Uninvited guests: NGOs, *amicus curiae* briefs, and the environment in the international investment regime

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Abstract

Environmental regulation is often at the heart of investment treaty arbitration. As the international investment regime, bolstered by the powerful process of investor-state dispute settlement (ISDS), continues to expand into and gain influence in distant corners of domestic environment governance, the pressure points created where the investment regime comes into conflict with environmental regulation have also multiplied. These collisions between the investment regime and the environment have generated public concern. However, the regime has remained seemingly unreceptive to these concerns and has hesitated to embrace participation by outside actors—such as non-governmental organizations (NGOs)—who would see such concerns accounted for in ISDS.

This study explores this complicated nexus between the investment regime, the environment, and NGOs. More specifically, it lays bare the relationship between the investment regime and its environmental "others," focusing on the role of NGOs, through the use of *amicus curiae* briefs in ISDS, in both shaping (and compelling) these interactions and encouraging greater openness and responsiveness in the regime to environmental issues. Ultimately, a discursive analysis of the NGO *amicus curiae* briefs submitted in environment-investment disputes and the responses to them from the regime's decision makers reveals that through this practice, NGOs have a crucial role in transforming the regime. However, this potential is currently underdeveloped and hampered by the very closed-off nature of the regime that these actors seek to overcome.

Résumé

La réglementation environnementale est souvent au cœur de l'arbitrage des traités d'investissement. Comme le régime d'investissement international, soutenu par le puissant processus de l'arbitrage de l'investissment, continue de gagner de l'influence dans la gouvernance de l'environnement domestique, les points de pression créés lorsque le régime d'investissement entre en conflit avec la réglementation environnementale ont également multiplié. Ces collisions entre le régime et l'environnement ont suscité l'inquiétude du public. Toutefois, le régime d'investissement reste peu réceptif à ces préoccupations et hésite à accepter la participation des acteurs extérieurs, tels que les organisations non gouvernementales (ONG), qui auraient de telles préoccupations prises en compte dans l'arbitrage des traités d'investissement.

Cette étude explore ce lien complexe entre le régime de l'investissement, l'environnement, et les ONG. Plus précisément, il examine la relation entre le régime d'investissement et ses « autres » environnementaux, mettant l'accent sur le rôle des ONG comme *amicus curiae* dans ISDS, à la fois dans l'élaboration ces interactions et d'encourager une plus grande ouverture et réactivité dans le régime aux questions environnementales. En fin de compte, une analyse discursive des mémoires *amicus curiae* soumis par les ONG dans les litiges environnementeux et

les réponses des décideurs du régime révéle que les ONG ont un rôle critique dans ce processus de transformation du régime. Cependant, ce potentiel est actuellement sous-développé et entravé par la nature fermé du régime.

Part I—Introduction

In 2002, a Chilean investor sues the government of Peru under the *Chile-Peru Bilateral Investment Agreement* when, as part of its programme to protect wetlands, marshes, and other water sources, a municipal government revokes the investor's permit to build a pasta factory.[1] A purportedly American investor launches a claim in 2008 under the *Dominican Republic-Central America-United States Free Trade Agreement* (*CAFTA*) when it fails to gain approval of an environmental impact study required for its ongoing mining activities in El Salvador.[2] Then, in 2009, a Swedish company sues Germany under the *Energy Charter Treaty* when local opposition over potential implications for climate change and pollution of the Elbe River results in delays to and limitations upon its permits to build a coal-fired power plant in Hamburg.[3]

As these and many other cases demonstrate, environmental regulation is often—and, indeed, increasingly—at the heart of investment treaty arbitration. These kinds of clashes have become more frequent as the regime sustaining the rights protecting foreign investors, enforced by a process of binding arbitration, continues to grow at what can only be described as at an exponential rate. International investment agreements (IIAs)—of which it is estimated there are currently approximately 3,000[4]—continue to swell in number while becoming more comprehensive and grander of scale, with recent agreements encompassing an ever wider range of parties and issue coverage.[5] As a result of this expansion, the pressure points created where the investment regime comes into conflict with

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[1] *Empresas Lucchetti, SA and Lucchetti Peru, SA v The Republic of Peru*, ICSID Case No ARB/03/4 [*Lucchetti*].

[2] *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No ARB/09/12 [*Pac Rim*, jurisdiction]. This case will be discussed in much greater dept below in part IV.

[3] *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v Federal Republic of Germany*, ICSID Case No ARB/09/6.

[4] See e.g. Joachim Pohl, Kekeletso Mashigo & Alexis Nohen "Dispute settlement provisions in international investment agreements: A large sample survey," *OECD Working Papers on International Investment, No. 2012/2*, (OECD Investment Division, 2012) at 9, online: <http://www.oecd.org/daf/inv/investment-policy/WP-2012_2.pdf>.

[5] Recent examples include the *Trans-Pacific Partnership* (TPP) and the *Transatlantic Trade Investment Partnership* (TTIP), which are currently being negotiated, and the *Canada-European Union Comprehensive Economic and Trade Agreement* (CETA), negotiations for which have recently concluded and resulted in an agreement.

environmental regulation have also multiplied. These encounters, and the responses to them generated by the investor-state dispute settlement (ISDS) process, have led to public concern, resistance, and, with little recourse for locally affected actors to weigh in on these decision making processes, frustration. The result is a tense yet unbalanced push-pull dynamic at the sites of these encounters, as myriad actors and interests vie to alternatively overcome or exploit the ISDS process. These constant interactions create a complex pattern of convergences and divergences, where opposing interests (and the norms, actors, and processes that support them) are brought together in often violent and intricate ways, yet struggle to overcome the forces that pull them together. In this study, I delve into this complex milieu so as, in essence, to shed light upon the relationship defined by the obvious intersections and tensions between locally authored efforts designed to protect the environment (and the actors who would preserve them), on the one hand, and those designed to protect foreign investment (and the actors who would propagate such protection), on the other.

The unique norm-productive characteristics of the investment regime further complicate this already complex landscape. The privatized decision-making function performed by arbitration tribunals in ISDS—conducted, as it is, by *ad hoc* panels of private arbitrators—coupled with the investor-focused rights contained within IIAs, dispatches much of the control over the regime's function and the production of its increasingly powerful norms to private actors. In ratifying these IIAs (particularly in such quantities), states seem to have willingly, and even enthusiastically, sponsored this arrangement. This has created a gap in the formal and informal infrastructure for the promulgation of the public interest relating to the environment—a function once thought to belong solely to the state. However, while non-state actors such as non-governmental organizations (NGOs) have attempted to fill this void, they have found themselves faced with a conundrum: the very regime that owns the processes through which efforts aimed at protecting the environment are compromised displays little interest in either exploring concerns over these impacts or permitting others to raise them.

The investment regime's turn to ever-greater closure, and the seeming ambivalence on the part of the state to this process, have been paralleled by increasing insistence in efforts to penetrate the regime. One tool used by NGOs to force their way into the regime and highlight the environmental concerns at play in ISDS disputes is the *amicus curiae* brief. This practice emerges as both necessary and appropriate to the unique circumstances of international investment law in that it allows such actors to "find ways to voice their concerns in the very places where law beyond the state is made."[6] The investment regime is now less and less able to ignore the insistence of NGOs that they have a stake and a place in ISDS. It is increasingly clear that the regime needs to become more open to the involvement of such actors and more sensitive to the environmental concerns that they raise.

In this study, I plan to explore the nexus between the investment regime, the environment, and NGOs: where and how collisions between the regime and the environment occur; the characteristics of the regime that invite or inhibit such comings together; and the role of NGOs in these processes. More specifically, I seek to unpack the relationship between the investment regime and its environmental "others," focusing on the role of NGOs, through the use of *amicus curiae* briefs in ISDS, in both shaping (and compelling) these interactions and encouraging greater openness and responsiveness in the regime to environmental issues. Ultimately, my analysis reveals that NGOs, through the practice of *amicus curiae* intervention in ISDS proceedings, have a crucial role in bringing about and shaping collisions between the investment regime and the environment in ways that lead to greater sensitivity to environmental concerns within the regime. This fledgling potential, however, has thus far been limited, as the regime continues to resist these efforts.

I proceed in four parts. My first task, in part II, is to contextualize the interactions between the international investment regime and the environment that comprise

[6] Gralf-Peter Calliess & Moritz Renner, "The Public and the Private Dimensions of Transnational Commercial Law" (2009) 10:10 German LJ 1341 at 1355.

my *objet d'étude*. To this end, I offer some preliminary definitions and explore the development of the investment regime against the broader background of fragmentation in international law, preparing the theoretical ground for my subsequent analysis. I then move on, in part III, to provide a more concrete sense of how and where collisions between the investment regime and the environment are taking place. Here, I map out these points of intersection and provide a cursory assessment as to their quality before discussing how NGOs might bring about more productive interactions in ISDS through *amicus curiae* briefs. Part IV comprises the analytical centerpiece of my project. This is where I examine discursively the *amicus curiae* briefs accepted in environmental disputes. I use this analysis, first, to uncover both the tactics employed by NGOs to enable more productive interactions between investment and environment and to encourage greater responsiveness in the regime to environmental concerns and then, second, to track the extent to which tribunals engage with these submissions in a meaningful way. Finally, in part V, I conclude. In this final part, I situate the conclusions of the analysis from part IV in a broader context, canvassing trends and structures within the regime that might be impacting upon the capacity of NGOs to facilitate these interactions effectively and ultimately encourage the regime's transformation.

Part II—Convergences, Collisions, and Complexity: The Investment Regime and the Environment in Context

In this part, I delve more deeply into some of the controversies hinted at in the introduction. I do this by taking a step back so as to gain a broader picture of the international milieu within which clashes between the international investment regime and the environment are unfolding, grounding these tensions in a larger historical context. So as to analyze the trends and characteristics that define the relationship between the investment regime and the environment, it is crucial to link them to this broader setting. As such, the following discussion will both elucidate the lines of enquiry and inform the development of the theoretical framework that will contour my subsequent analysis.

I proceed first by providing some definitional background around key concepts and terms and by mapping out the contours of the international investment regime. I then explore the clashes brought on as a result of fragmentation within international law, tracing these tensions, and the structural features of the international legal system leading to them, to the investment-environment context. Finally, drawing insights from this backdrop, I offer the theoretical framework that will lay the groundwork for the subsequent analysis in parts III and IV.

A. Definitional issues

Before proceeding, it is necessary to address some preliminary definitional issues. As such, in this section I detail the definition of "regime" that I employ. I then map out the central features of the investment regime according to the parameters of this definition. Finally, I address certain conceptual issues that relate to the counterpart to the investment regime in this study—the environment. All of this will provide useful background information as well as a frame of reference for the analysis in parts III and IV.

(i) "Regime": What's in a name?

The definition of "regime" is as central to my interrogation of the international investment regime as it is difficult to define. As will be seen, the structure of the

regime—that is, its prominent, defining features—alongside the very fact that such a discrete structure has arisen to govern international foreign investment in the first place, are crucial towards understanding how the regime operates. "Regime" is a nebulous term, subject to multiple (occasionally overlapping) definitions from a variety of disciplines. As such, here I will provide a necessary but brief discussion of the term before offering a formalization that serves the purposes of my analysis.

As Young points out, the theorization and definition of "regime" constitutes a "risky undertaking" for international legal scholars.[7] The risks seem to arise from the potential consequences of staking out boundaries between, and therefore isolating, various fields that lie under the "international law" umbrella. This might, in essence, deny international law its coherence and systemic character, calling into question its foundational and common principles.[8] This seems to have been less of a concern for scholars of international relations (IR), for whom "regime" is a central concept and consequently an object of much theorization. Krasner's seminal definition is that most often referred to—though not itself immune from criticism[9]—in IR circles: "principles, norms, rules and decision-making procedures around which actor expectations converge in a given issue area."[10] Other IR theorists have added gloss to this proposition, finding, for example, that a key feature of regimes is that they "constrain and regularize the behavior of participants, affect which issues among protagonists are on and off the agenda, determine which activities are legitimized or condemned, and influence where, when, and how conflicts are resolved."[11]

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[7] Margaret A Young, "Introduction: The Productive Friction between Regimes" in Margaret A Young, ed, *Regime Interaction in International Law: Facing Fragmentation* (Cambridge: Cambridge University Press, 2011) 1 [Young, "Introduction"] at 1.
[8] *Ibid* at 1.
[9] See e.g. Stephan Haggard & Beth A Simmons, "Theories of International Regimes," (1987) 41 Int'l Org 491 at 493-494.
[10] Stephen D Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables" in Stephen D Krasner, ed, *International Regimes* (Ithaca: Cornell University Press, 1983) 1 at 1.
[11] DJ Puchala & RF Hopkins in Krasner, ed, *ibid* at 62, as cited in Jeswald W Salacuse, *The Law of Investment Treaties* (Oxford: OUP, 2010) at 6.

Some international lawyers have looked no further than Krasner's definition for their analytical purposes. Salacuse, for example, has adopted this definition so as to frame an analysis of the investment regime.[12] Others have drawn from one or all of the three conceptualizations of "special regimes" offered in the ILC Study Group's report on fragmentation in international law.[13]

Each of these definitions has its strengths and drawbacks. Young has identified several sets of assumptions that underpin the divergence of these definitions: the actors that constitute regimes (including the role of non-state actors); the importance of international institutions; the various stages of legal development and application that ought to be accommodated; and the extent to which emergent practices within a regime can be accounted for.[14] Despite the risk of essentialization inherent in any definition of regime, she maintains that a "hybrid" definition remains possible. For her, "regimes are sets of norms, decision-making procedures and organisations coalescing around functional issue-areas and dominated by particular modes of behaviour, assumptions and biases."[15] This seems a useful and fulsome description. It captures, from a legal perspective, the commonalities that most strongly link the various corners of a regime together (with its focus on decision-making processes and legal norms). It also implies there is a dynamic and evolving relationship between them (e.g., organizational actors drive decision-making processes that shape the development of legal norms, which, in turn, have the capacity to influence the shape of institutions and decision-making processes) that is responsible for the ongoing (re)constitution of the regime. It also acknowledges the place that non-state actors ("organizations") have within a regime. Finally, it appears sensitive to the tendency, to be explored

[12] In its use in the investment law context, see Salacuse, *ibid*, ch 1. See also Jeffery L Dunoff, "A New Approach to Regime Interaction" in Young, ed, *supra* note 7 136 at 139, n 1. Dunoff uses Krasner's definition in his development of a new theoretical approach to regime interactions in international law.
[13] International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, UNGA, 58th Sess, A/CN.4/L.682 (2006) (finalized by Martti Koskenneimi) [ILC, *Fragmentation*].
[14] Young, "Introduction," *supra* note 7 at 4-11.
[15] *Ibid* at 11.

in some depth below, for international regimes to develop in an isolated fashion around discrete issue-areas.

One element that might be underemphasized in Young's otherwise apt conceptualization of regime, however, involves what Lang refers to as the "internal politics of regime definition."[16] In essence, Lang maintains that a complete and accurate portrait of a regime can only be sketched out by including an assessment of "the processes by which the inner 'principles of vision' of [a] regime are constituted and its 'normative biases' are constructed."[17] While this reflects certain elements of IR notions around regime "principles,"[18] it zeroes in more specifically on the internal politics that underlie and have led to the creation of the normative understanding of the world upon which a regime is built. In the context of the trade regime, Lang notes that

> any particular historically situated project of trade liberalisation takes its character, inner logic and politics in part from the nature of the choices that are made about how to characterise and describe different kinds of governmental measures. Such choices play a crucial role in shaping the governance of trade at an international level, organising the activity of the trade regime, allocating its supervisory resources and technologies to certain issues and not others, directing the attention and energies of professionals working within the field. The politics of the trade regime, then, are not (or not just) in its mandate to liberalise trade, but more importantly in the specific *principles of vision*—the particular implicit frameworks of visibility and invisibility—which the regime deploys to distinguish 'distortions' of trade flows from other kinds of governmental activity.[19]

This seems a crucial element for the purposes of this study. For one, the root of the conflicts at the heart of this study are, in essence, a matter of differing perspectives emanating from each of the investment and environment regimes on what is relevant and irrelevant to determining the outcome of an investment dispute. Where foreign investors see breaches of rights guaranteed under IIAs,

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[16] Andrew TF Lang, "Legal Regimes and Professional Knowledge: The Internal Politics of Regime Definition" in *ibid* at 114.
[17] *Ibid*.
[18] International relations scholars generally define this as "beliefs of fact, causation, and rectitude." See Salacuse, *supra* note 11 at 7, fn 30, quoting Krasner, *surpa* note 10 at 2.
[19] Lang, *supra* note 16 at 116-117.

affected communities see locally authored efforts to manage and protect the environment. The politics and presumptions that inform the outcome of such determinations in ISDS are particularly germane. As will be seen further below, even when environmental regulation is at issue in these disputes, the ISDS regime relies upon its established internal normative choices with respect to what information is relevant and irrelevant in its decision-making efforts. In assessing the potential for NGOs—actors that are both foreign to the investment regime and that bring with them their own pre-determined "principles of vision"—to transform the nature of the interactions between the environment and the investment regime, shedding light on this aspect of the regime would seem to be highly instructive. In many ways, NGO involvement in ISDS is an exercise in contestation of the presumptions that undergird the investment regime's norms and procedures. According to Lang, such contestation "cannot proceed until existing perceptions of what does and does not constitute a trade barrier lose their self-evidence."[20]

The definition that I will adopt for the purposes of this study, then, will be based largely upon that of Young, while incorporating aspects of Lang's observation: sets of norms, decision-making processes,[21] and institutions,[22] constituted by and connected through common principles of vision and preoccupation with or activity concerning functional issue areas.

(ii) Mapping out the International Investment Regime

With this definition in mind, a few of the key constitutive features of the international investment regime can now be sketched out. Given the relative narrowness of my focus, it is not my intention here to provide an exhaustive

[20] *Ibid* at 134.
[21] In choosing to employ the word "processes" over Young's choice of "procedure," I wish to *de*-emphasize the formally established means through which decisions are made so as to highlight the more informal ways in this is done. This seems appropriate in the investment context, where a high degree of discretion defines the ways in which decisions are made in ISDS, despite the existence of formal rules of arbitration.
[22] I chose the word "institution" over "organization" (the term Young employs) because it is broader; it encompasses "organizations" but isn't limited to them. This seems to better accommodate the less formal and cultural practices relevant to the operation and structure of the investment regime.

description of the regime governing all aspects of foreign direct investment (FDI).[23] As noted, I will concentrate largely upon ISDS, which is one element of the larger regime that is governed by IIAs.[24] To be sure, the foreign investment regime can be construed in a number of ways, potentially encompassing a vast network of norms, institutions, and actors.[25] In a sense, this focus means focusing upon a "regime within a regime." While acknowledging the tradeoff in terms of breadth in focusing in this way upon ISDS, it would be virtually impossible to address all potential elements of the regime within the scope of this project.

I focus on ISDS for a number of reasons. First, in many ways, ISDS is the main crucible within which collisions between the investment regime and the environmental occur. As will be explored further below, international institutions are not the central norm-producing loci of investment regime. Nor is the regime's authority underpinned by a single foundational document or a cluster of interlocking and complementary treaties, such as within the international trade regime. Rather, the regime coalesces weakly around a constellation of treaties of tenuous similarity and little connection. ISDS, then, provides the main point of entry for influence from actors—and the norms they might import—from outside the regime. It is supplies the main battlefield for these clashes, making it a highly appropriate aspect of the larger regime upon which to focus. Second, ISDS has provided one of the main norm-creation fora for the regime. Once an IIA has been ratified, the unique design of these agreements transfers much of the regime's norm-creation authority to *ad hoc* arbitration tribunals, who are brought together when disputes arise and are expected to interpret vaguely composed investment standards to determine whether host state activity violates investor rights. Given

[23] For a thorough discussion, see e.g. Salacuse, *supra* note 11; Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment*, 2nd ed (Cambridge: Cambridge University Press, 2004); Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford: OUP, 2008); David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge, UK: Cambridge University Press, 2008) ch 1 [Schneiderman, *Constitutionalizing*].

[24] Other aspects of the "investment treaty regime" that could be explored, for example, would include the negotiation and drafting of IIAs. I will discuss the reasoning behind my decision to focus on ISDS below in this part.

[25] Other examples of investment not normally regulated by IIAs include commercial loans, foreign portfolio investment, or state-backed (official) FDI.

this focus upon ISDS, what follows is not intended to provide a thorough accounting, but rather a basic outline, of the regime's principal characteristics.

1. Key Norms

The "basic building block" of the regime is the IIA.[26] The vast majority of these treaties are bilateral in nature, though several regional[27] and multilateral[28] IIAs exist as well. Indeed, the largely bilateral nature of the international investment regime is one of its unique features.[29] It bears underscoring that while these agreements are negotiated between and ratified by states, their protections are offered to private entities and individuals—that is, to foreign investors who are nationals of ratifying state parties to an agreement.

Many IIAs refer to similar standards of treatment owed by the host state to a foreign investor and its investment.[30] The regime's core standards include "fair and equitable treatment" or "minimum standard of treatment"[31]; "full protection and security"[32]; "national treatment"[33]; "most favoured nation"[34]; and "protection

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[26] Salause, *supra* note 11 at 6.
[27] Examples of regional agreements include the *North America Free Trade Agreement* (32 ILM 289 (1992)) [*NAFTA*] and the *Dominican Republic-United States-Central America Free Trade Agreement* (19 USCS §14011 (2005)) [*CAFTA*].
[28] The *Energy Charter Treaty* (2080 UNTS 95(1995)) [*ECT*] is an example.
[29] See e.g. Salacuse, *supra* note 11 at 11-13.
[30] *Ibid* at 9. For a fulsome discussion on these standards, see e.g. *ibid*; Sornarajah, *supra* note 23. See also Andreas F Lowenfeld, *International Economic Law: Second Edition* (Oxford: OUP, 2008). Lowenfeld notes that "[c]onsidering the large number of BITs in force, they are remarkably similar." (*Ibid* at 555.)
[31] Fair and equitable treatment (or minimum standard of treatment, with which it is either synonymous or at least similar in idea to) is a nebulous and contentious standard and is open to multiple interpretations. When interpreted restrictively, it is often equated to the minimum standard of treatment found in customary international law—that is, treatment so bad that it amounts to bad faith, willful neglect, an outrage, or a shock to the consciousness. When interpreted expansively, it offers protection for foreign investment that exceeds—and/or stands in addition to—that offered by the customary standard. Thus interpreted, it can be understood to protect investors from treatment such as improper, unfair, inequitable, or that violates legitimate investor expectations, which would be more benign than that captured by the customary standard.
[32] A standard that attracts varying interpretations, full protection and security can be understood to ensure as little as investor's physical security in the host state to as much as legal security and the stability of the host state investment environment.
[33] This standard is generally interpreted as either a right of entry for the foreign investor into the host state; as the investor's right to treatment equal to that enjoyed by national investors; or as both.

against expropriation."[35] However, as Sornarajah observes, these standards offer less normative uniformity across the regime than might be expected.[36] Additionally, the standards tend to be drafted in a vague and open-textured manner—a fact captured in Salacuse's observation that they are "breathtaking in their generality, vagueness, and lack of specificity" and "almost always expressed in general and even vague terms".[37] This vagueness, coupled with the fact that there exists no formal system of precedent in the decision-making processes of the regime, means that these standards are inevitably subject to often highly contradictory interpretation by the tribunals formed to arbitrate disputes. This vagueness, however, should not be seen as a sign that the regime lacks all coherence. Schneiderman, for example, has observed "constitutional features"[38] to the "interlocking web of agreements"[39] of international investment law, which would seem imply some degree of cohesion.[40] Although by no means airtight, then, there appears to exist a fairly consistent canopy of normative standards that bind, underpin, and constitute the international investment regime.

2. Key Processes

The chief decision-making process within the regime—and the focus of my study—is provided by the ISDS system. ISDS is provided for in IIAs and is engaged at the instigation of a foreign investor if it believes that the host state has violated one of the IIA's standards protecting its investment. While IIAs empower foreign investors to directly pursue arbitration against a host state—which can be contrasted with the trade regime, which accommodates only state-to-state litigation—host states do not, in return, enjoy rights vis-à-vis foreign investors

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[34] As in the trade context, MFN treatment ensures protection for the foreign investor against treatment less favourable than that offered by the host state to investors of non-party nations to an IIA.
[35] This is generally understood to include "indirect expropriations"—that is, state regulatory actions that are tantamount to takings—as well as more direct expropriations (such as direct seizure of assets).
[36] Sornarajah, *supra* note 23 at 206.
[37] Salacuse, *supra* note 11 at 10.
[38] Schneiderman, *Constitutionalizing*, *supra* note 23 at 27.
[39] *Ibid* at 26.
[40] In fact, Schneiderman sees an "investment rules regime" as constituted by these agreements. *Ibid* at 27.

under these agreements.[41] Whatever broader overarching objectives they have been designed to satisfy—such as economic development or sustainable development, for example—IIAs are intended, at their most basic, to facilitate the promotion and protection of foreign investment against the potential threat of otherwise unchecked excesses of state power. As such, they have not, to date, included provisions that would establish enforceable foreign investor responsibilities, for example, with respect to environmental degradation or human rights apart from what might exist in host state law.[42]

A panel of independent arbitrators is convened to preside over the dispute. The composition of these tribunals is determined in accordance with the rules under which the arbitration is to proceed or under specific provisions for such within the IIA. In contrast to other international regimes such as international trade, decision making in the investment regime is, in essence, "privatized."[43] That is, there is no overarching international institution wherein publicly accountable representatives meet to negotiate the rules of the regime. Rather, decision making is delegated to panels of independent arbitrators, who generally come from the ranks of elite commercial law practice or academia. This contributes to investment law's "curious hybrid flavour,"[44] reflected in the mix of public (e.g., treaties) and private (e.g., commercial-style arbitration) elements that constitute the regime.

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[41] However, IIAs do tend to include provisions that allow for state-to-state arbitration. Such proceedings are exceedingly rare. For discussion of two such instances, see Jarrod Hepburn & Luke Eric Peterson, "Cuba Prevails in Rare State-to-State Investment Treaty Arbitration Initiative by Italy on Behalf of Italian Nationals" *IA Reporter* (4 July 2011); Luke Eric Peterson, "Ecuador Initiates Unusual State-to-state Arbitration Against United States in Bid to Clarify Scope of Investment Treaty Obligation" *IA Reporter* (4 Jul 2011).

[42] For an excellent discussion on corporate social responsibility in the international investment regime context see Peter Muchlinski, "Corporate Social Responsibility" in Peter Muchlinski, Federico Ortino & Christoph Schreuer, eds, *The Oxford Handbook of International Investment Law* (Oxford, OPU, 2008) ch 17. There have, of late, been calls for the inclusion in future IIAs of private rights of action for claims relating to violation of international environmental law or labour rights by investors. As will be detailed below in part IV, *amici* have put forward the argument that investors owe certain obligations to host states and citizens. See *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No ARB/05/22, "*Amicus Curiae* Submission" (26 March 2007) [*Biwater*, *amicus* brief].

[43] Salacuse, *supra* note 11 at 13.

[44] Marc Jacob, "Faith Betrayed: International Investment Law and Human Rights" in Rainer Hofmann & Christian J Tams, eds, *International Investment Law and Its Others* (Baden Baden: Nomos, 2012) 25 at 32.

This is a unique and crucial feature of ISDS and of the regime more generally. Schill considers this to be not only "an important institutional arrangement in order to promote and protect foreign investment," but also a form of private enforcement of public international law, empowering investors to hold states accountable for violations of public international law in a neutral forum.[45] The perceived neutral or de-politicized forum that ISDS purports to offer through these privately constituted and *ad hoc* tribunals is a key component to the regime's founding mythos.[46]

The host state acts as defendant in these arbitrations. For states hoping to attract and preserve foreign investment, this can create an uncomfortable position. States, particularly from the "developing world," negotiate and ratify IIAs in the hope of appearing to offer an "investment-friendly" environment for foreign companies. When a state finds its regulatory activity challenged by foreign investors under an IIA, it must carefully consider how to mount a defence. As will be explored further below, a defendant state may be hesitant to introduce relevant policy concerns or disclose reasons for its actions if this might compromise the country's "investment-friendly" reputation.[47] This has particularly significant ramifications regarding the role, generally, of non-state actors in ISDS. A clear picture is emerging as to the power of foreign investors, as non-state actors, to drive the evolution of investment law (and, in the process, to alter the domestic law of host states). However, states may able to provide only limited counterbalance to this trend given their apparent interest in maintaining and expanding the regime's

[45] Stephen W Schill "Private Enforcement of International Investment Law: Why We Need Investor Standing in BIT Dispute Settlement" in Michael Waibel et al, eds, *The Backlash Against Investment Arbitration* (Alphen aan den Rijn, Wolters Kluwer, 2010) ch 2 at 31.

[46] See e.g. Ibrahim FI Shihata, "Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGMA" in Kevin W Wu, Gero Verheyen & Srilal M Perera, eds, *Investing with Confidence: Understanding Political Risk Management in the 21st Century* (Washington, DC: The World Bank, 2009) 2. This paper was derived from a conference presentation Shiahata gave in 1985 (i.e., during the infancy of the investment regime). Shiahata, who was the Secretary General of ICSID and the Vice President and General Council of the World Bank at the time, extols the virtues of ICSID's capacity "to provide a forum for conflict resolution in a framework which carefully balances the interests and requirements of all the parties involved, and attempts in particular to 'depoliticize' the settlement of investment disputes" in light of the unstable history of such protection, particularly in Latin America. (*Ibid* at 4.)

[47] See e.g. Amorkura Kawharu, "Participation of Non-Governmental Organizations in Investment Arbitration as Amicus Curiae" in Waibel et al, eds, *supra* note 45, 275 at 284 for discussion.

reach (or at least in preserving the *status quo*). This creates something of gap in the defence of the public purposes animating impugned domestic legislation. As we shall see, this void is, to some extent, being filled by another set of non-state actors—namely, NGOs.

