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ORIGINAL ARTICLE

INTERNATIONAL LAW AND PRACTICE: SYMPOSIUM ON INTERNATIONAL INVESTMENT LAW AND HUMAN RIGHTS

Social movements, reframing investment relations, and enhancing the application of human rights norms in international investment law

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Abstract

The recent moderate trend to increasingly apply human rights law in investment awards is accompanied by certain new investment treaties which include expressed human rights provisions. An analysis of recent investment awards indicates that though there are some 'winds of change' in this field, it is equally noticeable that human rights law is far from being mainstreamed in international investment law. Investment arbitration procedural law is also undergoing a process of change, and the new procedural rules tend to enhance public elements in the investment arbitral system. This study is aimed at explaining these recent legal changes, highlighting the role of social movements in reframing investment relations as well as increasing public pressure to apply human rights law. These framing changes concern broadening the frame of investment arbitration (beyond the foreign investor–host state dyad), reversing the perceived balance of power between investors and host states, and zooming-in on local individuals and communities residing in host states. The discussion on factors impeding legal change in this field emphasizes the role of the private legal culture prevalent in the investment arbitration system, which is reflected and reinforced by certain resilient socio-legal frames. Informed by this analysis, the study suggests some legal mechanisms which can mitigate the *inter-partes* frame, and increase the application of human rights law in investment arbitration; *inter alia*, rigorous transparency rules that are likely to facilitate increased public pressure on tribunals and increase the participation of social movements representing local actors in arbitral processes.

Keywords: framing analysis; human rights; investment arbitration; social movements; sociology of law

1. Introduction

The recent moderate trend to increasingly apply human rights law in investment awards is accompanied by certain new investment treaties which include human rights provisions. An analysis of recent investment awards indicates that though there are some 'winds of change' in this field, it is equally noticeable that human rights law is far from being

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mainstreamed in international investment law. Investment arbitration procedural law is also undergoing a process of change, and the new procedural rules tend to enhance public elements in the investment arbitral system; prominently rules promoting transparency and the EU Investment Court initiative. This study is aimed at explaining these recent legal changes, highlighting the role of social movements in reframing investment relations as well as increasing public pressure to apply human rights law. The discussion on factors impeding the extensive application of human rights emphasizes the role of the private legal culture prevalent in the investment arbitration system, which is reflected and reinforced by certain resilient socio-legal frames. Informed by this analysis, the study suggests some legal mechanisms which can mitigate the *inter-partes* frame, and increase the application of human rights law in investment arbitration.

Section 2 reviews recent changes concerning the moderate increase of human rights law in investment arbitration jurisprudence and investment instruments (including treaties and model investment treaties), as well as certain changes in investment arbitral rules pertinent to disputes involving human rights issues. Section 3 sheds light on some sociological factors explaining recent trends in this sphere, highlighting the role of social movements and social control mechanisms in the ongoing socio-legal changes. As for social movements, the above trend is primarily explained by framing strategies employed by civil society groups. These framing changes concern broadening the frame of investment arbitration (beyond the foreign investor–host state dyad), reversing the perceived balance of power between investors and host states, and zooming-in on local individuals and communities residing in host states. Section 4 examines factors explaining the limited socio-legal change in investment jurisprudence, addressing impediments relating to the public nature of social movements' activities and the deeply ingrained *inter-partes* frame in the investment arbitration community. Section 5 suggests certain legal strategies aimed at enhancing the application of human rights law in investment jurisprudence, including broader transparency rules which are likely to facilitate increased public pressure on tribunals and increase the participation of social movements representing local actors in arbitral processes, that is expected to mitigate the *inter-partes* frame. Section 6 concludes.

2. Recent changes in international investment law

An analysis of investment tribunals' jurisprudence law up to 2010 revealed that investment tribunals were generally reluctant to grant significant weight to human rights law in the resolution of investment disputes.[1] A string of investment awards rendered since 2010 (prominently, *Urbaser* v. *Argentina* (2016)),[2] has shown a more receptive approach towards the application of international human rights law.[3] This trend is complemented by some new investment treaties and Model Bilateral Investment Treaties (BITs) that include provisions regarding human rights. As for investment arbitral *procedure*, new rules modifying the dispute settlement system are included in new investment treaties and instruments adopted by transnational institutions and arbitral institutions, notably the EU Investment Court System initiative. As elaborated below, the formation of the latter EU initiative is vitally linked to social movements' operations, and the realization of this initiative is expected to generate some further change regarding the application of human rights law.

[1]See, e.g., C. Reiner and C. Schreuer, 'Human Rights and International Investment Arbitration', in P. M. Dupuy, F. Francioni and E. U. Petersmann (eds.), *Human Rights in International Investment Law and Arbitration* (2009), 82, at 90; M. Hirsch, 'Investment Tribunals and Human Rights: Divergent Paths', in ibid., 97, at 106–7; B. Choudhury, 'Democratic Implications arising from the Intersection of Investment Arbitration and Human Rights', (2009) 46 *Alberta Law Review* 983, at 988–90. See also E. De Brabandere, 'Human Rights Considerations in International Investment Arbitration', in M. Fitzmaurice and P. Merkouris (eds.), *The Interpretation and Application of the European Convention of Human Right* (2013), 183, at 191, 208.

[2]*Urbaser S.A. v. Argentina*, ICSID Case No. ARB/07/26, Award of 8 December 2016, at paras. 1193–221.

[3]See, also, e.g., *Tulip v. Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, 30 December 2015, paras. 86–98, and additional awards discussed below.

