: http://www.justice.gov.uk/courts/procedure-rules/civil/rules (last accessed 06 October 2014). For a closer analysis, see also A. Zuckerman, *infra* note 1090, at 441.
[1074] E. Metcalfe, 'JUSTICE Report: To Assist the Court: Third Party Interventions in the UK', dated 26 October 2009, available at: http://www.justice.org.uk/resources.php/32/to-assist-the-court (last accessed 06 October 2014), at 7-8. JUSTICE is UK-based civil society organization dedicated to 'advancing the access to justice, human rights, and the rule of law'.
[1075] Rule 55 of the Rules of the Supreme Court of Canada provides that: 'Any person interested in an application for leave to appeal, an appeal or a reference may make a motion for intervention to a judge.'. The requirements and regulating criteria are provided further below under Rule 57, which provides that: '(1) The affidavit in support of a motion for intervention shall identify the person interested in the proceeding and describe that person's interest in the proceeding, *including any prejudice that the person interested in the proceeding would suffer if the intervention were denied*. (2) A motion for intervention shall (a) identify the position the person interested in the proceeding intends to take with respect to the questions on which they propose to intervene; and (b) set out the submissions to be advanced by the person interested in the proceeding with respect to the questions on which they propose to intervene, their relevance to the proceeding and *the reasons for believing that the submissions will be useful to the Court and different from those of the other parties*.'. As mentioned previously, the *amicus curiae* procedure is on the other hand regulated under Rule 92. See Rules of the Supreme Court of Canada, *supra* note 970 (our emphasis), and the Ontario Rules of Civil Proceedings, *infra* note 1254. See also E. Metcalfe, *supra* note 1074, at 42-43.
[1076] In the landmark *Reference re Secession of Quebec* case, the Supreme Court of Canada accepted (and addressed the arguments of) both *amicus curiae* submissions and third party interventions. The latter were namely made by indigenous nations and groups such as Kitigan Zibi Anishinabeg, the Grand Council of the

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

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

4.1.1 Applicable procedural rules – A look at the US model

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

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

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

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

[1079] The Federal Court judge noted that: 'I am not satisfied that the moving parties can bring to the Court a point of view with respect to these issues which will, in any material way, be different from that of the parties. The essence of the judicial review application is the correct interpretation of the NAFTA. The proposed intervenors do not have any particular or unique expertise in interpreting international treaty obligations that would assist the Court beyond that which is offered by counsel for Canada, the United States, Mexico, the respondent and the members of the Arbitral Tribunal itself. The social policy concerns of the moving parties, including Canada's trade policy, would not assist in the determination of the legal issues which arise under the Government's application for judicial review'. See Attorney General of Canada, and S.D. Myers, inc., and The Council of Canadians, The Sierra Club of Canada and Greenpeace, 2001 F.C.T. 317, Reasons for Order of 11 April 2001, para 21. See also Y. Fortier and S. Drymer, *supra* note 323, at 476.

[1080] Ibid.

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

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

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

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

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

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

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

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

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

[1086] Ibid., at 985 citing E. Jones.

[1087] See the discussion in Part I – Section 1.5.2.

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

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

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

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

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

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[1089] E. Shaver, *infra* note 1098, at 1558, G. Hazard et al., *supra* note 977, at 771, and C. Tobias, *infra* 1204, at 317.
[1090] A. Zuckerman, *Civil Procedure* (2003), at 442.
[1091] The Rule was later amended in 1946 to extend intervention to interest in property not in the custody of the Court. See E. Shaver, *infra* note 1098, at 1556.
[1092] It is argued that the 1966 amendment was in response to the practice of lower federal courts of broadly construing the property interest requirement of the 1946 version of the Rule to permit more applicants to intervene. The 1966 amendment is still in force to this day. See E. Shaver, *infra* note 1098, at 1557, and M. Harris, *supra* note 1082, at 880.
[1093] See Federal Rules of Civil Procedure for the United States District Courts, as amended on 01 December 2013, available at: http://www.law.cornell.edu/rules/frcp/rule_24 (last accessed 06 October 2014) (our emphasis).
[1094] See for instance, Articles 387 and 388 of the California Code of Civil Procedure, which state that: '387. (a) Upon timely application, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by complaint, setting forth the grounds upon which the intervention rests, filed by leave of the court and served

that the formulation Rule 24(a)(2) – which dates back to the 1966 amendment – has been broadly and expansively construed to include intervention by non-disputing parties in public interest cases.[1095] Indeed, such an interpretation is seemingly in line with the intention of the Advisory Committee which drafted the Rule prior to its adoption in 1966.[1096]

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

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

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

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

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

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

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

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

[1098] E. Shaver, 'Intervention in the Public Interest Under Rule 24(a)(2) of the Federal Rules of Civil Procedure', (1988) 45 Washington and Lee Law Review 1549, at 1550.
[1099] R. Field et al., *supra* note 1084, at 982-983.
[1100] G. Hazard et al., *supra* note 977, at 754.
[1101] See E. Shaver, *supra* note 1098, at 1551 and G. Hazard et al., *supra* note 977, at 770-771.
[1102] Ibid., at 1569 referring to Harris v. Pernsley, 820 F.2d 592, (3d Cir. 1987), at para 596 (stating that 1966 version of Rule 24(a)(2) permits courts to settle intervention questions flexibly).
[1103] 404 U.S. 528, 92 S. Ct. 630 (1972).
[1104] The Court noted that the union member in question had filed the initial complaint to the Secretary against the election. It also stated that 'the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal'. As the Secretary must represent the public interest in free union elections as well as protect the rights of the union member, 'the union member may have a valid complaint about the performance of 'his lawyer'. Ibid., at para 539. See also R. Field et al., *supra* note 1084, at, at 983.
[1105] 713 F.2d 525 (9th Cir. 1983).

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

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

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

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

[1109] 764 F.2d 1265 (7th Cir. 1985).

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

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

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

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

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

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

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

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

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

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

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

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

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

State third party intervention is set forth under a wide variety of international treaties [1122] such as the ECHR, as previously mentioned, [1123] the United Nations Convention on the Law of the Sea, [1124] or the WTO DSU [1125] where intervention is

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

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

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

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

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

[1123] See *supra* note 64.

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

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

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

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

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

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

[1125] Article 10 of the DSU provides that: '1. The interests of the parties to a dispute and those of other members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process. 2. Any member having a *substantial interest* in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report. 3. Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel. 4. If a third party considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any covered agreement, that member may have recourse to normal dispute settlement procedures under this Understanding. Such a dispute shall be referred to the original panel wherever possible'. See WTO DSU, *supra* note 998 (our emphasis).
[1126] See Part I – Section 1.5.
[1127] *Asylum Case (Colombia v. Peru)*, *supra* note 855.
[1128] Convention on Asylum, entered into force 21 May 1929, OAS Official Records, OEA/Ser.X/I. Treaty Series 34.
[1129] *Asylum Case (Colombia v. Peru)*, *supra* note 855, at 77.

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

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

[1130] S. Rosenne, *Intervention in the International Court of Justice* (1993), at 12-13.
[1131] See *infra* note 1138.
[1132] Article 63 is specific to contracting parties to the same treaty: '(1) Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith. (2) *Every state so notified has the right to intervene in the proceedings*; but if it uses this right, the construction given by the judgment will be equally binding upon it'. ICJ Statute, *supra* note 94 (our emphasis). According to Zimmermann, Article 63 of the ICJ Statute could be traced back to Article 56 of The Hague Convention for the Pacific Settlement of International Disputes of 1899, entered into force 4 September 1900 (187 CTS 410); and Article 84 of The Hague Convention for the Pacific Settlement of International Disputes of 1907, entered into force 26 January 1910 (36 Stat. 2199,1 Bevans 577, 205 Consol. T.S. 233). See A. Zimmermann, *supra* note 55, at 1.
[1133] S. Rosenne, *supra* note 1130, at 95.
[1134] Article 59 states that: 'The decision of the Court has no binding force except between the parties and in respect of that particular case'. See ICJ Statute, *supra* note 94.
[1135] A. Zimmermann, *supra* note 55, at para 4.
[1136] Ibid., at para 4.