Perhaps counter-intuitively, then, an additional relevant feature of ISDS is the general exclusion of non-parties from disputes. Some IIAs do, however, include mechanisms through which other state parties to an IIA may intervene in a proceeding,[48] and some rules and IIAs now explicitly empower arbitrators to accept and consider non-party *amicus curiae* briefs.[49] There are some trends towards seeing a greater degree of stakeholder participation in proceedings[50]—as well as increased transparency around them—and the degree of participation accommodated in ISDS proceedings varies, depending upon the tribunal convened to adjudicate the claim, the rules under which it proceeds, and the IIA, among other factors.

As an additional feature of note, as alluded to above, there exists no formal system of precedence within the body of investment law. This has in part contributed to inconsistency in the interpretation of identical norms across—and even within—IIAs.

3. Key Institutions

As noted, unlike other international regimes, centralized institutions play a diminished role in the international investment regime. They are of some relevance for the purposes of my study—particularly in their role in administering and implementing reform of the regime's procedures—though not of central importance. As such, I will not address them in any detail here. Briefly, the international institutions most pivotal to the regime are the International Centre

[48] See e.g. *NAFTA*, *supra* note 26, art 1128.
[49] *ICSID Convention*, ICSID/15, (April 2006) [*ICSID Convention*], Rules of Procedure for Arbitration Proceedings (Arbitration Rules) [ICSID Rules], art 37(2). This provision allows (but does not compel) arbitration panels to consider submissions from non-disputing parties. Some IIAs include similar provisions. See e.g. *CAFTA*, *supra* note 26, art 10.20.3.
[50] There is, of course, a rich debate around the question of what counts as a legitimate stakeholder in the investment context. See e.g. Kawharu, *supra* note 46.

for the Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL).[51] While neither of these institutions offers fora for substantive norm creation or formalized decision making in the way that many other international organizations do (such as the WTO), both sponsor sets of widely employed procedural rules for ISDS.

ICSID falls under the institutional umbrella of the World Bank Group and offers "facilities for conciliation and arbitration of international investment disputes" for members States who have ratified its constitutive convention. Disputes arbitrated under the ICSID convention are subject to its rules of procedure, and under these rules tribunals are formed from a roster of arbitrators designated by the institution.[52] UNCITRAL, on the other hand, is most preoccupied with international trade and commercial law reform, focusing on the "modernization and harmonization of rules on international business." Most relevant in the international investment context is the set of procedural rules for arbitration that the institution has published and which is used as the procedural basis of many investor-state arbitrations.[53]

A variety of agreement-specific institutions, such as secretariats, play a role in the administration of the regime and even, to a lesser extent, the clarification of its norms. The Free Trade Commission (FTC), formed under the North American Free Trade Agreement (NAFTA) is perhaps the most prominent of these.[54] The FTC is comprised of members of the three state parties to NAFTA. While it has the power to issue "interpretations" of NAFTA standards that are binding upon tribunals,[55] in practice it has done so only once[56]—an effort that met with hostility

[51] Online: UNCITRAL Arbitration Rules, <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> [UNCITRAL Rules].
[52] Online: ICSID, <https://icsid.worldbank.org/ICSID/Index.jsp>. ICSID also offers an "alternate facility" for disputes in which one party to an IIA is not a member of ICSID.
[53] UNITRAL Rules, *supra* note 51.
[54] Established under Article 2001 of *NAFTA*, *supra* note 26.
[55] *Ibid*, art II31(2).
[56] *Note of Interpretation of Certain Chapter Eleven Provisions* (Free Trade Commission, July 31, 2001), online: Foreign Affairs and International Trade Canada, <http://www.international.gc.ca>. This was drafted in response to a number of arbitration awards in which Article 1105 (minimum

from tribunals.[57] The standard practice has since been to issue non-binding "statements" that offer insights into the intentions and opinions of the agreement's signatories. The implications of several of these statements will be referred to below.

(iii) Conceptualizing Environmental Implications

Assessing the environmental implications of ISDS poses certain conceptual challenges. Environmental problems are as diffuse and disparate as the legal and social responses they generate. Unlike the investment regime, which has formed a more or less cohesive set of common norms, decision-making processes, and institutions, despite being founded upon a diverse constellation of individual treaties, it would be difficult to locate a similar "environmental regime" on a global scale to serve as counter-part. Simultaneously transnational, international, and national in character, at best it comprises a loose network of individual regimes—each governed by separate institutions and norms—more than a cohesive whole. One such individual regime in international environmental law is the climate change regime. It is defined by a particular set of norms (as set out in instruments such as the *United Nations Framework Convention on Climate Change* and the *Kyoto Protocol*), specialized processes (such as the Kyoto mechanisms—Emissions Trading, the Clean Development Mechanism, and Joint Implementation), and dedicated institutions (e.g., the UNFCCC Secretariat and the Intergovernmental Panel on Climate Change). Each of these has been created and operates in an interrelated way so as to govern the (ostensibly discrete) issue of climate change.

While certain commonalities, such as protection or management of the environment, can be traced across many of these environmental regimes, at a

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standard of treatment) had been interpreted in a manner that was increasingly expansive and went beyond the intentions of NAFTA's signatories.

[57] See Gabrielle Kaufmann-Kohler, "Interpretive Powers of the Free Trade Commission and the Rule of Law" in Emmanual Gaillard & Frédéric Bachand, eds, *Fifteen Years of NAFTA Chapter 11 Arbitration* (Huntington: Juris Publishing, 2011) 175 at 183-185. She opines that tribunals are justified in rejecting such interpretations in instances in which they breach the rule of law in their lack of clarity, retroactive effect, or breach of procedural rights.

more granular level, each regime governs a discrete subject-area (often within an equally discrete jurisdiction), generally by way of unique processes, legal instruments, and institutions. In essence, there exists a broad range of actors and interests coalescing around different goals and projects related to the environment. There is certainly some degree of convergence and coherence between the regimes, particularly with respect to certain international environmental norms (such as the precautionary principle[58] or the prevention principle[59]), which can be found across numerous regimes. However, the ties connecting these regimes, where they exist, remain tenuous, even if the borders dividing them are porous in comparison to those erected around the more closed-off and self-isolating international investment regime. Complicating this landscape is the plethora of approaches to environmental problems that exists within domestic law. While these approaches can embody norms seen in international environmental law (the principle of public participation is a good example[60]), they can also embrace different, locally or regionally authored norms, processes, and institutions.

These regimes, then, and the relationships between them are often ill defined, diverse, and far-reaching; they can be neither neatly delineated nor comprehensively lumped together. As will be discussed below, this complex web of overlapping (and, at times, conflicting) norms, processes, and institutions bumps up against the investment regime at a number of points and in a number of ways. Given this scale and lack of cohesion, and because of the fact that the

[58] Although there is some disagreement over its precise meaning, the precautionary principle, in essence, compels protective regulatory action where there is a risk of harm to the environment or to human health, even where no scientific consensus exists as to its severity or the likelihood of its materialization. It is incorporated into a number of environmental treaties. For one such example, see *Convention on Biological Diversity*, 5 June 1992, 79 UNTS 1760.

[59] This principle encapsulates the basic premise that it is less dangerous and more cost effective to regulate so as to prevent environmental harm as opposed to reacting once harm has occurred. It is one of the foundational principles of the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal,* 22 March 1989, 1673 UNTS 57 (among other treaties).

[60] This norm is generally understood as constituting the right to participate, the right to access information, and the right to access justice. See e.g. Principle 10 of the *Rio Declaration on the Environment and Development*, UN GA, 12 August 1992, A/CONF.151/26; *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, 25 June 1998*,* 2161 UNTS 447 (entered into force 30 October 2001, 45 parties) (known as the "Aarhus Convention").

investment regime has not limited its encounters to one environmental regime, I have chosen to take a broad reading of what potentially falls within the gambit of my study. As such, I will examine the ways in which any kind of "environmental regulation" is implicated in the investment regime. For these purposes, "environmental regulation" will entail any of the political, social, or legal responses (norms, processes, institutions) emanating from all possible jurisdictional planes (national, international, transnational), and with the involvement of any interested actor (e.g., civil society, government), in which the natural environment is implicated. Although broad and potentially vague, this definition has several advantages.

First, this definition accommodates the ill defined and complex nature of the relationship between law and the environment, as sketched out above. Environmental problems and their responses are messy, diffuse, and pervasive, implicating a wide variety of actors who import an equally diverse and untidy landscape of interests. It seems apposite that any analytical definition reflects this disorder to some extent. Second, the investment regime's experience has not, as I have noted, been limited to one isolated environmental regime. Rather, the increasing reach of the investment regime into disparate contexts governed by various sets of norms and affecting divergent actors has meant that it has entangled a large cross-section of environmentally concerned norms, actors, and processes. I wish to ensure that my definition of "environmental regulation" is sufficiently supple so as to capture a full and accurate picture. This also allows me to employ a reasonably large sample size of *amicus curiae* briefs for the purposes of the discursive analysis I undertake in part IV. Too precise a definition or too narrow a focus—for example, upon one environmental issue, such as climate change or water—would not have allowed me to address as representative a sample and would therefore have compromised some of the robustness of my analysis. Finally, as is well showcased by the investment-environment disputes that I will be analyzing in parts III and IV, the problems that arise from these

encounters—and, indeed, all environmental problems[61]—are experienced differently by different actors. Rarely is an issue reducible to a simple decision over whether some aspect of the natural environment should be preserved. Instead, these disputes encompass a broad range of perceptions as to the nature of the problem, thus generating an abundance of potential responses. The decision to allow a mine to operate in an ecologically sensitive area, for instance, may invoke environmental worries, but also concerns about cultural heritage, human rights, investment, and inequality, among others (not to mention concerns about local or national economic development or even geostrategic concerns relating to the global market). Rarely will responses from affected actors emerge as tidily bundled sets of law; rather, locally organized reactions will tend to reflect the complex mosaic of stakes at play, whether the law is prepared only to deal with them as discrete issues or not.

B. Clashes and Tensions in International Law

As the above has set out, the international investment regime and regulation relating to the environment form part of and are born of very different perceptions, priorities, and interests. Each is comprised of sets of norms, processes, and institutions that promulgate a particular viewpoint and work to advance a particular agenda, a fact that produces friction between them when they come into contact. How did this dichotomous relationship develop? More to the point, what led to the development of the international investment regime's approach to its encounters with its environmental "others"? In order to better understand this uneasy relationship—and the role that NGOs have come to play as fulcrum between the two—it becomes necessary to situate this phenomenon in the

[61] Indeed, "environmental" movements themselves are no longer defined solely by clear-cut battles to preserve some discrete corner of the natural environment. There exists a much more complex landscape of how "environmental" issues are characterized and responded to, and environmental movements are increasingly hybridized with other movements as the lines between them intersect and blur. As a bizarre—and disturbing example—consider the environmentalist re-branding of the Tsagaan Khass neo-Nazi movement in Mongolia. A fascinating photo essay on the movement is featured in Alan Taylor, "A Mongolian Neo-Nazi Walks into a Lingerie Store in Ulan Batar," (6 July 2013) *The Atlantic: In Focus*, <http://www.theatlantic.com/infocus/2013/07/a-mongolian-neo-nazi-environmentalist-walks-into-a-lingerie-store-in-ulan-bator/100547/>.

general landscape of international law and the attendant tensions and disconnect amongst its regimes and social context. In sketching out some of this background, we will become better placed both to understand the nature of the problem and, in turn, the most appropriate responses.

To this end, I begin by describing some of the history of and tensions within international law. Drawing from this discussion, I then outline the contours of the problem in terms of its definition and its stakes. Finally, I formulate a response that responds to the concerns that I have laid out.

(i) Functionalism, Fragmentation, and Complexity in International Law

The broader international legal landscape is fraught with the same kinds of tensions and complexity that exists with respect to environmental regulation, as alluded to above, and that defines the relationship between the international investment regime and the environment. This increasing complexity and incoherence has spawned anxiety over what is perceived as the growing fragmentation of international law. What was once potentially seen as a vast realm of "international law"—a relatively coherent, if not homogenous, body of law—can now be seen as a constellation of more isolated and specialized regimes, each forming and governed by its own principles of law and institutions. The worry, according to the ILC Study Group in its seminal report on fragmentation in international law, is that

> such specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law. The result is conflicts between rules or rule-systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law.[62]

This fragmentation is often attributed to modern international law's functionalist origins, which saw various specialized international regimes form in response to

[62] ILC, *Fragmentation*, *supra* note at 11.

discrete issues on the international plane.[63] Initially, following World War I, cooperative institutional-legal responses were crafted around areas such as navigation, communications, and labour. Later, international regimes began to coalesce around issue-areas such as public health, intellectual property, and international trade. In each instance, these specialized regimes "reflected deliberate efforts by groups of states to respond to new and emerging political, economic, and social developments [and] developed in a relatively *ad hoc* and uncoordinated fashion."[64] In the end, what has resulted is a body of international law consisting of various specialized regime that link up and overlap, in some instances only very weakly if at all. Moreover, the nature of these linkages—both vertically and horizontally—is uncertain. With some exceptions,[65] there exists no universally recognized hierarchy as between norms or between the regimes, nor a judicial mechanism responsible for clarifying these relationships.

International law has continued to struggle with this legacy in light of its ongoing evolution, which has been characterized by increased density, the diffusion of norm-creation authority, and, with the advent of globalization, increased interdependences.[66] As understandings and manifestations of global issues began to challenge demarcations between individual regimes, international law found itself ill equipped to respond effectively. International law's functionalist origins, as expressed through the *ad hoc* evolution of these relatively isolated regimes, has led to an inability to respond to such global issues, which increasingly implicate an overlapping network of regimes, creating tension or "collisions" between them.

Further confusing this already complicated picture is the increasing refusal of problems confronting the global community to respect the boundaries (normative, adjudicative) that international law's regimes would erect between one another. This is particularly so, perhaps, with environmental problems. In both cause and impact, many environmental problems—such as biodiversity loss or climate

[63] Jeffrey L Dunoff, "International Law in Perplexing Times" (2010) 25 MdJ Int'l L 11 [Dunoff, "Perplexing"]; *Ibid*.
[64] Dunoff, *ibid* at 16.
[65] Examples of such exceptions might include *erga omnes* or *jus cogens.*
[66] Dunoff "Perplexing," *supra* note 63 at 18.

change—have a tendency to defy categorizations upon which the law depends for intervention. This increasingly transnationalized and diffuse character has meant that environmental issues have found themselves entangled in a number of regimes, many of which are ill equipped to relate to and, therefore, deal with them. So, for example, climate change might be exacerbated by carbon dioxide emissions in one jurisdiction (say, the United States), while its impacts might be disproportionately felt elsewhere (for example, Vanuatu); legal solutions might be proposed on the basis of environmental policy (the European Union's aviation carbon tax, for example) but implicate non-environmental policy areas (such as international transportation). Problems affecting the environment—like many other pernicious global issues—are slippery and pervasive. Extricating them from the larger context in which they are inextricably bound up, or excluding them from regimes that are not of a purely "environmental" character, detracts from their management or mitigation.

A few key observations can be made about this complex milieu. First, as global problems increasingly seep across or otherwise resist the categorical imperatives that international law's functional regimes would seek to impose upon them—and in so doing, implicate numerous regimes at once—clashes become inevitable, as individualized regimes struggle either to find ways to deal with unfamiliar issues and actors or to exclude these foreign elements from their ordinary operation. Second, the uncertainty characterizing this fragmentation, and international law's responses to corresponding conflict and uncertainty, has meant that how these conflicts are characterized and dealt with is, in essence, wide open to interpretation. This in turn sets the stage for competing claims of superiority between various normative projects and the regimes that they support.

The rise of the international investment regime has transpired within this milieu. The regime's normative roots can be traced back to eighteenth century "Friendship, Commerce, and Navigation" agreements (treaties, which were, in essence, trade agreements that tended to include provisions for the reciprocal protection of property for nationals of the signatory states) and customary

international law rules respecting the protection of foreign investment according to a minimum standard of treatment.[67] The more familiar aspects of the regime—particularly the practice of arbitration—began to take more shape during the period of European colonization that occurred in the late nineteenth to early twentieth centuries.[68] With the advent of decolonization, the previously sanctioned use of force as means of protecting foreign investment in colonized territories gave way to non-violent methods of resolving disputes—usually diplomacy or, in exceptional circumstances, inter-state adjudication.[69] This was considered a generally unsatisfactory means of protecting foreign investment by both international business and powerful capital-exporting nations,[70] leading, over the decades, to a variety of ultimately failed attempts to coordinate a multilateral agreement for investment protection.[71] Eventually, in light of such failures, capital-exporting states began to look to bilateral agreements to perform this function, the first of which was signed by the Federal Republic of Germany and Pakistan in 1959.[72]

Throughout its history, the investment regime has evolved to serve the purpose of protecting foreign investment from host state expropriation. As the colonial era grew ever distant and international dynamics began to shift such that the line between capital-importing and capital-exporting began to blur to some extent, this general mandate has broadened to include concepts of "economic development."

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[67] Kenneth J Vandevelde, "A Brief History of International Investment Agreements" (2005) 12 UC Davis Int'l L & Pol'y 157 at 158-159.
[68] See *ibid* at 158-161; Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press, 2007) at 13-16. See also (and especially) Kate Miles, "International Investment Law: Origins, Imperialism and Conceptualizing the Environment" (2010) 21:1 Colo J Int'l Envt'l L & Pol'y 1 [Miles, "Origins, Imperialism"]. Miles links this colonial history to the regime's ongoing approach to the relationship between foreign investor and the environment of the host-state. This history has also received treatment from Third World Approaches to International Law (TWAIL) scholars. See e.g. Sundya Pahuja, *Decolonising International Law* (Cambridge, UK: Cambridge University Press, 2011) ch 4.
[69] Van Harten, *ibid* at 16-18
[70] *Ibid*. Van Harten notes that this was a more desirable state of affairs for recently decolonized capital-importing states. (*Ibid* at 16).
[71] *Ibid* at 18-23. Prominent examples include the aborted *Havana Charter* and the spectacularly failed *Multilateral Agreement on Investment*.
[72] *Ibid* at 20.

Its core precepts, however defined, have not strayed from the purpose of protecting foreign investment from host state intrusion.

The result has been a regime that has remained faithful to the singular economic purpose from which it evolved, growing more and more effective in executing its mandate. The regime's fidelity has continued to weather shifting social realities and mounting resistance to the effects of its growing reach, particularly into areas involving environmental regulation. Rather, the regime's continued expansion has been accompanied and, perhaps, propelled along by the conviction that "protection of investor interests will invariably, without further state intervention, lead to the public good."[73]

(ii) Defining the Contours of the Problem

Having sketched out broadly some of international law's formation and accompanying challenges—in what Dunoff has termed aptly international law's current "perplexing times"[74]—two sets of enquiry now come into sharper contrast. First, how, more concretely, might the challenges hinted in the above history—the density, interconnectedness, and apparent heterogeneity (or, at the very least, the ambiguous structural hierarchy)—be conceptualized? And, as an important corollary to this, what is at stake in this complexity for international law and its role in society (and in the investment context more specifically)?

These enquiries will shape and set the ground for the second set of questions, to be explored in the section following. Given this outlook and these stakes, how can and how *should* the law respond? That is, how can international law, bundled in these isolated regimes, effectively deal with issues that transcend this structure? How should these regimes respond to "social" concerns that they have not evolved to deal with when their paths cross? More specific to the focus of my study, what kind of transformation might we hope to see in the investment

[73] Michael Waibel et al, "The Backlash against Investment Arbitration: Perceptions and Reality" Waibel et al, *supra* note 45 at xlvi. See further Miles, "Origins, Imperialism," *supra* note 68 at 39. Miles goes further, observing that in the investment context "public interest is increasingly conceptualized as a collective of private business interests."
[74] Dunoff, "Perplexing," *supra* note 63.

regime? This latter set of questions will inform the development of my approach for analyzing the relationship between the international investment regime and the environment and the role for NGOs in shaping these interactions, as will be explored in parts III and IV.

One aspect of the problem created by increased fragmentation lies in the heightened risk of "potentially inconsistent legal obligations."[75] International law, as expressed through its various regimes, seeks to place limitations upon state action, it might be said, through the imposition of obligations. However, this can prove problematic because, rather simply stated, "[s]ometimes … such state action is based on rival obligations." A conflict might arise, then, when a state has obligations emanating from different regimes (domestic or international), each of which compel action or inaction that is inconsistent with each other. For example, a state might hold obligations under an IIA to protect foreign investment as well as under multilateral legal instruments to respect human rights. According to the former obligation, the state may be *prima facie* prohibited from rescinding a lease established between itself and an investor to provide water services for its citizens, while under the latter, the state's obligation to respect its population's right to have access to clean water may ostensibly compel just such an action.[76] As this example demonstrates, circumstances may arise such that a state may find it impossible to uphold multiple competing obligations, and it may be forced, in effect, to choose between them. When this choice inevitably leads to a breach of the opposing obligation, the regime under which a resulting dispute is adjudicated may not be equipped to respond effectively to the considerations of both sides.

Conflicts between regimes arise as a result of the different respective goals each regime has evolved to accommodate. Baetens captures this in the straightforward example of potential conflict between the international investment and climate change regimes. She notes that

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[75] Jacob, *supra* note 44 at 41.

[76] See e.g. *Aguas del Tunari, SA v Republic of Bolivia*, ICSID Case No ARB/02/3 [*Tunari*]; *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic*, ICSID Case No ARB/03/19 [*Suez/Vivendi*]; *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No ARB/05/22 [*Biwater*].

> the objectives of each system are different. The objective of IIAs is to promote foreign investment by creating a stable, predictable legal environment in which all investors are treated fairly in a non-discriminatory way. The main idea behind Kyoto, in contrast, is that Parties have to change—sometimes drastically change—their national investment law in a way that favours certain investments which are considered more desirable for sustainable development. These different underlying goals might come into conflict when advanced before an arbitral panel whose jurisdiction is based on an investment treaty.[77]

A state may be attracted to (and, indeed, may feel compelled politically to participate in) each of these projects. From a state's perspective, the goals supported by both of these treaties may align with its policy objectives: say, increasing FDI, on the one hand, and mitigating the effects of climate change, on the other. However, obligations that states take on under these treaties may place them in a position that makes it difficult to satisfy both. This creates tension and, potentially, conflict between these obligations, which, in the context of investment, is often played out in ISDS proceedings.

However, this fragmentation also goes much deeper than mere collisions between legal norms, obligations, or competing goals and extends beyond the interaction of legal regimes on the international plane. For Fischer-Lescano and Teubner, fragmentation "has its origin in contradictions between society-wide institutionalized rationalities, which law cannot solve, but which demand a new legal approach to colliding norms."[78] Thus, fragmentation is "merely an ephemeral reflection of a more fundamental, multi- dimensional fragmentation of global society itself."[79] This fragmentation cannot be overcome, and any hope for legal "normative unity" is in vain. Rather, fragmentation can be expected to grow in intensity, and at most only a "weak normative compatibility of the fragments" can be achieved.[80] As such, with this reality in mind, for Fischer-Lescano and

[77] Freya Baetens, "The Kyoto Protocol in Investor-State Arbitration: Reconciling Climate Change and Investment Protection Objectives" in Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe, eds, *Sustainable Development in World Investment Law* (Alphen aan de Rijn: Kluwer Law International, 2011) 683 at 693.
[78] Andreas Fischer-Lescano & Gunther Teubner, "Regime Collisions: the vain search for legal unity in the fragmentation of international law" (2004) 25 Mich J Int'l L 999 at 1004.
[79] *Ibid*.
[80] *Ibid*.

Teubner, the law, if it is provide any assistance, must reinvent itself both procedurally but also, importantly, substantively so as to respond. It must resist the futile impulse to resort to a hierarchical understanding of the relationship between fragments, but rather "develop heterarchical forms of the law that limit themselves to creating loose relationships between the fragments of law."[81] Regimes, then, are in a constant process of negotiation between each other. This gives rise to a parallel process of reinvention and adaptation to varying degrees. Conflict between them cannot be avoided, and the normative compatibility that can be expected between regimes is weak at best.

The situation becomes perhaps even more complex when one looks beyond conflicts between isolated regimes to observe how an individual regime (like the international investment regime) interacts with a broader set of problems (such as those relating to the environment). In this context, a regime may be called upon to respond to an array of concerns or norms that originate from multiple regimes and jurisdictions or that are not easily traced to any single regime.

It is important to note that against the backdrop of this complexity, to frame this as an ideological battle that is waged upon an adjudicative battlefield, from which only one "side," equipped with its unique legal weapons, can emerge victorious, would be to miss the point. As Fischer-Lescano and Teubner stress, these conflicts are both inevitable and arise as a result of deeper societal frictions. Incoherence that arises from collisions cannot be simply ignored, and it cannot be resolved by resorting to a zero-sum calculation in which one set of norms or concerns is brushed aside as irrelevant (or less relevant). As such, any framing of the issue must be careful not to depict irreconcilable dichotomies, the only resolution of which would involve one regime or set of concerns overcoming the other.

Perez offers some useful insight to this end. In analyzing the relationship between trade and the environment, he rejects the "greens" versus "free-traders" binary

[81] *Ibid* at 1017.

distinction that has tended to characterize the trade-environment debate. In its place, he favours a pluralistic outlook, in recognition of the fact that the debate should be portrayed as "an amalgam of multiple dilemmas, constituted and negotiated by myriad institutional and discursive networks."[82] What Perez appears to be calling for is a nuancing of the debates between these normative projects. A variety of discourses have emerged in response to the particularly stark divides between certain regimes—particularly as between areas of international economic law, on the one hand, and more "social" areas of law, on the other. In the context of international trade, these "trade and …" debates have a tendency to be highly polemic, with deeply entrenched positional camps supporting opposing points of view. These kinds of binary representations run the risk of what Perez calls "discursive shallowness."[83] That is, they provide a poor and simplistic formulation of the debate, glossing over nuance pertaining to the multitude of issues and interests that are actually at play in favour of crude and antagonistic representations. Adopting this kind of approach in the trade-environment debate, for example, betrays a "broad insensitivity toward the complexity of the nature/society distinction."[84] In his project, Perez highlights the importance of looking beyond one institution (in his case, the WTO) in analyzing the trade-environment debate so as to see the broader landscape and the variety of "institutional arenas" in which the conflict actually takes place.[85] As in most debates, when painting in over-broad strokes, much of the picture is lost. This makes his ideas particularly transportable to the investment context.

Although not entirely parallel (particularly in that the investment regime is not similarly anchored to a large multilateral institution such as the WTO), similarly divided camps define the debates between investment law and its others.[86] As with the "trade and …" debates, the picture is exceedingly complex. Bearing Perez's warning in mind goes some distance in mitigating the tendency to

[82] Oren Perez, *Ecological Sensitivity and Global Legal Pluralism: Rethinking the Trade and Environment Conflict* (Oxford: Hart, 2004) at 7.
[83] *Ibid* at 13.
[84] *Ibid*.
[85] *Ibid* at 7.
[86] Some of this literature will be canvassed below, in part III.

oversimplify the discourse by capturing both the intricacy of the many moving parts involved as well as the tensions dividing the opposing interests at play. It offers the possibility of a more fulsome discussion of how these differing approaches can be understood or reconciled by unearthing underlying structures and rationalities and the relationships between them.

Another consequence presented by this fragmented landscape in international law concerns the growing reach and influence of "economic" regimes into new areas. There appears to be a growing subservience of non-economic interests vis-à-vis economic ones, the latter being expressed and satisfied through regimes of international economic law.[87] These regimes have been endowed with "teeth"—through normative bindingness, effective dispute settlement, and powerful institutions—in a way that other "social" regimes (such as those relating to environmental protection) have not. They also display a predisposition to self-isolate and "react" with hostility towards unfamiliar, non-economic interests. These two facts, seen side-by-side, appear to reflect a *de facto* legal privileging of economic interests in international law—a position that, naturally, economic regimes (through their processes, proponents, and institutions) seek to maintain. Indeed, as Young observes in the trade context, it is precisely the bindingness that the regime is able to command and deploy in comparison to other regimes that contributes to its efforts to remain "self-contained."[88]

This drama plays out vividly with respect to foreign investment. Conflicts between competing regimes—and between regimes and competing values and interests—are obviously in no way exclusive to the investment context. However, as Jacob notes, "the issue rears its head rather prominently in the investment law context, given its effectiveness, the extent of modern investor protection and the

[87] The three pillars of international economic law are generally considered to comprise the bodies of law governing international trade, the international monetary system, and international investment. See generally Lowenfeld, *supra* note 30.

[88] Margaret A Young, *Trading Fish, Saving Fish: The Interaction between Regimes in International Law* (Cambridge: Cambridge University Press, 2011) at 246 [Young, *Trading Fish*]. She notes that "[t]he need to guard the boundary of the WTO is based on the very reason that many seek to open it: the fact of the binding nature of trade commitments vis-à-vis other international norms… ." *Ibid*. A similar case might be made for the investment regime.

frequently very deeply intertwined involvement of international investors in matters of great public interest."[89] With ever more extension into and overlap with other areas,[90] conflicts with "social" areas such as the environment—along with human rights and labour, for example—have becoming increasingly prevalent for the international investment regime. As will be explored further below in part III, environmental regulation, in particular, is increasingly coming into conflict with the investment regime at many different points of intersection. Even where conflict is not direct—in that it does not come to a head during the course of the ISDS process—it is often not far below the surface. A subtler form of conflict that does play itself out in ISDS can be seen, for example, in concerns over the so-called regulatory chill effect.[91] The fact that the international investment regime and the environment are (perceived to be) pitted against one another—coupled with the fact that there is there is an increasingly acknowledged public interest in these conflicts[92]—militates in favour of a broader, contextualized approach to understanding the investment regime's relationship to and interactions with the environment.