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2.1 The application of human rights law in international investment law investment jurisprudence

A survey of investment awards rendered from 2010 through 2018[4] reveals that out of 355 decisions rendered during this period, 123 explicitly mentioned 'human rights'. An examination of those 123 awards reveals that 37 of them include only incidental or marginal references to international human rights law issues.[5] Consequently, 86 investment awards (of the 123 mentioning 'human rights') address human rights issues in a non-incidental or non-marginal manner. Those 86 decisions have been analysed in accordance with the tribunals' attitudes regarding the application or non-application of international human rights law in investment law. The analysis resulted in a division of the 86 awards into three primary groups: Group one is comprised of 28 (out of 86) decisions reflecting predominantly positive attitudes towards the incorporation of human rights law. Group two consists of nine awards reflecting predominantly negative attitudes towards the application of human rights. Group three contains 49 decisions that do not express a distinct attitude regarding the incorporation of human rights law.[6]

As noted, Group one includes 28 decisions[7] (out of 86 decisions) reflecting predominantly positive attitudes towards the incorporation of human rights law; representing the legal change in this sphere. This group is comprised of decisions containing general statements supporting the application of human rights law;[8] decisions including some legal statements supported by case law from human rights tribunals or human rights instruments;[9] and decisions containing some statements indicating support for the application of human rights law, but also pointing to some differences between these two branches of international law.[10]

Group two includes nine decisions[11] (out of 86 decisions) representing resistance to the trend towards increasing the application of human rights. This group is comprised of decisions expressing opposition to the application of human rights. Some of them emphasize the differences between the two branches of international law;[12] and some contain statements indicating a general non-receptive approach regarding the application of human rights, but also some statements regarding the restricted application of certain human rights rules in investment disputes.[13]

Group three includes 49 decisions[14] (out of 86 decisions) that do not express a distinct attitude regarding the application or non-application of human rights. Most tribunals in this group do not

[4]The survey examines decisions of investment tribunals published on the italaw.com website that were rendered from 1 January 2010 to 31 December 2018. The survey includes investment awards published on this website by 13 October 2019. These decisions include jurisdictional awards, awards on the merit, final awards, reports of ICSID Annulment Committees, and similar decisions, Thus, for example, decisions regarding stay of enforcement, expedited procedure, and procedural orders are not included in the survey.

[5]For example, references to 'human rights' are occasionally included in the citations of ICJ judgements that do not address human rights, or in the citations of certain Reports of the International Law Commission concerning general rules of international law.

[6]For the list of all decisions, see Annex.

[7]Annex, Cases No. 5, 14, 15, 16, 23, 25, 27, 28, 32, 50, 53, 64, 76, 77, 80, 87, 90, 91, 97, 99, 100, 112, 114, 116, 117, 118, 121, 122.

[8]See, e.g., *Urbaser v. Argentina*, *supra* note 2; *Impregilo v. Argentina*, ICSID Case No. ARB/07/17, Award, 21 June 2011; *Tulip v. Turkey*, *supra* note 3; *EDF International v. Argentina*, ICSID Case No. ARB/03/23, Award, 11 June 2012; *Al-Warraq v. Indonesia*, UNCITRAL, Final Award, 15 December 2014; *Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016.

[9]See, e.g., *Total v. Argentina Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010; *Burlington v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017; *Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015.

[10]See, e.g., *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011; *Grand River v. United States*, UNCITRAL, Award, 12 January 2011.

[11]Annex, Cases No. 9, 24, 30, 40, 43, 59, 59a, 59b, 69, 74, 107.

[12]See, e.g., Bernhard *von Pezold v. Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015; *White Industries v. India*, UNCITRAL, Final Award, 30 November 2011; *Renta 4. v. Russia*, SCC Case no. 24/2007, Award, 20 July 2012; *RosInvestCo v. Russia*, SCC Arbitration V Case No. 079/2005, Award, 12 September 2010.

[13]See, e.g., *The Rompetrol v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013; *Yukos v. Russia*, UNCITRAL PCA Case No. AA 227, Final Award, 18 July 2014.

[14]Annex, Cases No. 1, 6, 7, 8, 11, 12, 13, 17, 19, 20, 22, 35, 36, 37, 41, 42, 47, 48, 49, 52, 54, 55, 56, 60, 61, 62, 67, 70, 73, 75, 78, 79, 83, 84, 85, 86, 92, 95, 96, 101, 103, 104, 105, 106, 110, 111, 115, 119, 123.

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essentially address the parties' arguments regarding human rights. Many of the decisions here do not explain the reasons for not substantially addressing the parties' human rights arguments:[15] some awards suggest that the factual findings obviate the need to address human rights arguments;[16] and some Annulment Committees' Reports mentioning that the original tribunal has already addressed the human rights issue.[17]

This brief survey indicates a moderate increase in the application of international human rights law in investment tribunals' jurisprudence. A comparison of investment awards rendered before and since 2010 reveals that investment tribunals in the recent period have been more willing to incorporate human rights. The investment awards adopted during the earlier period showed that a receptive approach towards the application of human rights were clearly *fewer* (e.g., *Mondev* v. *US* (2002))[18] and more *limited* in their scope (e.g., *Phoenix* v. *The Czech Republic* (2009) relating to a violation of the most fundamental rules protecting human rights).[19] In addition, investment awards rendered up to 2010 did not include clear and broad statements supporting the incorporation of human rights law like those found in some investment awards rendered since 2010 (such as *Urbaser* (2016))[20] and the *Tulip Annulment* (2015)).[21] A similar trend also arises from findings of recent empirical studies of investment awards in this sphere.[22]

Thus, we may conclude that although there are some 'winds of change' regarding the increasing trend to apply human rights in investment jurisprudence, it is also noticeable that the approach supporting the application of human rights is not the dominant one among investment tribunals. The 'indistinct majority' of awards mentioning 'human rights' (49/86 decisions) and the majority of investment decisions not mentioning 'human rights' (232/355) suggest that human rights law has not been mainstreamed in international investment law.

2.1.1 International instruments

While the bulk of investment treaties do not include provisions regarding human rights,[23] recent investment treaties and Model BITs signify a gradual inclusion of provisions referring to or mentioning 'human rights'.[24] This recent tendency is manifested, for example, in the EU-Canada Comprehensive and Economic Trade Agreement (CETA) 2016;[25] Norway's Model BIT 2015;[26]

[15]See, e.g., *Balkan Energy v. Ghana*, PCA Case No. 2010-7, Interim Award, 22 December 2010; *Pacific Rim v. El Salvador*, ICSID Case No. ARB/09/12, Award, 14 October 2016; *Ioan-Micula, v. Romania*, ICSID Case No. ARB/05/20, Final Award, 11 December 2013.