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

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

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

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

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

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[1137] Ibid., *supra* note 55, at para 2.
[1138] ICJ Statute, *supra* note 94.
[1139] Article 81, ICJ Rules of Court, *supra* note 852. However, if the third state's intervention lacks the jurisdictional link, then it does not become a 'party' to the dispute and the respective judgment does not amount to *res iudicata*. See *Land, Island and Maritime Frontier Dispute Case (El Salvador/Honduras: Nicaragua Intervening)*, ICJ Rep 92 1990, where an ad hoc chamber of the ICJ found that Nicaragua might be allowed to intervene as a third state even without requiring such a jurisdictional link. See also *Land and Maritime Boundary between Cameroon and Nigeria Case (Cameroon v Nigeria)*, ICJ Rep 1029 1999. and Sovereignty over *Pulau Ligitan and Pulau Sipadan Case (Indonesia/Malaysia)*, ICJ Rep 575 2001 cited by A. Zimmermann, *supra* note 55, at paras 10, 13. See also S. Rosenne, *supra* note 1130, at 95, and B. Bonafe, *supra* note 1154, at 744.
[1140] Article 85, ICJ Rules of Court, *supra* note 852.
[1141] A. Zimmermann, *supra* note 55, at para 13.
[1142] See B. Bonafe, *infra* note 1154, at 740 citing *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras)*, Application by Nicaragua for Permission to Intervene, Judgment of 13 September 1990, ICJ Reports 1990 p. 92, para. 99; and *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, Application by Malta for Permission to Intervene, Judgment of 14 April 1981(Judge Oda, Separate Opinion), ICJ Reports 1981, p. 3, at para. 23.

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

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

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

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

[1143] See B. Bonafe, *infra* note 1154, at 740-741.
[1144] See also S. Rosenne, supra note 1097, at 94-96.
[1145] *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, *supra* note 1142 (our emphasis), at para 5.
[1146] See *supra* note 1139.
[1147] *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, *supra* note 1142 (our emphasis), at para 9.

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

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

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

[1148] A. Zimmermann, *supra* note 55, at para 13.
[1149] Ibid., at 741 citing *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application for Permission to Intervene, Judgment of 4 May 2011, I.C.J. Reports 2011, p. 348, at para 23-26. See also *Barcelona Traction case*, *supra* note 357, at para 46 on the question of *ius standi*.
[1150] *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *supra* note 1149, at para 26 (our emphasis).
[1151] A. Zimmermann, *supra* note 55, at para 9.
[1152] See B. Bonafe, *infra* note 1154, at 742, 755 citing also *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *supra* note 1142, at para 76. See also A. Zimmermann, *supra* note 55, at para 9.
[1153] In this regard, a third state may opt to intervene if it aims to prevent the formation of a precedent that could be contrary to its own specific claims. However, such third state 'must explain with adequate specificity how particular reasoning or interpretation of identified treaties by the Court might affect its claim'. See the ICJ's rejection of the Philippines application to intervene in *Sovereignty over Pulau Ligitan and Pulau Sipadan Case*, *supra* note 1139, at para 60. See also P. Palchetti, 'Opening the ICJ to Third States: Intervention and Beyond', (2002) 6 Max Planck Yearbook of United Nations Law 139, at 156-158.

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

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

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

[1154] For an exhaustive survey, see B. Bonafe, 'Interests of a Legal Nature Justifying Intervention before the ICJ', (2012) 25 Leiden Journal of International Law 739, at 739.
[1155] Ibid., at 756.
[1156] *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *supra* note 1149, Dissenting Opinion of Judge Al-Khaswaneh, at para 5 (our emphasis).
[1157] For a comprehensive analysis on the issue, see generally S. Rosenne, *supra* note 1130.
[1158] See Part III – Section 3.

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

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

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

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

Separately, the role described above is articulated in a more expansive manner than the previously discussed role available to NAFTA parties under Article 1128.[1163] As shown throughout this research, NAFTA case-law shows a consistent practice of intervention by NAFTA-contracting states as 'non-disputing parties' to make submissions on a question of interpretation of NAFTA in accordance with Article 1128.[1164]

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

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

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

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

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

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

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

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

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

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

i. Background

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

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

[1166] See *supra* note 64.

[1167] See Part III – Section 1.1.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[1177] See also T. Bevilacqua, *supra* note 1168, at 509.
[1178] SIAC Arbitration Rules, 5th Edition of 01 April 2013, available at: http://www.siac.org.sg/our-rules/rules/siac-rules-2013#siac_rule24 (last accessed 06 October 2014). For further elaboration, see G. Born, *supra* note 1173, at 2602-2605.
[1179] T. Bevilacqua, *supra* note 1168, at 510; G. Born, *supra* note 1173, at 2599-2601.
[1180] Swiss Rules of International Arbitration, entered into force 01 June 2012, available at: https://www.swissarbitration.org/sa/download/SRIA_english_2012.pdf. (last accessed 06 October 2014).
[1181] K. Kim and J. Mitchenson, *supra* note 1168, 413.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.3 Common denominators

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

[1189] See UNCITRAL, Working Group II (Arbitration and Conciliation) – 'Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules', 46th session, 5-9 February 2007 (A/CN.9/WG.II/WP.145/Add.1), available at: http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html#46thsession (last accessed 06 October 2014), at, para 2.
[1190] Ibid., at para 6.
[1191] Ibid., at para 2.
[1192] See UNCITRAL Arbitration Rules (2010), *infra* note 1303.
[1193] J. Paulsson and G. Petrochilos, 'Report: Revision of the UNCITRAL Arbitration Rules', 03 September 2006, available at: http://www.uncitral.org/pdf/english/news/arbrules_report.pdf (last accessed 06 October 2014), at 73.
[1194] A. Zimmermann, *supra* note 55, at 13.

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

5. Concluding remarks

To date, numerous courts and tribunals have had an extensive *amicus curiae* practice. Notwithstanding such liberalism, the position of courts and tribunals on *amicus curiae* may be poignantly summarized by the following words of the WTO Appellate Body's decision in the *Hot-Rolled Lead* case:

> *Individuals and organizations, which are not members of the WTO, have no legal 'right' to make submissions or to be heard by the Appellate Body*. The Appellate Body has no legal 'duty' to accept or consider unsolicited *amicus curiae* briefs submitted by individuals or organizations, not members of the WTO…[1195]

Third party intervention is, on the other hand, generally practiced in a limited manner and continues to be rather a rare exception.[1196] The background is that dispute settlement largely remains of a bilateral nature.[1197] When parties arbitrate or litigate, they generally have a legitimate expectation to do so amongst each other as per their agreement – and not with anyone else. In a commercial arbitration or litigation setting, the intervention of third parties is strictly confined to the realm of contractual

[1195] See WTO, Report of the Appellate Body, *United States: Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismut Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R (10 May 2000), para. 41 ('*Hot-Rolled Lead* case').
[1196] See generally, A. Zimmermann, *supra* note 55.
[1197] Ibid., at para 17.

relationships, i.e. the third party must be, along with the disputing parties, bound by the same arbitration agreement or contractual agreement in which the former is contained.

In domestic law settings, intervention could arise in public interest related litigation – as clearly reflected by US case law. A broad right to intervene is considered to ultimately allow third party intervenors to be heard, the taking into account of third party interests and, it is argued, the enhancement of the legitimacy of proceedings.[1198] Yet, the burden caused by third party intervention on the proceedings and to disputing parties is a paramount factor that requires further reflection.[1199] The protection of third parties' interests ought to be balanced with the disputing parties' interests on one hand, as well as the accuracy and efficiency of proceedings on the other. In this respect, tribunals have not hesitated in exercizing their discretion in modulating the intervention of third parties to fit the particular needs, and circumstances, of the litigation either by rejecting it, or restricting its scope.

These questions are further addressed in Part III through the prism of investor-state arbitration.[1200] Indeed, IIAs and BITs contain an 'offer to arbitrate' by host states that is exclusively aimed at foreign investors. The intervention of third parties in the form of a joinder – as understood in an international commercial arbitration context – could lead to unwelcomed structural changes, and hurdles, to the investor-state dispute settlement regime. That said, intervention as a 'non-party' may turn out to be an interesting model that merits further scrutiny.

[1198] On the impact of third party intervention in general on the legitimacy of proceedings, see P. Sands and R. Mackenzie, *supra* note 55, at para 29; W. Benedek, *infra* note 661, at 204.
[1199] E. Triantafilou, *supra* note 18.
[1200] See Part III – Section 3.2.2.

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

Introductory remarks

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

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

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

In the *UPS* and *Bechtel* cases, civil society petitioners sought to intervene as third parties in order to effectively raise, assert, or defend the 'direct' interests of certain

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

1. Transcending *amicus curiae* submissions

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

[1201] Part III – Section 2.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

i. Petitioners' requests

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

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

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

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

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

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

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

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

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

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

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

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

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

[1253] Ibid., at para 87.