A final, and related, point to be noted here is that, as should be fairly evident from the above discussion, caution is required in conceptualizing this phenomenon as one of (or as relating to) regime interactions. Ultimately, regimes are constructs; their individual composition and their relation to one another (and to other interests) do not necessarily reflect a naturally existing organization or self-evident hierarchy. It might further be argued that it is essentially impossible to

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[89] Jacob, *supra* note 44 at 42.
[90] Baetens, *supra* note 77.
[91] See e.g. Stephen Clarkson & Stepan Wood, *A Perilous Imbalance: the Globalization of Canadian Law and Governance* (Vancouver: UBC Press, 2010); Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (Cambridge, UK: Cambridge University Press, 2009) [Tienhaara, *Expropriation*]. In the climate change context, see Kate Miles, "Transforming Foreign Investment: Globalisation, the Environment, and a Climate of Controversy" (2007) 7 Macquarie L J 81 [Miles, "Transforming"]; *Cf* Stephen Schill, "Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?" (2007) 24:5 J Int'l Arb 469. Schill argues, in essence, that such fears are overblown.
[92] See generally Jorge E Vinuales, *Foreign Investment and the Environment in International Law* (Cambridge: Cambridge University Press, 2012) [Vinuales, *Foreign Investment*]; Andreas Kulick, *Global Public Interest in International Investment Law* (Cambridge, UK: Cambridge University Press, 2012).

separate activity related to investment (or, more broadly, economic development) from the environment. All human activity must, of course, transpire within the physical environment in some fashion. Viewing the interaction between investment and environment through the lens of regime interactions may ultimately obscure this fact. Despite the myriad ways the law is used to effectively "disembed" economic activity and the systems that govern it (a concept addressed further below), the latter remains harnessed unavoidably to both society and the environment. Any notion that there exists a somehow independently composed and discretely functioning investment regime—which may, at times, find itself clashing with "alien" environmental interests emanating from outside its independent orbit—is critically flawed. Put another way, by focusing on the ways in which investment and environment interact and come into conflict, it can become easy to over-emphasize what separates them, while overlooking their fundamental interlinkages.

However, the fact remains that while investment and environment cannot in reality be so easily separated, this is precisely what the law aspires to do. As described above in part I, a discrete investment regime *has* formed in response to activity relating to FDI that seeks both to operate independently of as well as exclude from its operations "outside" interests such as those relating to the environment. That is, there is a difference between the underlying holism of the investment-environment relationship and how the law has been built to negotiate it. Exposing and interrogating the inconsistency of the latter phenomenon does not necessarily negate the reality of former and does not constitute its endorsement.

In light of the above discussion, a number of salient features to the problem can be observed. First, the international legal landscape, of which the international investment regime forms part, is increasingly fragmented and home to a variety of functionally specific regimes. Second, as certain of these regimes (particularly those of an economic character such as the international investment regime) expand and become more influential, the "social" interests they encounter (such as those relating to regulation of the environment) become entangled in these

regimes, which are ill-equipped to respond meaningfully. Third, such conflicts are inevitable. Fourth, this intricately networked landscape of interests, regimes, and relationships is unavoidably complex. Finally, as follows, approaches to understanding and responding to the issues this presents are ill served by resort to polemic debates defined by strict dichotomies.

(iii) Open, Environmentally Responsive Regimes and Productive Interactions with the Environment

With this picture in mind, a question emerges: how might regimes in international law such as the international investment regime cope with this reality? What kind of transformations might better equip regimes to manage the complex relationships and realities with which they are confronted?

Self-isolation will in no way eliminate collisions between regimes and "alien" issue areas. The regimes comprising international law, it would seem, have no choice but to adapt to fragmentation, complexity, and the increasingly irrelevance of the normative boundaries between issue areas. Regimes must, then, become more responsive to the shifting social context in which they continue to operate and must find ways to effectively decode and react to the signals they receives from international society by way of these interactions.

In the trade-environment context, Perez usefully develops the idea of ecological "sensitivity" as a means of describing this necessary evolution. The "sensitising [of] the WTO to environmental concerns" is the ultimate result of necessary "normative transformation."[93] The goal, for Perez, is not a perfect integration of environmental concerns into the institutional and normative structures of the WTO. Indeed, "[t]he search for more *responsive* legal structures should not be perceived … as a search for perfect 'internalisation.' More responsiveness to environmental problems does not eliminate the systems' blind spots—it only changes the structure of its closure."[94]

[93] Perez, *supra* note 82 at 94-95.
[94] *Ibid* at 28 [emphasis in original].

Parallels can perhaps be drawn with Young's emphasis on the importance (in analyzing the functions of and relationships between international regimes) of appreciating the extent to which, and the ways in which, regimes "are removed from their social embeddedness."[95] The notion of "social embeddedness" was famously deployed by Karl Polanyi to describe the relationship between market economies, on the one hand, and society and social relations, on the other. In particular, the term is used to depict the tendency of markets (and the effects flowing from this tendency) to remove (or "disembed") themselves from social context so as to operate unconstrained and according to their own logics, embedding within themselves (and thus subordinating to these logics) the social context and relationships they have escaped.[96] For Young, this line of questioning—which requires penetrating enquiry into the complexity and context that underlies the make-up, operation, and interaction of regimes—is essential toward determining the extent to and manner in which the law is able to reflect international society.[97] This accords well with the notion of regime "sensitivity" explored above. So as to better reflect social realities and relationships, regimes must become more self-conscious of their own tendencies to disembed themselves from the social context in which they operate.

This would also seem to dovetail with Fischer-Lescano and Teubner's notion of "compatabilization techniques." Isolated regimes must uncover ways of undergoing self-transformation from within. This occurs through a process wherein a "'re-entry' of conflicting law" within a regime occurs, thereby enabling a sort of "translation" of conflicting rationalities and their compatabilization with those of the recipient regime.[98] They draw from the Doha Declaration on TRIPS

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[95] Young, "Introduction," *supra* note 7 at 11.
[96] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of our Time* (Boston: Beacon Press, 1944).
[97] Young, "Introduction," *supra* note 7 at 11. Young contends that this requires

> an understanding of a range of law-making processes, including domestic legal systems, as well as other phenomena. It is particularly urgent in confronting global problems that are 'wicked' in nature, where there can be no definitive formulation or bounded solution. The productive friction of 'regime interaction' may lead to a more responsive and effective international legal system than the sum of constituent regimes.

[98] Fischer-Lescano & Teubner, *supra* note 78 at 1030.

and Public Health, which emanated from the WTO in response to concerns over the effects that TRIPS was having upon public health in the developing world, as an example of this phenomenon in action. The Doha Declaration illustrates how

> the economically oriented WTO regime has created an internal limitation on its own logic through the reformulation of a principle of health protection. This compatibilization technique allows to build [*sic*] responsive external linkages within its own perspective of economic rationality. Such a "re-entry" of conflicting law within one's own legal system allows for the translation of rationality collisions within the *quaestio iuris*… .[99]

In essence, what must occur is reorganization of a regime's own internal logic in such a way that "external" rationalities are deeply integrated through a process of internalization. This kind of transformation extends beyond superficial efforts to merely accommodate, in a piecemeal or tokenistic fashion, the logics of outside issues or regimes, but rather occurs at the much deeper level of the regime's own internal rationalities. It must come from within, not be imposed from without. As such, in the further example of the troubled relationship between the WTO and the environment,

> this means that the re-entry of environmental rationalities within the self-organization of this regime should be promoted; that is, a re-entry extending far beyond the very narrow terms of Articles 7, 11 and 3.2 of the DSU [Dispute Settlement Understanding]. The reconstruction of non-WTO law within the WTO legal system would then not be an external imposition of limits but the internal achievement of the WTO regime itself and would reflect upon a process of mutual constitution.[100]

Further insights might be draw from the literature on "reflexivity"[101] and

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[99] *Ibid* at 1030 [footnote omitted].
[100] *Ibid* at 1030 [footnote omitted].
[101] It is not my intent here to examine this rich literature in any depth. Briefly, in essence, the underlying presumption of a reflexive approach is that if social subsystems are left to operate autonomously and to self-regulate—and increasingly they are—then the way to encourage them to assist in the development of social goals (say, environmental protection) is to ensure that they internalize these social values and embrace them in self-regulatory activities. Reflexive law's adaptability to the variability and complexity of environmental issues and its potential (by prescribing integration and accommodation between competing social objectives) for cultivating political and social legitimacy arguably make it particularly attractive in the environmental context. See generally Gunther Teubner, "Substantive and Reflexive Elements in Modern Law" (1983) 17 L & Soc Rev 239. For an environmental treatment of the topic, see Eric W Orts, "Reflexive Environmental Law" (1995) 89 Nw UL Rev 1227.

"responsiveness"[102] in law.[103] Schneiderman, for example, has put this theory to use in the investment context. He tracks and examines the degree to and ways in which the investment regime responds to the social and environmental "irritants" that it comes into contact with so as to gain a sense of its "reflexivity." He appears to examine the regime's capacity (through its actors and rules) to respond appropriately and autonomously (that is, without political direction) to such concerns, noting only partial evidence that this is taking place.[104]

So, how is this kind of transformative change effected? How do regimes become—and, importantly, how can they be encouraged to become—more environmentally responsive or sensitive? As emphasized in the above section, overcoming or avoiding conflict in international law between regimes and interests or issues outside their existential preoccupation is impossible. However, this is not to say that these collisions must necessarily lead to undesirable outcomes. In fact, counter-intuitively perhaps, it is these very conflicts that can prove to be the greatest driver in encouraging more openness in regimes.

Young provides some useful guidance in her treatment of "regime interactions." According to Young, regimes should become more open to interaction with one another so as to better respond to the global issues that challenge the boundaries that divide them. However, these interactions have the potential to do more harm than good. Indeed, "[a]n acceptance of unchecked regime interaction risks arbitrary and undisciplined decision-making."[105] The end goal, then, is not necessarily more cohesion within the international legal order. In fact, in the context of international fragmentation, Koskeneimmi and Leino have argued

[102] This, too, is a dense body of literature, a proper survey of which is beyond the scope of this project. For an overview of the concept and literature (and its connection to "reflexive law" in a historical context) see generally Peer Zumbansen, "Law After the Welfare State: Formalism, Functionalism, and the Ironic Turn of Reflexive Law" (2008) 56 Am J Comp L 769.
[103] So as to not commit to any particular theoretical framework or literature, I have chosen not to adopt any single term to describe this phenomenon, instead referring to it alternately as sensitivity, openness, consciousness, or responsiveness.
[104] David Schneiderman, "Legitimacy and Reflexivity in International Investment Arbitration" (2011) 2:2 J Int'l Dispute Settlement 471 [Schneiderman, "Legitimacy and Reflexivity"].
[105] Young, *Trading Fish*, *supra* note at 24.

against greater cohesion.[106] Rather, for Young, what should be sought is the promotion of more "productive friction" in these interactions.[107]

According to Young, interactions can be shaped so that the synergies that are produced can be harnessed in such a way that will render international law more responsive to international society. This in turn will lead to better fostering of solutions to pervasive global issues.[108] Although Young's notion of "productive friction" arises in the context of interactions between different regimes in international law, it seems applicable to the relationship between individual regimes and the alien interests with which they are inevitably faced. Such interactions play out in a manner that is similar to those occurring between separate regimes. Through conflict, they bring to isolated regimes direct awareness of the multitude of "alien" interests and processes at play within their sphere of influence and operation. They essentially force regimes to respond to shifts in on-the-ground social context, often by generating new approaches. In this way, they bring to the attention of these otherwise closed-off regimes their normative and procedural blind spots, providing them, as such, with direction for necessary adaptation and change. In turn, in line with Young's theory, this would seem to lead towards an international legal system in which regimes are able, in tandem and individually, to better respond to social realities.

Just as these collisions are inevitable, so too, it would seem, is regime transformation. As Tams and Hofmann have noted in the investment context,

> [i]n engaging with 'others', investment law itself changes; the traces left on it by domestic law, by human rights law and by international environmental law … are often obvious—e.g. in treaty language expressly addressing environmental concerns; in the tribunals' recourse to domestic law (as applicable law or to guide the interpretation); or in the gradual opening up of the dispute settlement process. … 'Others' can frighten; they can attract, and they can leave indifferent. They can be discriminated against, embraced, or ignored. ... The investment law that reveals itself in

[106] Martti Koskenniemi & Päivi Leino, "Fragmentation of International Law? Postmodern Anxieties" (2002) 15 Leiden J Int'l L 553.
[107] Young, "Introduction," *supra* note 88 at 1-2.
[108] *Ibid* noting that "the productive friction of 'regime interaction' may lead to a more responsive and effective international legal system than the sum of the constituent regimes."

> these reactions is not monolithic. In responding, it constitutes itself—but in a dynamic and atomised area of law, this is a constant process. In this process ... [others] are increasingly influential catalysts… .[109]

Schneiderman seems similarly to see the potential for transformation through conflict. In querying the extent of the investment regime's "reflexivity," for example, he tracks how responses "to the perturbations introduced by competing social sub-systems … [through] conflicts are resulting in the introduction of new limitative constitutional norms within the regime itself."[110] Increased "reflexivity" or "sensitivity" to outside concerns appears, then, to be reliant upon such collisions.

Of course, issues such as those relating to the environment come into contact with international regimes (such as investment) from both global and local angles (as opposed to interactions between regimes, which tend to occur on a purely international plane). Similarly, the "opposing sides" in the former scenario are not as structurally symmetrical as in the latter. However, either way, the conflicts that result serve essentially the same purpose—that is, to reconcile, however clumsily or excruciatingly, the different aspects or goals around a common problem.[111] The end result is the same: regime transformation along lines that gradually dissolves barriers designed to maintain regime isolation and to keep "alien" intrusions at bay.

These interactions may take on a variety of forms. As underscored in Fischer-Lescano and Teubner's discussion of the WTO, DSU, and the environment (referenced above), however, it follows that fruitful interactions entail more than a *pro forma* exercise in (re-)drafting treaties and other legal documents to account for a wider array of norms an interests that exist in international law. Rather, truly productive interactions should engender and encourage transformation from within legal regimes. As noted above, these interactions should provide occasion

[109] Ranier Hofmann & Christian J Tams, "International Investment Law and Its Others: Mapping the Ground" in Hofman & Tams, eds, *supra* note 44, 2 at 11 [Hofmann & Tams, "Mapping the Ground"].
[110] Schneiderman, "Legitimacy and Reflexivity," *supra* note 104.
[111] See Young, *Trading Fish*, *supra* note at 88 at 248, 5.

for the "'re-entry' of conflicting law" within a regime, thereby enabling a sort of "translation" of conflicting rationalities and their compatiblization with those of the recipient regime.[112] In this way, "productive" interactions must go beyond merely making available more adjudicative tools for those tasked with deciding between conflicting norms. Rather, they should be such that they lead to transformation within a regime—to its opening up and its reception to seemingly conflicting norms from other regimes in a way that renders the law more responsive to on-the-ground realities. Resort merely to rules of treaty application will not respond adequately to the dynamic, complex, and heterarchical nature of the relationships that define the problem.

The effectiveness of relying upon rules of treaty interpretation has been explored in the investment-environment context, to be explored in part III, has found itself facing the task of reconciling various normative conflicts. Some have argued a case for turning to rules of interpretation such as Articles 31 or 32 of the Vienna Convention on the Law of Treaties (VCLT), the *leges posteriori* rule, the *leges speciali* rule, or the principle of *ejusdem generis*.[113] The solution, it often follows, involves elaborating upon the adjudicative toolkit available to arbitrators or drafting future IIAs so as to better clarify the relationship between investment and the environment. Baetens, for example, suggests that "[f]uture IIAs should include references to the social, environmental, and human rights of the State Parties."[114] Astriti makes a similar argument, suggesting that drafting IIAs with more precise language could lead to more "textual determinacy" and could "contribute to clarify" the "uneasy" relationship between investment and the environment.[115]

Such approaches, insofar as they promulgate resort to principles of international law to "resolve" conflicts by clarifying the hierarchy between investment and environmental regulation seem to go only so far. For example, while additional references to the environment in IIAs provides some general clarity around the

[112] Fischer-Lescano & Teubner, *supra* note at 78 at 1030.
[113] See discussion in Baetens, *supra* note at 77.
[114] *Ibid* at 705.
[115] Alessandra Asteriti, "Waiting for the Environmentalists: Environmental Language in Investment Treaties" in Hofmann & Tams, eds, *supra* note 44, 117 at 153.

relationship between investment law and the environment, the ultimate determination remains within the gambit of investor discretion in ISDS.[116] While such reference may make it more difficult for arbitrators to ignore environmental concerns in their decision making, they may not elucidate the precise palette of interests at play. That is, this approach does little to contextualize the circumstance of the dispute that extends beyond matters that the investment regime is prepared to address.

This may be better achieved through a process that, in essence, politicizes the processes through which these collisions occur. As Jacobs notes,

> [n]either doctrinal formulas of legal unity, nor the theoretical ideal of a norm hierarchy, nor the institutionalization of jurisdictional hierarchy provide an adequate means to avoid such conflicts. Instead, the only possible perspective for dealing with such policy conflicts is the explicit politicization of legal norm collisions through power mechanisms, negotiations between relevant collective actors, public debate and collective decisions.[117]

If, in the end, regimes are to be more responsive to on-the-ground environmental realities, in order to encourage deeper regime transformation, these interactions, too, must go further. They must, in essence, provoke change within a regime's individual "principles of vision."[118] Lang notes that

> [d]ifferent international legal regimes tend to have different logics which express and embody different normative biases, so that 'coordination' between regimes is therefore always about hierarchising those preferences in particular contexts. Achieving 'coherence' in the international order means achieving a particular *kind* of coherence—'balancing' the demands of each regime always means achieving a particular *kind* of balance—which inevitably favours some interests and values over others.[119]

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[116] This is a shortcoming that has been recognized by some of these commentators. Baetens, for example, notes that "tribunals cannot be expected to solve all problems" and that moreover,

> it is not ideal that the development of this important part of international law [the relationship between sustainable development and investment law] depends on the goodwill of an ad hoc panel to consider objectives outside the purely investor-related context—after all, this is the context from which it derives its jurisdiction.

Baetens, *supra* note 77 at 715.
[117] Fischer-Lescano & Teubner, *supra* note 78 at 1003.
[118] See generally Lang, *supra* note 16.
[119] *Ibid* at 113.

What Lang appears to be hinting at is that the *process of "balancing"* must *itself* be politicized. If, in the investment context, this process is left entirely to the mechanisms, actors, and norms that already constitute the ISDS system, the regime's inherent "normative biases" will inevitably dictate (or presuppose) the outcome of this balancing in favour of economic interests. It is these "inner logics and dynamics" of a regime that must be laid bare and transformed.[120]

Perez makes a similar observation. As various complex economic systems in international law struggle to adapt to "environmental irritations," their reactions are a result of their internal structures (and not external directives).[121] The task, he seems to propose, is one of figuring out where these systems are blind to environmental concerns and then finding ways to adjust the structure of this closure—not trying to change the structure of these systems or eliminating these blind spots altogether.[122] Proposals for change cannot properly "resolve" the tensions that exist between the investment regime and the environment. Rather, they must be concerned with channeling these tensions more productively.

To recap briefly, then, it seems that the international investment regime will, inevitably, be faced with collisions with its "others" such as those relating to environmental regulation. If it is to manage the complex and inevitable social, environmental, and legal realities in which it operates, so as to deal with these encounters and better respond to international society—particularly with respect to the environment—it must become more open, self-aware, and environmentally sensitive. The collisions themselves will best instigate and guide the regime's necessary internal transformation. The result is a self-reinforcing process of sorts in which collisions between the environment and the investment regime spur on the regime's transformative opening, which in turn ensures that these interactions become both easier and more productive. Of course, the argument could be made

[120] *Ibid* at 113. Lang appears to be emphasizing that we should be looking beyond a regime's adjudicative processes to really see what is going on. Although he is referring to the relationship between different regimes in international law, the point bears making with reference to an individual regime's interactions with alien issue areas more broadly.
[121] Perez, *supra* note 82 at 22.
[122] *Ibid* at 28-29.

that the international regime *is* in fact sensitive, and that its current structures, norms, logic, and relationship to environmental concerns in fact reflect genuinely the needs and interests of international society. However, as will be become clearer below, the nature of these collisions—and the very fact of their existence and continued growth—would seem to indicate otherwise.

Part III—Where and How Have Interactions Occurred between Investment and Environment?

The previous part explored the formation and general features of regimes in international law and their occasionally uncertain and tumultuous interactions with alien regimes and concerns. It further traced a potential response—that is, that these regimes need to become more open and environmentally "conscious" or "sensitive." It further proposed that this transformation is likely best facilitated through interactions between these regimes and their "others" in the first place. We are now well placed to take a closer look at how this situation plays out more specifically in the international investment regime—the topic with which this part is preoccupied. My primary purpose here is fourfold: first, to map out the points at which the investment regime and the environment intersect; second, to assess, in a fairly cursory way, the nature of these interactions; third, to obtain a sense of how NGOs might bring about more productive interactions; and fourth, to examine the primary means within ISDS for them to do so.

I begin by laying out a high-level account of the investment regime's relationship with two of its oft encountered "others"—human rights and the environment. Then, I map out where, more specifically, through ISDS the regime has been coming into contact with the environment and provide a preliminary assessment as to the results of these encounters. My assessment to this end is meant to determine, in a general way, the degree to which, as a result of these interactions, the regime has come to display environmental consciousness or sensitivity. I do this by examining the extent to which environmental norms are becoming incorporated within its boundaries through investment-environment interactions in ISDS. I then shift focus to discuss the role of NGOs, in the context, more broadly, of the rise of non-state actors in international law, in this process. Finally, I examine the practice of *amicus curiae* brief submission as a mechanism of participation available to NGOs within ISDS and conclude by discussing how NGOs can use *amicus curiae* briefs to encourage more productive interactions

between the investment regime and the environment. This will set the ground for my analysis in part IV.

A. Ever the Twain Shall Meet? The International Investment Regime and its "Others"

As an "economic" regime, ISDS has long come under scrutiny for the way in which it has encountered its social and environmental "others" in both international and domestic law. In particular, commentators from various quarters have levelled criticism against the regime for its poor engagement with the laws relating to human rights and the environment. Here, I provide a brief overview of the concerns generated by the regime's approach to interactions as they have played out in ISDS with both human rights and the environment. Of course, my project focuses largely upon implications of the latter, so I will go further to this end, examining in greater detail how and where these interactions have occurred. However, given the parallels between the two, and given the overlap between human rights and the environment, as implicated in my analysis in part IV, I will also briefly address some aspects of the former.

(i) Human Rights

Investment tribunals have found themselves grappling with human rights issues during the course of arbitrations in a number of cases. Several disputes, for example, have been brought by investors whose concessionary rights relating to the provision of water services have been revoked as a result of state-initiated re-publicization of these services—an issue that when arbitrated, implicated both investor rights and the human right to water.[123] These will be explored in much greater detail below in part IV. Other well know ISDS brushes with human rights[124] have included legislation designed to address the socio-economic consequences of South Africa's past racially discriminatory policies under

[123] *Biwater*, *supra* note 42; *Suez/Vivendi*, *supra* note 42; *Tunari*, *supra* note 42.
[124] For a general overview, see Barnali Choudhury, "Democratic Implications Arising from the Intersection of Investment Arbitration and Human Rights" (2009) 46:4 Alta L Rev 983.

apartheid,[125] property rights of indigenous communities,[126] the right to health,[127] and cultural rights.[128]

A vast literature observing the oft-uneasy relationship between the regime and human rights has evolved in step with the regime itself.[129] Much of this literature has been preoccupied with discerning ways of seeing more peaceful coexistence between investment and human rights. Along these lines, a variety of solutions have been offered for bringing about better accommodation of human rights issues in the investment regime. These have included the incorporation, either *ex ante* or *ex post*, of human rights impact assessments (HRIA) in IIAs;[130] making

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[125] *Piero Foresti, Laura de Carli & Others v The Republic of South Africa*, ICSID Case No ARB(AF)/07/01 [*Foresti*].

[126] *Bernhard von Pezold and Others v Republic of Zimbabwe*, ICSID Case No. ARB/10/15 [*Pezold*]. This dispute has developed in the aftermath of Zimbabwe's land reform project. It is ongoing, and no major decisions have been issued. For background, see e.g. European Centre for Constitutional and Human Rights, "Human Rights inapplicable in international investment arbitration?" online: ECCHR <http://www.ecchr.de/index.php/worldbank.html>. See also *Glamis Gold, Ltd v United States of America*, Award of 8 June 2009, 48 ILM 1039 (2009) [*Glamis* final award], discussed below in part IV at length.

[127] *Methanex Corporation v. United States of America*, Award of 3 August 2005, UNCITRAL [*Methanex* final award]; *Técnicas Medioambientales Tecmed, SA v The United Mexican States*, final award of 29 May 2003, ICSID Case No ARB (AF)/00/2 [*Tecmed*]; *SD Myers v Canada*, final award of 30 December 2002, 40 ILM 1408 (2001) [*SD Myers*]; *The Case of Dow Agrosciences LLC v the Government of Canada* "Notice of Arbitration" (31 March 2009) online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/DowAgroSciencesLLC-2.pdf> [*Dow Chemical*]; *Chemtura v Canada*, award of 2 August 2010, UNCITRAL [*Chemtura*].

[128] See e.g. *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, final award of 11 September 2007 [*Parkerings*]; *Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt*, final award of 20 May 1992, ICSID Case No ARB/84/3.

[129] As a small sample, see e.g. Bruno Simma, "Foreign Investment Arbitration: A Place for Human Rights?" (2011) 60:3 Intn'l & Comp L Q 573; Peter Muchlinski, "'Caveat Investor'? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard" (2006) 55 Intn'l & Comp L Q 567; Ryan Suda "The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization" in Olivier De Schutter, ed, *Transnational Corporations and Human Rights* (Oxford: Portland, 2006); Pierre-Marie Dupuy, Francesco Francioni & Ernst-Ulrich Petersmann, eds, *Human Rights in International Investment Law and Arbitration* (Oxford: OUP, 2009); Gazzini, Tarcisio & Yannick Radi, "Foreign Investment with a Human Face—with Special Reference to Rights of Indigenous Peoples" in Hoffman & Tams, eds, *supra* note 44, 87. For a succinct yet thorough general overview, see especially Moshe Hirsch, "Investment Tribunals and Human Rights: Divergent Paths," in Dupuy, Petersmann & Francioni, eds, *ibid*, 97; Patrick Dumberry & Gabrielle Dumas-Aubin "When and How Allegations of Human Rights Violations can be Raised in Investor-State Arbitration" (2012) 13 J World Invest & Trade 349.

[130] See e.g. Carin Smaller, *Human Rights Impact Assessments for Trade and Investment Agreements: Report of the Expert Seminar, Geneva, 23-24 June 2010* (Geneva: Berne Declaration, Canadian Council for International Co-operation & Misereor, 2010), online: <http://www2.ohchr.org/english/issues/ food/docs/report_hria-seminar_2010.pdf>. Indeed a number of IIAs now provide for human rights impact assessments (HRIA). Recent examples

"human rights audits" a *de rigeur* facet of both states' and investors' due diligence;[131] procedural changes to the UNCITRAL and ICSID rules so as to render the regime more transparent and legitimate;[132] bringing investment treaty disputes to existing domestic, regional, or international human rights adjudicative bodies;[133] improving channels for *amicus curiae* brief submissions in arbitration;[134] and the reform more broadly of ISDS to include a standing body of panelists, publicly open proceedings, permanent third-party *amicus curiae* status, and an available appeal process.[135] Others have proposed bridging the investment-human rights gap through the inclusion of certain clauses within IIAs such as: exception provisions;[136] clauses that grant citizens the right to launch counterclaims against foreign investors who have perpetrated human rights transgressions;[137] clauses that would allow for enforcement of an investor's

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include the HRIA conducted by the National Human Rights Commission regarding the proposed BIT between Thailand and the US (conducted *ex ante*) and the HRIA assessment of the *Canada-Colombia BIT* (conducted *ex post* by the Office of the High Commission for Human Rights). See James Harrison, *Conducting a Human Rights Impact Assessment of the Canada-Colombia Free Trade Agreement: Key Issues* (CCIC Americas Policy Group, 2009), online: http://www.ccic.ca/_files/en/working_groups/003_apg_2009-02_hr_assess_of_cfta.pdf.

[131] Simma, *supra* note 129.

[132] See e.g. Luke E Peterson & Kevin Gray, *International Human Rights in Bilateral Investment Treaties and Investment Treaty Arbitration*, Working Paper for the Swiss Ministry for Foreign Affairs (Winnipeg: IISD, 2003), online: IISD, <http://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf>; Alessandra Asteriti and Christian J Tams, "Transparency and Representation of the Public Interest in Investment Treaty Arbitration" in Stephen Schill, ed, *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press, 2010).

[133] Peterson & Gray, *supra* note 132; Suda, *supra* note 129.

[134] James Harrison, "Human Rights Arguments in Amicus Curiae Submissions: Promoting Social Justice?" in Dupuy, Petersmann & Francioni, eds, *supra* note 129, 396. Harrison's take on their potential is somewhat ambivalent. He discusses their benefits, downsides, and limitations in terms of addressing human rights issues in ISDS. Of course, the use of *amicus curiae* briefs in the environmental context will be discussed at much greater length below.

[135] *Ibid.*

[136] Barnali Choudhury, "Exception Provisions as a Gateway to Incorporating Human Rights Issues into International Investment Agreements" (2011) 49 Colum J Transnat'l L 670. Such clauses would allow states to derogate from treaty obligations to, for example, to take actions necessary to protect "public order," "morality," "extreme emergency/national interests" and "public health," and "security" (even though most of these don't explicitly reference human rights, they could be broadly interpreted so as to include them). Although exceptions have not been employed with respect to the protection of human rights, the use of such exceptions has been discussed extensively in the context of the Argentine currency crises and resulting arbitration against the country under a number of IIAs.