[16]See, e.g., *Adel A Hamadi Al Tamimi v. Oman*, ICSID Case No. ARB/11/33, Award, 2 November 2015; *Bear Creek v. Perú*, ICSID Case No. ARB/14/21, Award, 30 November 2017.

[17]See, e.g., *Suez v. Argentina*, ICSID Case No. ARB/03/19, Decision on Annulment, 5 May 2017.

[18]*Mondev. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, of 11 October 2002, at paras. 143–4.

[19]*Phoenix. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, at para. 78.

[20]*Urbaser v. Argentina*, *supra* note 2, paras. 1193–1221.

[21]*Tulip v. Turkey*, *supra* note 3, paras. 86–98.

[22]S. Steininger, 'What's Human Rights Got to Do with It? An Empirical Analysis of Human Rights References in Investment Arbitration', (2018) LJIL 31, at 35, 45. See also V. Kube and E.-U. Petersmann, 'Human Rights Law in International Investment Arbitration', (2016) 11 *Asian Journal of WTO & International Health Law and Policy* 65, at 71 (see also 68–9).

[23]See, e.g., E. De Brabandere, 'Human Rights and International Investment Law', in M. Krajewski and R. T. Hoffmann (eds.), *Research Handbook on Foreign Direct Investment* (2019), 619, at 9. See also Steininger, ibid., at 34–5.

[24]See, e.g., De Brabandere, ibid., at 625–6; N. Nicolas, 'Recent Clauses Pertaining to Environmental, Labor and Human Rights in Investment Agreements', Klu*wer Arbitration Blog*, 23 July 2019, available at arbitrationblog.kluwerarbitration.com/2019/07/23/recent-clauses-pertaining-to-environmental-labor-and-human-rights-in-investment-agreements-laudable-success-or-disappointing-failure, accessed 6 December 2019.

[25]2017, Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States, OJ L 11/23, at the preamble; Annex 8-E Joint Declaration on Arts. 8.16, 9.8, 28.6, available at trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.

[26]2015, Agreement Between the Kingdom of Norway and . . . for the Promotion of and Protection of Investments, Arts. 6, 8(2), 11, 12, 31, available at www.regjeringen.no/contentassets/e47326b61f424d4c9c3d470896492623/draft-model-agreement-english.pdf.

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Nigeria-Morocco Agreement 2016 (not yet in force);[27] SADC Model BIT 2016;[28] India's Model BIT 2016;[29] Ecuador's Model BIT 2018;[30] and the Netherlands' Model Investment Agreement 2019.[31] On the multilateral level, the 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises' was published in 2018.[32]

2.1.2 Soft law instruments

Some new non-legally binding instruments applying to 'business and human rights' include human rights duties attributed to multinational investors; notably, the UN Guiding Principles on Business and Human Rights 2011;[33] Council of Europe's Committee of Ministers Recommendation on Human Rights on Business 2016;[34] and the 2011 edition of the OECD Guidelines for Multinational Enterprises.[35]

2.2 Settlement of disputes procedure

Rules applying to the resolution of investment disputes are occasionally significant for the application of human rights law by investment tribunals.[36] These rules are in a process of change. Many new investment treaties concluded in recent years have adopted diverse changes in investment arbitration procedure.[37] The EU and international arbitral institutions (such as the International Centre for Settlement of Investment Disputes (ICSID) and United Nations Commission on International Trade Law (UNCITRAL)) have adopted various instruments enhancing public elements in the procedural rules governing the settlement of investment disputes. For example, concerning enhanced transparency: ICSID amended its Arbitration rules in 2006 and is currently engaged in a further process of revision,[38] UNCITRAL adopted in 2014 new rules on transparency (which came into effect in 2014),[39] and in the same year the UN adopted the 'Mauritius Convention on Transparency' under

[27]2016, Reciprocal Investment Promotion and Protection Agreement between Morocco and Nigeria, Art. 18(2), available at pca-cpa.org/wp-content/uploads/sites/6/2016/01/Morrocco-Nigeria-BIT-2016.pdf.

[28]2012, SADC Model Bilateral Investment Treaty Template with Commentary, Art. 15, available at iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf.

[29]Model Text for the Indian Bilateral Investment Treaty, Art. 12.1(v), available at www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf.

[30]Ministry of Foreign Affairs and Human Mobility (Ecuador), 'Ecuador proposes new investment agreements that protect the country and defend human rights' (2018), available at www.cancilleria.gob.ec/en/ecuador-proposes-new-investment-agreements-that-protect-the-country-and-defend-human-rights/.

[31]2019, Netherlands Model of Investment Treaties, Arts. 5(3), 6(6), 7, 23, available at www.rijksoverheid.nl/ministeries/ministerie-van-buitenlandse-zaken/documenten/publicaties/2019/03/22/nieuwe-modeltekst-investeringsakkoorden.

[32]OHCHR, 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises' – Zero Draft, 16 July 2018, Arts. 3(1) and 13(7), available at www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf.

[33]OHCHR, 'Guiding Principles on Business and Human Rights', 2011, Arts. 11–15, available at www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf.

[34]See, e.g., Council of Europe – Committee of Ministers, 'Human rights and business', Recommendation CM/Rec(2016)3, 2 March 2016, Arts. 22–23, available at edoc.coe.int/en/fundamental-freedoms/7302-human-rights-and-business-recommendation-cmrec20163-of-the-committee-of-ministers-to-member-states.html.

[35]See, e.g., OECD, 'Guidelines for Multinational Enterprises', 2011, Arts. A(2), (9)–(12), available at www.oecd.org/daf/inv/mne/48004323.pdf.

[36]See Sections 2.2 and 3.1.4 below.