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

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

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

ii. The tribunal's response

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

[1255] Ibid., at para 84.
[1256] Ibid., at para 85.
[1257] Report of the Appellate Body, *United States: Import Prohibitions of Certain Shrimp and Shrimp Products*, *supra* note 1027.
[1258] Report of the Appellate Body, *United States: Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismut Carbon Steel Products Originating in the United Kingdom*, *supra* note 1042.
[1259] UPS v. Canada, *supra* note 1241, at para 83.
[1260] UPS v. Canada, *supra* note 517, para 26.
[1261] Ibid., para 11.

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

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

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

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

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

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

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

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

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

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

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

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

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

i. Petitioners' requests

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ii. The tribunal's response

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

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

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

[1301] See Articles 355-369 on third party intervention. Article 356 provides that: 'the intervenor shall establish its intervention on the basis of a personal interest, a positive right, and certain existence , although its exercise may be subject to terms and conditions.' (our translation). See *Código de Procedimiento Civil*, entry into force 02 April 1976, available at: http://www.wipo.int/wipolex/es/details.jsp?id=11445 (last accessed 06 October 2014).
[1302] Aguas del Tunari, S.A. v. The Republic of Bolivia, *supra* note 539.
[1303] Article 17(5) of the UNCITRAL Arbitration Rules states that: 'The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party *provided such person is a party to the arbitration agreement*, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties' (our emphasis). See UNCITRAL Arbitration Rules (2010), entry into force 06 December 2010, available at: http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf (last accessed 01 November 2013).
[1304] Aguas del Tunari, S.A. v. The Republic of Bolivia, *supra* note 539, at 2 (our emphasis).

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

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

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

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

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

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.

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

[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

[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

[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

[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]

4. Concluding remarks

This research posits that civil society should be recognized as a third-party intervenor when relevant and necessary as a 'non-party' intervenor. There are nonetheless challenges that may be arguably posed by broader stakeholder access to investor-state disputes. First, there is a question as to whether third party intervention should be premised on affected 'direct' interests or the 'broader' public interest. This debate is essential in understanding detractors' arguments relating to the additional costs and burdens third party intervention might cause.[1462]

[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.

The *UPS* tribunal found that Article 14 of the ICCPR,[1463] cited by the petitioners as one of the basis on which they should be granted standing, relates to persons whose *rights* and *obligations* – which according to the tribunal solely emanates from NAFTA. This shifts attention to the second challenge, i.e. civil society does not have any *rights* and *obligations* under IIAs or BITs – which provide that the sole two disputing parties in investor-state arbitration are the foreign investor, acting as claimant; and the host state, acting as respondent.

Civil society's third party intervention would be possible if both disputing parties give their consent. Otherwise, and notwithstanding the compelling access to justice arguments, investor-state tribunals would be venturing in a grey zone when deciding on the matter even if host states consent to civil society's third party intervention. Investor-state tribunals would most likely have to rely on their discretionary powers and authority – as they have done over a decade ago when the *amicus curiae* procedure was first accepted in the absence of any rules on the matter. The facts and circumstances of each case will be crucial and determinative factors in this regard, precisely because not all investor-state arbitrations are public interest-related disputes; and moreover, not all investor-state arbitrations that are in fact public interest-related involved the 'direct' interests of civil society and those it represents.

Against this backdrop, it may be argued that, when the *'direct' interests*, and not merely the *'broader' public interest*, of communities or groups are at stake, there would be a compelling need to secure broader third party intervention to civil society petitioners that are acting on their behalf or on behalf of those affected communities or groups.

[1463] 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.

CONCLUSION

The first ever BIT was concluded between West Germany and Pakistan in 1959.[1464] Makhdoom Ali Khan, Pakistan's former Attorney General, recalled the rationale behind his country's negotiation of BITs as 'everyone simply considered the treaties a piece of paper, something for the press, a good photo opportunity and that was the end of it'.[1465] States such as Pakistan have now realized that they have created, perhaps inadvertently, a formidable international law regime that bestows upon foreign investors both unprecedented substantive and procedural rights.

With this realization, the investor-state arbitration mechanism thus created has come under severe criticism when public-national interests were perceived as being trumped by private-foreign ones. To say the least, investor-state arbitration has increasingly become a divisive issue that is being systematically debated not only by specialist international law practitioners, but also citizens, civil society, parliaments and politicians, and of course multinationals and investors.[1466]

Stakeholders in this debate are often taking dogmatic and defensive positions on the basis of stereotypical perspectives, as opposed to empirical ones. The stereotype of the inherently inferior foreign investor who resorts to arbitration to seek remedies of the discretionary abuse committed by the inherently superior host state is simply flawed. Equally inaccurate is the assumption that host states are attempting to fend off claims by powerful foreign investors aimed at contesting measures taken in the public interest. This research comes to the rather obvious conclusion that facts and circumstances are fundamentally different in each particular investor-state arbitration. Yet, the current

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[1464] Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, signed 25 November 1959, available at: http://investmentpolicyhub.unctad.org/Download/TreatyFile/1387 UNCTAD reports that Pakistan has concluded 50 IIAs, see UNCTAD's website, available at: http://investmentpolicyhub.unctad.org/IIA/CountryBits/160 (last accessed 01 July 2015).

[1465] Quoted in J. Kurtz, 'Buidling Legitimacy Through Interpretation in Investor-State Arbitration', in in Z. Douglas et al. (eds.), *The Foundations of International Investment Law* (2014), at 261–262.

[1466] In the wake of the ongoing TTIP negotiations, the EU Parliament called for 'a new justice system, run by publicly-appointed judges and subject to scrutiny and transparency rules, [that] should replace private arbitration' . See EU Parliament, 'TTIP: ease access to US market, protect EU standards, reform dispute settlement', 8 July 2015, available at: http://www.europarl.europa.eu/news/en/news-room/content/20150702IPR73645/html/TTIP-ease-access-to-US-market-protect-EU-standards-reform-dispute-settlement (last accessed 01 August 2015).

debate over the legitimacy of investor-state arbitration has taken such a polarizing turn that this obvious assertion now appears rather blurred.

There is no doubt that investor-state arbitration is important in order to guarantee access to justice to foreign investors, replace diplomatic protection, and uphold international principles and standards of investment protection as well as the international rule of law. The investor-state arbitration regime must equally ensure that host states could freely enact legitimate public interest measures. One of the key ways to ensure this is that investor-state tribunals need to get a full understanding of the issues at stake in order to 'arrive at a correct decision'.[1467]

As an example, upon deciding whether a host state violated its international law obligations towards a foreign investor who invested in a water distribution concession, should a tribunal consider whether the ability to access water of a segment or group of a host state's population was undermined as a result of a water price increase by that same foreign investor?[1468] In essence, should an investor-state tribunal consider relevant environmental protection, public health, human rights or other public policy issues when adjudicating host state responsibility under international law vis-à-vis foreign investors?

This was not the precise question of this research. In fact, it may be argued that the answer to this question has been settled long ago. Since the *Methanex v. United States* decision in 2001, the answer to that question is essentially *yes*.[1469] Some, primarily international commercial arbitration specialists, are nonetheless committed to a negative answer. It is based – from this research's perspective – on anachronistic conceptions that are merely out of touch with an established reality, *a fait accompli*. The contemporary investor-state dispute settlement regime suffers from negative perceptions of systemic deficiencies partly as a result of such conceptions.[1470] These detractors fail to recognize

[1467] Aguas Provinciales de Santa Fe S.A et. al. v. The Argentine Republic, *supra* note 555, at para. 23.
[1468] See Introduction – Section 1.
[1469] It is worthy to recall here that, while deciding to accept *amicus* submissions by civil society, the *Methanex* tribunal noted 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).
[1470] Various sources were cited throughout this research to that effect. See here, *inter alia*, C. Olivet and P. Eberhardt, 'Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom' (November 2012), *Transnational Institute* and *Corporate Europe Observatory*, available at: http://www.tni.org/sites/www.tni.org/files/download/profitingfrominjustice.pdf (last accessed 06 October 2014);

that (i) there are public interest-related investor-state arbitrations that could potentially affect the public's broader interest; and (ii) although limited in number, certain public interest-related investor-state arbitrations closely relate to environmental protection, public health, human rights or other public policy issues that could potentially affect the direct interests of certain communities or groups who are third parties to arbitration proceedings.