[137] Suda, *supra* note 129.

voluntary code of corporate conduct;[138] provisions that make investor access to rights under an IIA contingent upon observance of human rights in its conduct within the host state;[139] and other human rights-friendly language more generally, such as "right to regulate" clauses or language that protects human rights and clarifies the responsibilities of investors and states vis-à-vis international and domestic social and human rights.[140] Others still have argued that that there exists already an implicit obligation upon investors in the "fair and equitable treatment" protection standard to refrain from unconscionable conduct[141] or that international human rights obligations (via international agreements to which states have committed themselves) are justification enough for violating an investor's rights.[142]

(ii) Mapping out Points of Intersection: Where the Environment Meets the International Investment Regime through ISDS

The investment regime has come into contact with the environment throughout almost the entirety of its evolution, most directly through ISDS. As with human rights, the uncomfortable coming together of the investment regime and the environment has inspired a large body of literature that explores concerns with the issue from numerous points of view. As will be explored in depth below, much of this extensive literature is concerned with the application of (or impact upon) both domestic[143] and international environmental norms[144] in ISDS. Other lines of

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[138] *Ibid*.
[139] Peterson & Gray, *supra* note 132.
[140] Howard Mann, *International Investment Agreements, Business and Human Rights: Key Issues and Opportunities* (Winnipeg: International Institute for Sustainable Development, 2008), online: <http://www.iisd.org/pdf/2008/iia_business_human_rights.pdf>.
[141] See Muchlinski, *supra* note 42. See also the use of this argument in the *amici* in the *Suez/Vivendi* dispute as discussed below in part IV.
[142] Peterson & Gray, *supra* note 132. The argument has been employed by *amici* in the context of the human right to water, for example. See e.g. *Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, "*Amicus Curiae* Submission" (April 4 2007) [*Suez/Vivendi amicus* brief]; *Biwater amicus* brief, *supra* note 42(as discussed below in part IV).
[143] Anxiety over the early experience with *NAFTA* and its impact upon environmental regulation generated a great deal of literature around this issue. As a very small sample, see e.g. DA Gantz, "Reconciling Environmental Protection and Investors Rights under Chapter 11 of NAFTA" 31 (2001) Env L Rep; Chris Tollefson, "Games Without Frontiers: Investor Claims and Citizen Submissions Under the NAFTA Regime" (2002) 27 Yale J Intn'l L141. For a more recent accounting, see e.g. Clarkson & Wood, *supra* note 91.

enquiry highlight the negative social and environmental impacts and pressures that ISDS places on domestic sovereignty and policy space,[145] while others link the current system to its colonial roots, highlighting the way in which the regime continues to reinforce the instrumentalist relationship between foreign investor and the environment of the imperial colonies that held sway during the colonial era.[146]

Many aspects of environmental regulation have formed the object of ISDS proceedings. They appear classifiable according to their structure and subject matter. In terms of structure, the kind of government action that has been implicated seems to fall into three broad groups: domestic norms and laws (which would include adoption or codification of international environmental norms); governmental policies and other activities (which might include, for example, presidential decrees); and non-political decision-making processes (such as permitting or environmental impact assessments as performed by regulatory agencies and government bureaucracies). The environmental subject matter of such government action would include the management or protection of natural resources, land, water, or the environment more generally; sustainable development; and climate change.

Practical examples from each of the above three categories abound. Environmental norms and laws that have been implicated, one way or another, in ISDS include pesticide bans,[147] laws designed to protect water bodies,[148] the

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[144] See generally e.g. Cordonier Segger, Gehring & Newcombe, eds, *supra*, note 77; Ricardo Pavoni, "Environmental Rights Sustainable Development, and Investor-State Case Law: A Critical Approach" in Dupuy, Francioni & Petersmann, eds, *supra* note , 525; Jacob Werksman, Kevin A Baumert & Navroz K Dubash, "Will International Investment Rules Obstruct Climate Protection Policies?" (2003) 3 Int'l Env Agreements, Pol, L & Econ 59; Kate Miles, "Transforming," *supra* note 91.

[145] See e.g. Suzanne Spears, "The Quest for Policy Space in a New Generation of International Investment Agreements" (2010) 13:4 J Intn'l Econ L 1037; Asa Romson, *Environmental Policy Space and International Investment Law* (Stockholm: Acta Universitatis Stockholmiensis, 2012); Tienhaara, *Expropriation*, *supra* note 245.

[146] Kate Miles, "Origins, Imperialism," *supra* note 68; Pahuja, *supra* note 68.

[147] See e.g. *Dow Chemical*, *supra* note 127; *Chemtura*, *supra* note 127.

[148] See e.g. *Lucchetti*, *supra* note 1.

prohibition of bulk water exports,[149] and pollution protection initiatives.[150] Other governmental activity that has attracted the ire of foreign investors includes expropriation of ecologically sensitive land to establish natural reserves,[151] permitting or operation of landfill sites,[152] decisions relating to water extraction, water distribution concessions[153] or waste treatment activities,[154] renewable energy policy,[155] and "political" decisions around energy such as the phase-out of nuclear power plants[156] or a moratorium on fracking.[157] Decision-making processes that have been at the centre of disputes include environmental assessments,[158] permitting around natural resource extraction activities[159] and damages awarded against investors for environmental liability in judicial proceedings.[160] Exact numbers are not available, though there is some indication that the environment is increasingly at issue in ISDS disputes.[161]

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[149] *Sun Belt Water Inc v Government of Canada*, Notice of Intent to Submit a Claim to Arbitration (27 November 1998). This claim has been inactive since 1998, and arbitration was never formally commenced.
[150] *Tecmed*, *supra* note 127.
[151] E.g. *CDSE v Costa Rica*, Award of 17 February 2000, ICSID Case No ARB/91/1; *Marion Unglaube v Republic of Costa Rica*, ICSID Case No ARB/08/1.
[152] *Metalclad Corporation v Mexico* (2001), Award of 30 August 2000, 40 ILM 36 (2000); *Waste Management, Inc v United Mexican States*, ICSID Case No ARB(AF)/00/3; *Vito G Gallo v The Government of Canada*, award of 15 September 2011 (UNCITRAL).
[153] E.g. *Tunari*, *supra* note 42; *Compañiá de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No. ARB/97/3 [*Vivendi*].
[154] E.g. *SD Myers*, *supra* note 127.
[155] See e.g. the recent notices of arbitration relating to programming in a province of Canada designed to promote green energy growth through subsidy for wind turbine construction and operation. *Mesa Power Group, LLC v Government of Canada*, notice of arbitration of 4 October 2011 (UNCITRAL); *Windstream Energy LLC v Government of Canada*, notice of arbitration of 28 January 2013 (UNCITRAL).
[156] See e.g. the notice of arbitration recently filed by a Swedish investor against the government of Germany over its plans to phase out nuclear power plants. *Vattenfall AB and others v Federal Republic of Germany,* ICSID Case No ARB/12/12.
[157] *Lone Pines Resources Inc v Government of Canada*, notice of intent of 8 November 2012. This notice of intent to file suit under NAFTA originates from a US oil and gas company over the government of Quebec's decision to place a temporary ban on shale gas exploration and development (i.e., hydraulic fracturing or "fracking") within the province.
[158] See e.g. the ongoing arbitration in *Clayton/Bilcon v Government of Canada*, notice of arbitration of 26 May 2008 (UNCITRAL).
[159] *Glamis*, *supra* note 126; *Pac Rim*, *supra* note 2; *Commerce Group Corp and San Sebastian Gold Mines, Inc v The Republic of El Salvador*, ICSID Case No ARB/09/17.
[160] See e.g. *Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador*, UNCITRAL, PCA Case No 2009-23 [*Chevron*].
[161] Viñuales, *supra* note 92 at 17.

(iii) Interactions between the Investment Regime and the Environment

It is clear from this overview, then, that ISDS has provided a forum through which environmental regulation has become entangled with the international investment regime. Before moving on to explore the role of NGOs in these processes, it first bears gaining a sense of what kinds of interactions are actually occurring—a sense, that is, of how productive they have been—and how they may have been encouraging transformative change from within the investment regime such that some degree of opening and "environmental consciousness" can be observed.

It should be stressed that my aim here is not to offer a definitive or empirical assessment. It is doubtful that such an assessment, in any case, would reveal whether genuine transformation towards greater environmental consciousness has occurred or whether the regime has opportunistically or disingenuously adopted tokenistic gestures towards becoming more environmentally sensitive (an exercise in "green washing," in a sense). Rather, in the interest of setting the stage for the subsequent discussion regarding the role of NGOs, I hope to provide a general sense of the regime's *status quo* in terms of its interactions with the environment. That is, what, generally, has been the regime's response when it has collided with environmental concerns? Rather than providing an accounting of environmental "wins" and "loses," I hope to uncover insights into how these decisions are made, the assumptions and methods relied upon by decision makers, and the extent to which the regime invites and is able to accommodate environment norms when confronted with such situations. This will help to reveal gaps or shortcomings in the relationship between the investment regime and the environment that, as we shall see, NGOs might play some part in remedying.

As has been noted,[162] the investment regime inevitably changes as a result of its encounters with the environment. However, by way of preliminary observation, it appears that while these interactions have led to some opening of the regime, they remain, by and large, tentative and their effects limited. This can be seen, in

[162] See especially Tams & Hofmann, "Mapping the Ground," *supra* note 44.

particular, in the ways in which the regime's actors have borrowed norms from other regimes in arbitration of disputes. Under both the ICSID Convention as well as a number of IIAs, tribunals have the explicit power to apply rules from other international legal regimes. However, under ICSID, for example, the provision that thus empowers tribunals is worded vaguely and in such a way that it ultimately affords maximum arbitrator discretion in determining its applicability. Article 42(1) provides:

> The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law *as may be applicable*.[163]

As such, the scope and applicability of other norms from international law to ISDS disputes is unclear. Moreover, recent tribunal interpretation of similar provisions in IIAs reveals that tribunals may be uncomfortable taking an expansive reading of such powers when confronted with the potential applicability of outside "social" norms.[164]

Nevertheless, tribunals do, on occasion, apply norms from outside international regimes.[165] Much has been written,[166] for example, about the use of the principle of proportionality by the tribunal in *Tecmed v Mexico*.[167] The dispute concerned

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[163] *ICSID Convention, supra* note 49, art 42(1) [emphasis added].

[164] For example, one recent tribunal opined that a similarly worded provision in two IIAs did not "incorporate the universe of international law into the BITs or into disputes arising under the BITs."[164] The ruling was used to deny an *amicus curiae* application by a European human rights NGO and a set of indigenous communities who were claiming that the international human rights law on indigenous people—in which they claimed to have expertise—was relevant to the proceedings. See *Bernhard von Pezold and Others v Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No 2 (26 June 2012) at para 57.

[165] For discussion, see Pierre-Marie Dupuy, "Unification Rather that Fragmentation of International Law? The Case of International Investment Law and Human Rights" in Dupuy, Francioni & Petersmann, eds, *supra* note 129, 45 at 56-57 (pointing to the *Mondev* and *Methanex* cases).

[166] See e.g. David Schneiderman, "Investing in Democracy: Political Process and International Investment Law" (2010) 60:4 UTLJ 909.

[167] *Tecmed*, *supra* note 127. For discussion more generally about the use of proportionality by investment tribunals see Alec Stone Sweet & Florian Grisel, "Transnational Investment Arbitration: From Delegation to Constitutionlization?" in Dupuy, Francioni & Petersmann, eds, *supra* note 129, 118 at 130-133; Alec Stone Sweet, "Investor-State Arbitration: Proportionality's New Frontier" (2009) 4 L & Ethics of HR 47 at 68 [Stone Sweet, "Proportionality's New

the Mexican government's refusal to renew a Spanish investor's two-year licence to operate a hazardous waste site in light of, among other considerations, poor implementation of a variety of environmental standards and the site's proximity to a municipality. The tribunal determined that an expropriation had occurred, but then turned to European Court of Human Rights (ECtHR) "proportionality analysis" jurisprudence so as to assess if the measure at issue was proportional in light of its stated objective. A similar turn to proportionality occurred has since occurred in other disputes.[168] In that tribunals have turned to an "alien" norm (from the human rights regime) in resolving a conflict between the investment regime's own norms and environmental regulation, this would seem to be a promising move towards regime transformation. However, Stone Sweet notes that the rare tribunals that have done so have tended towards a "timid" application of the principle.[169] This seems to have been the case in *Tecmed*, where the tribunal, in ultimately determining that the measure at issue was not, in fact, proportional, "declined to provide the kind of scholastic exposition, or doctrinal justification, which a self-conscious doctrinal move toward proportionality might have generated" and failed to follow a "step-by-step procedure"[170] as would be *de rigueur* in ECtHR jurisprudence. The principle has also not been adopted uniformly or pervasively since the *Tecmed* decision.[171]

Schneiderman makes the observation, further, that when decision makers from within the investment regime (i.e., arbitrators) do draw upon norms from other regimes, they have tended to look to relatively friendly, economic regimes such as WTO law.[172] He notes that looking to norms emanating from the WTO system "is to seek out reinforcements entirely in sync with the project of spreading economic liberalism world wide."[173] Put another way, by borrowing norms more

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Frontier"].
[168] See e.g., *Azurix Corp v The Argentine Republic*, ICSID Case No. ARB/01/12.
[169] Stone Sweet, "Proportionality's New Frontier," *supra* note 167 at 68.
[170] *Ibid*.
[171] Though see its adoption in *Saluka Investments BV v The Czech Republic*, partial award of 17 March 2006 (UNCITRAL); *Continental Casualty Company v The Argentine Republic*, ICSID Case No ARB/03/9.
[172] Schneiderman, "Legitimacy and Reflexivity," *supra* note 104 at 490.
[173] *Ibid* at 490.

consistently and more enthusiastically from the WTO than from other regimes, the investment regime is legitimizing the normative project that underpins its own development and is bolstering the norms upon which it already relies to define itself. Conversely, incorporating norms from alien regimes might go some distance in eroding—or at least transforming—these foundations and characteristics.

This apparent timidity in embracing alien norms is seen in particular in the way in which tribunals have dealt with conflict between investor rights under an IIA and state obligations under domestic or international environmental law. Tribunals have looked to environmental norms in their decision making, though have been more likely to make mention of, as opposed to actually apply, norms from international environmental law.[174] Pavoni notes that while international environmental law is generally applicable to ISDS proceedings, its "applicability has not yet been translated into unequivocal and consistent reliance on environmental principles and rules by investment tribunals in the pertinent cases."[175] Citing the *Biwater Gauff* and *Methanex* cases,[176] Pavoni documents several instances in which tribunals have been invited to consider the relevance of principles of environmental law or sustainable development but have shied away from doing so.[177] Pavoni sees more willingness by tribunals to engage with environmental norms when the dispute involves conflict with a states' obligation under a multilateral environmental agreement (MEA).[178] However, such obligations have not always provided adequate defence to derogation from the obligation to protect investor rights under IIAs. In *SD Myers*, for example, Canada was found in violation of NAFTA when its ban of the export of PCBs—which was done as part of its commitment under the *Basel Convention*[179]—affected the economic activities of the claimant investor, whose business involved the disposal

[174] Pavoni, *supra* note 144.
[175] *Ibid* at 528.
[176] Both of these disputes are discussed at length below, in part IV.
[177] Pavoni, *supra* note 144 at 529.
[178] *Ibid* at 529.
[179] *Basel Convention*, *supra* note 59.The *Basel Convention* prohibits the export/import of hazardous wastes, such as PCBs from and to non-parties to the convention (and the US at the time was not a party).

of PCB waste.[180]

Even though a tribunal may consider potential international environmental norms, often the approach ultimately taken in rendering a decision is purely "economic" in nature.[181] It can be added, too, that much of international environmental law is soft law; many principles have not clearly obtained customary status. Given the inconsistent and lukewarm application of clearly binding hard law norms of international environment law by tribunals, it seems even more unlikely that soft law norms would find their way into ISDS decisions.

Additionally, tribunals have not seemingly exercised their inherent powers to introduce these issues of their own volition. Brown notes that under the principle of *jura novit curia*, international courts are permitted to raise points of law without a party to the proceedings having done so and reasons that international investment tribunals would be similarly empowered.[182] While he holds this out as a potential avenue for bringing sustainable development norms and interests to the table in dispute in which they are implicated, he notes that tribunals have not, to date, seemed keen to do so.[183]

A tribunal may in fact be more likely to look to environmental norms when adjudicating disputes under certain IIAs such as NAFTA, which includes extensive and explicit provisions relating to environmental protection.[184] It is true that, particularly in recent years, more and more environmental references have found their way into the regime by way of incorporation in IIAs. With reference to a sample of over 1,800 IIAs, for example, Astreti documents 9.4 per cent contain some kind of explicit reference to the environment.[185] However, very few of these provisions are procedural in nature, and where they do occur, they remain

[180] *SD Myers*, final decision, *supra* note 127.
[181] Pavoni, *supra* note 144 at 542-543 citing specifically *Methanex*, though contrasting it to the approach taken by the tribunal in *Parkerings*, *supra* note 128.
[182] Chester Brown, "Bringing Sustainable Development Issues before Investment Treaty Tribunals" in Cordonier Segger, Gehring & Newcombe, eds, *supra* note 77, 175 at 184.
[183] *Ibid.*
[184] *Ibid* at 530-532.
[185] Asteriti, *supra* note 115 at 115-117.

generally vague and aspirational in nature.[186] Moreover, as Tienhaara observes, it remains ultimately at the discretion of arbitrators to interpret how and under what circumstances a state may exercise its right to regulate.[187] The haziness of these provisions, coupled with the general vagueness of IIAs and the lack of procedural provisions referring to the environment, leads potentially to investment-focused decisions that "make[] extensive use of policy arguments in order to increase the level of protection granted to the investor."[188] So, while, as Astriti observes, the introduction of these environmental provisions in IIAS

> constitutes a significant change in the functioning of the investment regime[,]... [t]he particular structure of the investment regime has meant that process determinacy has been accompanied by a form of decentralised production, which makes the double functions of law, predictability and stabilisation, problematic.[189]

In other words, despite these hints of a growing attentiveness to environmental concerns within the regime, it has been a lukewarm and only partial transformation, hindered by the nature of the regime's inner structure and logic.

Even given the brevity of this overview, it can be said that interactions between the investment and environmental regimes in ISDS remain tentative. Despite overtures in decisions and references in treaties to norms from the environmental regime, environmental norms continue to be sidelined in a weighting that would seem to privilege "economic" considerations and investor rights over other considerations. Rather, there is little evidence of genuine "re-entry" of environmental norms into the investment regime, which remains relatively closed off, self-isolating, and unresponsive to local environmental concerns. Where the

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[186] *Ibid*.

[187] Tienhaara, *Expropriation, supra* note 91 at 277. Astriti echoes this point, noting that

> [t]he investment legal regime works on a model based on broad principles (the fair and equitable treatment, non-discrimination, generous expropriation protections) coupled with stringent dispute settlement provisions. This inevitably focuses the attention and the analysis on the 'judicial' production of the tribunals… .

Astriti*, ibid* at 152.

[188] *Ibid* at 152-153.

[189] *Ibid* at 154-155. She sees environmental provisions as providing something of a counter-balance to the regime's generally open-textured nature. As noted above in part II, she suggests that more precise language in IIAs could lead to more "textual determinacy" and "contribute to clarify" the "uneasy" investment-environment relationship. *Ibid* at 153.

regime has displayed some degree of environmental responsiveness—such as in the incorporation of environmental norms into IIAs—it is done superficially and ineffectively. Where the regime has innovated such responses, as Schneiderman remarks, it has seemingly "been encouraged or prompted by critiques issuing out of states and social movements regarding the system's deleterious effects on state capacity and social and environmental degradation."[190] That is, the regime itself has demonstrated little capacity or willingness to transform.

B. NGOs and the Practice of *Amicus Curiae* Participation

Given the environmental unresponsiveness and closed-off nature of the investment regime, as emerges from the above depiction, it seems injudicious to expect the regime to appreciate or respond to the environmental ramifications of its interactions with locally authored regulation through ISDS. Moreover, as has been noted (and as will be elaborated upon below), the state may be similarly hesitant to take up this task. In this light, NGOs[191] become crucial actors in the process not only of ensuring environmental interests are accounted for in ISDS but also of transforming the regime. The most powerful and effective way that NGOs are able to execute this dual role has been by participating as *amicus curiae* in ISDS proceedings, which will be treated in detail in the subsequent sections. It

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[190] Schneiderman, "Legitimacy and Reflexivity," *supra* note 104 at 483.

[191] There is arguably no clear-cut or universally accepted definition of what constitutes an NGO. It is a question that has attracted a vast amount of academic attention and will not be explored in depth here. While it is well beyond the scope of this paper to get to the bottom of this controversy, the notion of "NGO" is certainly of importance to this study. Given the particular methodological challenges presented by the focus of this study (as detailed in part IV), coupled with the relatively limited sample of data available, a fairly broad definition of NGO is appropriate. As such, I have chosen to adopt Charnovitz's well-known definition, which seems particularly accommodating of these circumstances:

> Groups of individuals organized for the myriad of reasons that engage human imagination and aspiration. They can be set up to advocate a particular cause, such as human rights, or to carry out programs on the ground, such as disaster relief. They can have memberships ranging from local to global.

Steve Charnovitz, "Two Centuries of Participation: NGOs and International Governance" (1997) 18:2 Mich J Int'l L 183 at 186. Charnovitz's definition captures the essential character of the movements and organizations that I wish to analyze—that is, those operating beyond the state and motivated by environmental concerns of a global or local character.

For another potential definition of NGO, see e.g. Herman Rechenberg, "Non-governmental Organizations" in Rudolf Bernhardt & Michael Macalister-Smith, eds, *Encyclopedia of Public International Law* (Amsterdam: Max-Planck-Institut für Ausländisches Öffentliches Recht und Völkerrecht, 1992) 612.

first bears exploring more generally the role of NGOs in the international investment regime, which is the subject of discussion in this section. This will provide background for the subsequent discussion on the importance and utility of *amicus curiae* briefs in ISDS.

(i) NGOs in International Investment Law

The rise of NGOs as increasingly prominent and influential actors in international law has been the subject of much theorization and discussion.[192] NGOs now have an established place in various international institutions, especially those relating to issue areas such as the environment and human rights, and are increasingly influential in international norm creation as well as in the operation a variety of international regimes.[193] They have also become a conduit for the expression of interests and transmission of information in various international dispute settlement fora.[194]

As hinted at in the introduction, several features of the investment regime (and of ISDS in particular) endow NGOs with an especial function. One such feature is the role and position of arbitrators in ISDS. As alluded to in the above section, arbitrators have shown little initiative in drawing from environmental norms on their own, even when adjudicating disputes in which environmental regulation is at issue or under an agreement that makes explicit reference to the relevance of environmental norms or objectives. This reluctance can perhaps be explained by

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[192] A veritable universe of literature exists on this topic. See e.g. Barbara Gemmill & Abimbola Bamidele-Izu, "The Role of NGOs and Civil Society in Global Environmental Governance" in Daniel C Esty & Maria N Ivanova, eds *Global Environmental Governance: Options and Opportunities* (Princeton: Yale School of Forestry and Environmental Studies, 2002) 1; Jean L Cohen & Andrew Arato, *Civil Society and Political Theory* (Cambridge, MA: MIT Press, 1992); Paul Kevin Wapner, *Environmental Activism and World Civic Politics* (Albany: State University of New York, 1996); Gaelle Breton-Le Goff "NGOs' perspectives on non-state actors" in Jean d'Aspremont, ed, *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (New York: Routledge-Cavendish, 2011) ch16.

[193] The extent of this involvement can, in many ways, to be traced to the 1992 UN Conference on Environment and Development (UNCED) in Rio de Janeiro, where NGOs had an unprecedented physical presence and influence in drafting the instruments that ultimately emerged as a result of the conference. For a brief accounting of this history, see e.g. Peter Willetts, "From Stockholm to Rio and beyond: the impact of the environmental movement on the United Nations consultative arrangements for NGOs" (1996) 22:1 Rev Int'l Stud 57.

[194] Such fora include the International Court of Justice (ICJ) and the World Trade Organization (WTO), as will be explored further below.

the culture of the international arbitration community, which seems accurately described as commercially oriented.[195] As Tienhaara notes, arbitrators tend to be experts in commercial law and do not, as a general rule, have much (if any) experience with environmental law.[196] Schneiderman makes a related point. The problem, he seems to say, is not that the regime is completely closed off to "external influences" *per se*, but rather that

> in so far as it is responsive to its own shortcomings[,] those responses will be determined by the regime's own principal players (lawyers, arbitrators, academics). These actors will respond in accordance with the regime's own embedded preferences employing the regime's own terminology and typically not according to the logic of competing sub-systems, such as international environmental or human rights law.[197]

This harkens back to Lang's contention that it is a regime's inner "principles of vision," which must be confronted—a challenge, it would seem, that can only be mounted from actors that come from *outside* the regime—if transformation is to occur. NGOs, then, are in a position to do this, mainly by bringing otherwise unfamiliar environmental concerns to the tribunal's attention and offering expertise in environmental law.[198] NGOs are uniquely situated, as well, to offer "local" expertise on the potential and actual impacts arising from a dispute.

A second feature is the unique role non-state actors play in the investment regime and in ISDS in particular. Dumberry and Labelle-Eastaugh note that "[i]nternational investment law is arguably the sphere of international law in

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[195] See for example the discussion in Tienhaara, *Expropriation*, *supra* note 91 at 143-144.
[196] *Ibid* at 206. Her review of the CVs of the arbitrators who decided several major decisions in which environmental regulation was implicated revealed that only 2 out of the 23 arbitrators involved in these decisions appeared to have had "any significant experience with environmental law." *Ibid*.
[197] Schneiderman, "Legitimacy and Reflexivity," *supra* note 104 at 480.
[198] Many commentators have noted the potentially beneficial role that NGO (and other non-party) expertise can play in both individual proceedings as well as in improving the legitimacy the regime in general. See e.g. Christina Knahr, "The new rules on participation of non-disputing parties in ICSID arbitration: blessing or curse?" in Chester Brown & Kate Miles, eds, *Evolution in Investment Treaty Law and Arbitration* (Cambridge: Cambridge University Press, 2011) ch 15 at 335; Nigel Blackby & Caroline Richard, "Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration?" in Waibel et al, eds, ch 10 at 254.

which non-state actors play the greatest role."[199] As highlighted in previous sections, the investment regime grants access to the dispute settlement mechanisms embedded within international treaties exclusively to a set of non-state actors—namely foreign investors, the vast majority of which are large multi-national corporations (MNCs). While this unprecedented arrangement may not elevate these actors to the status of subject in international law,[200] it has afforded them a tremendous amount of influence in shaping the investment regime and its constitutive norms.[201]

This feature feeds into—and is sustained by—a third feature: the role of the state in the investment regime. The operation of the regime and the powerful position it affords investors casts the traditional role of the state in protecting the public interest in a somewhat ambivalent light. While in the course of ISDS the state finds itself in the position of defending its right to craft environmental regulation most appropriate to national circumstances, in signing IIAs in the first place, it is also responsible for negotiating away its ability to do just that. This contradiction can make it more difficult for states hoping to encourage and preserve foreign investment, on the one hand, to rise to the challenge of defending the public interest in ISDS proceedings, on the other.

These two factors potentially position NGOs to fill a void in representing local environmental interests in ISDS—as both a counterbalance to powerful investor interests and in lieu of, or as spur to, the state. This is augmented by the often highly localized nature of the effects of ISDS outcomes—which, as described, can affect local decision making relating to issues such as land use, environmental assessment, and pollution prevention—as they relate to the environment. The very

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[199] Patrick Dumberry & Erik Labelle-Eastaugh, "Non-State Actors in International Investment Law: The Legal Personality of Corporations and NGOs in the Context of Investor-State Arbitration" in d'Aspremont, ed, *supra* note 192, 360 at 360.
[200] See the discussion in *ibid*.
[201] See e.g. Jacob, *supra* note 44, observing that BITs are drafted more by professionals than by diplomats. See also Miles, "Origins, Imperialism," *supra* note 68 at 38*ff*, linking this with the increasing involvement of corporate actors in negotiation of international agreements and the trend towards "commercial diplomacy" (evidenced by the growing corporate presence in diplomatic missions).

local character of the impacts of disputes uniquely positions NGOs (particularly locally based ones) to ensure that these local interests are accounted for in ISDS proceedings, particularly in states where democratically accountable institutions may be weak or lacking altogether.

A final characteristic of the regime that makes NGOs particularly important facilitators of interaction with the environmental regime relates to the internal structure of the regime. As noted, unlike other international regimes, the international investment regime is constituted around a vast and informal network of IIAs—generally negotiated under highly secretive conditions[202]—and *ad hoc* decision making bodies; no centralized institutions are directly and exclusively responsible for normative or procedural design. Rather, the regime is nebulous; its decision-making authority and mechanisms for norm production are diffuse and de-centralized. Indeed, as Jacob notes, it is "[n]ot only despite, but *because of* their vast numbers, individual investment treaties avoid the critical gaze of the public eye."[203] In this context, if interaction is to be pervasive, it will likely most effectively be facilitated through the work of transnationalized, mobile, responsive, and hybrid networks such as those that NGOs have become adept at forming.

The unique makeup of the investment regime, and the particular role of NGOs within it, then, means that the involvement of these actors has two potential and interrelated effects. First, by bringing concerns related to the environment forward, NGOs force interactions between the regime and these "alien" concerns, which might not otherwise have a channel for entry into the regime—and which, as can be seen from the overview of the previous sections, the investment regime's actors would likely otherwise forgo. NGO involvement can foster awareness of environmental concerns and local realities for decision makers from

[202] For a discussion of such concerns as they relate to the ongoing Trans-Pacific Partnership (TPP) negotiations, see David S Levine, "The Most Important Trade Agreement That We Know Nothing About" *The Slate* (30 July 2012), online: <http://www.slate.com/articles/technology/future_tense/2012/07/trans_pacific_partnership_agreement_tpp_could_radically_alter_intellectual_property_law.html>.
[203] Jacob, *supra* note 44 at 32.

within the investment regime and forces them to account (however weakly) for these issues. In so doing, NGOs contribute to a re-politicization, in essence, of the regime, creating openings for greater debate and negotiation over the appropriate balance between investor and environmental protection when these two sets of interests run afoul of one another in the ISDS process. Simultaneously, by finding, exploiting, and even creating points of entry for these interactions, NGOs contribute to a process of opening up within the regime. Their increasing involvement, then, makes it more difficult for the investment regime to avoid these discussions and harder for it to remain inward looking, closed off, and unresponsive to collisions with other regimes. Ultimately, these interventions have the potential to anchor "the emergence ... of the idea of civil society" in the arbitral world.[204] As will now be explored, the foremost forum for NGOs in this activity is ISDS, and their tool the *amicus curiae* brief.