[37]On new procedural rules included in investment treaties concluded in 2018 see UNCTAD, 'Reforming Investment Dispute Settlement: A Stocktaking', (2019) 1 *International Investment Agreements Issues Note* 1; on new rules concerning transparency see paras. 8–10, and on arbitrators' conflict of interest see paras. 7–9, 20, available at www.unctad.org/en/PublicationsLibrary/diaepcbinf2019d3_en.pdf.

[38]ICSID, 'Proposals for Amendment of the ICSID Rules', (2020) 1 ICSID Working Paper No. 4, at Ch. X p. 331, available at icsid.worldbank.org/sites/default/files/WP_4_Vol_1_En.pdf.

[39]UNCITRAL, 'Rules on Transparency in Treaty-based Investor-State Arbitration', 2014, [hereinafter UNCITRAL Transparency Rules].

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which parties to investment treaties concluded before 1 April 2014 express their consent to apply the above UNCITRAL rules on transparency.[40] Ongoing negotiations in the UNCITRAL Working Group III (Investor-State Dispute Settlement Reform) also address transparency issues.[41]

The boldest initiative to change the current investment arbitration system is included in the EU 'Investment Court System'. The EU Council authorized the European Commission in June 2013 to negotiate the Transatlantic Trade and Investment Partnership Agreement (TTIP). The negotiating directives stated that the TTIP should include investment protection and an investor-state dispute settlement system (ISDS), provided that the final outcome meets EU interests.[42] The TTIP was initially welcomed by a large majority of European national parliaments and the media alike.[43] The opposition of European civil society groups (discussed below) and declining public support for the TTIP[44] led the EU Commission, in a rare move, to interrupt the TTIP negotiations in order to conduct a public consultation in 2014, focusing on the investment part of the TTIP.

Following the results of that consultation,[45] in September 2015 the EU Commission published a revised ISDS proposal suggesting extensive curtailments as to how, when, and where investors could challenge government decisions, as well as a permanent Investor Court System (ICS). According to the new EU initiative, the ICS would be comprised of an investment tribunal and appellate tribunal; all judges would have to hold qualifications comparable to judges in other international courts; judges would be assigned to each dispute on a random basis to guarantee their independence; judges would be barred from working as legal counsel on any other investment dispute while acting as judges; and the dispute settlement proceedings would be transparent.[46] As for the substantive rules to be applied by the proposed tribunals, the EU proposal states that the investment provisions included in the future TTIP should not affect the parties' right to regulate through measures necessary to achieve legitimate public policy objects, including the protection of public health, environment, safety, and morals, as well as cultural diversity.[47] The procedural rules included in the more recent Multilateral Investment Court initiative are substantially similar to the above Investor Court System proposal.[48]

Though the EU's multilateral court initiative does not expressly aim to apply human rights in investment disputes,[49] the requirement that judges in the prospective tribunals be barred from working as legal counsels in any other investment dispute (while acting as judge) is

[40]United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, UN Doc. A/Res/69/116 (2014).

[41]See, e.g., Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session, UN Doc. A/CN.9/935 (New York, 23–27 April 2018), para. 76; Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session, UN Doc. A/CN.9/970 (New York, 1–5 April 2019), para. 71.

[42]European Commission, 'Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)', SWD(2015)3 final, 13 January 2015 [hereinafter EU 2015 Report on Consultation], at 88, available at www.trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf.

[43]M. Bauer, 'Campaign-triggered mass collaboration in the EU's online consultations: the ISDS-in-TTIP case', (2015) 14 *European View* 121, at 124.

[44]L. J. Eliasson and P. G. D. Huet, 'TTIP negotiations: Interest groups, anti-TTIP civil society campaigns and public opinion', (2018) 16 *Journal of Transatlantic Studies* 101, at 102–3.

[45]On the results of this consultation see Section 4 below.

[46]EU Commission, 'Creating more investment opportunities in the EU and the US – Factsheet on Investment in the context of the TTIP', 23 November 2015, available at trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153018.pdf; EU Commission, 'TTIP textual proposal on investment protection and investment court system', 12 November 2015, ch. II – Investment [hereinafter 'TTIP textual proposal'], available at www.trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf.

[47]TTIP textual proposal, ibid., Art. 2(1).

[48]On the interactions between the ICS bilateral system and the multilateral MIC initiative see, e.g., European Commission, 'Recommendation for a COUNCIL DECISION authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes', COM/2017/0493 final, 13 September 2017, at 1–3, 6, available at eur-lex.europa.eu/resource.html?uri=cellar:df96826b-985e-11e7-b92d-01aa75ed71a1.0001.02/DOC_1&format=PDF.

[49]But the European Commission noted in the above Recommendation to the Council that '[a]ction by the Union at multilateral level cannot compromise the level of protection of fundamental rights in the Union', ibid., at 6.

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expected to generate a change in the composition of current investment tribunals (which often include investment lawyers who sequentially or simultaneously work in commercial law firms and serve as arbitrators).[50] Under the new rules, the ratio of adjudicators who have been socialized into the private legal culture is expected to be reduced. As discussed in Section 4 below, the private law background of many investment arbitrators tends to influence their approach regarding the application of human rights law.

3. Framing, social control and changes in international investment law

Mutual interactions between international law and societies,[51] and interrelationships between legal and social change,[52] point out that significant international legal changes are intertwined with socio-cultural changes. Social change has been at the heart of sociology since its inception, and the general assumption is that changes are integral to social life. Some social changes result from planned activities, while others are unintended, with changes most often being the outcome of a combination of both deliberate and unplanned activities.[53] Causes of social change include social structural strains, ideational changes, technological innovations, demographic changes, and the diffusion of ideas.[54] Although sociological literature discusses numerous causes of social change, this study addresses two interrelated factors that may explain the above changes in international investment law:[55] the role of social movements in modifying frames of investment relations and social control processes. Some factors *impeding* socio-legal change in this sphere are discussed in Section 4 below.