The next logical question of interest to this research was '*how*?', i.e. how would an investor-state tribunal consider environmental protection, public health, human rights or other public policy issues when adjudicating host state responsibility under international law vis-à-vis foreign investors? The *amicus curiae* procedure was accepted by investor-state tribunals, ICSID, UNCITRAL and an increasing number of states as an answer to that question. This research attempted to contribute to the debate by understanding the answer as to '*how*?'

The *amicus curiae* answer is a novel development given its inadequacy and irrelevance in international commercial arbitration. International commercial arbitration rules had been adapted to investor-state arbitration. However, the subject matter of the latter widely transcends strictly commercial aspects of arbitrations between two private parties. This procedural interchangeability faded to some extent with (i) the increasing recognition by investor-state tribunals for the necessity of a shift in procedure where the public interest is at stake; (ii) both ICSID and UNCITRAL amending existing, or adopting new, arbitration rules; (iii) NAFTA parties setting out new guidelines to increase third-party participation and transparency under Chapter XI disputes; and (iv) an increasing number of recently negotiated IIAs and BITs confirming this trend. These developments indeed marked a clear paradigm shift, i.e. investor-state arbitration is increasingly perceived as distinct – both substantively and procedurally – from international commercial arbitration. The various examples cited in this research show that investor-state tribunals could render decisions with vast socio-economic implications

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The Economist, 'The Arbitration Game: Governments Are Souring on Treaties to Protect Foreign Investors' (11 October 2014), available at: http://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration (last accessed 05 January 2015). Also, see generally, UNCTAD 2013 Report, *supra* note 210; J. Maupin, *supra* note 48, at 62; A. Martinez, *supra* note 181. For a dismissal of much of this criticism, see generally C. Brower and S. Blanchard, *supra* note 8.

making them the target of mounting pressure 'for the public voice to be heard'.[1471] In this light, states have increasingly recognized the need for enhanced transparency and third party participation within investor-state arbitration. All of these factors lead to the formal recognition of the *amicus curiae* procedure.

Against this backdrop, civil society now participates in investor-state arbitrations as *amicus curiae* and raises arguments that comprise, but also often transcend, the mere furtherance of 'broader' public interest issues. In some cases, civil society equally and distinctly aims to raise, assert, or defend the 'direct' interests of communities or groups that claim to be affected by investor-state arbitrations or the arbitral claims of foreign investors. Indeed, the acceptance of civil society's *amicus curiae* participation in investor-state disputes is typically premised on an underlying 'broader' public interest to a given dispute. Yet, in certain cases, and in light of their particular facts and circumstances, tribunals explicitly noted that civil society petitioners sought to participate on the basis of their 'direct' interests'. [1472] Such 'direct' interests also relate to environmental protection, human rights or other public policy issues that are not necessarily brought forward by host states.

Civil society also viewed the *amicus curiae* procedure as insufficient. The mere submittal of a 15 to 20 page *amicus* brief, along with an invariable access to hearings and case materials, was considered as an incomplete access to justice. The recently-recognized *amicus* role before investor-state tribunals contrasts starkly with access to international human rights jurisdictions where civil society may benefit from three procedural roles, i.e. standing as a party, representation of victims, or participation as *amicus curiae*. Civil society has indeed adequate and effective access to these jurisdictions; whereas it arguably does *not* benefit from such access before investor-state tribunals. In the landmark *Bechtel* case, civil society organizations precisely sought standing as third parties in order to act *on behalf* of adversely affected groups from the city of Cochabamba and formulated their request on the basis of these stakeholders' *rights*:

[1471] R. Garcia, *supra* note 972, at 357.
[1472] See United Parcel Service v. Canada, *infra* note 517, at para 13.

> *…this Tribunal's award will determine Petitioners' rights*. As such, it is essential that Petitioners have an opportunity to be heard by the Tribunal.[1473]

These arguments were premised on the principle of access to justice, most notably on the basis of Article 14 of the ICCPR.[1474] Investor-state tribunals have correctly dismissed such arguments given that, under IIAs and BITs, foreign investors acting as claimants on the one hand, and host states acting as respondents on the other, are the sole parties whose rights and obligations are being adjudicated upon. Investor-state tribunals cannot therefore grant standing to additional disputing parties. There is simply no legal basis for a civil society *ius standi* before investor-state tribunals. As shown, this is consistent with the practice of international human rights jurisdictions where civil society benefits from standing in the same manner as 'any person' who seeks redress of violations to *rights* guaranteed under the ECHR, IACHR, or the Banjul Charter.

This research has shown, however, that there may be procedural and substantive avenues to accommodate investor-state tribunals' dismissal. From a procedural standpoint, courts and tribunals may, on the basis of their legitimate exercise of discretion, allow third party intervention based on 'non-party' intervention as is practiced at the ICJ for instance or the access given to some non-disputing IIA or BIT contracting parties.[1475] From a substantive standpoint, the fact that IIAs and BITs solely set forth the rights and obligations of foreign investors and host states respectively does not mean that investor-state disputes might not affect the rights of communities or groups that are formally recognized under either international or municipal law. These rights could translate as 'direct' interests before investor-state tribunals. The debate then shifts away from the jurisdictional barrier that was rightly set by investor-state tribunals, i.e. third party interests would not interfere (jurisdictionally) with the adjudication of foreign investors' and host states' treaty rights and obligations.

In concreto, under the proposed third party intervention procedure, civil society would be considered as a third party to the dispute and not as an additional disputing party on the one hand, nor a mere assistant of an investor-state tribunal as *amicus curiae* on the other. This research thus adheres to the position that third party intervention

[1473] See the petitioners' requests at Aguas del Tunari, S.A. v. The Republic of Bolivia, *supra* 716, para 48.
[1474] See Article 14(1), ICCPR, *supra* note 1250.
[1475] Article 85, ICJ Rules of Court, *supra* note 852; Article 21.11, United States-Peru BIT, *supra* note 505.

should not lead to the 'addition of a party to the dispute' – to use the *UPS* tribunal's terms.[1476] In other words, foreign investors should not be faced with an 'additional party'. Visually speaking, third party intervention stands somewhere between standing and *amicus* participation. Third party intervention does not (i) necessarily equate to standing as an additional party; and (ii) transcends the mere *assistance of the court as a friend*. Third party intervenors would be able to effectively scrutinize foreign investors' claims and arguments, and in fact, have access to hearings, case materials, submit relevant factual and legal arguments accordingly, including by oral observations.[1477]

Third party intervention is *grosso modo* an enhanced, more expansive, *amicus curiae* role. It is subject to a direct, significant, and legally protectable interest; or a 'real and concrete' interest underlying to a legal norm. This research thus proposed a standard for third party intervention on the basis of a '*direct and significant interest in the outcome of the arbitration*'. Otherwise, the remaining criteria regulating *amicus curiae* interventions simply apply *mutatis mutandis*.[1478]

That said, two crucial points are worthy to reiterate here. First, despite being categorically recognized as non-underlying to any third party right, but rather as a matter of procedural discretion, and subject to the assistance of investor-state tribunals (amongst other conditions), the *amicus* procedure is now fully recognized in investor-state arbitration as a procedural means to channel 'broader' public interest concerns. Second, there is a need to ponder over a more expansive procedural role, i.e. through third party intervention, to those stakeholders whose 'direct' interests – and not merely whose 'broader' interests – are affected by a given investor-state dispute. The *amicus* procedure would be the proper means to channel 'broader' public interests; and third party intervention would be resorted to raise, assert, or defend the 'direct' interests of affected communities or groups that relate to environmental protection, human rights or other

[1476] United Parcel Service v. Canada, *supra* note 517, at para 13.
[1477] These modalities are well reflected in the US-Peru BIT: '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…'. See Article 21.11, United States-Peru BIT, *supra* note 505 (our emphasis).
[1478] The criteria are 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 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'. See UPS v Canada, *supra* note 517, at para 7(iii). See also Part III – Section 1.2.

public policy issues – if and when relevant to investor-state disputes. Both procedures need not be conflated. A clear distinction of the type of interest at stake in the arbitration is a paramount factor to take into account when assessing the adequacy of either procedure.

This research has accordingly attempted to emphasize that the adequacy and relevance of civil society participation is a factual issue rather than a conceptual one. This research does not purport to call for a systematic approval of civil society participation in investor-state disputes. Investor-state tribunals would need to judge whether civil society's factual and legal arguments would be relevant to the adjudication of the dispute between a foreign investor and a host state, i.e. in assessing whether a host state violated the rights bestowed upon a foreign investor by virtue of an IIA or BIT, and whether that foreign investor is entitled to damages.

