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## 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]

[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

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[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

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[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

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.