3.1 Social movements and social framing

Sociological literature on social change underscores the role of social movements[56] in social change,[57] and some of the notable ones are linked with well-known legislative changes;[58] e.g., the Civil Rights Movement, Gay and Lesbian Movements, and the Women's Movement.[59] Until the late 1980s, the bulk of social movement scholarship focused on material-organizational resources or political institutional patterns that enabled or constrained these groups. However, like the broader 'cultural turn' in social sciences, social movements scholars

[50]For an analysis of the 'double hatting' in investment arbitration see M. Langford, D. Behn and R. H. Lie, 'The Revolving Door in International Investment Arbitration', (2017) 20 *Journal of International Economic Law* 301.

[51]See, e.g., M. Hirsch, *Invitation to the Sociology of International Law* (2015), 9 et seq.

[52]See, e.g., R. Cotterrell, *The Sociology of Law* (1992), 44–65.

[53]G. Ritzer, *Introduction to Sociology* (2015) 593–4; J. A. Weinstein, *Social Change* (2010), 1, at 9–10; J. Macionis, *Sociology* (2012), 565–6.

[54]Weinstein, ibid., at 55–6; Macionis, ibid.

[55]Additional sociological perspectives may also shed light on recent developments in this field, including the social conflict perspective and Bourdieusian approaches (emphasizing power relations, symbolic capital, and social hierarchies in investment arbitration). On power relations in international adjudication see M. Hirsch, 'Introduction: Sociological Perspectives on International Tribunals', *Temple Journal of International and Comparative Law* (forthcoming).

[56]The term 'social movement' refers to a sustained and intentional collective effort, usually operating outside of established institutional channels, either to bring about or to resist social change: Ritzer, *supra* note 53, at 594. See also D. A. Snow, S. A. Soule and H. Kriesi, 'Mapping the Terrain', in D. A. Snow, S. A. Soule and H. Kriesi (eds.), *The Blackwell Companion to Social Movements* (2006), 3, at 11.

[57]See, e.g., Weinstein, *supra* note 53, at 133–93; Ritzer, *supra* note 53, at 592–608; A. Giddens and P. Sutton, *Sociology* (2013), 994.

[58]On 'legal mobilization' (legal strategies employed by social movements to promote social change) see M. McCann, 'Law and Social Movements: Contemporary Perspectives', (2006) 2 *Annual Review of Law and Social Science* 17; E. Lehoucq and W. Taylor, 'Conceptualizing Legal Mobilization: How Should We Understand the Deployment of Legal Strategies?', (2020) 45 *Law & Social Inquiry* 166.

[59]Ritzer, *supra* note 53, at 594–604; Macionis, *supra* note 53, at 548; D. A. Snow, 'Framing Processes, Ideology, and Discursive Fields', in Snow, Soule and Kriesi, *supra* note 56 [hereinafter Snow, 'Framing Processes'], at 380.

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have become increasingly aware of the interpretative and meaning-construction elements involved in social movements' activities. This stream in social movement literature emphasizes that social mobilization requires assigning a particular meaning to social phenomena and that actors share grievances – prominently through framing reality.[60]

3.1.1 Social movements framing

The framing perspective in social movement literature emphasizes the significant interconnections between changes in people's subjective views of reality and social change. When interacting, people seek to maintain a common frame, but frames are vulnerable to change (or manipulation).[61] The sociological concept of 'frame' builds on insights drawn from Erwin Goffman's seminal scholarship on frame analysis. According to Goffman, frames refer to 'frameworks or schemata of interpretation' that 'allow its user to locate, perceive, identify, and label … occurrences',[62] thus 'rendering what would otherwise be a meaningless aspect of the scene into something that is meaningful'.[63] These frames also organize social experience and guide action.[64] Goffman observed that socially accepted frames form central elements of groups' culture, and are often institutionalized in various ways (though subject to change at different periods).[65] Social frames entail some events being kept 'out of frame', thus kept out of focus and *dis*attended.[66] Such frames frequently emerge from intersubjective interactions between individuals in social groups, and they change over time, occasionally due to the activities of social movements.[67]

Snow, Benford and additional scholars developed the concept of 'framing' in *social movement* literature. This scholarship views social movements as 'signifying agents' engaged in meaning construction.[68] Social movements' frames perform three core functions: *focusing attention* by bracketing some items in our sensory field (delineating what is in-frame/out-frame); *articulation* function, in the sense of tying together various punctuated elements of the scene so that one coherent set of meanings is conveyed; and *transformative* function, by reconstituting the way in which some objects of attention are understood as relating to each other or to the actor.[69] As to the practical outcome of these frames, Snow, Vligenthart and Ketelaras explain:

> Given the focusing, articulation, and transformative functions of frames, it is arguable that how we see, what we make of, and how we act toward the various objects of orientation that populate our daily lives depend, in no small part, on how they are framed.[70]

[60]N. Pedriana, 'From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women's Movement in the 1960s', (2006) 111 *American Journal of Sociology* 1718, at 1720–1; D. A. Snow, R. Vliegenthart and P. Ketelaars, 'The Framing Perspective on Social Movements: Its Conceptual Roots and Architecture', in Snow, Soule and Kriesi, *supra* note 56, at 392–3; Snow, 'Framing Processes', ibid., at 384; J. H. Turner, *Contemporary Sociological Theory* (2013), 429.

[61]Turner, ibid., at 427–9.

[62]E. Goffman, *Frame Analysis: An Essay on the Organization of Experience* (1974), 21.

[63]Ibid., at 21.

[64]Goffman, *supra* note 62, at 10, 21. See also Snow, 'Framing Processes', *supra* note 59, at 385. Goffman adds that, 'frames' refer to 'definitions of a situation [that are] built up in accordance with principles of organizations which govern events – at least social ones …': Goffman, *supra* note 62, at 10–11.

[65]E. Goffman, 'A reply to Denzin and Keller', (1981) 10(1) *Contemporary Sociology* 60, at 63. See also Snow, 'Framing Processes', *supra* note 59, at 385.

[66]See Goffman, *supra* note 62, at 201, 210.

[67]G. Ritzer and J. Stepnisky, *Sociological Theory* (2013), 363.

[68]Snow et al., in Snow, Soule and Kriesi, *supra* note 60, at 394; Snow, 'Framing Processes', *supra* note 59, at 384.