As the primary subjects of international law, states should maintain efforts to enhance transparency in general, and third party participation in investor-state disputes through the recognition of the *amicus curiae* procedure in particular. These efforts have benefited from continuous consolidation since the ground-breaking *Methanex* decision in 2001.[1479] Host states should also consider supporting a more expansive role for third party stakeholders that would compare, but not necessarily equate, to the adequate and effective access those stakeholders benefit from before several not only domestic jurisdictions, but also international ones. IIAs and BITs should be amended by states to explicitly recognize the right of non-disputing parties to act as third party intervenors if and when their direct interests are affected by investor-state disputes. Endorsing third party intervention requests, and calling on investor-state tribunals to exercise their discretionary procedural powers to accept them, would be a positive step towards that direction. In fact, the application of such discretion would be reminiscent of how the *amicus curiae* procedure was first introduced in investor-state arbitration over more than a decade ago.

From a more holistic perspective, detractors of the intervention of third parties in a macro sense, i.e. *amicus* or other forms of intervention, often raise an 'equality of arms' argument against the proliferation of third party interests before investor-state tribunals

[1479] Methanex Corporation v United States, *supra* note 428, at para 49.

that would ultimately prejudice foreign investors. There is a quasi-general recognition, as shown, that investor-state arbitration has been devised to ensure access justice to foreign investors. That said, it is unwarranted to assume that civil society acts exclusively 'in favour of' host states. Civil society could also submit arguments as a third party 'in favour of' a foreign investor-claimant in investor-state arbitrations.[1480] The direction of civil society's intervention will essentially depend on the facts and circumstances of each particular case. The question then is not whether civil society's third party intervention would favour a host state over a foreign investor, or *vice-versa*. This issue should not be a source of concern. Rather, to use the example of the previously discussed *Metalclad* case, the main issue is to determine whether a foreign investor-claimant dumped 20,000 tons of untreated toxic waste near a community that could have had its representatives legitimately act as third party intervenors in the ensuing arbitration. [1481] In more concrete terms, third party intervention would allow investor-state tribunals to get a more complete picture of the factual and legal issues at stake, which could turn out to be crucial for the purposes of rendering more just and balanced decisions.[1482] 'Justice' and 'balance' would mean that investor-state tribunals would not award 'polluters' millions of dollars in damages – as *Metalclad* was described.[1483] The absence of stakeholder participation in this precise case, including most notably community members inhabiting the Metalclad project area who had complained from widespread sickness and contamination, was particularly detrimental to the perception of the legitimacy of the *Metalclad* tribunal's decision. Again, the fact that *justice* tilts in favour of either claimants (foreign investors) or respondents (host states) is inexorably dependent on the facts and circumstances, the merits, of each particular case. Rendering *justice* is ultimately the most relevant and compelling concern to take into account when discussing civil society's, or any third party's, access to investor-state tribunals, either via the *amicus curiae* or third party intervention procedures.

[1480] In *Grand River v. the United States*, an *amicus curiae* submission was filed by a Canadian indigenous organization in support of the foreign investor (the claimant). See Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, *supra* note 148.
[1481] Metalclad Corporation v. United Mexican States, *supra* note 257.
[1482] As previously mentioned, this was also an argument suggested in E. Triantafilou, *supra* note 18.
[1483] The United Mexican States v. Metalclad Corporation, *supra* note 314, at 5, 107. See also D. Schneiderman, *supra* note 304, at 82.

As thoroughly discussed throughout this research, 'justice' and 'balance' have been widely perceived to be deficient in the contemporary foreign investment regime.[1484] Judge Bruno Simma raises the following questions:

> …how we can mediate the tension between investment protection and human rights concerns? What legal mechanisms and arguments may we employ to assure a harmonious interface of the two? What are possible, and acceptable, legal avenues for an international investment tribunal to consider international human rights law in investor-state disputes? [1485]

Indeed, what happens if a foreign investor undermines, or impedes the fulfilment of, human rights or causes harm to the environment as a result of its protected investment activities? Should it benefit from the protection of an IIA or BIT? More specifically, if there is a close nexus between that violation or harm on the one hand, and the expropriation of the foreign investor's investment on the other, should that constitute compelling factors for the reduction, or even dismissal, of its potential claim for damages against the expropriating host state in an investor-state arbitration, i.e. as 'mitigating or off-setting effects'? [1486] The answers to these questions exceed the scope of this research. Yet, they capture the importance of the on-going debate over investor-state arbitration. A foreign investment and investor-state arbitration framework that solely takes into account the objectives of foreign investment promotion and protection, without adequately and effectively considering host states' duty to address public interest issues and/or foreign investors' potential obligations or responsibilities towards, or the potentially adverse impacts of their activities on, host states' populations, communities or groups, clearly echoes with the anti-globalization slogan of '*mondialisation à sens unique*'.

It was argued in this research that in order to ensure this much-needed balance that Judge Bruno Simma alluded to, affected stakeholders should be adequately and effectively involved in the investor-state arbitration process to the extent they have a '*direct and significant interest in the outcome of the arbitration*'. This could be potentially achieved through the third party intervention procedure. Not only would just and balanced investor-state tribunals' decisions progressively affect the international law

[1484] It is evident that, as signalled by Judge Bruno Simma, 'we are now confronted with claims of a lack of balance leading to apprehension, disillusionment and disappointment on the part of participants–voiced not just by left-wing regimes in Latin America or the usual suspects among the NGOs but, for instance, also by US presidential candidates in their electoral campaigns'. See Simma, *supra* note 196, at 575.
[1485] Ibid, at 573-574.
[1486] M. Wells-Sheffer, *supra* note 206, at 507.

on foreign investment, but also contribute to a more just and balanced process of economic globalization. Some have proposed the idea of counter-claims in investor-state arbitration to rid it of its 'unilateral' dimension and re-balance its dynamics.[1487] In the same vein, others are re-thinking the entire investment treaty regime in order to allow adversely affected host state populations to directly participate in arbitration proceedings as disputing parties.[1488] Others suggested the need to re-negotiate balanced IIAs or BITs that would clearly articulate foreign investors' rights, but also their potential obligations and responsibilities not only towards host states, but also host states' populations.[1489] Others prefer a 'softer' approach through the enhancement of corporate responsibility and self-regulation through codes of conduct and guidelines, the implementation of human rights impact assessments including prior public consultations with local communities.[1490] In sum, these proposals, including this research, fit within an increasingly widespread recognition for the need to address the 'problem' of, and the 'backlash' towards, the investment treaty regime and investor-state dispute settlement…[1491]

[1487] Under such a model, the host state would submit a counter-claim in an investor-state dispute on behalf of individuals or groups from its population that may be adversely affected by foreign investors-claimants' activities. See F. Francioni, *supra* note 847, at 738. See also W. Ben Hamida, *supra* note 1391.

[1488] See J. Daniel Amado, 'From Investors' Arbitration to Investment Arbitration: A Mechanism for Allowing the Participation of Host State Populations in the Settlement of Investment Conflicts' (2014), University of Cambridge Faculty of Law Research Paper No. 8/2014.

[1489] See, *inter alia*, C. Olivet and P. Eberhardt, *supra* note 1470, at 73.

[1490] Berne Declaration, Canadian Council for International Co-operation (2010). Human Rights Impact Assessment for Trade and Investment Agreements. Report of the Expert Seminar, June 23-24, 2010, Geneva, Switzerland, available online: http://www.srfood.org/images/stories/pdf/otherdocuments/report_hria-seminar_2010_eng.pdf.

[1491] On the use of the term 'backlash', see A. Martinez, *supra* note 181.

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SUMMARY

Introduction

With over 3,000 bilateral (BIT) and international investment agreements (IIAs) worldwide, the contemporary global framework of foreign investment has for long addressed in limited ways environmental protection, public health, human rights, or other public policy concerns that may be affected by foreign investment activity. Arbitral tribunals have recognized, perhaps belatedly, that '*there is an undoubtedly public interest*' in certain investment treaty arbitrations and that '[t]*he substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties*'. In one of the post-Argentine financial crisis investment treaty arbitrations, the tribunal recognized that the water systems at the heart of the dispute 'provide basic public services to millions of people and as a result may raise a variety of complex public and international law questions, including human rights considerations'. In fact, an Argentine civil society petitioner sought to intervene as *amicus curiae* in this arbitration on the basis of '*the right of every person to participate and make their voices heard in cases where decisions may affect their rights*'.