(ii) The Role of *Amicus Curiae* Briefs in ISDS

It would seem, then, that NGOs have a unique and potentially crucial role to play in both bringing about and shaping interactions between the investment regime and the environment and in so doing, opening up and fostering environmental consciousness within investment regime. As has been noted, ISDS appears to provide the primary forum for this activity. So, what means are at the disposal for NGOs to do this?

There are a number ways in which NGOs seek to trouble the investment regime by bringing it in contact with environmental concerns. For example, they often employ critique through literature and advocacy campaigns as an indirect means of suggesting, in various subtle and unsubtle ways, that the investment regime is failing to account for environmental concerns.[205] However, in this section, I highlight some of the features surrounding the evolution and operation of the

[204] Francesco Francioni, "Access to Justice, Denial of Justice, and International Investment Law" in Dupuy, Francioni & Petersmann, eds, *supra* note 129 at 63, 76.
[205] For examples from a very small sample, see e.g. International Institute on Investment, online: IISD, <www.iisd.org>; Center for International Investment Law, online: <www.ciel.org>; Corporate Europe Observatory, online: <www.corporateeurope.org>; Council of Canadians, online: <www.canadians.org>.

mechanism through which NGOs are able to most *directly* interact with the investment regime through ISDS: *amicus curiae* briefs. This will provide important background for the case studies examined in the following part (IV).

1. Amicus Curiae *Briefs: A Brief History*

The practice of *amicus curiae* submissions, although still only an emergent one in ISDS, enjoys a long history and can be found in a variety of domestic and international settings. Although its origins date back to Ancient Rome, it developed more recently in the common law courts of seventeenth century England and subsequently spread to the United States and across the Commonwealth.[206] While its current form varies from jurisdiction to jurisdiction,[207] the development of the practice in ISDS seems most to resemble the United States tradition (which tends to involve an interested third party advocating for its own position, as opposed to an independent lawyer appointed by the court to provide knowledge of an area of law in which it lacks expertise, as is more common in the UK[208]). Although not commonplace in all international judicial fora—the International Court of Justice, for example, has not embraced the involvement of *amicus curiae* in proceedings[209]—the practice has become a feature of some, including the Iran-United States Claims Tribunal[210] and the WTO.

The introduction of *amicus curiae* briefs in WTO litigation was particularly influential upon the investment experience. The practice had not explicitly been provided for in the WTO's DSU (Dispute Settlement Understanding). However, in 1998, during the course of the *Shrimp/Turtle* dispute,[211] a group of environmental NGOs (including one, the Center for International Environmental

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[206] Blackaby & Richard, *supra* note 198 at 257. See also e.g. Florian Grisel & Jorge Vinuales, "L'*amicus curaie* dans l'arbitrage d'investissment" (2007) 22:2 ICSID Rev 380.
[207] *Ibid* at 258.
[208] *Ibid* at 258.
[209] *Ibid* at 259.
[210] Eric de Brabandere, "Non-state actors in international dispute settlement: Pragmatism in International Law" in d'Asprement, ed, *supra* note 129 at 352.
[211] The dispute was launched by a set of developing countries against the US. It concerned a domestic measure that essentially banned the importation of shrimp that had not been harvested with the use of a "turtle excluder device," a contraption designed to prevent the by-catch of endangered sea turtles.

Law, that authored several of the briefs that will be discussed in part IV) were eventually successful in their request to submit an *amicus curiae* brief to the WTO panel for consideration.[212] *Amicus* briefs have since been accepted in a number of WTO disputes, though rejected in others, resulting in an uncertain track record.[213] In any event, this set of events paved the way for *amicus* participation in investment disputes.

In ISDIS, the first *amicus curiae* application arose under NAFTA. These first requests were made in 2000 by an international sustainable development NGO to the tribunal in *Methanex v United States*.[214] Briefly, third party involvement was not contemplated, at the time, in either NAFTA or under the rules under which the dispute was proceeding (UNCITRAL), so the *Methanex* tribunal's eventual decision to accept the submissions was path-breaking. Several subsequent NAFTA arbitrations saw non-disputing parties apply to make *amicus curiae* submissions. In *UPS v Canada*, several months after the initial *Methanex* ruling regarding the admission in principle of third party submissions, the Canadian Union of Postal Workers and the Council of Canadians applied both to be added as parties to the proceedings and, failing that, to be permitted to make

[212] In their initial submission, the *amici* expressed concerns over the Panel report's potential impact upon domestic capacity to enact environmental regulation. The Panel ultimately decided such submissions were "incompatible" with the DSU unless they were appended to (and, as such, formed part of) a party's submissions and so declined to consider them. WTO Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R 15 May 1998 at para 7.8. During the dispute's appeal proceedings, however, the Appellate Body disagreed and ruled that the DSU did in fact authorize panels to accept such submissions. WTO Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R 12 October 1998 [*Shrimp/Turtle* Appellate Body].

[213] The appropriateness and utility of *amicus curiae* participation at the WTO has generated a great deal of academic discussion. See e.g. Petros C Mavroidis, "Amicus Curiae Briefs Before the WTO: Much Ado About Nothing" in Armin von Bogdandy, Petros C Mavroidis & Yves Meny eds, *Festschrift fur Claus-Dieter Ehlermann* (Kluwer International: 2002); Robert Howse, "Membership and its Privileges: The WTO, Civil Society, and the *Amicus* Brief Controversy" (2003) 9 ELJ 505; Nathalie Bernasconi-Osterwalder et al, *Environment and Trade: A Guide to WTO Jurisprudence* (London: Earthscan, 2006); Gabrielle Marceau & Mikella Hurley, "Transparency and Public Participation in the WTO: A Report Card on WTO Transparency Mechanisms" (2012) 4:1 Trade L & Dev't 19.

[214] This case will be referred to in much greater detail below in part IV, and I will turn the history and surrounding and the implications of this first experiment with *amicus curaie* participation in the conclusion (part V).

submissions. Both requests were denied.[215] More recently, it has become more commonplace for NAFTA tribunals to accept applications from would-be *amici curiae*. Since the seminal decision in *Methanex*, tribunals have accepted applications made by various applicants, including an industry lobby group,[216] unions and labour organizations,[217] First Nation governments,[218] and NGOs of various stripes.[219] Despite this apparent trend towards allowing such interventions, not all recent NAFTA tribunals have been so welcoming of non-party (non-state) interventions.[220]

Following *Methanex*, non-NAFTA tribunals began taking their cue from this experience. Although the first request under ICSID for *amicus curiae* status was rejected,[221] some subsequent applications were successful, beginning with the decision to allow the *amicus* participation of several environmental NGOs in the Suez/Vivendi arbitration against Argentina.[222] A variety of NGOs[223] and the European Union[224] have since been permitted to participate as *amici* in various

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[215] *United Parcel Service of America Inc v Government of Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amicus Curiae of 17 October 2001 (UNCITRAL). The request for party status was rejected outright. The request for *amicus curiae* status was determined to be, in principle, within the power of the tribunal to grant. However, the tribunal declined to do so at the jurisdictional stage of the proceedings on the basis that the interests and expertise of the *amici* were not such that they stood to offer assistance to the tribunal in its determination of jurisdiction. Meanwhile, the US Chamber of Commerce, a business lobby group, also applied for *amicus curiae* status but was rejected.

[216] For example, the National Mining Association in *Glamis*. See discussion at *infra* note 367.

[217] *Merrill & Ring Forestry LP v The Government of Canada* Final Award of 31 March 2010 (UNCITRAL, ICSID Administered). The United Steel Workers; Communications, Energy and Paperworkers Union of Canada; and the British Columbia Federation of Labour were permitted to file a joint *amicus* submission.

[218] Such as the Quechan Indian Nation in *Glamis* and the Assembly of First Nations in *Grand River Enterprises Six Nations, Ltd, et al v United States of America* (UNCITRAL) [*Grand River*].

[219] Including the Sierra Club, Earthworks, and Friends of the Earth in *Glamis*.

[220] For example, applications made by an industry lobby group, the Study Center for Sustainable Finance, and by Barry Appleton, an investment lawyer and self-proclaimed interested party and expert in investment arbitration (on behalf of himself), were recently declined by the tribunal in the ongoing *Apotex v United States* arbitration. *Apotex Holdings Inc and Apotex Inc v United States of America*, ICSID Case No ARB(AF)/12/1.

[221] *Tunari*, *supra* note 42.

[222] *Suez/ Vivendi amicus* brief, *supra* note 42. This will be addressed at length below in part IV.

[223] See generally part IV, *infra*.

[224] *AES Summit Generation Limited and AES-Tisza Erömü Kft v The Republic of Hungary*, ICSID Case No ARB/07/22 [*AES*]; *Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania*, ICSID Case No ARB/05/20 [*Micula*]; *Electrabel SA v Republic of Hungary*, ICSID Case No ARB/07/19 [*Electrobel*].

cases. However, there has been little consistency in tribunals allowing such participation, and *amicus* applications have been rejected in a number of cases.[225] Greater consistency may, however, be on the horizon, as a slow evolution has also been evidenced in the procedural machinery of the investment regime: the ICSID Rules now offer clearer rules for such non-party participation,[226] as do a variety of IIAs.[227] This topic will be returned to below.

2. The Utility of Amicus Curiae *Briefs in ISDS: Shaping Interactions*

There is a vast literature addressing the emergence, use, and potential of *amicus curiae* briefs in ISDS. It is beyond the scope of this project to survey this landscape in its entirety. What will be sketched out below are several of the prominent positions either for or against the admission of *amicus curiae* submissions to ISDS proceedings. This will provide a fuller picture as to how NGOs can use *amicus* briefs (and whether they should) to bring greater environmental consciousness to the investment regime—a topic to be addressed by way of case study in the part IV.

For many commentators, what role—if any—*amicus curiae* participation should play in ISDS is determinable largely by looking to the benefits to be reaped for the operation and continued existence of the system itself. For most, the key benefit lies in the ability of *amicus curiae* to better "legitimize" ISDS. The "legitimacy crisis" to which this line of thinking is responding is rooted in public concerns over the regime's apparent lack of transparency and accountability.[228] This is seen, for example, in the limited degree to which the public is invited (or permitted) to participate and the unelected and officially unaccountable status of arbitrators in light of the potential impacts of decisions upon sovereignty and the

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[225] These applications were made mostly by public interest NGOs. See e.g. *Chevron*, *supra* note 160; *Tunari*, *supra* note 42; *Pezold, supra* note 126. *Vivendi*, *supra* note 153 was also rejected and involved an application from a group of NGOs and several named individuals.
[226] ICSID Rules, *supra* note 49, art 37(2). See below for discussion.
[227] See e.g. *CAFTA*, *supra* note 26, art 10.20.3. For an excellent discussion of this landscape and its evolution, see generally Grisel & Vinuales, *supra* note 226.
[228] As a very small sample, see e.g. Charles H. Brower, II, "Structure, Legitimacy, and NAFTA's Investment Chapter," (2003) 36 Vand J Transnat'l L 37; Susan D Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions" (2005) 73 Fordham L Rev 1521.

public interest.[229] From this perspective, those who view the introduction of *amicus curiae* into the ISDS process as a positive development tend to focus on the potential of this form of participation to ameliorate perceived shortcomings within the system, particularly with respect to perceptions regarding its legitimacy, transparency, and accountability. Choudhury, for example, extols the potential for *amicus curiae* submissions, in increasing public participation, to cure the system's "democratic deficit."[230] She also sees the involvement of *amicus curiae* through the submission of briefs as a means of bolstering the legitimacy of ISDS.[231] Many others echo this perspective.[232] VanDuzer, for example, observes that its openness to *amicus curiae* participation "[u]ndoubtedly … contributes to the legitimacy of NAFTA investor-state arbitration"[233] and calls for greater formalization of the process in arbitration rules. Significantly, arbitration tribunals have themselves on occasion noted that *amicus curiae* involvement in ISDS has a crucial role to play in enhancing the regime's legitimacy.[234]

Others in this camp are somewhat more ambivalent. Blackaby and Richard seem skeptical that the creation of processes to accommodate *amicus curiae* participation will alone be enough to resolve the lack of transparency and accountability—and resulting legitimacy crisis—perceived to plague the system.[235] They note, in fact, that unless accompanied by further procedural opening (such as access to the arbitration records and oral hearings, discussed further below), *amici curiae* may not be able to participate meaningfully, so their participation may end up "exacerbat[ing] the democratic deficit" while providing little assistance to the tribunal.[236] Grisel and Vinuales are also cautiously optimistic, seeing the potential for *amicus* participation to enhance the system's

[229] See generally, for example, Van Harten, *supra* note 68.
[230] Barnali Choudhury, "Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?" (2008) 41 Vand J Transnat'l L 775.
[231] *Ibid*.
[232] See e.g. Eugenia Levine, "*Amicus Curiae* in International Investment Arbitration: The Implications of an Increase in Third-Party" (2011) 20 Berkeley J Intn'l L 200 at 219-220.
[233] J Anthony VanDuzer "Enhancing Procedural Legitimacy of Investor-State Arbitration through Transparency and *Amicus Curiae* Participation" (2007) 52 McGill LJ 681 at 717.
[234] See discussion below, *infra*.
[235] Blackaby & Richard, *supra* note 198.
[236] *Ibid* at 271.

legitimacy, while also noting that many factors play into this potential success.[237] For some, such as Knahr, it is too early for definitive assessments given the prospective positive and negative effects of the rise of *amicus curiae* in ISDS.[238] Her primary concern, particularly in light of recent applications by the European Commission to file *amicus* submissions in a number of disputes,[239] appears to revolve around the potential for such *amici* to co-opt the ISDS process, which properly belongs to the disputing parties.[240] For these and other commentators, concerns that militate against greater inclusion of *amici curiae* in ISDS can be seen to coalesce around the potential impact of these briefs upon the continued, efficient operation of ISDS for foreign investors. For such commentators, while *amicus* involvement is to be welcomed insofar as it contributes to the smooth functioning of the system—potentially by legitimizing or de-mystifying ISDS—vigilance must be maintained against the potential for it to otherwise affect the system.[241]

Some fear that what they perceive as the non-legitimate, unaccountable, and unrepresentative character of NGOs themselves can mean that their increased involvement in ISDS actually works to undermine its legitimacy.[242] Additional concerns that have been put forward along similar lines include the potential for "re-politicization" of the dispute settlement process relating to foreign investment,[243] for additional costs and burdens upon the parties,[244] and for the

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[237] Grisel & Vinuales, *supra* note 206.
[238] Knahr, *supra* note 198.
[239] See *AES*, *supra* note 224; *Electrobel*, *supra* note 224; *Micula*, *supra* note 114.
[240] Knahr, *supra* note 198.
[241] This sentiment is well captured by Vinuales, who notes that while enhanced legitimacy has obvious benefits for ISDS, *amicus* participation can also become

> a double-edged sword in that if badly used, *amicus* intervention *could undermine the very arbitration regime it is supposed to strengthen*. Whereas *amicus* intervention may help legitimize the overall arbitration system, such intervention may also erode the traditional basis of arbitral proceedings, namely the consent of the parties.

Jorge E Vinuales, "Amicus Intervention in Investor-State Arbitration" (2007) 61 Dispute Resolution J 57 [emphasis added] at 75.
[242] See e.g. Brower II, *supra* note 228; Blackaby & Richard, *supra* note 198 at 269.
[243] See e.g. Blackaby & Richard, *ibid*; Knahr, *supra* note 198; Noah Rubens, "Opening the Investment Arbitration Process: At What Cost, for What Benefit?" (2006) 3:3 Transnat'l Dispute Management.
[244] See e.g. Levine, *supra* note 232; Rubens, *ibid.*

overwhelming of the system with by a tsunami of would-be *amici curiae* (the floodgates argument).[245]

Some commentators maintain that *amicus curiae* participation may offer further potential benefit in terms of the quality of tribunal decision making. Although speaking mostly of the WTO context, Boisson de Chazournes, for example, notes that *amici curiae* can offer a "non-economic perspective" and unique expertise,[246] while fostering "creative legal thinking" in decision making.[247] In a similar vein, others have noted that the inclusion of *amicus curiae* is the best way to ensure that tribunals are made aware of the public interest that may be at stake in a dispute, therefore ensuring better decision making.[248] Going further, Ishikawa argues that *amici curiae* can offer "more comprehensive legal arguments than the parties," can highlight the broader implications of decisions, and can bring forward issues that parties cannot or will not.[249]

Other commentators offer arguments either for or against increased *amicus* involvement that go beyond purported benefit or harm to the ISDS. For example, it has been noted that third world states have generally treated *amicus* involvement in proceedings with suspicion—presumably concerned that these interveners, coming, as they tend to, from the global North, will further tip the power balance against their interests.[250] Others see benefits that extend beyond increased legitimacy or more effective decision making in ISDS. Francioni, for example, appears to see the inclusion of *amici curiae* within the ISDS process as mechanism that boosts the legitimacy of civil society actors in the investment

[245] For a summary, see Kyla Tienhaara, "Third Party Participation in Investment-Environment Disputes: Recent Developments" (2007) 16:2 RECIEL 230 at 240 [Tienhaara, "Third Party Participation"]. This argument has seemingly fallen out of fashion more recently, perhaps as this concern has not borne itself out in either the international investment or WTO setting.
[246] On the expertise point see also Tomoko Ishikawa, "Third Party Participation in Investment Treaty Arbitration" (2010) 59:2 Int'l & Comp LQ 373 at 403.
[247] Laurence de Boisson Chazournes, "Transparency and *Amicus Curiae* briefs" (2004) J World Invest & Trade 333 at 335.
[248] See e.g. Andrew Newcombe & Axelle Lemaire, "Should Amici Curiae Participate in Investment Treaty Arbitrations?" (2001) 5 Vindobona J 22.
[249] Ishikawa, *supra* note 246 at 401-403.
[250] See e.g. Boisson de Chazournes, *supra* note 247 at 336 discussing the phenomenon as it relates to the WTO.

regime while also creating access to justice opportunities for these actors within the regime that begin to parallel those enjoyed by foreign investors.[251] Given the pressure that ISDS places upon state sovereignty over the design and implementation of public policy, he notes that *amicus curiae* involvement can facilitate the regime's reach into these policy areas such that they are accounted for in decision-making processes.[252]

Tienhaara offers cautious optimism for *amicus* involvement in ISDS "[f]rom an environmental perspective"—presumably in that they offer potentially some response to growing public concerns over the impact of ISDS upon environmental policy space.[253] Like many other commentators, however, she argues that changes that have facilitated greater inclusion of *amicus curiae* briefs have not going far enough, particularly in terms of transparency. Brown makes a similar environmental argument, finding that *amicus* access to ISDS proceedings can be, and is increasingly, a means of bringing sustainable development issues into ISDS and the investment regime.[254] Brabandere sees notes that it has enabled participation of marginalized groups (particularly First Nations).[255] He remains fairly pessimistic, however, pointing out, quite correctly, that *amicus curiae* participation "is not tantamount to participation *as a party in the proceedings*."[256] Blackaby and Richard are also less convinced. They seem to question the actual benefit to the public offered by *amicus* participation, warning of the potential this approach has towards simply adding another partisan party into the mix without

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[251] Francioni, *supra* note 204.

[252] He seems, in an indirect way, to advocate for a widening of the scope of arbitration and sees *amicus curiae* participation as a potential driver of this process. He notes that

> to the extent that amicus curiae briefs bring into the arbitral proceedings factual and legal considerations concerning the safeguarding of public goods, such as human and environmental health or the preservation of local cultural heritage, they can become a powerful tool to widen the scope of investment arbitration so as to encompass consideration of public policy concerns with regard to the adverse effects of an investment

Francioni Francioni, "Access to Justice, Denial of Justice and International Investment Law" (2009) 20:3 EJIL 729 at 740 [Francioni, article].

[253] Tienhaara, "Third Party Participation," *supra* note 245 at 242.

[254] Brown, *supra* note 182.

[255] Brabandere, *supra* note 210 at 353.

[256] *Ibid* at 354 [emphasis in original].

actually making disputes more open for the public.[257] Moreover, they argue that particularly in light of the questionable representativeness of NGOs in proceedings, their involvement may not be necessary, as state parties can and often do obtain public and civil society input in constructing their defence (so would-be *amici* already have the opportunity to weigh in on disputes through the usual democratic and lobbying channels).[258]

Clearly, then, as this a wide range opinions of demonstrates, the import and utility of *amicus curiae* participation in ISDS is not a given. It would certainly be incorrect to take this practice as a panacea for curing the regime's shortcomings from the perspective of either the regimes proponents or its opponents. However, to the extent that options are limited for NGOs to participate in the investment regime's processes, they provide a vital—and virtually exclusive—entry point. Moreover, as will be explored in the next part, they provide a unique (if not ideal) forum for NGOs to encourage self-transformative processes within the regime.

[257] Blackaby & Richard, *supra* note 198 at 268.
[258] *Ibid* at 269.

Part IV—Analysis: NGOs and *Amicus Curiae* Briefs in Action

To briefly recap, in part III we obtained a sense of the kinds of ways in which the international investment regime has encountered, and continues to encounter, the environment through ISDS. We also saw the degree to which the regime exhibits, more broadly, a certain environmental "consciousness." As noted, it would seem that despite the many ways in which the regime, through ISDS, bumps up against environmental concerns and interests, it has continued to remain closed off and unresponsive to these concerns in such a way that would demonstrate a sensitivity to the environment. That is, the regime itself remains relatively closed, its interactions with the environment unproductive.

A set of enquires, to be addressed in this part, follows from this. First, given how weakly environmental norms and processes have penetrated the investment regime and how resistant the regime remains to further opening up, how do we move the situation beyond this point? Building upon the findings from part III, what role can and are NGOs playing in shaping the self-reinforcing push-pull dynamic between the regime and its environmental "others" and how successful have their efforts been? In order to uncover answers for these questions, below I examine how NGO use of *amicus curiae* briefs in ISDS briefs might encourage, force, or instigate transformation in the regime by injecting environmental concerns into the process, creating (inadvertently or intentionally) more environmental consciousness and openness for the further introduction of such concerns.

My ultimate goal in this analytical exercise is, in essence, twofold: first, to provide a sense of how NGOs, through the submission of *amicus curiae* briefs, are bringing environmental concerns to ISDS and, second, to trace some of this work to outcomes and changes within the investment regime. Ultimately, this analysis will feed a broader assessment of the unique role (both potential and actual) of NGOs in facilitating more productive interactions between the investment regime and the environment. My goal here is not to provide a comprehensive analysis as to the most effective strategies or reforms. Given the

small sample of data available, this would be impossible. Rather, my objective is to offer some preliminary suggestion informed by an analysis of the experience thus far with *amicus curiae* briefs in investment disputes involving the environment.

A. Discursive Analysis: NGO Efforts to Bring Environmental Issues into the Investment Regime

This section comprises my analysis of relevant NGO *amicus curiae* briefs. After first outlining my method and elaborating upon the purpose animating the analysis, I proceed to analyze the *amicus curiae* briefs submitted in five ISDS proceedings wherein the environment was implicated. For each, I will provide some basic factual background on the dispute, detail briefly the procedure that led to submission of the brief, and then offer an analysis of how the authors of each brief appear (explicitly or otherwise) to be nudging the regime towards greater environmental sensitivity and openness. I then to trace the effects of these efforts in the investment regime (with reference to the tribunal's decisions) and provide, by way of summary and synthesis, some general conclusions about the approaches taken by *amici* to ISDS proceedings by identifying trends and similarities.[259]

(i) Method and Aim

Given the narrow focus of my project, I have selected for analysis only those *amicus curiae* briefs submitted in proceedings with (1) some degree of publicly available documentation;[260] (2) with at least one major decision issued by the tribunal;[261] (3) which were accepted by the tribunal;[262] and (4) with an

[259] Ishikawa has undertaken a study that is, in some ways, similar to the present one. However, while she does examine the substantive contributions of *amici*, distinct from the present study, she is preoccupied mostly with the gap between public and private procedure. Ishikawa, *supra* note 246.

[260] As noted, some disputes proceed confidentially, without the public release of documentation or awards.

[261] Without a decision from at least one major phase of the proceedings (i.e., jurisdiction, merits, damages, and costs), it would be impossible acquire a sense of the effect that the *amicus curiae* brief may have had in the tribunal's decision making.

[262] Similar to my reasoning for excluding *amicus curiae* briefs from disputes lacking a major-phase decision, I would not be able to trace the effect (if any) of the brief in any of the tribunal's

environmental nexus. Additionally, I have excluded submissions made in proceedings that would otherwise meet these criteria but that were submitted by groups other than NGOS. While such examples are few, as will be explained in more detail below, this did result in the exclusion of three submissions that might otherwise have been examined: one from a First Nations government, another from an industry group, and a third from a union. I also did not examine submissions made by governments not party to the dispute but party to the underlying IIA, the participation of whom as non-disputing parties is provided for in some IIAs, (such as NAFTA, for example).

I adopted a generous view of what constitutes an environmental angle so as to obtain a fairly comprehensive sample and so as to reflect the descriptions of the environment as it relates to the investment regime offered in parts II and III. Essentially, I interpreted as sufficiently "environmental" any dispute involving norms or laws, governmental policies or other activities, and non-political decision-making processes relating to management or protection of natural resources, land, water, or the environment more generally. Incidentally, my approach to categorization yielded a list comprised of cases generally considered in academic literature to constitute "environmental" disputes.[263]

The cases I ultimately selected can be characterized as falling generally into two categories: those concerning environmental regulation and those concerning control over natural resources (water in particular). As might be expected given the nebulous, cross-cutting, and far-reaching nature of the environment as discussed in part II, several cases did not display a clear-cut environmental angle, though I chose to include them nonetheless. These disputes, which pertained to the management and use of water, exhibit an inherently hybrid flavour—particularly tangible in the approaches adopted by the *amici* in their briefs, as will be see below—in that they implicate the human right to water. I would argue that

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decisions where the application was denied from the outside as, presumably, there would be nothing to trace.

[263] See e.g. Vinuales, *Foreign Investment*, *supra* note 92 at 18-22. His list does not include *Biwater*, however does include other factually similar cases such as *Suez/Vivendi* and *Vivendi*.

this area of law can properly be characterized as part of both international human rights and environmental law. Water is, of course, a natural resource. The management and regulation of its use, whether for human consumption or any other activity, it would follow, is necessarily "environmental" in nature according to the definition I employ. This fact does not change when a rights-based approach is deployed in these efforts. In fact, this appears to reflect an identifiable trend in the use of a human rights lens to frame both the nature of environmental problems and the manner in which environmental protection and management efforts ought to be undertaken.[264] This hybridity is, moreover, reflected in the concept of sustainable development—and indeed, as will be seen, many of the *amici* in these claims draw from the norms of sustainable development law in constructing their arguments.

After an initial assessment of the entire body of *amicus curiae* documentation in the ISDS context, I excluded a number of briefs and applications from my study given that the disputes of which they form part lacked an environmental angle,[265]

[264] For an overview of earlier work in this area, see e.g. John Merrils, "Environmental Rights" in Daniel Bodansky, Jutta Brunée & Ellen Hey, eds, *Oxford Handbook of International Environmental Law* (Oxford: OUP, 2007) 663; Alan Boyle, "Human Rights or Environmental Rights? A Reassessment" (2007) 18 Fordham Env L Rev 471. See also the recent work of David Boyd, who observes a growing crystallization of the right to a healthy environment through its incorporation in a variety of constitutional instruments throughout the world. David Boyd, *The Environmental Rights Revolution* (Vancouver: UBC Press, 2013). As further evidence of this trend, the Human Rights Council of the United Nations recently appointed an Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, UNGA Res, 19th Sess A/HRC/RES/19/10 (19 April 2012). In his preliminary report, the Independent Expert, John Knox, underscores the fact that while some facets of the relationship between human rights and the environment are "now firmly established ... many issues are still not well understood," noting further that "the lack of a complete understanding as to the content of all environmentally related human rights obligations should not be taken as meaning that no such obligations exist." John Knox, *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UNGA, 22nd Sess HRC A/HRC/22/43 (24 December 2012) at paras 58-60.

[265] I excluded the submissions and applications for this reason from the following disputes: *United Parcel Service of America Inc v Government of Canada*, UNCITRAL (which concerned the public nature of Canada's postal service); *Grand River*, *supra* note 218 (a dispute regarding the production and sale of tobacco products); *Apotex Inc v The Government of the United States of America*, UNCITRAL (which concerns generic drug production). Each of these could also have been excluded from my study on other grounds.

lacked a major-phase decision,[266] or had been rejected by a tribunal at the application stage.[267] Several additional submissions were excluded for not having been authored by an NGO.[268] *Amicus curiae* documentation from five disputes ultimately met my criteria and are analyzed below: *Methanex v United States* (*Methanex*);[269] *Suez/Vivendi v Argentina* (*Suez/Vivendi*);[270] *Biwater Guaff v Tanzania* (*Biwater*);[271] *Glamis v United States* (*Glamis*);[272] and *Pac Rim v Republic of El Salvador* (*Pac Rim*).[273] To the best of my knowledge, I have assembled an exhaustive list of briefs that meet the criteria I have set out.

The entirety of the documentation upon which I relied was unavailable in any one location. As such, I amassed the various documents required for my analysis—which included *amicus curiae* briefs and applications; tribunal awards of differing stages, letters, and procedural orders; and party memorials and other submissions—from a variety of trusted websites.[274] Wherever possible, I gathered

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[266] There are two decisions that I excluded on this basis. As of 9 July 2011, no major decision has been rendered by the tribunal convened to resolve the *Chevron v Ecuador* dispute. The dispute concerns a major US oil company who has initiated arbitration under the US-Ecuador BIT against the Republic of Ecuador over the enforcement of a $19 billion award made against it in Ecuadorian courts over the detrimental effects to the environment and to the lives of Amazonian farmers resulting from illegal dumping in the Ecuadorian Amazon over the course of many years by a company it acquired. *Supra* note 160. The second dispute, *Foresti*, *supra* note 125, which settled before the tribunal issued a jurisdictional decision, so was also excluded.

[267] Such was the case with would-be *amici curiae* in both the *Vivendi, supra* note 152, and *Tunari, supra* note 42, disputes.