[69]Snow et al., in Snow, Soule and Kriesi, *supra* note 60, at 393; Snow, 'Frame', in G. Ritzer and J. M. Ryan (eds.), *The Concise Encyclopaedia of Sociology* (2011), 235 at 235; Snow, 'Framing Processes', *supra* note 59, at 384–5.

[70]Snow et al., in Snow, Soule and Kriesi, *supra* note 60, at 393.

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These scholars highlight the *collective action* aspects of frames; signifying a collective interpretation of reality in a way that is intended to mobilize potential adherents and constituents, as well as to garner bystander support (so that people move 'from the balcony to the barricades').[71] Collective action frames that inspire people to participate in social movements' activities are clearly 'agentic' and contentious in the sense of calling to action and challenging mainstream frames of reality.[72] From this perspective, social movements' success or failure depends to a significant extent on their capacity to revise what is considered as *just and unjust*; to redefine some existing problem or condition as an 'injustice' that demands correction (rather than as a 'misfortune' which warrants only charitable consideration).[73]

3.1.2 Social movements in international investment law

Among the many social movements active in the sphere of international investment law, we focus here primarily on two prominent civil society groups: The Corporate Europe Observatory (CEO)[74] and the Transnational Institute (TNI),[75] and to a lesser degree on the broader alliance of organizations 'Stop TTIP'[76] that also exerts criticism against current forms of investment arbitration. Some other groups, prominently the European Federation for Investment Law and Arbitration (EFILA), oppose and vigorously criticize anti-ISDS groups, and aim to promote a more favourable investment climate in Europe.[77] In addition to their attempts to change the international legal regime applicable to foreign investments, the NGOs cited here pursue broader objectives, notably food safety, environmental and human rights protection (including labour rights). Due to this linkage, the public debate in many European and North American countries regarding the TTIP and CETA negotiations was frequently entwined with the debate on reforms in ISDS. As Eliasson and Huet explain in their article on the anti-TTIP civil society campaign: 'ISDS was quickly deemed a useful target which could be drastically simplified to the general public in order to garner attention and raise awareness of TTIP.'[78] This linkage was manifest not only in the publications of these NGOs[79] but also in the mass media coverage.[80]

The activities undertaken by those civil society groups included a broad variety of means, including publications and messages transmitted primarily through the internet and social media,[81] as well as some traditional means such as press releases to the mass media,[82] street protests and rallies,[83] and

[71]Snow et al., ibid., at 395; R. D. Benford and D. A. Snow, 'Framing Processes and Social Movements', (2000) 26 *Annual Review of Sociology* 611, at 614.

[72]Benford and Snow, ibid., at 614; Snow, 'Framing Processes', *supra* note 59, at 385.

[73]Snow, ibid., at 380, 383–4; Snow et al., in Snow, Soule and Kriesi, *supra* note 60, at 396. On the selective nature of interpretative frames see D. Della Porta and M. Diani, *Social Movements* (2006), 76.

[74]On Corporate Europe Observatory, its aims and activities, see Corporate Europe Observatory (CEO), 'About CEO', available at corporateeurope.org/about-ceo.

[75]On the vision, mission and values of the Transnational Institute, see The Transnational Institute (TNI), 'Mission', available at www.tni.org/en/page/mission.

[76]On this alliance of organizations see Stop ISDS, 'Alliance', available at stopisds.org/alliance/. On the Council of Canadians and their activities against Investment Arbitration see The Council of Canadians, 'Investment Arbitration', available at canadians.org/tags/investment-arbitration.

[77]On European Federation for Investment Law and Arbitration see European Federation for Investment Law and Arbitration (EFILA), 'About EFILA', available at www.efila.org/about-efia/.

[78]Eliasson and Huet, *supra* note 44, at 105.

[79]Ibid., at 105, 109. See also Bauer, *supra* note 43, at 125.

[80]Bauer, ibid., at 24–5. See also G. Monbiot, 'This transatlantic trade deal is a full-frontal assault on democracy', *Guardian*, 4 November 2013; S. Donnan and S. Wagstyl, 'Transatlantic trade talks hit German snag', *Financial Times*, 14 March 2014; M. Vaudano, 'Le traité Tafta va-t-il délocaliser notre justice à Washington?', *Le Monde*, 15 April 2014.

[81]Bauer, *supra* note 43, at 124. On the role of online and social media publications see also, L. J. Eliasson and P. G. D. Huet, *Civil Society, Rhetoric of Resistance, and Transatlantic Trade* (2019), 3–6.

[82]See, e.g., Corporate Europe Observatory (CEO), 'Press', available at corporateeurope.org/en/press.

[83]See, e.g., regarding street protests in Germany, Eliasson and Huet, *supra* note 44, at 107. On various protest activities lodged by the 'Stop TTIP', see P. Graziano and M. Caiani, 'Europeanization and Social Movements: The Case of the Stop-TTIP campaign', Paper presented at the SGEU ECOR Conference, Trento, 15–18 June 2016, available at ecpr.eu/

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petitions sent to public officials.[84] Opposition to the TTIP (and significantly to its expected provisions regarding ISDS) was especially pronounced in Europe, prominently in Germany,[85] and over time, criticism spilt over to other European countries, including Belgium, Austria, the Netherlands, the UK, and Spain.[86] In 2014–2016, thousands of events were held across Europe by groups both supporting and opposing the TTIP, but over 75 per cent of them were organized by its opponents.[87] Duran and Eliasson observe that opposition to the TTIP was led by civil society groups that altered public opinion about it.[88]

The significant change in the EU's position during the TTIP negotiations concerning investment arbitration and the resulting new Investment Court initiative demonstrates the significant impact of social movements on public opinion and public bodies in this field.[89] The TTIP was initially welcomed by a large majority of European national parliaments and the media alike.[90] Soon after the official launch of the negotiations, however, civil society groups started raising concerns over the future treaty[91] and the opposition of European groups to the TTIP – and especially to ISDS – dominated the public debate (and correlated with declining public support for the TTIP in Europe).[92]