By promoting and protecting foreign investments under international law, states avidly seek to attract much-needed foreign capital into their economies, including in key sectors such as for instance natural resource extraction, energy, or water treatment and distribution – i.e. sectors that could potentially have adverse effects on host states' communities and groups, including indigenous communities. Investor-state tribunals have now acknowledged the need to grasp the complexity of public interest issues when adjudicating host state responsibility under international law vis-à-vis foreign investors. The context is that some arbitral tribunals had been criticized for failing to go beyond the sole objective of upholding the promotion and protection of foreign investments. It was argued that this was primarily the result of a unidimensional analysis of, on the one hand, the facts that lead to the alleged violations of foreign investors' international rights; and on the other, the letter of BITs and IIAs in isolation of other relevant international law norms.

The context of foreign investments in host states is often highly complex and investor-state tribunals are increasingly faced with utterly difficult mandates. The state is no longer the sole voice of the public interest. In fact, the interests of the state and civil society – including the groups and communities it purports to represent – are not systematically aligned. These include, for instance, international and local NGOs, faith-based associations, indigenous associations or organizations, gender-focused associations, epistemic communities or research institutions, trade unions, and other associational bodies aimed at representing local communities or groups, including small-scale farmers for example. Accordingly, there could be a need for civil society to raise facts and arguments related to public interest issues in order to ensure a balanced adjudication of investor-state disputes.

Problem statement and research aim

If there is a need for civil society to have a role in public-interest related investor-state arbitration, the question for this research then becomes: *Which procedural capacity could govern civil society's participation in investor-state arbitration and under what conditions?*

By first examining civil society's recently recognized *amicus curiae* role in addressing the 'broader' *public interest* at stake in investor-state arbitration, this research aims to provide a comprehensive understanding of civil society's role as practiced hitherto. It then considers whether such role may be equally adequate whenever investor-state arbitrations closely relate to environmental protection, public health, human rights or other public policy issues that could potentially affect the *direct interests* of certain communities or groups who are third parties to arbitration proceedings.

Structure

This research has attempted to provide an appreciation of civil society's role in investment treaty arbitration and, subsequently, reflect upon its status therein through three main Parts. Part I deals with 'The Function and Modalities of Civil Society Participation Before Investor-State Tribunals'. Part II contains this research's comparative analysis by addressing 'The Function and Modalities of Civil Society Before

other Jurisdictions'. Finally, Part III addresses the question of: 'An Enhanced Role for Civil Society Before Investor-State Tribunals?'.

The Function and Modalities of Civil Society Participation Before Investor-State Tribunals

Procedurally, an *amicus* role for civil society may be sufficient in ensuring a mechanism for *broader* public interests to be voiced before investor-state tribunals. This is *in* the result of a progressive and substantial development over the past fifteen years. With transparency and legitimacy concerns in mind, procedural rules governing *amicus curiae* submissions to investor-state tribunals have been gradually formalized. Tribunals went from accepting them on the basis of their inherent discretionary powers to applying clearly defined criteria under the relevant arbitration rules and treaties. For civil society to intervene as *amicus curiae*, investor-state tribunals generally take into account whether (a) there is a public interest in the arbitration; (b) the *amicus* petitioners have sufficient interest in the outcome of the arbitration; (c) their submissions will assist in the determination of a factual or legal issue related to the arbitration by bringing a perspective or particular knowledge that is different from that of the disputing parties; and (d) their submissions can be received without causing prejudice to the disputing parties. More fundamentally, investor-state tribunals have been systematic in emphasizing that 'the need to safeguard the integrity of the arbitral process requires in fact *that no procedural rights or privileges of any kind be granted to the non-disputing parties*'; in other words, *amicus* intervention is not underlying to any third party right, including civil society's, and is entirely subject to the exercise of a tribunal's discretion. From a practical perspective, an *amicus* will generally be granted an opportunity to submit a short brief, following an inconsistent access to case documents as well as the disputing parties' pleadings, and a generic access to public hearings if they take place.

Notwithstanding this generally positive development, access as *amicus curiae* may not necessarily be sufficient whenever third parties' *direct* interests are at stake. Public interest-related investment treaty arbitrations may closely relate to environmental protection, public health, human rights or other public policy issues that could potentially affect the *direct interests* of certain communities or groups who are third parties to

arbitration proceedings. Civil society has sought to represent such groups in a number of cases on that basis by requesting *standing* before investor-state tribunals, i.e. its addition as a disputing party. These included for instance adversely affected communities who opposed and contested a foreign investor's water price increase in a water distribution concession granted by the host state, alleging therefore that their right to access water had been undermined. Such instances raise compelling arguments for a more expansive access before investor-state tribunals, a more enhanced opportunity *to be heard*.

The Function and Modalities of Civil Society Before other Jurisdictions

Civil society is in fact active in a slightly similar respect before international human rights jurisdictions where it could gain standing as a party acting *on behalf of* victims of human rights violations. The comparison with international human rights jurisdictions is of relevance. International human rights law and the international law on foreign investment are not, in the words of Judge Bruno Simma, 'separate worlds'. Both in fact aim to protect the *individual* – as the 'ultimate' subject of international law – against wrongful state conduct. The jurisprudence of the European Court of Human Rights (ECtHR), or even the more liberal African Commission for Human Rights (ACHPR), with respect to civil society's standing sheds light on a fundamental point – civil society's standing is premised on the adjudication of the human *rights* of victims on the one hand, and the obligations of their states on the other, by virtue of an international treaty such as the European Convention for the Protection of Human Rights and Fundamental Freedoms or the African Charter on Human and Peoples' Rights.

The comparison with other jurisdictions such as the WTO Dispute Settlement mechanism, including domestic ones in common law systems, sheds light on the fundamental limitations of the *amicus curiae* procedure. It is clear that an *amicus* has no *right to be heard* upon accessing a court or tribunal. Although not available to civil society before international jurisdictions, the third party intervention procedure as practiced at the ICJ provides opportunities for inspiration. There, a state may intervene as a non-disputing party. This procedure is indeed familiar to the investment treaty arbitration realm. Numerous IIAs and BITs explicitly recognize the *right* of non-disputing contracting states to intervene without becoming additional parties to the

arbitration. In essence, it is a more enhanced form of *amicus curiae*. This procedure fundamentally differs with third party intervention (or joinder) that would equate to standing – as practiced in international commercial arbitration.

An Enhanced Role for Civil Society Before Investor-State Tribunals?

Civil society petitioners requested standing asserting 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'. Notwithstanding the compelling access to justice arguments raised by civil society, the current architecture of investment treaty arbitration would not accommodate civil society's standing. It is quintessentially construed as a *unilateral* form of dispute settlement where foreign investors act as claimants, and host states act as respondents. The international law on foreign investment encapsulates the rights of foreign investors, such as the right to fair and equitable treatment or prompt, adequate, and effective compensation in the event of expropriation, that host states are under an international obligation to uphold. Calling for civil society standing in investor-state arbitration would therefore be a misnomer. However, civil society – or any third person's – intervention as a non-disputing party appears as a procedurally feasible alternative, an enhanced, more expansive, *amicus curiae* role. It may be subject to a '*direct and significant interest in the outcome of the arbitration*'. It would entail the right to attend all hearings, to make written and oral submissions to the tribunal, and to receive the written submissions of the disputing parties.

Conclusion

Despite being categorically recognized as non-underlying to any third party right, but rather as a matter of procedural discretion, and subject to the assistance of investor-state tribunals (amongst other conditions), the *amicus* procedure is now fully recognized in investor-state disputes as a procedural means to channel 'broader' public interest concerns. This research has sought to examine whether civil society could participate in investment treaty arbitration in a more expansive manner, i.e. beyond the *amicus* procedure or the mere *assistance* of tribunals. Unless the entire investment treaty arbitration regime is re-thought, civil society's standing as an additional disputing party

would not be feasible, nor perhaps desired. That said, third party intervention as a non-disputing party – as it is understood under the ICJ's Rules of Court as well as numerous IIAs and BITs – would present a realistic alternative. Such intervention could be subject to a '*direct and significant interest in the outcome of the arbitration*'.