[268] Along these lines, the submissions made by several unions and labour groups—the United Steelworkers; Communications, Energy and Paperworkers Union of Canada; and the British Columbia Federation of Labour—in *Merrill & Ring, supra* note 217. As discussed further below, for this reason I also excluded from my analysis the submissions made by the Quechan Indian Nation and the National Mining Association in the *Glamis* dispute.

[269] *Supra*, note 127.

[270] *Supra*, note 42. The *amicus curiae* submission made in *Suez/Vivendi* was done on behalf of a consortium of various groups that, although self-describe their organizations in a variety of ways, can arguably be defined as NGOs given the broad definition I have adopted. See *supra* note 191 and *infra* note 311.

[271] *Supra*, note 42.

[272] *Supra*, note 126.

[273] *Supra*, note 2. As with the *Suez/Vivendi* submission, *supra* note 270, in *Pac Rim*, a consortium of groups came together to submit the brief. This group, too, was composed of an eclectic grouping of organizations devoted to various causes. Again, although they describe their organizations in differing manners, the nature of their organization and activities fit, I would argue, within the definition of NGO I have adopted. See *infra* note 401 for details on these organizations.

[274] These included ICSID (https://icsid.worldbank.org/ICSID/Index.jsp); ITA Law (http://www.italaw.com/); NAFTAClaims (http://www.naftalaw.org/); US Department of State

documents from official governmental, non-governmental, and international organizational websites. To the best of my knowledge, even those documents taken from less official websites are faithful and accurate copies.

After laying out some of the basic facts around the investment dispute and the circumstances leading to the involvement of the *amici*, I provide some critical analysis of the briefs themselves. Specifically, I analyze the substantive content laid out in the documents with a view to uncovering the ways in which NGOs are employing this medium to encourage—deliberately or otherwise—an opening of the ISDS regime and to mobilize an environmental consciousness from within the regime. To this end, I conduct a discursive analysis of the briefs so as to uncover evidence that NGOs are employing this medium so as to (1) contextualize the dispute; (2) introduce environmental norms into the dispute (either those completely alien to the regime or those referenced in IIAs); and, finally, (3) challenge the regime's tendency to monolithically characterize disputes as purely "investment" related by showing how they can be seen also as "environmental" due to their impacts upon the environment and the people who live within it. My method involves examining, for example, the legal argumentation employed, the presentation of facts, and the general perspectives adopted by the *amici* in their briefs.

I then turn to an analysis around the effect of this involvement upon the regime by looking to the way in which each tribunal has responded to these submissions. Here I look for evidence that the tribunals have begun to internalize some of the environmental concerns and arguments brought forward by the *amici* by evaluating the degree to which, if at all, tribunals are engaging with *amicus* arguments and concerns regarding the environment. More specifically, I examine the relevant awards to uncover (1) the degree to which the *amici*'s submissions

(http://www.state.gov/s/l/c3439.htm); Foreign Affairs, Trade and Development Canada (http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/nafta.aspx); the Center for International Environmental Law (CIEL) (http://www.ciel.org/); the International Institute for Sustainable Development (IISD) (http://www.iisd.org/).

are explicitly referred to and (2) the manner in which and extent to which tribunals adopt or reference the *amici*'s arguments in their reasoning.

(ii) The Briefs

As noted above, my analysis in this section comprises an examination of the *amicus curiae* submissions from five disputes. Three of these disputes concern environmental regulation (*Methanex*, *Glamis*, and *Pac Rim*), while two of them concern control over water (*Suez*/*Vivendi* and *Biwater*). I examine them in the order in which the tribunal decided to permit the *amici* to participate.

1. Methanex Corporation v United States of America

On 3 December 1999, Methanex, a Canadian company, initiated arbitration against the United States under NAFTA. The claim revolved around a plan to ban methyl tertiary-butyl ether (MTBE), a gasoline additive, in the state of California. The ban, constituted by a set of California measures, had been proposed as a result of concerns that the environmental and related human health risks arising out of the use of MTBE were "significant" such that they could not be mitigated. The measures initially involved labeling gasoline pumps where MTBE was present, with an eventual ban of the product to take place in 20002.[275] At the time of the ban, Methanex was the largest producer of methanol (a component of MTBE) in the world, though did not manufacture MTBE itself.[276] It claimed that the proposed ban constituted a breach of its rights under Articles 1102 (national treatment), 1105 (minimum standard of treatment), and 1110 (expropriation) and requested damages of $970 million.[277]

On 25 August 2000, the International Institute for Sustainable Development (IISD) filed a petition to act as *amicus curiae* to the *Methanex* tribunal. As described above in part III, this was the first time that such a request had been made in the context of an investment treaty dispute. The would-be *amici*

[275] *Methanex*, final award, *supra* note 127 at Part II – Ch D (generally).
[276] *Ibid* at paras 1-5 of Part I.
[277] Ultimately, while the tribunal determined that it had jurisdiction over the dispute, it rejected each of the claimant's claims. *Ibid.*

requested access to the disputing parties' memorials and to the tribunal's orders, admittance to the oral hearings, and the capacity to make oral and written submissions.[278] The tribunal eventually received another petition from a group of two would-be *amici*—Communities for a Better Environment, the Bluewater Network of Earth Island Institute, and the Center for International Environmental Law (the Communities/Bluewater/CIEL *amici*)—on 13 October 2000.[279]

The tribunal issued an initial decision with respect to the admissibility of the would-be *amici* on 15 January 2001. In its decision, it determined that it had the authority in principle to accept the submission of *amicus curiae* briefs, though it reserved its decision as to the admissibility of the two petitions it had received.[280] By 2003, the Free Trade Commission (FTC) had issued its Statement on Non-disputing Parties,[281] and following this, on 6 April 2004 the tribunal allowed the submissions from both sets of *amici*. The *amici* submitted their final briefs on 9 March 2004. As a final twist to this already dense procedural plot, following the oral proceedings on the merits, the four *amici* submitted a joint request to make further written submissions (which was attached), on 29 June 2004.[282] The tribunal rejected this request in a letter dated 23 July 2004, apparently upon the objection of the claimant.[283]

a. The Communities/Bluewater/CIEL Brief

In their brief, the Communities/Bluewater/CIEL *amici* focus almost exclusively upon presenting the environmental impacts and norms they believe to be relevant to the dispute. For example, they highlight principles of international

[278] *Methanex Corporation v United States of America* (UNCITRAL), "Decision of the Tribunal on Petitions from Third Persons to Participate as 'Amici Curiae'" (15 January 2001) at paras 1-3 [*Methanex* Initial Decision on *Amicus* Participation]. The *amici* submitted a revised petition on 16 October 2000.
[279] Initially, a group of a slightly different composition (Communities for a Better Environment and the Earth Island Institute) submitted a request on 6 September 2000.
[280] *Methanex* Initial Decision on *Amicus* Participation, *supra* note 278.
[281] Free Trade Commission, "Statement of the Free Trade Commission on non-disputing party participation" (2003) [FTC Statement]. This history will be returned to below, in the conclusion. The criteria suggested by the FTC are also outlined below. See *infra* note 431.
[282] *Methanex Corporation v United States of America* (UNCITRAL), "Joint Post-Heating Submission by *Amici* to the Tribunal" (29 June 2004).
[283] I was unable to locate either the tribunal's letter nor the claimant's memorial of objection. As noted in *Methanex* final award, *supra* note 127, Part II-Ch C page 23 para 44.

environmental law pertinent to the state's obligation to regulate so as to protect human health and the environment, focusing in particular on the precautionary principle, the right to water, public participation, and subsidiarity. They point to such norms as offering a counter-balance to investment norms, being relevant to the dispute, and, as a result, bearing consideration by the tribunal. Interestingly, the *amici* point to these norms as evidence of the obligations that the host state (and the state of California) owes towards its citizens and of the right of the state to regulate so as to meet these obligations.[284] This effectively painted a more complicated picture of the rights at play in the dispute, with foreign investors depicted as one group of rights-bearers vis-à-vis the state amongst many others.

Like the IISD *amici*, whose brief is analyzed below, they also emphasize the references to environmental and sustainable development objectives evidenced within the text of NAFTA and its environmental side agreement, noting that "[b]oth NAFTA and the North American Agreement on Environmental Cooperation (NAAEC) explicitly preserve the right of each Party government to protect the environment, requiring that governments maintain, strengthen and enforce laws and regulations to protect the environment."[285] This, they contend, requires that "[t]he environmental provisions of both agreements are part of the context in which this Tribunal must interpret Methanex's claim under Chapter 11."[286] This seems to be an effort to remind the tribunal of the environmental context in which NAFTA was seemingly designed to operate. Perhaps also, the *amici* were employing the opportunity to attempt to nudge NAFTA's environmental machinery to life by encouraging the tribunal to operationalize some of the text's heretofore otherwise moribund environmental goals. Moreover,

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[284] They note that

> Under international law, governments have both a right and an obligation to regulate to protect human health and the environment. The international legal principles discussed in this submission demonstrate that this Tribunal must give substantial deference to measures implemented to achieve these goals.

Methanex Corporation v United States of America (UNCITRAL), "Submission of Non-Disputing Parties" of Bluewater Network, Communities for a Better Environment, and Center for International Environmental Law (9 March 2004) at para 3 [*Methanex* Bluewater/Communities/CIEL *amicus* brief].

[285] *Ibid* at para 6.

[286] *Ibid.*

placing the environmental objectives embedded within the NAFTA text side-by-side with an array of additional environmental norms and obligations at play in the dispute, the *amici* appear, further, to be offering a re-characterization of the dispute as more than merely an "investment" one.

They also deploy a number of international environmental hard and soft law instruments (such as the Espoo Convention on Environmental Impact Assessment, the Convention on Biodiversity, and Agenda 21) in their analysis of Article 1102 (national treatment). They rely on the principles enshrined in such texts in arguing that the "less favorable" aspect of this standard ought to be interpreted in light of the legitimate right of states to "to address legitimate threats, even when circumstances – such as the fact that a majority of investors in a given field are foreign – give them reason to know that their actions will fall disproportionately on foreign investors."[287] This can be seen in contrast to the investor's argument that evidence of the state's advance knowledge of the likely discriminatory impact (as opposed to evidence of protectionist intent) is the appropriate determinant of breach.[288] In this way, the *amici* appear to be offering an alternate, environmentally sensitive (and contextualized) interpretation of this investment norm. As seen in the IISD's brief, this approach offers the tribunal an interpretation of NAFTA's investment protection standards that reflects a certain hybridity with environmental norms. The Communities/Bluewater/CIEL *amici* remind the tribunal, throughout their submission, that NAFTA's provisions cannot be interpreted in isolation from these environmental norms. Moreover, the *amici* caution against rigid interpretation given the fluid and responsive nature of environmental and health regulation and the role that politics necessarily plays:

> When a government identifies a potential risk to human health or the environment, it must decide whether and to what extent to take steps to protect against that risk. While science plays an important role in identifying the existence of a risk, the decision concerning the appropriate response to that risk is fundamentally political.[289]

[287] *Methanex* Bluewater/Communities/CIEL *amicus* brief, *supra* note 284 at para 23.
[288] *Methanex* final award, *supra* note 127.
[289] *Methanex* Bluewater/Communities/CIEL *amicus* brief, *supra* note 284 at para 26.

In other words, regulation designed to protect human health and the environment must, by its nature, evolve so as to respond to an ever-shifting landscape of scientific understanding, interests, and emerging threats. Norms of investment protection ought not, they imply, be understood as providing blanket protection against such changing realities. They also draw attention to the role that democratic engagement plays in these changes—a challenge to the notion that ISDS can (or should) be disengaged from any and all "political" context.

Further, the brief emphasizes how the complexity of investment disputes—and the swaths of public policy areas that they can implicate—compels a contextualized analysis. The *amici* subtly urge the tribunal to take a broad reading of the facts and issues that are relevant to the dispute when environmental legislation is implicated:

> Clearly, investment disciplines implicate a much broader range of government regulation and thus require a broad focus in identifying the criteria relevant to determine illegitimate discrimination. A narrow analysis that looks only at economic competition would ignore circumstances that explain the need for health and environmental measures and that are therefore relevant to determining legitimate intent.[290]

b. The IISD Brief

The main thrust of the IISD's 9 March 2004 *amicus* brief appears to comprise an attempt to reframe the dispute and redefine what it puts at stake. To this end, the *amici* seem to mount an effort to illustrate that the dispute, at its core, is about the right to regulate and, as such, is "squarely about the restrictions that Chapter 11 places upon the right of the NAFTA national and sub-national governments to regulate to protect the environment."[291] They attempt to debunk the "dangerous" and "groundless" idea that the protections offered foreign investors under IIAs such as NAFTA inherently override the normal regulatory activities of domestic governments concerned with, for example, protecting the health and environment

[290] *Ibid* at para 31.
[291] *Methanex Corporation v United States of America* (UNCITRAL), "*Amicus Curiae* Submissions" of the International Institute for Sustainable Development (9 March 2004) at para 7 [*Methanex* IISD *amicus* brief].

of its citizens.[292] Through this line of reasoning, they appear to warn the tribunal that there is more at stake in the debate than a foreign investor's rights and that, in fact, the decision has the potential to undermine the important sovereign right to regulate in the public interest.

The brief also seems to challenge Methanex's apparent attempt (as evidenced in its heavy reliance upon WTO case law to justify its position) to import trade law wholesale into an investment dispute. In particular, they reject the claimant's reliance upon WTO law to establish that "the whole concept of environmental protection [is] an exception to the rule on regulating foreign investors"[293] by "incorrectly incorporat[ing] certain trade law rules into Chapter 11."[294] Conversely, the brief identifies several significant differences between the regimes that would seem to indicate that disputes implicating environmental regulation ought be dealt with differently under NAFTA than under the WTO regime. Significantly, the *amici*, like the Community/Bluewater/CIEL *amici*, point to NAFTA's codified environmental objectives as indication that the *Methanex* dispute ought to be determined differently than the way in which WTO disputes in which environmental regulation was implication were decided. The *amici* trace "clear recognition of environmental protection and sustainable development" in NAFTA's Preamble and the subsequent "reconfirmation" of these principles in NAFTA's environmental side agreement, the *North American Agreement on Environmental Cooperation*.[295] On a deeper level, mindful of the still nascent phase of the investment regime's development, the *amici* appear to caution the tribunal against adopting an approach that borrows from the experience of the WTO in developing norms and practices to deal with intrusions from the environment when there exist clear indicators about how this balancing should occur within the text of NAFTA itself. The result appears to resemble a delicate attempt by the *amici* to embed an awareness of environmental concerns

[292] *Ibid* at para 11.
[293] *Ibid* at para 24.
[294] *Ibid* at para 18.
[295] *Ibid* at para 23, citing to *NAFTA*, *supra* note 26, Preamble; *North American Agreement on Environmental Cooperation*, (1993) 32 ILM 1480, Preamble.

within the norms and processes of ISDS by translating the text's environmental objectives text into operable norms.

Indeed, like the Community/Bluewater/CIEL *amici*, the IISD *amici* appear to advocate subtly for an application of investment principles that reflects a teleological approach to interpretation and a resulting internalization of certain environmental norms. This is reflected in the their avowed approval of the WTO appellate body's approach in the *Shrimp/ Turtle* dispute, wherein it favoured an approach "that expressly included a specific recognition of the role of sustainable development principles as part of the *internal* requirements for interpreting the WTO Agreements, drawing on the preamble to the WTO Agreement in so doing."[296]

This approach appears to permeate the entire *amicus* submission. It can be seen, for example, in its assessment of the content of the protections offered by Article 1102 (national treatment). The IISD contended that the "in like circumstances" requirement of the national treatment standard found in NAFTA is broader than the "like products" standard found in the national treatment standard in trade law. The use of "circumstances"—a decidedly broader and more vague term—they reason, reflects the unique nature of investment. They go further, drawing a link between the unique character of investment to its equally unique capacity to create local impacts:

> "[C]ircumstances" cannot be limited to the physical characteristics of a product produced by an investment or of the investment itself. Investments are not just physical things. They leave a "footprint" on the ground in terms of impacts on the environment, in the community, and so on. These impacts cannot be disassociated from an investment's "circumstances" simply because it is foreign owned.[297]

The IISD also attempts to draw a link between the tribunal's decision making process and the broader and on-the-ground effects of its impending decision. Perhaps hoping to inspire the tribunal to build upon the legacy it had begun to

[296] *Methanex* IISD *amicus* brief, *supra* note 291 at para 16, citing *Shrimp/Turtle* (Appellate Body), *supra* note 212 at para 116.
[297] *Ibid* at para 39.

establish with its "groundbreaking" decision to allow *amicus* participation,[298] they also impress upon it the importance and precedent-setting nature of the decision. For example, they note that

> [t]he standard of proof and the burden of proof that this Tribunal looks to should take into account the real world consequences that those tests and standards would result in. While investor-state tribunals do not create law that is binding upon other tribunals, it is well known that other tribunals will look to previous cases to help determine the correct approach to the law, and this is one in several important respects, play a key role in the development of international law in this area.[299]

This appears to represent an effort by the *amici* to invite the tribunal, in light of the relative newness of ISDS and the accompanying uncertainty as to how it should proceed, to find ways to consider the broader and longer-term implications of its decision. As such, it seems to be an early NGO attempt to insist that the investment regime cannot attempt to sit in isolation of a broader social and environmental context.

c. Impacts: Response to the Briefs

The *Methanex* tribunal makes some explicit reference to the two *amicus curiae* contributions, though it declines to pass comment upon the substance, quality, or helpfulness of their submissions other than to note that "[it] does not seek to summarise … the contents of the amici submissions, which were detailed and covered many of the important legal issues that had been developed by the Disputing Parties."[300]

In terms of the substance of the *amici*'s submissions, the tribunal is similarly reticent. It does not appear that any of the environmentally focused arguments put forth within either *amicus* brief gained any traction with the tribunal. No mention is made, for example, of the "right to regulate" in relation to protection of the environment, as relied upon by the IISD, nor of any of the international

[298] See *ibid* at para 2.
[299] *Ibid* at para 68.
[300] *Methanex* final award, *supra* note 127, Part II-Ch C, page 16, para 29.

environmental law principles relied upon by the Community/Bluewater/CIEL *amici*.

Interestingly, however, the tribunal did pick up on some of the IISD's argumentation with respect to Article 1102 (national treatment). It even quotes favourably from the IISD's brief with respect to the argument that WTO law cannot simply be imported into the investment regime and that the "like circumstances" criteria of NAFTA's national treatment standard should not be assumed synonymous with the GATT's "like products" standard. The tribunal states that

> [i]n its Rejoinder, the USA argues that Methanex had received national treatment, the GATT provisions were irrelevant and Methanex had not proved that it had received less favourable treatment. The International Institute for Sustainable Development (IISD), in its carefully reasoned Amicus submission, also disagrees with Methanex's contention that "trade law approaches can simply be transferred to investment law."[301]

It should be noted that while the tribunal's argumentation in rejecting Methanex's national treatment claim in some ways mirrors that offered by the IISD in their brief,[302] these arguments were also mounted by the United States in its defense.[303] Additionally, the tribunal ignored other elements of the IISD's national treatment argumentation, notably that pertaining to the appropriateness of the California measures given the state's "zero risk" approach to MTBE in light of significant risk of environmental harm.[304]

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[301] *Ibid*, Part IV-Ch 3, para 27, page 13. *Ibid*, citing to *Methanex* IISD *amicus* brief, *supra* note 291 at para 34.

[302] For example, the tribunal points to the use elsewhere in the NAFTA text of the "like products" terms (see decision Part IV-Ch 3, para 29, page 14; Part IV-Ch B, para 25, page 11; *cf* IISD *amicus* brief at para 36. The tribunal also relies upon the argument, broached also by the IISD, that methanol (Methanex's sole product) was not in direct competition with ethanol as a gasoline oxygenate because only MTBE (of which methanol was a component) was an oxygenate (see decision Part IV-Ch B, paras 24-25, 28, page11; *cf* paras 56-58 of the IISD brief). The tribunal also echoes the argument, articulated by the IISD in their brief, that both domestic and foreign producers of methanol received the same treatment (IISD brief at para 40)

[303] Indeed, it is the United States' memorials that the tribunal refers to on this front.

[304] See *Methanex* IISD *amicus* brief, *supra* 291 note at para 60*ff*. With respect to the "zero risk" argument, see *ibid at* paras 40-42.

Interestingly, the tribunal's reasoning with respect to the investor's expropriation claim, although not seemingly inspired by specific arguments advanced by the *amici*, seems to reflect the spirit of their argument. Just as it was argued by the *amici* (particularly the in the Community/Bluewater/CIEL brief), the tribunal seems to imply that the state has the right to regulate in response to evolving human health and environmental concerns and that investors operating in a foreign state must account for a shifting regulatory landscape.[305]

d. General Conclusions

As can be seen in the above discussion, this first experiment in *amicus* participation in ISDS appears to reflect an attempt to introduce an environmental perspective to the dispute. The *amici* both bring to the tribunal's attention relevant international environmental norms as well as offer an environmental reading and application of the investment norms implicated in the dispute. Moreover, the interventions reflect an attempt to situate, for the tribunal, the dispute in its broader social and environmental context by highlighting all the stakes at play in the events leading to the dispute and the outcome of the decision.

In terms of result, it would appear these efforts were met with only tentative engagement by the tribunal. While the tribunal clearly perceived it necessary to acknowledge the *amici*'s role, it did not see fit to respond directly to their concerns or adopt much of their reasoning. In particular, the tribunal did not accept the invitation to consider outside environmental norms or interests. Rather, the only *amici* argumentation that appeared to gain much traction—relating to the expropriation claim—allowed the tribunal to make its determination without

[305] The tribunal reasons that as the measures were non-discriminatory and made for a specific public purpose, and since no specific commitments made to the investor, no expropriation took place. In a seminal and oft quoted statement, it notes specifically that

> Methanex entered a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level, operating under the vigilant eyes of the media, interested corporations, non- governmental organizations and a politically active electorate, continuously monitored the use and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons.

Methanex final award, *supra* 127 note at Part IV-ch D, para 9, page 5. Subsequent *amici* have relied upon this aspect of the *Methanex* decision in their argumentation. See e.g. *Glamis* Sierra/ Earthworks *amicus* brief, *infra* note 369.

specific reference to these "alien" concerns. In this way, despite being presented with the opportunity to bring some degree of environmental sensitivity to their decision making, the tribunal adopted an approach already familiar to the regime.

2. Suez/Vivendi v Argentina

The almost prosaic origins of this drawn-out and complicated dispute are well encapsulated by the dispute's tribunal in its final award: "This investment dispute arises out of one of the world's largest water distribution and waste water treatment privatizations in a great city, the city of Buenos Aires."[306] As part of a process of rapid and widespread privatization of public services that occurred in Argentina in the late 1980s and early 1990s, the decision was taken to privatize the provision of water services in Buenos Aires.[307] After a bidding process, a 30-year concession contract was awarded to a consortium of French, English, and Spanish companies. As a result, an improvement and expansion of water services in the city "appears to have taken place."[308] In 2001, Argentina experienced a well documented and devastating financial crisis, to which it responded, amongst other ways, by enacting a number of measures that compromised, in the investors' estimation, the financial integrity of the their investment. In response, the investors planned to raise tariffs for the water-related services they provided—a proposal that was rebuffed by Argentina. Not long thereafter, the state terminated the concession and re-publicized the water management system.[309]

Alleging that this course of action by the Argentine government constituted an expropriation of their investment as well as breach of fair and equitable treatment and full protection and security under three different BITs, the investors initiated arbitration against Argentina on 17 April 2003. Argentina mounted a positive defence: of necessity, under international law, and of national emergency, under

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[306] *Suez / Vivendi* final award, *supra* note 42 at para 26.
[307] As noted by the *amici* (and discussed further below), this process was undertaken at least in part so as to satisfy conditions attached to World Bank and International Monetary Fund (IMF) funding. Interestingly, the tribunal appears to describe this as "advice, financing, and encouragement" (*ibid* at para 31).
[308] *Ibid* at para 36.
[309] *Ibid* at para 26ff.

two of the BITs.[310]

A group of five NGOs filed jointly a "Petition for Transparency and Participation as *Amicus Curiae*" on 27 January 2005. Four of these NGOs were of local provenance,[311] while one was international.[312] In it the *amici* requested disclosure of the documentary record, the opportunity to make a submission, and access to oral hearings. On 19 May 2005, the tribunal issued an order, in which it determined that Article 44 of the ICSID Convention (the dispute was proceeding under the ICSID rules) granted it the power, in principle, to permit prospective *amicus curiae* the opportunity to make submissions.[313] The request for access to the hearings was denied, however, and a decision on the request for documentation deferred.[314] The *amici* duly submitted their application on 1 December 2006. The tribunal subsequently granted the request to make an *amicus curiae* submission (though denied the disclosure request) in its decision of 12 February 2007.[315] The *amici* finally filed their brief on 4 April 2007.

In their brief, the *amici* offer the tribunal a nuanced reading of the facts leading up to the dispute, highlighting the serious social impacts underlying them. They point out that the crisis "had devastating effects on the population," particularly on the

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[310] Ultimately only the claim relating to fair and equitable treatment was successful, and both of Argentina's defences were rejected. *Ibid*.

[311] They were Asociación Civil por la Igualdad y la Justicia (a "non-profit organization whose mission is to contribute to the strengthening of democratic institutions in Argentina and to defend the basic rights of disadvantaged groups"), Centro de Estudios Legales y Sociales (a human rights NGO), Consumidores Libres Cooperativa Ltda de Provisión de Servicios de Acción Comunitaria, and Unión de Usuarios y Consumidores (the latter two being organizations devoted to the protection of Argentine users and consumer rights). See *Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, "Petition for Transparency and Participation as Amicus Curiae" (27 January 2005) at 2.

[312] Namely, the Center for International Environmental Law.

[313] *Suez, Sociedad General de Aguas de Barcelona, SA, and Vivendi Universal SA v the Argentine Republic*, ICSID Case No ARB/03/19, "Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*" of 19 May 2005 [*Suez/ Vivendi* order on *amicus* brief #1].

[314] *Ibid*.

[315] *Suez, Sociedad General de Aguas de Barcelona, SA, and Vivendi Universal SA v the Argentine Republic*, ICSID Case No. ARB/03/19, "Order in Response to a Petition of Five Non-Governmental Organizations for Permission to Make an *Amicus Curiae* Submission" of 12 Feb 2007 at para 7 [*Suez/ Vivendi* order on *amicus* brief #2]. By that point, the newly minted ICSID Rules—which, it will be recalled, included a revised Rule 37(2) pertaining to *amicus curiae* submission—were in operation, but did not apply to the *Suez/ Vivendi* proceedings. A variety of conditions were attached to this grant, including that the submission could not exceed 30 double-spaced pages of 12-point font and must be filed electronically. *Ibid* at para 27.

poverty rate, which saw a massive increase in the early years of the crisis.[316] The *amici* use this context to underscore the destructive social impact that a sudden and dramatic increase in the price of water—as had been demanded by the investors—would have had upon the population of Buenos Aires, stressing that "[i]t would have transformed an economic and social crisis into a full-fledged humanitarian disaster by abruptly depriving millions of citizens on their access to life-giving water" and would have "triggered further social unrest."[317] In essence, the *amici* seem to attempt to highlight the full nature of what was at stake when Argentina took the action it did, framing the facts of the crisis as involving something more than arbitrary government actions affecting the rights and assets of investors. Rather, they present a factual scenario that depicts a crisis with far-ranging social impacts and implications for the human right to water.

Drawing from this context, the *amici* outline the international obligations that Argentina was under to respect the human right to water. If Argentina had not frozen the tariffs, it would have meant that "water would have become unaffordable for millions of people in the province of Buenos Aires" and that Argentina would have been in breach of its international legal obligations.[318] Put in this light, the *amici* illustrate the range of obligations (and corresponding interests) that were implicated in the dispute and suggest they be considered alongside Argentina's relevant obligations to its foreign investors.

Interestingly, as a further and related tactic, the *amici* seem to propose to the tribunal a means of resolving the normative conflict between Argentina's international obligations with respect to the right to water, on the one hand, and the obligations owed to the investors under the BITs in its decision making, on the other. They argue that the tribunal has several options. First, it can employ human rights as applicable law to the dispute. They submit that Article 42(1) of the ICSID Convention effectively compels the tribunal to consider applicable rules of international law as sources of law and that "given that the factual circumstances

[316] *Suez/Vivendi amicus* brief, *supra* note 142 at page 3.
[317] *Ibid* at page 3.
[318] *Ibid* at page 13.

underlying this dispute implicate Argentina's human rights obligations, the Tribunal should apply both international and domestic Argentine human rights law to the dispute."[319] A second approach they offer the tribunal is to employ human rights law to assist in the interpretation of the investment standards found in the BITs. They argue that "[a] contextual interpretation of language in a BIT is … necessary" in the context of the principle of systemic integration of the international legal system, as contained within Article 31(3)(c) of the Vienna Convention on the Law of Treaties.[320] This, they contend, "leads to normative dialogue, accommodation, and mutual supportiveness among human rights and investment law."[321]

As a final option, the tribunal can employ a human rights lens in its application of the BIT standards. Focusing first on the fair and equitable treatment standard, the *amici* note that the standard is flexible such that it becomes "wholly appropriate for the Tribunal to consider the human rights purposes and impacts of Argentina's measures."[322] By using this lens, the crucial enquiry is flipped on its head to then become "whether strict compliance with every term of the concession contract was at all *compatible with the human rights obligations of the state*."[323] With this as the starting point to the dispute, the investor's assertion that Argentina made "arbitrary changes to the legal framework" in violation of the standard, for example, actually opens the door to a broader interrogation of "the tensions betweens stability and regulatory change in society."[324] Seen in this way, a fuller array of stakes and obligation at play in the dispute become evident, laying the groundwork for a more nuanced balancing. As such, while

> [o]n the one hand, BITs aim at establishing a secure and stable legal framework conducive to economic activity ... [o]n the other hand, human rights law and international environmental law establish positive duties upon States to regulate to prevent deleterious consequences to, *inter alia*,

[319] *Ibid* at page 14.
[320] *Ibid* at page 15.
[321] *Ibid*.
[322] *Ibid* at page 17.
[323] *Ibid* [emphasis added].
[324] *Ibid* at page 19.