The intense resistance to ISDS by civil society groups and the European Parliament[93] led the EU Commission to interrupt the TTIP negotiations and conduct a public consultation, focusing on the investment part of the TTIP. The EU public consultation was launched on 27 March 2014: it outlined a possible EU approach and sought feedback on the proposed EU approach.[94] The consultation concerned both substantive investment protection issues and ISDS questions. The Commission received a total of nearly 150,000 replies, and the vast majority (about 97%), were submitted collectively through various NGOs.[95] These groups provided pre-prepared answers (made available through online platforms or software), allowing the loading of replies directly into the database of the public consultation (thus making it possible to submit very significant numbers of replies in a short amount of time).[96] In addition, the EU Commission received replies from over 3,000 individual citizens and some 450 organizations.[97] Those collective submissions reflect widespread opposition to ISDS in TTIP or in general. As the EU Commission report on these consultation notes, '[i]n these submissions, the ISDS

Filestore/PaperProposal/693a6f26-d799-4870-b257-36e7bafabd53.pdf; L. Buonanno, 'The new trade deals and the mobilisation of civil society organizations: comparing EU and US responses', (2017) 39 *Journal of European Integration* 795, at 796.

[84]Eliasson and Huet, *supra* note 44, at 102–3, 106.

[85]Ibid., at 107. See also Bauer, *supra* note 43, at 124; Donnan and Wagstyl, *supra* note 80.

[86]See, e.g., Eliasson and Huet, ibid., at 107–8; Bauer, ibid., at 124. See also A. Reinisch, 'The European Union and Investor-State Dispute Settlement: From Investor-State Arbitration to a Permanent Investment Court', CIGI Investor-State Arbitration Series Paper No. 2, March 2016, at 8, available at www.cigionline.org/sites/default/files/isa_paper_series_no.2.pdf.

[87]Eliasson and Huet, *supra* note 44, at 107.

[88]P. G. Duran and L. J. Eliasson, 'The Public Debate over TTIP and Its Underlying Assumptions', (2017) 51 *Journal of World Trade* 23, at 23–5. See also Eliasson and Huet, ibid., 101–2.

[89]On social movements' pathways of influence see Section 3.1.4 below.

[90]See Section 2.2 above.

[91]Bauer, *supra* note 43, at 124.

[92]Eliasson and Huet, *supra* note 44, at 102–3.

[93]On the influence of the European Parliament and Civil Society groups on the European Commission's position in this sphere see L. Puccio and R. Harte, 'From arbitration to the investment court system (ICS): The evolution of CETA rules', European Parliamentary Research Service In-Depth Analysis PE 607.251, June 2017, at 1, available at www.europarl.europa.eu/RegData/etudes/IDAN/2017/607251/EPRS_IDA(2017)607251_EN.pdf; N. Lavranos, '2019: the Year of the Big Harvest!', *Kluwer Arbitration Blog*, 30 December 2018, available at arbitrationblog.kluwerarbitration.com/2018/12/30/2019-the-year-of-the-big-harvest/; B. Lange, 'TTIP Negotiations Investment Protection: Investor-State Dispute Settlement (ISDS)', European Parliament Legislative Train 11.2019, 20 November 2018, available at www.europarl.europa.eu/legislative-train/theme-international-trade-inta/file-ttip-investment-protection-investor-state-dispute-settlement-(isds).

[94]'EU 2015 Report on Consultation', *supra* note 42, at 10.

[95]Ibid., at 3.

[96]Ibid., at 10. See also CEO's call to people to appeal to the EU Commission, CEO, 'Still not loving ISDS: 10 reasons to oppose investors' super-rights in EU trade deals', 16 April 2014, available at corporateeurope.org/en/international-trade/2014/04/still-not-loving-isds-10-reasons-oppose-investors-super-rights-eu-trade

[97]'EU 2015 Report on Consultation', *supra* note 42, at 3.

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mechanism is perceived as a threat to democracy and public finance or to public policies'.[98] The majority of business associations and large companies supported investment protection and ISDS in TTIP.[99]

Media reports on the results of these consultations frequently referred to public opinion's strong opposition to ISDS,[100] and the new EU Trade Commissioner Malmstrom's key message was that the '[t]he consultation clearly shows that there is a huge scepticism against the ISDS instrument'.[101] In September 2015 the EU Commission published a revised ISDS proposal, including extensive curtailments on how, when, and where investors could challenge government decisions as well as suggesting the establishment of a permanent Investor Court System.[102]

3.1.3 Reframing investment arbitration and investment relations

The civil society groups' communications raised public awareness to investment arbitration and conveyed to the public a frame drastically different from that prevailing in the investment arbitration community.[103] Employing the mass media and new social media, these NGOs redefined the existing situation in international investment law as pervaded by injustice and changed public frames by expanding the scope of the investment arbitration frame, reversing the typical balance of power between the main actors within the frame, and zooming-in on the rights of individuals and communities residing in host states.

3.1.3.1 Expanding the scope of the frame. Conventional framing of international investment relations is primarily focused on two main actors: the foreign investor and the host state.[104] The new frame projected through prominent publications added the 'investment arbitration industry' as a significant actor, composed of law firms and arbitrators.[105] The revised frame highlights the important role played by arbitrators and law firms in investment arbitration.[106] One of the most prominent NGO publications in this sphere states: 'The law and the consequential disputes are largely shaped by law firms, arbitrators and, more recently, a phalanx of speculators . . . '.[107] These publications focus particularly on elite law firms[108] (from which many arbitrators are drawn) that dominate the field of investment arbitration.[109] As regards lack of transparency, it is argued that the secrecy of the investment arbitration regime protects the market of leading law firms.[110] In this new frame, investment arbitrators are not perceived as a semi-judiciary genuinely independent of the rival parties; many arbitrators and lawyers are presented as maintaining significant ties with foreign investors[111] and sharing business

[98]Ibid., at 14.

[99]Ibid.

[100]Bauer, *supra* note 43, at 127.