In all cases, the adequacy of civil society's access will inexorably depend on the facts and circumstances of each case – it ought not to be regarded as a *droit acquis*. Investor-state tribunals would get a fuller understanding and appreciation of the complex public interest issues at stake, which in turn would allow them to render balanced, less contested, awards. As instruments of global governance, these tribunals would secure further legitimacy, and dismiss their association with anti-globalization slogans of '*mondialisation à sens unique*'. The right to intervene for third parties with 'a *direct and existing interest* in the outcome of a dispute' is recognized by the European Commission as part of its proposals for reforming investor-state arbitration that would be explicitly incorporated in the EU's future investment treaties. Indeed, third party intervention is one of the many reforms that could ensure the sustainability of the adjudication of host-state responsibility vis-à-vis foreign investors through arbitration, as a non-politicized, fair, efficient, and a largely successful tool for dispute settlement.

SAMENVATTING

DE ROL VAN HET MAATSCHAPPELIJK MIDDENVELD IN INTERNATIONALE INVESTERINGSARBITRAGE: STATUS EN VOORUITZICHTEN

Inleiding

Wereldwijd zijn er meer dan 3,000 bilaterale investeringsbeschermingsovereenkomsten (IBO's) en internationale investeringsovereenkomsten (IIO's) van kracht. Deze overeenkomsten hebben gedurende een lange tijd slechts geringe aandacht besteedt aan milieubescherming, volksgezondheid, mensenrechten en overige kwesties van overheidsbeleid die beïnvloed kunnen worden door buitenlandse investeringsactiviteiten.. Arbitragetribunalen hebben in feite al erkend -mogelijkerwijs te laat-, dat er '*ongetwijfeld een publiek belang*' speelt in internationale investeringsarbitrage en dat '*de inhoud van de geschillen verder strekt dan in de gebruikelijke transnationale arbitrage tussen commerciële partijen*'. In één van de investeringsgeschillen in de nasleep van de Argentijnse financiële crisis erkende het arbitragetribunaal dat het waterdistributiesysteem dat aan de basis lag van het geschil 'elementaire openbare diensten aan miljoenen mensen levert en bijgevolg verschillende complexe publiekrechtelijke en internationaalrechtelijke vragen met zich meebrengt, waaronder vragen van mensenrechtelijke aard'. Een vertegenwoordiger van het Argentijnse maatschappelijk middenveld trachtte in te grijpen in deze arbitrage als *amicus curiae* op grond van '*het recht van eenieder om deel te nemen en hun stem te laten horen wanneer uitspraken hun rechten kunnen beïnvloeden*'.

Door buitenlandse investeringen te promoten en te beschermen onder internationaal recht, proberen staten het nodige kapitaal aan te trekken voor hun economieën, en in het bijzonder voor belangrijke sectoren zoals de ontginning van natuurlijke hulpbronnen, energie, of waterzuivering en –distributie – sectoren met potentieel nadelige effecten voor lokale (inheemse) gemeenschappen in de gastlanden. Investeringstribunalen hebben de noodzaak erkend om rekening te houden met de complexiteit van publieke belangen in hun beslissing omtrent de aansprakelijkheid van een staat ten opzichte van buitenlandse investeerders onder internationaal recht. Sommige

arbitragetribunalen werd verweten dat zij niet verder gingen dan het louter handhaven van de bevordering en bescherming van buitenlandse investeringen. Er werd aangevoerd dat dit voornamelijk het gevolg was van een éénzijdige analyse van, enerzijds, de feiten die leidden tot de vermeende schendingen van de rechten van buitenlandse investeerders, en anderzijds, de tekst zelf van IBO's en IIO's die geïnterpreteerd werd zonder rekening te houden met andere relevante internationale rechtsnormen.

De context waarin buitenlandse investeerders in de gastlanden opereren is vaak zeer complex en arbitragetribunalen worden in toenemende mate geconfronteerd met uiterst moeilijke vraagstukken. De staat is niet meer de enige vertegenwoordiger van het publieke belang. De belangen van de staat en deze van het maatschappelijk middenveld – met inbegrip van de groepen en gemeenschappen die pretenderen het te vertegenwoordigen – zijn niet langer systematisch identiek. Maatschappelijke groeperingen omvatten, bijvoorbeeld, internationale en lokale NGO's, op geloofsovertuiging gebaseerde verenigingen, inheemse verenigingen of organisaties, gendergerichte verenigingen, epistemische gemeenschappen of onderzoeksinstellingen, vakbonden, en andere organisaties gericht op het vertegenwoordigen van lokale gemeenschappen of groepen, zoals kleine en middelgrote landbouwers. Er kan bijgevolg behoefte zijn voor het maatschappelijk middenveld om feiten en argumenten in verband met het publiek belang op te werpen met het oog op de evenwichtige beslechting van investeringsgeschillen tussen investeerders en staten.

Probleemstelling en Onderzoeksdoel

Als er behoefte bestaat aan een rol voor het maatschappelijk middenveld in internationale investeringsarbitrage met betrekking tot publiek belang, luidt de vraag voor dit onderzoek als volgt: *Welke procedurele capaciteit zou het maatschappelijk middenveld toegekend kunnen worden en onder welke voorwaarden zou het kunnen deelnemen?*

Dit onderzoek richt zich eerst op de recent erkende rol van *amicus curiae* voor het maatschappelijk middenveld om het bredere *publiek belang* op te werpen in investeringsarbitrage. Hiermee beoogt dit onderzoek een volledig overzicht te bieden van deze rol zoals het maatschappelijk middenveld die tot dusver vervuld heeft. Vervolgens

wordt er gekeken of een dergelijke rol ook kan volstaan wanneer investeringsarbitrage betrekking heeft op de bescherming van het milieu, volksgezondheid, mensenrechten of andere aspecten van overheidsbeleid die invloed zouden kunnen hebben op de *directe belangen* van bepaalde gemeenschappen of derden in de arbitrageprocedure.

Structuur

Dit onderzoek heeft gepoogd de rol van het maatschappelijk middenveld in investeringsarbitrage te waarderen en, vervolgens, te reflecteren op de status van het maatschappelijk middenveld hierin in drie delen. Deel I behandelt de 'Functie en Modaliteiten van de Deelname van het Maatschappelijk Middenveld in Investeringsarbitrage'. Deel II bevat de rechtsvergelijkende analyse van dit onderzoek en kijkt naar de 'Functie en Modaliteiten van het Maatschappelijk Middenveld in Andere Rechtsgebieden'. Tot slot behandelt Deel III de volgende vraag: 'Een Grotere Rol voor het Maatschappelijk Middenveld in Investeringsarbitrage?'.

De Functie en Modaliteiten van de Deelname van het Maatschappelijk Middenveld in Investeringsarbitrage

Procedureel gezien kan een *amicus* rol voor het maatschappelijk middenveld ervoor zorgen dat *bredere* publieke belangen gehoord worden in investeringsgeschillen. Dit is het resultaat van een progressieve en aanzienlijke ontwikkeling in de voorbije vijftien jaar. Bezorgdheid omtrent transparantie en legitimiteit hebben geleid tot de formele introductie van procedurele regels inzake *amicus curiae* tussenkomsten in investeringsarbitrage. Tribunalen gingen van het aanvaarden van deze tussenkomsten op grond van hun inherente discretionaire bevoegdheid naar het toepassen van duidelijk gedefinieerde criteria onder de relevante arbitrageregels en –verdragen. Alvorens het maatschappelijk middenveld toe te laten als *amicus curiae* beoordelen arbitragetribunalen veelal of voldaan is aan de volgende voorwaarden: (a) er is sprake van een publiek belang in de arbitrage; (b) de *amicus* verzoekers hebben voldoende belang bij de uitkomst van de zaak; (c) hun tussenkomst moet een invalshoek of specifieke kennis bieden die verschillend is van die van de partijen in het geschil en die zou helpen bij het beslechten van een feitelijke of juridische vraag met betrekking tot de arbitrage; (d) hun tussenkomst

mag de partijen betrokken bij het geschil niet benadelen. Investeringsarbitragetribunalen hebben systematisch benadrukt dat ‘de noodzaak om de integriteit van de arbitrale procedure te waarborgen vereist dat er *geen procedurele rechten of privileges van welke aard ook toegekend worden aan de niet in het geschil betrokken partijen’*; met andere woorden, een *amicus* tussenkomst leidt niet tot enig recht als derde partij, inbegrepen voor het maatschappelijk middenveld, en is volledig onderworpen aan de discretie van het tribunaal. Vanuit praktisch oogpunt zal een *amicus* meestal de mogelijkheid krijgen om een korte nota in te dienen, waarna de *amicus* al dan niet toegang krijgt tot de procedurestukken, alsmede de conclusies van de partijen in het geschil, en een generieke toegang tot publieke hoorzittingen als deze plaatsvinden.