> human health and the environment. … Under this light, the notion that an investor can expect the legal framework to remain frozen in time is by nature incompatible with the foreseeable and foreseen reality of expected regulatory change, especially in the public health and environmental context.[325]

This is an interesting approach. In effect, the *amici* offer a cogent roadmap to assist the tribunal in its navigation of the difficult terrain upon which investment norms overlap with relevant international environmental/human rights obligations.

a. Impacts: Response to the Brief

While the tribunal does not summarize or provide more than scant background on the involvement of the *amici* and the procedural twists and turns that led to the submission of their brief,[326] it does explicitly respond to several of the *amici*'s arguments during the course of its reasoning relating to Argentina's defence of necessity. Noting that the brief "further developed the relationship of the human rights law to water and to the issues in this case," the tribunal goes on to delineate several of the links drawn by the *amici* between human rights and the right to water at play in the dispute, specifically with respect to the Argentina's defence of necessity.[327]

Ultimately, the tribunal rejects the argument, advanced by both the state and the *amici*, that Argentina's human rights obligations constituted necessary action such as would justify breaching its obligations under the BITs.[328] Interestingly, the claimants appear also to have responded specifically to the claims made by the

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[325] *Ibid*.
[326] See *Suez/Vivendi*, *supra* note 42 final award at paras 13, 18.
[327] Specifically, the tribunal paraphrases the *amici*'s argument that human rights law ought to provide the lens through which Argentina's obligations to the investors are viewed and their argument that, as such, the measures it took were justified. Specifically, it notes that

> [h]uman rights law, the NGOs contend in their submission, required that Argentina adopt measures to ensure access to water by the population, including physical and economic access, and that its actions in confronting the crisis fully conformed to human rights law. Since human rights law provides a rationale for the crisis measures, they argue that this Tribunal should consider that rationale in interpreting and applying the provisions of the BITs in question.

Ibid at para 256.
[328] *Ibid* at para 262.

amici regarding the role of the human right to water.[329] This may to some extent account for the tribunal's fairly extensive treatment of the argument. Even so, it is notable that the tribunal does specifically reference both Argentina and the *amici* in its response.

b. General Conclusions

The *amici* appear, first, to reveal to the tribunal a more complete picture of all the stakes, interests, and obligations implicated in the dispute and, second, to demonstrate how there is (and indeed must be) room at the table for consideration of these factors alongside investment standards and obligations. Moreover, they illustrate how the legal framework exists within the investment regime to empower tribunals to make this more fulsome analysis and to reconcile the opposing obligations at play.

The tribunal response to the *amici*'s arguments is lukewarm at best. While it does make some explicit reference to the brief's contents, the tribunal does little to engage with the ideas offered, again rejecting the opportunity to adopt a more environmental (and, in this instance, human rights) reading of the facts of the dispute and interpretation of the applicable norms. In this way, it demonstrates only tentative steps towards greater environmental sensitivity.

3. Biwater Guaff v Tanzania

This claim, brought against the government of Tanzania by an English-German investor, Biwater Gauff, arose out of a World Bank/ African Development Bank/ European Investment Bank-backed project to upgrade and repair the beleaguered water and sewage system in the city of Dar es Salaam. As part of the package of

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[329] *Ibid* at para 255. The claimants memorial appears not to be publicly available. As paraphrased by the tribunal

> With respect to the role of human rights as argued by Argentina and the *amici curiae* … the Claimants respond that they have never questioned the right of the population to water. They point out that Argentina's decision to privatize the Buenos Aires water service … was precisely to make that right more effective for larger numbers of Argentine inhabitants… . They further argue that it was the Argentine government's actions during the crisis, not … the Claimants, that put the population's right to water at risk… . Finally, the Claimants argue that what is at issue in these cases is whether Argentina breached its legal commitments under the BITs and that human rights law is irrelevant to that determination.

conditionalities attached to the loan, the banks required the system to be managed and operated by a private entity.[330] Accordingly, after Tanzania had organized a bidding process, a 10-year lease was awarded for the provision of services and the undertaking of certain works to City Water, an operating company (owned by Biwater Gauff), which began its operations in 2003. Within short order, it became evident that the project was not destined to be financially viable for the claimant due to a number of reasons.[331] Beginning in 2004, the company initiated efforts to renegotiate the lease. These efforts were ultimately rebuffed by the government, which terminated the lease in 2005. When the claimant refused to cease operations, the government began seizing assets and deporting its staff.[332]

Following this, Biwater initiated arbitration proceedings under the UK-Tanzania BIT on 5 August 2005. It claimed that the government's actions constituted an expropriation of their investment (the repudiation of the lease, seizure of assets, and deportation of staff) and unreasonable or discriminatory measures (by announcing the termination of the lease to the public prematurely, amongst others), as well as a violation of its rights to fair and equitable treatment (by not employing an independent regulator, failing to temper the public's expectations regarding the improvement of water services, and failing to adjust the terms of the lease, amongst others things), to full protection and security, and to unrestricted transfer of capital and returns.[333]

On 27 November 2006, a group of three local NGOs (the Lawyers' Environmental Action Team, the Legal and Human Rights Centre, the Tanzania Gender Networking Programme) and two international environmental NGOs (the

[330] *Biwater* final award, *supra* note at para 3.
[331] These included the poor structuring of their bid and shortfall in expected financial contributions from shareholders.
[332] See generally *Biwater* final award, *supra* note 42.
[333] The first two were provided for under Articles 5 and 6 of the *UK-Tanzania BIT* respectively; the latter three were provided for under Article 2. Ultimately, the tribunal determined that while Tanzania was in breach of its obligations by failing to provide fair and equitable treatment, by engaging in unreasonable and discriminatory conduct, and by expropriating the investor's assets, no damages were owed to the investor, as the investment had ceased to hold any economic value by the time the breaches occurred. *Biwater*, final award, *ibid*. There was, additionally, a dissenting/concurring opinion issued by one of the arbitrators. It did not, however, address the *amici* or their submissions.

Center for International Environmental Law and the International Institution for Sustainable Development) petitioned for *amicus curiae* status, access to arbitration documents, and the right to attend the oral hearings.[334] They filed their petition pursuant to Rule 37(2) of ICSID, which, it will be recalled, had only recently come into effect.[335] In its Procedural Order 5, issued on 2 February 2007, the tribunal granted the *amici*'s request to file a written submission but denied their requests to attend the hearing and to gain access to the documentary record.[336] It imposed a number of conditions upon the written submission, including that it be issued jointly, comprise no more than fifty double-spaced pages, and not include evidence (though evidence could be referred to within the brief itself).[337] Although the tribunal had left open the possibility of further *amicus* involvement as the dispute progressed, when both parties subsequently expressed the view that further requests should not be entertained, the tribunal complied.[338]

In their brief, the *amici* make a number of factual connections for the tribunal that it might otherwise have overlooked or been unaware of. First, they attempt to tie the dispute to the complex and rocky history around the privatization of water services in Tanzania. They depict a system that, despite years of attempted private sector involvement, had long been struggling to provide adequately for Tanzania's population and had not improved (and had, in fact, in some ways deteriorated) since being taken over by Biwater.[339] They also highlighted the role of international financial institutions (IFIs) in the credit-dependent country's recent privatization efforts, noting that privatization of the services was an approach that "was not only supported but in fact mandated by the World Bank and other

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[334] *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*, Case No ARB/05/22, "Petition for *Amicus Curiae* Status" of 27 November 2006 [*Biwater amicus* petition].
[335] This was, in fact, the first time that such an application had been made under the revised ICSID rules. See discussion below in the conclusions.
[336] *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*, Case No ARB/05/22, Procedural Order 5 of 2 February 2007 [*Biwater*, procedural order 5].
[337] *Ibid* at para 60.
[338] *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*, Case No ARB/05/22, Procedural Order 6 of 25 April 2007.
[339] *Biwater amicus* brief, *supra* note 42 at paras 1-5.

donors."[340] When these efforts failed, then, and as Biwater (ultimately the sole bidder for the contract) continued to perform these services even more poorly than the state-owned entity before it had, the government had little recourse but to cancel the lease and revert control of operations back to the state entity.[341]

The *amici* also take pains to highlight the interests implicated in the dispute's outcome and impacts experienced by both the local community and the developing world. The *amici* note that the arbitration "raises a number of issues of vital concern to the local community … as well as for other developing countries that have privatized, or are contemplating a possible privatization of, water or other infrastructure services," particularly in terms of the potential negative consequences for human rights and sustainable development.[342]

On a local scale, they underscore how the investor's actions—which included creating fewer new connections than had been promised; failing to pay into a fund that was meant to expand services into poor, underserviced areas as promised; and perpetrating a decline in water availability in many areas of the city[343]—had real-life consequences for the local population. Specifically, these actions endangered "both its own investment and the people of Dar es Salaam's access to water"[344] and "the [investor's] poor performance affected not only the Claimant's income but also the people of Dar es Salaam who were dependent on the Claimant for water delivery."[345] In this way, the *amici* demonstrate how there was more at stake than the mere non-performance or cancellation of a contract. They stress that not only was the investor responsible for the losses it ultimately incurred, but the same chain of actions that led to these losses also carried significant collateral effects relevant to the dispute—that is, it affected the ability of the people of Dar es Salaam to access clean water. In introducing these facts to the dispute, the *amici* effectively notify the tribunal of the full spectrum of interests and stakes at

[340] *Ibid* at para 4.
[341] *Ibid* at para 6.
[342] *Ibid* at para 7.
[343] *Ibid* at para 68.
[344] *Ibid* at para 10.
[345] *Ibid* at para 68.

play, alerting it to the environmental and social context in which it was rendering its decision, thus making it more difficult to ignore.

As with *amici* who filed briefs in other cases, they also detail the various international obligations that the government of Tanzania was struggling to uphold against the obligations it held towards the investor.[346] In this way, they bring home for the tribunal the fact that the state's obligations under the BIT comprised but one set of relevant obligations to be weighed in the dispute:

> [T]he Tribunal … must take into consideration the human rights and sustainable development aspects of this case when assessing the consequences for the claims at issue here. In this light, terminating the contract, if legitimately done in order to prevent the deterioration or abuse of human rights, cannot be found to be a breach of the contract whose very purpose was to promote and enhance the achievement of those rights.[347]

The *amici* seem to suggest that a proper balancing in the ISDS decision-making process ought to account for human rights, sustainable development, and investor responsibility alongside the obligations owed to the investor by the state. In fact, by suggesting that investors owe a variety of responsibilities in their conduct towards the host state and its population when investing in foreign countries, the *amici* appear to be mounting an effort to contribute to the ripening of such a principle in customary international commercial and investment law.[348]

Finally, and on a related note, the *amici* also seem to urge the tribunal to resist the inclination to view foreign investments, and the disputes that arise, as sitting in isolation from social and environmental context. They remind the tribunal that improving access to water forms part of Tanzania's Millennium Development Goals and that water is "a key to sustainable development."[349] They point out that "[t]he provision of water services in developing countries is not, and cannot be understood as just another business venture," and that investors who "choose to

[346] *Ibid* at para 96.
[347] *Ibid* at para 98.
[348] See generally *ibid* at Section 2.
[349] *Ibid* at para 44.

enter into this sector … encumber themselves with responsibilities"[350] that both carry legal consequences for non-fulfillment and are relevant to the dispute. They point out, further that the investor, as a member of the private sector "Partnership for Sustainable Development" would have been well aware of the responsibility it was taking on with respect to helping to facilitate sustainable development in Tanzania.[351] In this way, the *amici* appear to promulgate a contextualized approach to ISDS decision making in recognition of the fact that the dispute is inherently about more than just investment.

a. Impacts: Response to the Brief

In contrast to earlier experiences with *amicus curiae* briefs in the environmental context, the tribunal appears to have not only seriously considered but also to have been influenced by the *amicus curiae* brief. It notes, for example, that the *amici* "approach the issues in this case with interests, expertise and perspectives that have been demonstrated to materially differ from those of the two contending parties" making their contribution a "useful" one.[352] More specifically, in addition to a detailed discussion of the procedural aspects of the *amici*'s involvement and the decisions it took with respect to this,[353] the tribunal also summarizes and quoted extensively from the contents and arguments contained within the brief.[354] It explicitly draws inspiration from the brief in the reasoning of its decision, noting that it "found the *Amici's* observations useful" and that "[t]heir submissions … informed the analysis of claims set out [in the decision's reasoning], and where relevant, specific points arising from the *Amici's* submissions are returned to in that context."[355]

The tribunal appears to explicitly reference the *amici*'s arguments twice in its decision. In one instance, during its discussion of the appropriate interpretation of

[350] *Ibid* at para 11.
[351] *Ibid* at para 46.
[352] *Biwater* final award, *supra* note 42 at para 359.
[353] *Ibid* e.g. at paras 57-68; 76-83.
[354] *Ibid* at paras 370-391.
[355] *Ibid* at paras 392.

the fair and equitable treatment standard, the tribunal notes specifically that in making its determination, it had

> taken into account the submissions of the Petitioners, as summarised earlier, which emphasise countervailing factors such as the responsibility of foreign investors, both in terms of prior due diligence as well as subsequent conduct; the limit to legitimate expectations in circumstances where an investor itself takes on risks in entering a particular investment environment; and the relevance of the parties' respective rights and obligations as set out in any relevant investment agreement (here the Lease Contract).[356]

Additionally—and importantly—the tribunal appears to accept more generally the importance and presence of social and environmental context to the dispute as highlighted by the *amici* in their brief. The tribunal seems, in fact, to employ the *amicus* submissions as a means of providing a contextual backdrop to its decision, noting that the brief "provides a very useful initial context for the Arbitral Tribunal's enquiry" and summarizing its contents before addressing the claims at issue in the dispute.[357] The tribunal also explicitly contradicts Biwater's position that the *amici* had not advanced any issues of legal or factual relevance in their brief. While Biwater had in essence argued that no sustainable development, environmental, or other issues were relevant[358] the tribunal appeared to agree with the *aimici*'s assessment that a number of "wider interests"[359] were in fact at play.

b. General Conclusions

The *amici* appear to make a concerted effort to contextualize the dispute, connecting it to Tanzania's history with privatization, its status as a developing country, and, importantly, the local interests affected by the dispute and its

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[356] *Ibid* at para 601.
[357] *Ibid* at para 355.
[358] As paraphrased by the tribunal in *ibid* at para 257, Biwater had argued that

> no issues arise as to whether the Republic ought to have involved the private sector in the water supply process in the first instance; what form of private sector participation should have been employed (if any); or whether the purported termination of the lease contract was a failure of the concept of private sector participation in general. Further, … no environmental issues arise for determination in this case and that the arbitration raises no issues of sustainable development.

(The claimant's memorial does not appear to be publicly available.)
[359] *Biwater* procedural order 5, *supra* note 336 at para 53.

outcome. They also introduce sustainable development norms and other international obligations owed by Tanzania into the dispute, inviting the tribunal to weigh these alongside investment norms in its deliberations. Interestingly, they also employ the *amicus* brief to nudge the law on investor responsibility towards crystallization. Finally, the *amici* also attempt to demonstrate for the tribunal how the dispute cannot properly and completely be classified as a purely investment-related dispute.

The tribunal's response, particularly in comparison to previous tribunal responses, evidenced some degree of genuine engagement with the *amici*'s arguments. Not only was the brief extensively extracted from, the tribunal also incorporated some of the reasoning offered by the *amici* into its decision. In this way, it appears as though the tribunal was doing more than paying lip service to the *amici*. While the tribunal did not explicitly adopt a particularly environmental perspective in its decision making, it did seem to take on a more contextualized approach, seemingly in response to the *amici*'s suggestion that it do so.

4. Glamis Gold Ltd v United States of America

This arbitration involved a Canadian mining company, Glamis Gold, which on 9 December 2003 initiated arbitration against the United States under NAFTA. The company had attempted, from 1994 to 2002, to construct and operate an open pit gold and silver mine at the Imperial Project, a concession over which it owned rights and which was located on federal land in southeastern California.[360] The project was also situated near (though not upon) Native American lands designated as culturally and spiritually important.[361] The mine was to employ an on-site heap-leach (cyanide) processing technique. In response to public concerns over the potential environmental and cultural impacts of the mine, California enacted a variety of regulations. These related largely to mitigation efforts, including requirements that the mine be completely backfilled and the land

[360] *Glamis* final award, *supra* note 126 at para 10.
[361] *Ibid*.

restored upon completion of extraction activities.[362] Glamis claimed that the California regulations, along with what it felt were wrongful delays by the federal government in considering its project, essentially eviscerated the economic viability of the project. It asserted this amounted to a breach of both fair and equitable treatment (Article 1105) and an expropriation (Article 1110).[363]

The project and subsequent arbitration drew considerable public attention, generating concern from a variety of sectors over the potential environmental and cultural impacts if the project was approved or the claim allowed by the NAFTA tribunal. Unsurprisingly, given both the subject matter at the heart of the dispute and the established (though nascent) procedure established with the *Methanex* arbitration and 2003 FTC Statement, the arbitration also attracted applications from a number of prospective *amicus curiae*. In the end, four applications and briefs were submitted by a total of six non-disputing non-state[364] parties. The Quechan Indian Nation submitted the first application and accompanying brief on 19 August 2005.[365] This was followed, on 30 September 2005, by an application and brief submitted jointly by two environmental NGOs, Friends of the Earth Canada and Friends of the Earth United States (FOE).[366] Subsequently, the National Mining Association, an advocacy group for the mining industry in the US,[367] filed an application and brief on 13 October 2006.[368] Finally, on 16

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[362] *Ibid.*

[363] *Ibid* at para 11. The tribunal ultimately denied both the expropriation and fair and equitable treatment claims. For the reasoning provided for the former, see *ibid* at paras 534-536; for the latter, see para 758*ff*.

[364] Article 1128 of NAFTA permits non-disputing state parties to make submissions in disputes.

[365] *Glamis Gold, Ltd v The United States of America* (UNCITRAL) "Application for Leave to File a Non-Party Submission and Submission" of Quechan Indian Nation (19August 2005).

[366] *Glamis Gold, Ltd v The United States of America* (UNCITRAL) "*Amicus Curiae* Submissions" "*Amicus Curiae* Appliction" of Friends of the Earth Canada and Friends of the Earth United States (30 September 2005) [*Glamis* FOE *amicus* brief].

[367] The NMA's website declares that the organization is

> U.S. mining's advocate in Washington, D.C. and beyond. NMA is the only national trade organization that represents the interests of mining before Congress, the administration, federal agencies, the judiciary and the media—providing a clear voice for U.S. mining. NMA's mission is to build support for public policies that will help America fully and responsibly utilize its coal and mineral resources.

"About NMA Overview," online: <http://www.nma.org/index.php/about-nma-overview>.

[368] *Glamis Gold, Ltd v The United States of America* (UNCITRAL) "Non-disputing Party Submission" and "Application for Leave to File a Non-disputing Party Submission by the National Mining Association" of the National Mining Association (13Oct 2006).

October 2006, Sierra Club and Earthworks, with the assistance of Earthjustice and the Western Mining Action Project, submitted a joint application and brief.[369] On the same day, the Quechan Nation filed leave to make a further, supplemental submission after having reviewed further memorials from the parties to the dispute.[370]

The tribunal approved the first of these applications (from the Quechan Nation) in a terse decision dated 16 September 2005.[371] In letters of 15 February 2007, the tribunal accepted all of the remaining applications and submissions (including the supplemental Quechan submission) for consideration.[372] As I noted above, the briefs that I will focus on from the *Glamis* dispute are those authored by NGOs: the FOE documents and the Sierra Club/Earthworks documents.

a. The FOE Brief

The FOE *amici* focus mainly on the relatively narrow issue of corporate nationality and its effects upon the ability of corporations to access remedies under trade and investment treaties in their *amicus* submission. Despite emphasizing in their application their interest and expertise in environmental law and policy,[373] they do little, seemingly, to link this subject area with the bulk of their legal argumentation in the actual submission. Instead, they engage in extensive argumentation about the international law relating to corporate

[369] *Glamis Gold, Ltd v The United States of America* (UNCITRAL) (16Oct2006) "Application of Non-disputing Parties for Leave to File a Written Submission" of Sierra Club and Earthworks (16 October 2006) [*Glamis* Sierra/Earthwords *amicus* brief].
[370] *Glamis Gold, Ltd v The United States of America* (UNCITRAL) "Application for Leave to File a Supplemental Non-party Submission" of Quechan Indian Nation (16 Oct 2006).
[371] *Glamis Gold, Ltd v The United States of America* (UNCITRAL) Decision on Application and Submission by Quechan First Nation (16 September 2005). Without providing a detailed rationale, the tribunal referenced the "views of the Parties" in determining that the application and brief met the criteria set out in the FTC statement on non-disputing party participation and allowed the submission. *Ibid* at para 10.
[372] It did so noting that each provided "a perspective, particular knowledge or insight that is different from that of the disputing parties" as stipulated by the FTC Statement. *Glamis* final award, *supra* note 126 at para 286. I was unable to locate the original letters of 15 February 2007.
[373] See e.g. *Glamis* FOE application, *supra* note 366 at paras 3, 6, 8.

nationality so as to bolster a claim that Glamis, as a dual national of both Canada and the US, was not entitled to make a Chapter 11 claim.[374]

The *amici* do, however, make some effort to illuminate the environmental angle that is relevant to the dispute. They submit, for example, that the tribunal should "show special sensitivity to the environmental and cultural context of the claim."[375] Further, they contradict Glamis's claim that federal and state efforts at environmental regulation violated its Chapter 11 rights. They do this by clarifying that such rights do not entitle foreign companies to have a say, after the fact, on the appropriateness of democratically enacted regulation that may affect its business activities. Specifically, they note that "it is not the function of a NAFTA tribunal to weigh the range of facts and considerations that contribute to government environmental and cultural preservation decision-making"[376] and that "the Tribunal should not engage in a *de novo* review of the merits or necessity of the environmental and cultural preservation objectives pursued by the United States and California."[377] In essence, the *amici* seem, with this line of argument, to be linking the dispute to the larger democratic processes that were at play in the passage of the environmental regulations at issue. They attempt to provide a perspective on the appropriate balancing that the tribunal should be undertaking in its assessment of the claim by suggesting that the nub of the dispute does not concern the merit or necessity of the regulation at issue—an evaluation that is better served by the democratic process under which the regulation was passed. Rather, the issue is more appropriately characterized as concerning "whether the Claimant has been accorded fair and equitable treatment *given* these environmental and cultural preservation objectives."[378]

The FOE *amici* also bring environmental concerns to the attention of the tribunal by referring to Article 1114 of NAFTA.[379] In so doing, in a fashion similar to the

[374] *Glamis* FOE *amicus* brief, *supra* note 366 at Section III.
[375] *Ibid* at para 40.
[376] *Ibid*.
[377] *Ibid* at para 41.
[378] *Ibid* [emphasis in original].
[379] Article 1114 states:

Methanex amici, the FOE *amici* remind the tribunal of the intention of the NAFTA parties to preserve state power to craft environmental policy in the broader interest of the public. They caution the tribunal against interpreting NAFTA's substantive standards (specifically the right to fair and equitable treatment under Article 1105) in such a way that would "do violence to the express intentions of the Parties, as articulated in Chapter 11 itself" as evidenced by the presence of Article 1114.[380] This move, it seems, effectively reminds the tribunal that not only are there are broader environmental interests at play in the litigation, but that some degree of commitment to preserving the right of states to regulate so as to protect the environment is embedded directly in the text of the agreement itself.

A final interesting aspect to the brief concerns the *amici*'s reference to the role of customary international law norms. They remind the tribunal of its capacity (and obligation) to interpret NAFTA in light of "any relevant rules of international law applicable in the relations between the parties."[381] Although they raise this argument in the context of customary international doctrine relating to diversity of corporate nationality, the argument serves as a reminder to the tribunal that ISDS cannot isolate the investment regime from the broader landscape of international norms. Indeed, the *amici* point to WTO case law that makes a similar case against interpreting WTO treaties "in clinical isolation from public international law."[382]

> 1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.
> 2. The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

[380] *Glamis* FOE *amicus* brief, *supra* note 369 at para 42.
[381] *Ibid* at para 14, citing VCLT Art 31(3)(c).
[382] *Ibid* at para 15, citing *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R at para 15.

b. The Sierra Club/Earthworks Brief

The Sierra Club/Earthworks brief seems preoccupied mostly with drawing the tribunal's attention to the right and necessity of the state to regulate so as "to protect public health, cultural resources, and the environment from the significant impacts of large-scale mining" such as the disputed project.[383] By countering the claimant's interpretation of the substantive protection offered by Articles 1110 and 1105, the *amici* attempt to offer a fresh perspective on these norms and their relation to the facts of the case in light of the states' obligation to protect human health and the environment through regulation.

In a similar vein, the *amici* also urge the tribunal to consider the broader context within which governments pass environmental and other regulation. They point to decisions in which previous NAFTA tribunals acknowledged that governments "in their exercise of regulatory power, frequently change their laws and regulations in response to changing economic circumstances or changing political, economic or social considerations."[384] Citing an oft-reproduced quotation from the *Methanex* award, they imply that, just as investors in previous cases, Glamis ought to have been aware that it was operating in

> a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level, operating under the vigilant eyes of the media, interested corporations, non-governmental organizations and a politically active electorate, continuously monitored the use and impact of [mining operations] and commonly prohibited or restricted [certain mining practices] for environmental and/or health reasons.[385]

Finally, and perhaps most importantly, the *amici* also urge the tribunal to consider the broader interests implicated in the dispute's outcome, noting, for example, that "[t]he subject matter of this arbitration raises issues of public importance."[386] The

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[383] *Glamis* Sierra/Earthwork *amicus*, *supra* note 369 brief at para 2.
[384] *Ibid* at para 42, citing *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1 (also known as *Marvin Feldman v. Mexico*) final award (11 January 2005) at para 112.
[385] *Glamis* Sierra/ Earthworks *amicus*, *supra* note 369 at para 43, citing *Methanex* final award, *supra* note at Part IV-Ch 5, page 5 [all modifications made in the brief].
[386] *Ibid* at para 55.

amici stress that the tribunal's decision could provoke potentially far-ranging and negative impacts upon non-parties to the dispute. They seem to be reminding the tribunal that given this reality, it cannot conduct its decision making in complete isolation of the broader interests potentially at play. They further intimate that in addition to the likely obvious impact upon the particular environmental regulation at issue, the tribunal's decision risked contributing to a much broader regulatory chill:

> Because the Tribunal's decision in this case will be considered by tribunals in future investment arbitrations, its decision will help determine the rights and obligations of government in implementing future health and environmental measures. Thus, a decision requiring the United states to compensate Glamis will not only pressure California to rescind important environmental and health measures, but will also compromise the legitimate powers of governments to protect the health, safety, and the environment of their citizens.[387]

c. Impacts: Response to the Briefs

The *Glamis* tribunal does not appear to draw at all from the environmental *amici*'s submissions. The only explicit reference to these contributions comes during the tribunal's discussion of procedural elements of the dispute.[388] While this may point to a total lack of engagement with the *amici*'s submissions, other elements of the tribunal's decision may indicate otherwise, making this an unusual case.

From the outset, the *Glamis* tribunal provides an unusually considered and pensive treatment of the role of "context"—including that provided by way of *amicus curiae* participation—in its decision making. The tribunal declares the "case-specific focus" it adopts in its decision.[389] However, it similarly avows an awareness "of the larger context in which it operates."[390] The tribunal is clearly

[387] *Ibid* at para 55.
[388] See e.g. *Glamis* final decision, *supra* note 126 at paras 275-290.
[389] *Ibid* at para 3.
[390] *Ibid* at para 4.

not ignorant of the public interest implicated in the dispute, likely in part a result of the degree of *amicus* interest and participation.[391]

It goes so far as to construct a series of principles to define its contextual "awareness." These principles also appear meant, in part, to temper the impact of the *amicus* participation. Of particular note, by the first principle, the tribunal confines "its decision to the issues presented by the dispute before it." As such,

> [t]he Tribunal is aware that the decision in this proceeding has been awaited by private and public entities concerned with environmental regulation, the interests of indigenous peoples, and the tension sometimes seen between private rights in property and the need of the State to regulate the use of property. These issues were extensively argued in this case and considered by the Tribunal. However, given the Tribunal's holdings, *the Tribunal is not required to decide many of the most controversial issues raised in this proceeding*.[392]

The tribunal's second principle addresses specifically the role of *amicus* submissions in its decision, declaring that these filings should be addressed "explicitly in [the] Award to the degree that they bear on decisions that must be taken."[393] Although ostensibly appreciative of "the thoughtful submissions made by a varied group of interested non-parties who, in all circumstances, acted with the utmost respect for the proceedings and Parties," the tribunal ultimately "does not reach the particular issues addressed by these submissions" in light of its holdings.

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[391] It is careful, however, to frame this as an "awareness" that is subsidiary to its grander task of resolving the particular dispute:

> [T]his Tribunal, in undertaking its primary mandate of resolving this particular dispute, does so with an awareness of the context within which it operates. The Tribunal emphasizes that it in no way views its awareness of the context in which it operates as justifying (or indeed requiring) a departure from its duty to focus on the specific case before it. Rather it views its awareness of operating in this context as a discipline upon its reasoning that does not alter the Tribunal's decision, but rather guides and aids the Tribunal in simultaneously supporting the system of which it is only a temporary part.

Ibid at para 7.

[392] *Ibid* at para 8 [emphasis added].

[393] *Ibid* at para 8.

d. General Conclusions

Both of the *Glamis* briefs reviewed above appear to reflect a clear strategy by the *amici* to introduce environmental norms into the dispute by reference both to outside international obligations as well as to specific references in the NAFTA text. In the case of the FOE brief, they also demonstrate to the tribunal how investment norms can be interpreted in light of the environmental norms implicated in the dispute. They do this by, in essence, reformulating the enquiry, transforming the question from "have the environmental regulations breached the investment standards?" to "have investment standards been breached in light of the host society's decision making with respect to regulating its environment?" The *amici* both also attempt to contextualize the dispute for the tribunal, drawing to its attention the many broader interests and stakes that stand to be impacted by the decision.