Dit zijn zonder meer positieve ontwikkelingen, maar toegang als *amicus curiae* volstaat mogelijks niet wanneer de *directe* belangen van derde partijen op het spel staan. Investeringsgeschillen van publiek belang kunnen sterk gelinkt zijn aan bescherming van het milieu, volksgezondheid, mensenrechten of andere kwesties van overheidsbeleid die mogelijk gevolgen kunnen hebben voor de *directe belangen* van bepaalde gemeenschappen of groepen die derde partijen zijn bij een arbitrageprocedure. Om deze reden heeft het maatschappelijk middenveld getracht deze groepen te vertegenwoordigen in een aantal zaken door arbitragetribunalen te verzoeken om de mogelijkheid om *in rechte op te treden*, m.a.w. op de treden als een partij in het geschil. Deze hadden onder meer betrekking op de betwisting door benadeelde gemeenschappen van een verhoging van de waterprijs ten gevolge van de toekenning van een waterdistributie-concessie aan een buitenlandse investeerder door de staat, omdat hiermee hun recht op toegang tot water ondermijnd werd. In dergelijke gevallen klinken de argumenten voor een uitgebreidere toegang tot investeringsarbitrage en het recht om gehoord te worden des te overtuigender.

De Functie en Modaliteiten van het Maatschappelijk Middenveld in Andere Rechtsgebieden

Het maatschappelijk middenveld is in feite op ietwat vergelijkbare wijze actief bij internationale mensenrechteninstanties waar het in rechte kan optreden in naam van de slachtoffers van mensenrechtenschendingen. De vergelijking met internationale

mensenrechteninstanties is van belang. Internationale mensenrechten en het internationaal recht inzake buitenlandse investeringen zijn, met de woorden van Rechter Bruno Simma, geen 'aparte werelden'. Beiden trachten ze het *individu* – als het 'ultieme' subject van internationaal recht – te beschermen tegen onrechtmatig handelen van de staat. De jurisprudentie van het Europees Hof voor de Rechten van de Mens (EHRM), of zelfs van de meer liberale Afrikaanse Commissie voor Mensenrechten (ACHPR), met betrekking tot de mogelijkheid voor het maatschappelijk middenveld om in rechte op te treden werpt licht op een wezenlijk punt - de mogelijkheid voor het maatschappelijk middenveld om in rechte op te treden is gestoeld op het beoordelen van de mensen*rechten* van de slachtoffers enerzijds, en de verplichtingen van hun staten anderzijds, op grond van een internationaal verdrag, zoals het Europees Verdrag tot Bescherming van de Rechten van de Mens en de Fundamentele Vrijheden of het Afrikaans Handvest voor de Rechten van de Mens en Volken.

De vergelijking met andere rechtsprekende instanties, zoals het geschillenbeslechtingsmechanisme van de Wereldhandelsorganisatie en nationale geschillenbeslechting in 'common law' systemen, werpt licht op de fundamentele beperkingen van de *amicus curiae* procedure. Het is duidelijk dat een *amicus* geen *recht heeft om* door een rechtbank of een tribunaal *gehoord te worden*. Hoewel het maatschappelijk middenveld deze mogelijkheid niet heeft bij internationale rechtsprekende instanties, kan de procedure voor tussenkomst van een derde zoals die bij het Internationaal Gerechtshof (IGH) bestaat inspiratie bieden. Voor het IGH mag een staat tussenbeide komen als derde partij. Deze procedure is inderdaad bekend binnen het gebied van internationale investeringsarbitrage. Tal van IIO's en IBO's erkennen expliciet een recht om tussenbeide te komen voor verdragsluitende staten die geen partij zijn bij het geschil zonder dat ze door die tussenkomst partij worden bij het geschil. Wezenlijk is dit een verbeterde vorm van *amicus curiae*. Deze procedure verschilt fundamenteel van tussenkomst van een derde partij (of samenvoeging van zaken), wat zou neerkomen op optreden in rechte – zoals de praktijk is in internationale commerciële arbitrage.

Een Grotere Rol voor het Maatschappelijk Middenveld in Investeringsarbitrage?

Het maatschappelijk middenveld verzocht om in rechte op de treden aangezien '*… de uitspraak van het Tribunaal de rechten van de verzoekers zal bepalen*. Als zodanig is het essentieel dat de verzoekers de mogelijkheid krijgen om gehoord te worden door het Tribunaal'. Niettegenstaande de overtuigende argumenten van het maatschappelijk middenveld in het voordeel van toegang tot de rechtsgang, is de huidige architectuur van investeringsarbitrage niet geschikt om het maatschappelijk middenveld in rechte te laten optreden. Het is wezenlijk opgebouwd als een *eenzijdige* vorm van geschillenbeslechting waar buitenlandse investeerders optreden als eisers en gastlanden als verweerders. Het internationaal recht aangaande buitenlandse investeringen omvat de rechten van buitenlandse investeerders, zoals het recht op een eerlijke en billijke behandeling of snelle, adequate en effectieve compensatie in geval van onteigening, die gastlanden op grond van een internationale verplichting moet respecteren. Een oproep om het maatschappelijk middenveld in rechte te laten optreden als procespartij in investeringsarbitrage zou dus bedrieglijk zijn. De tussenkomst van het maatschappelijk middenveld of een andere derde als een partij niet betrokken bij het geschil door middel van een betere, meer uitgebreide rol als *amicus curiae* kan beschouwd worden als een procedureel haalbaar alternatief, mogelijk op voorwaarde dat '*er een direct en aanzienlijk belang is bij de uitkomst van de arbitrage*'. Dit zou met zich meebrengen dat er een recht is om alle hoorzittingen bij te wonen, om schriftelijke en mondelinge conclusies in te dienen bij het tribunaal, en om de schriftelijke conclusies van de partijen in het geschil te ontvangen.

Conclusie

Ondanks de duidelijke erkenning dat de *amicus* procedure niet leidt tot een recht als derde partij, en het eerder gezien wordt als een kwestie van procedurele discretie afhankelijk (onder meer) van het arbitragetribunaal, is de *amicus* procedure nu volledig erkend in geschillen tussen een investeerder en een staat als een procedureel middel om 'bredere' publieke belangen te kunnen behartigen. Dit onderzoek heeft getracht te bestuderen of het maatschappelijk middenveld zou kunnen deelnemen aan internationale investeringsarbitrage op een uitgebreidere wijze, dat wil zeggen buiten de *amicus*

procedure en het loutere *bijstand verlenen* aan tribunalen. Tenzij het gehele regime van internationale investeringsarbitrage herdacht wordt, is een status als derde partij voor het maatschappelijk middenveld niet haalbaar, en wellicht ook niet wenselijk. Een tussenkomst als derde partij niet betrokken bij het geschil – zoals voorzien in de Regels van het Internationaal Gerechtshof en in talrijke IIO's en IBO's – zou echter een realistisch alternatief zijn. Een dergelijke tussenkomst zou verbonden kunnen worden aan de voorwaarde van een '*direct en aanzienlijk* belang bij de uitkomst van het geschil'.

Of de toegang van het maatschappelijk middenveld toereikend is, zal onverbiddelijk afhankelijk zijn van de feiten en omstandigheden van elk geschil – het moet niet als een *droit acquis* worden beschouwd. Arbitragetribunalen zouden een beter begrip krijgen van de complexe kwesties van publiek belang in het geding, wat het tribunaal op zijn beurt in staat zou stellen om evenwichtige, minder omstreden, beslissingen te nemen. Als instrumenten van *global governance* zouden deze tribunalen meer legitimiteit verkrijgen en zich ontdoen van hun associatie met anti-globaliseringsleuzen zoals *'mondialisering in één richting'*. Het recht van tussenkomst voor derden met 'een *rechtstreeks en actueel belang* bij de uitkomst van een geschil' is een onderdeel van het voorstel van de Europese Commissie voor de hervorming van investeringsarbitrage en zal expliciet opgenomen worden in de toekomstige investeringsverdragen van de EU. De tussenkomst van derden is inderdaad een van de vele hervormingen die zouden kunnen zorgen voor de duurzaamheid van geschillenbeslechting tussen gastlanden en buitenlandse investeerders door middel van arbitrage als een niet-gepolitiseerd, eerlijk, efficiënt, en grotendeels succesvol instrument voor geschillenbeslechting.

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