The tribunal's response is somewhat ambivalent. On the one hand, it explicitly declines to engage the *amici*'s arguments. On the other, it adopts a somewhat contextualized approach to its decision making and is clearly aware of both the background of environmental interests and concerns surrounding the dispute as well as of the relevance and importance of the participation of *amici curiae* to the dispute. This may actually indicate some degree of environmental consciousness building has occurred.

5. Pacific Rim Cayman LLC v Republic of El Salvador

In 2008, Pacific Rim, a purportedly American company[394] filed notice of intent to bring a claim against the Republic of El Salvador under the Dominican Republic-United States-Central American Free Trade Agreement (CAFTA).[395] It did this when, several years after discovering deposits of silver and gold on land over which it owned the right to explore, it did not receive the necessary environmental

[394] Prior to 2008, at which point the company reorganized under the laws of Nevada, it had been a Canadian-based company operating out of the Cayman Islands. Neither Canada nor the Cayman Islands are party to *CAFTA*.
[395] *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No ARB/09/12, Notice of Intent to Arbitrate (9 December 2008).

permits to begin exploitation activities.[396] It based its claim on a long list of grounds under both CAFTA and Salvadoran investment law, including that an unlawful expropriation of its investment had occurred; that El Salvador had failed to protect its investment; that it had been denied most favoured nation and national treatment; and that it had been treated arbitrarily and discriminatorily.[397] It made reference both to the fact that it had received no decision on its permit application as well as to the then-president of El Salvador's public announcement of his opposition "in principle" to the granting of further mining licenses in the country until a new legislative approach to mining and environmental protection in the country had been crafted.[398]

As the claim proceeded towards an initial decision on jurisdiction,[399] on 2 March 2011, as provided for under *CAFTA* and the ICSID Arbitration Rules—and following the public release of a procedural order regarding *amicus curiae* participation in the proceedings[400]—an alliance of local NGOs applied for leave to submit an *amicus curiae* brief to the tribunal as a non-disputing party intervener.[401] The NGO consortium received authorization to submit an *amicus*

[396] The investor contended that under Salvadoran law, by virtue of acquiring an exploration licence for several packets of land in 2002, it also obtained automatically the right to eventually extract any mineral deposits found once it had obtained the necessary environmental permit. *Ibid* at 7-8.
[397] It demanded 77 million USD in compensation. *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No ARB/09/12, Notice of Arbitration, (30 April 2009).
[398] See *ibid*, n 47, n 58; *Pac Rim* decision on jurisdiction, *supra* note 2 at paras 1.10 – 1.12
[399] Ultimately, the tribunal determined it had no jurisdiction to determine the *CAFTA* claims, though it found jurisdiction to determine the merits of the claims made under other areas of investment law. *Pac Rim*, jurisdiction decision, *ibid*.
[400] ICSID, News Release "Procedural Order Regarding *Amicus Curiae*" (2 Feb 2011), online: <http://www.italaw.com/sites/default/files/case-documents/ita0608.pdf>.
[401] *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No ARB/09/12, "Application for Permission to Proceed as *Amici Curiae*" (2 March 2011). The consortium, Mesa Nacional Frente a la Minería Metálica de El Salvador, was comprised of a mix of organizations whose activities encompass a range of issues, including development, human rights, environmental protection, poverty, civic participation, and community advocacy. The materials themselves were drafted and submitted by the Center for International Environmental Law. See *ibid* at 3.

curiae brief in a procedural order released by the tribunal on 23 March 2011,[402] and they did so officially on 20 May 2011.[403]

The *amici*'s main approach appears to comprise an effort to both contextualize and redefine the dispute as something other than simply investment-related. For example, they attempt to reframe the dispute as one between the investor and the communities affected by its proposed projects—communities with otherwise little recourse for offering input into such projects—rather than as one between the investor and the government of El Salvador:

> Critical to ascertaining these jurisdictional issues is an understanding that the real opposition to Pac Rim's mining plans was *not* generated at the level of government ministries, but rather at the level of the local, potentially affected communities.[404]

They further tie this contestation to a broader historical context. Specifically, they underscore the relevance of the country's bloody civil war and subsequent democratization struggles, linking this context to land rights and local environmental stewardship. They note that

> [l]ocal communities and NGOs, including *amici*, in reflection of their hard-fought empowerment and awareness of their own rights, and in a legitimate exercise of the democratic process in the post-Civil War political environment, refused to accept Pac Rim's plans to dig mines under their own lawfully owned land, build dangerous waste ponds, and otherwise threaten the continuity of their environment, livelihoods, and way of life.[405]

They also highlight the potential human and environmental impacts of the dispute and its outcome, emphasizing that "[t]he potentially affected local communities do matter[;] [i]t is their land, their livelihoods, their well-being and fundamental

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[402] *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No ARB/09/12, Procedural Order 8 (23 March 2011) [*Pac Rim* Procedural Order 8].
[403] *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No ARB/09/12, "Submission of *Amicus Curiae* Brief" (20 May 2011) [*Pac Rim amicus* brief]. This submission was an edited version of the submission annexed to the March 2011 application. The edits reflect formal and substantive changes required by the tribunal in Procedural Order 8, *ibid*.
[404] *Ibid.*
[405] *Ibid* at 2-3.

rights that are at stake here"[406] and cataloging illegal investor activities and adverse environmental impacts.[407]

An additional feature of the *amici*'s approach is its resistance to the investor's characterization of the "political" dimension of the treatment it received as counter to international and domestic investment law. Rather, linking the events at the core of the dispute to a more general "political debate concerning sustainability, metals mining and democracy in El Salvador,"[408] the *amici* reject as inappropriate the interpretation of *CAFTA*'s investment protection such that it would render the agreement "a strict liability insurance policy guaranteeing foreign investors 100% protection against all risk … designed to stand in the way of history, or freeze public policy developments."[409] The *amici* employ these observations in support of their claim that the dispute is not a "legal dispute" as provided under Article 25 of ICSID, nor a "measure" under Article 10 of *CAFTA* (and hence that the tribunal lacks jurisdiction in its adjudication).

a. Impacts: Response to the Brief

In contrast to some earlier tribunals, the *Pac Rim* tribunal seems to actively engage with the *amicus* submission before it. It mentions the circumstances of the *amici*'s involvement and outlines the issues raised in their brief, making particular reference to arguments that depart from those offered by the respondent.[410] It goes further yet, by making explicit reference to—and even drawing from—these arguments throughout the decision, seeming to indicate that many (if not all) of the *amici*'s arguments were given serious consideration during its decision making.

The tribunal, in fact, refers to and quotes from the *amicus* brief extensively. As seen with the *Methanex* tribunal, for example, the arguments the tribunal seems most interested in are not those relating to the unique environmental perspective

[406] *Ibid* at 1.
[407] *Ibid* at 3. They made note, for example, of the investor trespassing and of water pollution resulting from the investor's exploratory activities.
[408] *Ibid* at 14.
[409] *Ibid* at 6 [footnotes omitted].
[410] *Pac Rim* decision on jurisdiction, *supra* note 2 at paras 1.33 – 1.38.

that the *amici* attempt to bring to the table, but rather those relating to the interpretation of the treaty provisions at issue in the dispute. Specifically, the tribunal outlines the gist of the *amici*'s argument—alongside those of the disputing and non-disputing state parties—with respect to whether an "abuse of process" had transpired such that would require the tribunal to decline jurisdiction.[411] It takes particular interest in the arguments that differ from those offered by the respondent—especially the *amici*'s argument that the investor's attempt to relocate what was essentially a dispute between itself and locally affected communities to a forum at which they would have limited rights to participate constituted an abuse of process.[412] Even though the tribunal does not ultimately adopt this line of reasoning, the fact that the *amici*'s arguments were addressed seems indicative of engagement.

As a further sign of engagement, the tribunal addresses specifically (through rejects) the *amici*'s argument that the investor's corporate restructuring, to the extent that it was done for the purpose of access investor benefits under *CAFTA*, constitutes an abuse of process.[413] Although the *amici*'s arguments do not figure into the tribunal's ultimate reasoning, the tribunal's willingness to address the substance of the *amicus* brief is illuminating.

Additionally, the tribunal considers the *amici*'s arguments with respect to use of the denial of benefits by El Salvador, singling out quotations from the brief that showcase how the *amici*'s perspective focuses on potential negative local impacts of interpreting the substance of the clause too narrowly.[414] It also makes (albeit

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[411] *Ibid* at paras 2.36 – 2.40.
[412] *Ibid* at para 2.40, citing to *Pac Rim amicus* brief, *supra* note 403 at 10.
[413] It notes,

> That [hoping to access CAFTA], however, is not a sufficient answer to determine the issue of Abuse of Process in this case. *The Tribunal does not accept the arguments made to the contrary in the* Amicus Curiae *Submission.* As already described, there is an important issue of timing and other circumstances in this case, to which it is necessary to return below at some length.

Pac Rim decision on jurisdiction, *supra* note 2 at para 2.43 [emphasis added].
[414] *Ibid* at 4.58-4.59.

fleeting) mention of the *amici*'s arguments with respect to these impacts and difficulties for the host state in support of its decision.[415]

b. General Conclusions

As noted, the *amici* here focus their efforts on providing context to the dispute (relating to the local environmental impacts, history, and broader processes of democratization and resistance to foreign mining in El Salvador) and on reframing it as more than a mere disagreement between investor and state. They bring a unique, local, and environmentally imbued perspective to the dispute, which they invite the tribunal to adopt in making its decision.

The tribunal ultimately demonstrates a comparatively high degree of engagement with the *amici*'s arguments, going so far as to integrate some of them into their reasoning, albeit in a limited way. Notably, however, while the tribunal takes care to respond, to some extent, to the submission, it does not take up the *amici*'s invitation to consider relevant outside environmental (and human rights) norms in its decision making. In fact, the tribunal seems to ignore these arguments altogether. As such, although perhaps going beyond the tribunals formed in cases previously canvassed, the tribunal's response here provides little evidence of anything more than tentative environmental consciousness.

(iii) Conclusions from the Analysis

From the extensive survey above, a number of salient points surface with respect to both the content of the *amicus curiae* briefs submitted in environmental disputes (that is, what the *amici* are attempting to do and how they are employing the briefs to go about doing it) and the response to these efforts from the regime (as seen in the extent to which tribunals reference and engage these submissions in the awards). An assessment of both of these points is essential towards assessing the potential and actual NGO utilization of *amicus curiae* briefs in ISDS

[415] *Ibid* at 4.85. The tribunal ultimately declined jurisdiction under *CAFTA* (though not under Salvadoran investment law) on the grounds that El Salvador had successfully established proper use of the clause. See *ibid* at para 4.92.

to encourage transformation from within the investment regime. Hence, each will be summarized briefly below.

A number of commonalities regarding the briefs and the participation of the *amici* more generally can be observed. For one, the briefs, although often drafted by or with the assistance of savvier international environmental NGOs (such as IISD or CIEL), tend to come from potentially affected and often vulnerable groups seeking a platform to voice their concerns. This was the case, for example, in the *Biwater*, *Suez/Vivendi*, and *Pac Rim* disputes, where local interested groups used the forum to try to have their environmental concerns accounted for.

Second, drawing from these local origins, the *amici* use these briefs to bring a unique perspective to the dispute—one that differs from both of the parties. Often, this is expertise related to local impacts, which the *amici* have proven effective at linking to expertise relating to international and environmental law and policy.

Third, the *amici* employ this perspective to bring otherwise neglected context to the dispute. The kind of context that *amici* have brought to the dispute has ranged from the historical (such as the local struggles serving as background to the dispute emphasized by the *Pac Rim amici*), to the socio-economical (such as the impacts of the crisis in Argentina, as noted by the *Suez/Vivendi amici* or the dynamics of poverty and privatization underscored by the *Biwater amici*), to the institutional (such as the influence of IFIs like the World Bank in the design of policies, the abandonment of which eventually formed the basis of investment disputes, as noted by both the *Suez/Vivendi* and *Pac Rim amici*). In each instance, this context complexified the facts giving rise to the dispute in a way that a purely investment-focused outlook (as favoured by arbitration tribunals) could not, laying bare the deeply entangled economic, environmental, and broader contextual ramifications at play in these disputes.

Fourth, many of the *amici* bring to light the oft obscured socio-political dynamics playing in the background to these disputes. Several of the *amici* (e.g. in the *Glamis* and *Pac Rim* disputes and hinted at also by the *Methanex amici*) highlight

how many of the policy changes that inspired ISDS claims are actually the result of broader, ongoing democratic conversations with respect to the appropriate balance between environmental regulation and natural resource extraction. This is a direct challenge to the regime's attempted de-politicization of investment disputes.

Finally, each of the briefs assessed above appears to reflect an attempt to trouble, more generally, the investment regime's monolithic approach to determining the relevance of facts, the interests at play, and the rights and responsibilities engaged of the underlying dispute. This can be seen, for example, in the *Biwater amici*'s insistance that some investments (such as the provision of water services in a developing country) are not just "ordinary" investments or in the *Methanex amici*'s attempt to distinguish investment treaty arbitration from commercial arbitration.

In terms of tribunal responses, the record is mixed. Several of the tribunals to these disputes demonstrate some degree of engagement with the *amicus curiae* briefs, while others showed essentially none.

In instances where tribunals respond more or less directly to the substance of the briefs, several trends can be observed. First, tribunals tend not to respond to environmental concerns raised by *amici*. Where, for example, NGOs emphasize the right of the state to regulate so as to protect the environment (such as in *Methanex*) or bring other environmental concerns to the table (such as the *Pac Rim amici*, noting issues of environmental stewardship), tribunals tend not to respond, and their reasoning does not ultimately reflected these concerns. As a second and related trend, tribunals do not demonstrate any particular willingness to incorporate or refer to environmental norms when making their decisions. Despite the almost universal attempt by the *amici* in the briefs surveyed to bring to light relevant environmental norms and suggest that they ought to be considered alongside investment norms as relevant to deciding the dispute, no tribunal appears to have done so. The fact that tribunals remain hesitant to draw from or introduce into ISDS "alien" norms despite the cogent invitation to do so

from NGOs with an expertise to offer may suggest that there is something more to this hesitancy than lack of awareness or lack of comfort with these other areas of law. A third observation that can be made (one that seems to provide some indication of opening in the regime) is that tribunals occasionally do respond to—or at least acknowledge—efforts by *amici* to contextualize the dispute to some extent (as evidenced in the *Glamis* and *Biwater* awards, for example).

Finally, even where tribunals have not proven responsive to the arguments and concerns brought forward by NGOs acting as *amici curiae*, they have demonstrated an awareness of the importance of having such participation in general. It is somewhat unclear whether this reflects a genuine move towards (or appreciation of the necessity of) greater openness and environmental responsiveness in the regime or whether this merely reflects a shrewd understanding of the usefulness of such participation in creating the impression of greater openness—perhaps in response to concerns about the regime's legitimacy or democratic deficit.

This picture is, as has been stressed, necessarily incomplete given the small number of applicable cases and the lack of direct insight into the arbitration decision-making processes (i.e., without details around tribunal deliberations, the degree to which arbitrators have been preoccupied with the concerns brought to their attention by *amici* can only be inferred from the printed page). However, it does provide a general overall sense of the effects of *amicus* participation in nudging the investment regime towards greater openness and environmental responsiveness.

It seems clear, for example, that even when they play the game as it is laid out for them, *amici* (and the environmental concerns they bring to the table) are largely ignored. This seems to be the case even when they seem to demonstrate effectively that they have something unique, important, or representative to offer to the proceedings. As Blackby and Richard have noted, "[d]espite tribunals' professed concern with taking wider interests into account in the decision-making process, past practice shows that once amicus curiae briefs are submitted,

tribunals rarely refer to them."[416] Tribunals have reiterated the importance and necessity of prospective *amici* in legitimately representing the public interest in ISDS proceedings in which the public interest is at stake.[417] Yet, even when tribunals have acknowledged the public interest implications of a decision with which they are faced, they have tended not to consider seriously what the *amici* have to say. Rather, tribunals appear to adopt a strategy of what Perez, in the WTO context, dubs "incorporate but ignore"[418] or what Ishikawa has described as possible "lip service."[419] That is, rather paradoxically, tribunals profess, on the one hand, an awareness of the environmental public interest implicated in the disputes over which they preside, while on the other hand, when presented with a unique and informed perspective on these issues, they do little more than regurgitate a few passages from briefs (if they respond at all).

Of course, as has been stressed, and as Ishikawa notes, while "express reference … does indicate some influence, no mention does not necessarily mean no influence."[420] It may, in other words, be difficult to detect the potentially subtle ways in which *amicus curiae* involvement in ISDS is influencing the regime and fostering greater environmental self-awareness. This is a point echoed, in some ways, by Renner, who implies that the very fact that such submissions are admitted by tribunals is an indication that a larger process of "legal-political re-embedding of market processes" is afoot.[421] Nevertheless, direct reference to the content or arguments of the briefs would seem, logically, a good indication that some kind of "re-entry" of environmental norms or genuine internalization (however weak) of environmental norms or concerns is occurring. This has not seemingly occurred. Rather, despite NGO efforts, the regime remains stubbornly

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[416] Blackaby & Richard, *supra* note 198 at 271.
[417] See e.g. *Methanex* final decision, *supra* note 127 at para 49; *Suez/Vivendi* final decision, *supra* note 42 at para 18; *Biwater* final decision, *supra* note 42 at para 53.
[418] Perez, *supra* note 82 at 102*ff*.
[419] Ishikawa, *supra* note 246 at 408 (in reference to the tribunal's extensive quotation of the *Biwater amici*'s brief, while ignoring the general substance of it in its actual decision making).
[420] *Ibid* at 409.
[421] Moritz Renner, "The Dialectics of Transnational Economic Constitutionalism" in Christian Joerges & Josef Falke, eds, *Karl Polanyi, Globalisation, and the Potential of Law in Transnational Markets* (Oxford: Hart, 2011) 419 at 435-436.

attached to its pre-existing internal approaches to handling (or not handing) collisions with the environment. These encounters, despite NGO efforts to shape them in productive directions (such that local and environmental concerns are accounted for), have illustrated the regime's ongoing hostility to "alien" norms and its inability to respond to concerns emanating from outside the regime. Ultimately, the regime has displayed an overarching "business as usual" attitude towards its decision making, even if it has made some room for the inclusion of these actors and has gestured that it shares concerns over potential public interest impacts. In effect, the regime has maintained its self-isolation and hostility towards efforts aimed at its opening.

V—Conclusions

In this study, I have sought to examine the complex relationship between the investment regime and its environmental "others." More specifically, focusing on the use of *amicus curiae* briefs in ISDS, I have explored the role that NGOs have to play in both shaping and compelling these interactions so as to foster greater environmental responsiveness in the regime. My analysis has revealed that NGOs acting as *amici curiae* in ISDS do, in fact, have a crucial role in bringing about and contouring collisions between the investment regime and the environment in ways that lead to greater sensitivity to environmental concerns within the regime. However, there is little evidence that this potential has, to date been completely realized; the regime remains both closed off to "outside" intrusions and relatively unresponsive to environmental concerns when confronted with them.

Situating these findings in a broader context, what other trends and structures can be detected within the regime that might be impacting upon the ability of NGOs to play this role in bringing about the regime's transformation? Certainly, NGOs' capacity to facilitate more (and more productive) interactions between the environment and the investment regime depends upon more than merely making the submission of *amicus curiae* a possibility. This is a point well articulated by Blackaby and Richard, who argue that the regime's current procedural rules make it doubtful that prospective *amici* will be able to participate effectively.[422] Renner

[422] They note that

> [i]t is questionable whether the admission of amicus curaie briefs alone increases the transparency and legitimacy of investment arbitration. Under the rules applied to the admission of amicus briefs, civil society groups are invited to file submissions without being able to review the parties' pleadings or attend the oral hearings. In the absence of public access to the arbitration record or to the oral proceedings, the content of such briefs is unlikely to be focused or helpful. At worst, the presence of amicus curiae—a further partisan party advocating a position on behalf of persons to whom it is unaccountable, behind closed doors, and without being afforded a full opportunity to make a meaningful contribution—may exacerbate the democratic deficit, politicize investment disputes, and disrupt proceedings, without assisting the tribunal to decide the matters in dispute

Blackaby & Richard, *supra* note 198 at 254. Although they are speaking in terms of the potential for *amicus* briefs to lend greater legitimacy to the regime (see my discussion of this particular viewpoint above in part III), a similar argument can be made regarding the possibility of these briefs to encourage better interactions and environmental responsiveness.

seems to make a similar argument, noting that the "the contestation of dis-embedding movements in the arenas of transnational law can only be successful if, *at the level of procedural law, these arenas are public and accessible* to potential contestants."[423] Procedural openness, then, is vital if NGOs are to see their efforts have effect.

Importantly, and more specifically, securing access to the arbitration's documentation and to oral hearings has remained consistently problematic for *amici curiae*. While it is beyond the scope of this study to provide a detailed account of disclosure procedures within the regime,[424] one key feature bears noting. While awards are more and more likely to be made publicly available,[425] *amici* have experienced challenges in obtaining access to other documentation, such as the parties' memorials.[426] Without access to these documents, *amici* are working blindly and are, in essence, left to imagine the key facts of the case and the parties' respective legal approaches.[427] Requests for disclosure are virtually always denied,[428] unless they are arbitrated under NAFTA, as the state parties themselves make awards and documents publicly available.

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[423] Renner, *supra* note 421 at 436 [emphasis added].
[424] For a detailed overview, with particular attention paid to the role of confidentiality, see Stephen Jagush & Jeffrey Sullivan. "A Comparison of ICSID and UNCITRAL Arbitration: Areas of Divergence and Concern" in Waibel et al, eds, *supra* note 45, 93 at 93*ff*.
[425] ICSID itself will generally publish awards so long as both parties agree, and even where there is a disagreement, parties are themselves free to make the awards public. Meanwhile, under UNCITRAL, the publication of awards can only be done with the consent of both parties (UNCITRAL Rules, *supra* note 51, art 34(5)). However, generally, awards are made public.
[426] Under the revised 2006 ICSID rules, it is at the discretion of tribunals to grant requests by *amici* for access. UNCITRAL rules, on the other hand, come much closer to imposing an actual duty of confidentiality upon parties, which means that disclosure is even more difficult to obtain. *Cf.* Caron, Caplan, and Pellonpaa, who argue that it is not clear that the rules actually impose duty of confidentiality given that there are no provisions within the rules governing publication of the actual existence of the proceedings themselves. David D Caron, Lee M Caplan & Matti Pellonpaa *The UNCITRAL Arbitration Rules—A Commentary* (Oxford: OUP, 2006).
[427] *Amici* have themselves underscored repeatedly how this lack of disclosure hamstrings their ability to draft an effective and useful brief. See e.g. *Biwater amicus* Petition, *supra* note 334, at section 1.3, noting that it was impossible for the *amici* to even fulfill the requirements for filing a petition under ICSID Rule 37(2) given the tribunal's decision to deny them access to the arbitration record.
[428] Requests were denied in *Interaguas*, *Suez*, *Tunari*, *Biwater*, *AES*, and *Pezold*. The sole exception to this trend appears to be *Foresti*. For discussion, see e.g. Blackaby & Richard, *supra* note 198 at 267.

There is some indication that despite what the presence of these procedural encumbrances might indicate—and despite the somewhat bleak picture that the analysis from part IV paints—the regime may be moving towards finding an enhanced and more influential role for public interest *amici curiae*.[429] Indeed, NGOs have been in large part responsible for the recent and gradual procedural changes in the regime that have led to greater openness. The most obvious example of such *amicus*-driven changes pertains to the materialization of increasingly formalized mechanisms for *amicus* involvement. Following the request by NGOs to participate as *amici* in the *Methanex* dispute, the FTC issued its seminal Statement on Non-disputing Parties in NAFTA arbitration in 2003.[430] Importantly, the Statement confirmed the NAFTA parties' support for the practice of *amicus curiae* participation.[431] The FTC seems to have been responding directly to these requests by would-be *amici* in the *Methanex* (and, subsequently, the *UPS*) disputes.[432] It appears that the initial NAFTA experience with *amicus curiae* submissions has, in turn, directly influenced similar formal changes in 2006 to the ICSID arbitration rules regarding the admission of *amici*.[433] One notable amendment involves the addition of Rule 38 regarding the admittance of *amicus curiae* submissions, which reflects the approach proposed in the FTC Statement.

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[429] In the recent *Foresti* dispute, for example, the tribunal issued a procedural order in which it granted access to these documents. *Piero Foresti, Laura de Carli and others v Republic of South Africa* Letter of 5 October 2009, ICSID Case No. ARB(AF)/07/1. However, the case settled before the *amici* could file their brief.

[430] *Supra* note 231.

[431] It also suggested the procedures that ought to be adopted for such submissions and delineated the factors, *inter alia*, that a tribunal is to consider in determining whether or not to accept such submissions. Specifically, the FTC offered four criteria that ought to be considered by tribunals in determining whether or not to accept prospective *amicus* participation :

> (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
> (b) the non-disputing party submission would address matters within the scope of the dispute;
> (c) the non-disputing party has a significant interest in the arbitration; and
> (d) there is a public interest in the subject-matter of the arbitration.

Ibid, clause 9.

[432] It will be recalled that following the Statement's release, the *Methanex* tribunal eventually decided to accept the *amicus* submission before it, referring to the FTC criteria (and the parties' consent) in its decision to do so (*Methanex* final award, *supra* note 127 at paras 26-30).

[433] See e.g. Renner, *supra* note 421 at 435-436; Asteriti & Tams, *supra* note 132.

These early efforts by would-be *amici curiae*, then, have led to a gradual but perceptible procedural opening up of the regime. Subsequent *amicus* participation appears to have built upon and contributed to this momentum, and can perhaps be linked to a larger trend towards transparency that can potentially be observed more generally in the regime.[434]

It must be noted, however, that this greater openness to the inclusion of *amici curiae* in ISDS has not seen universal uptake across the regime.[435] Additionally, although the issue of *amicus curiae* participation was on the agenda for the recent renegotiation of the UNCITRAL arbitration rules, unlike the reworked ICSID rules, the revised UNCITRAL rules, which were released in 2010, do not address this issue[436] (though a general consensus appears to have emerged that proceedings should, generally speaking, become more open to public involvement).[437] Moreover, access to oral hearings continues to prove challenging for *amici*. Finally, other emerging countertrends—such as the potential move of

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[434] For example, it has been observed that the EU has made the inclusion of mechanisms for greater transparency in ISDS a priority in future BITs. See e.g. Nathalie Bernasconi-Osterwalder, "Analysis of the European Commission's Draft Text on Investor-State Dispute Settlement for EU Agreements" (19 July 2012), online: IISD, <http://www.iisd.org/itn/2012/07/19/analysis-of-the-european-commissions-draft-text-on-investor-state-dispute-settlement-for-eu-agreements/>.

[435] Many recently negotiated IIAs do not feature provisions outlining how tribunals should handle such applications.

[436] Certainly Article 15 of UNCITRAL has been interpreted as empowering tribunals to accept *amicus curiae* involvement. In fact, this was argued by the prospective *amici* in their two respective briefs to the *Methanex* tribunal, which accepted this reasoning. However, calls to clarify and make explicit within the text of the UNCITRAL rules the status of *amicus curiae* submissions, the power of tribunals to admit them, and criteria to be considered were ignored. See Jan Paulsson & Georgios Petrochilos, *Revision of the UNCITRAL Arbitration Rules*, online: UNCITRAL, <http://www.uncitral.org/pdf/english/news/arbrules _report.pdf>. The authors suggest that "the power on the tribunal to accept *amicus curiae* briefs in written form … [e]specially in light of the frequent use of the UNCITRAL Rules in arbitrations under international investment treaties … should be made explicit in the Rules." *Ibid* at para 133. They propose the following subsection be appended to the then-current Article 15:

> Unless the parties have agreed otherwise, the Arbitral Tribunal may, after having consulted with the parties, and especially in cases raising issues of public interest, allow any person who is not a party to the proceedings to present one or more written statements, provided that the Tribunal is satisfied that such statements are likely to assist it in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight which the parties are un- able to present. The Arbitral Tribunal shall determine the mode and number of such statements after consulting with the parties.

Ibid at para 136. This resembles the revised ICSID Rule 37(2). See *supra* note 49.

[437] Astretiti & Tams, *supra* note 132 at 8.

some ISDS proceedings to fora more traditionally preoccupied with commercial arbitration[438] and the potential turn to mediation over arbitration[439]—may temper some of the movement towards greater openness and transparency that is currently being witnessed.

Considering these countercurrents—and in light of what the analysis from part IV reveals—an obvious final enquiry emerges. Could it be reasonably argued that the investment regime may not offer the best forum for difficult conversations regarding the appropriate balance between protection of the environment, on the one hand, and protection and promotion of foreign investment, on the other?[440] Certainly, as should now seem obvious, the investment regime was not designed to mediate these kinds of debates. Moreover, its questionable that any amount of procedural tweaking will render investment tribunals well positioned to ultimately make these determinations. In many ways, however, it is irrelevant that ISDS is not the best place for these debates; ultimately, this is where the drama is unfolding. This is a reality that the regime can no longer ignore. It is time for the regime to adapt—a process in which the assistance of NGOs should not so readily be dismissed.

[438] For example, there are signs that the International Court of Commerce (ICC) is attempting to attract ISDS business and that a small but growing number of BITs employ its services for ISDS. See Lisa Bench Nieufeld, "The ICC New York Conference: Releasing a New Report," (17 September 2012) online: Kluwer Arbitration Blog, <http://kluwerarbitrationblog.com/blog/2012/09/17/the-icc-new-york-conference-releasing-a-new-report/>. The ICC, whose expertise lies in administering commercial arbitrations, does not tend to publish its decision, as is commonplace in the tradition of commercial arbitration.

[439] See Gary Born, "Beach Books, for Arbitration Lawyers…" (26 July 2013) online: Kluwer Arbitration Blog, <http://kluwerarbitrationblog.com/blog/2013/07/26/beach-books-for-international-arbitration-lawyers/>.

[440] For a discussion on this question in the trade and environment context, see Young, *Trading Fish*, *supra* note 88 at 245.

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