[101]European Commission, 'Report presented today: Consultation on investment protection in EU-US trade talks', 2015, available at europa.eu/rapid/press-release_IP-15-3201_en.htm.

[102]On the EU permanent investment court initiative see Section 2.2 above.

[103]Prior to the above civil society groups' operations, public awareness to investment arbitration was low, and the investment arbitration community's frame largely prevailed in the public's previously held perception. See, e.g., Eliasson and Huet, *supra* note 44, at 105; Duran and Eliasson, *supra* note 88, at 33. See also A. Depalma, 'Mexico Is Ordered to Pay a U.S. Company $16.7 Million', *New York Times*, 31 August 2000.

[104]See, e.g., R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2012), 249; J. W. Salacuse, *The Law of Investment Treaties* (2010), 205.

[105]See, e.g., C. Olivet and P. Eberhardt, *Profiting from Injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom* (2012). On the 'investment arbitration industry' see at 7–9, 15–16.

[106]See e.g., ibid., at 11; P. Eberhardt, C. Olivet and L. Steinfort, *One Treaty To Rule Them All: The ever-expanding Energy Charter Treaty and the power it gives corporations to halt the energy transition* (2018), 47.

[107]Olivet and Eberhardt, ibid., at 11. See also Eberhardt, Olivet and Steinfort, ibid., at 47.

[108]On 'elite of law firms and lawyers' see Olivet and Eberhardt, ibid., at 7, 15; Eberhardt, Olivet and Steinfort, ibid., at 8, 47, 95.

[109]See, e.g. Eberhardt, Olivet and Steinfort, ibid., at 95, 47, 49–51; Olivet and Eberhardt, ibid., at 7–8, 22, 38–41.

[110]Eberhardt, Olivet and Steinfort, ibid., at 22, 72.

[111]See, e.g., Olivet and Eberhardt, *supra* note 105, at 7–8; Eberhardt, Olivet and Steinfort, ibid., at 47.

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beliefs with them.[112] According to this vantage point, that group of elite law firms and arbitrators also influences the legal balance between host states and foreign investors (see further below).

3.1.3.2 Reversing the power balance in investment relations. The new frame conveyed by civil society groups reverses the underlying power asymmetry between the main actors within the frame. In the previous conventional frame, the foreign investor was typically perceived as the weaker party vis-à-vis the host sovereign state[113] (notably due to the host state's superior legal position in the domestic legislative process as well as its control of the relevant territory); thus, implicitly deserving enhanced legal protection. The above-cited NGO publications portray transnational foreign investors as powerful actors[114] which often confront weak 'countries with critical economic needs',[115] or host states 'fighting a major economic crisis'.[116] From this perspective, investors use international legal instruments to sue and 'scare governments into submission'.[117]

According to this conception, the position of host states is further weakened by investment *tribunals* which do not 'act as a fair and neutral intermediary',[118] but rather prioritize the rights of investors at the expense of sovereign host states.[119] As to the interpretation of investment law, investment tribunals are presented as inclining to adopt an expansive 'claimant-friendly' interpretation of various treaty clauses.[120] These publications often use popular symbols of *in*equality in legal proceedings, such as images of tilted scales.[121]

3.1.3.3 Zooming in on local communities and individuals. Most directly related to the application of human rights law, the frame projected out by the social movements' publications zooms-in on the effects of foreign investments on local populations and individuals in host states. While the conventional *inter-partes* model in investment law primarily focused the audience's attention on the two litigating parties,[122] the new frame turns the spotlight onto the inhabitants of host states, particularly with regard to vulnerable groups. The revised frame draws attention to the detrimental consequences of investments and legal mechanisms protecting investors' rights on the reduced protection accorded to human rights, public health, and environmental resources available to largely 'invisible'[123] individuals and local groups in host states.[124] The following statement by a civil society group illustrates this feature of the revised frame: 'When companies sue governments in international arbitration tribunals, investment arbitrators ... can decide to penalise governments for ensuring people's human rights to health, access to water or electricity as well as the right to a healthy environment.'[125] These and other publications by anti-ISDS groups have been

[112]Olivet and Eberhardt, ibid., at 8.

[113]See, e.g., *Tecmed v. Mexico*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, at para. 122; see also *Azurix Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006, at para. 311.

[114]See, e.g., Eberhardt, Olivet and Steinfort, *supra* note 106, at 95. See also 'Rights for People, Rules for Corporations – Stop ISDS', available at stopisds.org/.

[115]Olivet and Eberhardt, *supra* note 105, at 7, 9.

[116]Ibid., at 23.

[117]Ibid., at 27. See also CEO, 'Still not loving ISDS', *supra* note 96.

[118]Ibid., at 71.

[119]Ibid., at 7. On concerns about arbitrators' commitment to deliver fair and independent judgements see also Eberhardt, Olivet and Steinfort, *supra* note 106, at 47.

[120]Olivet and Eberhardt, ibid., at 9, 11, 48; Eberhardt, Olivet and Steinfort, ibid., at 53, 95.

[121]See, e.g., the cover page of Olivet and Eberhardt, ibid. See also the cover page for CEO, 'Still not Loving ISDS', *supra* note 96. See also 'ISDS in numbers', 8 October 2019, available at www.bilaterals.org/?isds-in-numbers.

[122]See, e.g., *Aguas del Tunari v. Bolivia*, ICSID Case No. ARB/02/3, Letter from President of Tribunal Responding to Petition by NGOs to Participate as amici curiae, 29 January 2003.

[123]On these invisible local communities in investment disputes see N. Perrone. 'The "Invisible" Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime', (2019) 113 *AJIL Unbound* 16.

[124]See, e.g., Olivet and Eberhardt, *supra* note 105, at 7–8, 11, 13, 35; Eberhardt, Olivet and Steinfort, *supra* note 106, at 8, 19, 24, 68; P. Eberhardt, B. Redlin and C. Toubeau, *Trading Away Democracy* (2014), 2, 4, 11–12.

[125]Olivet and Eberhardt, ibid., at 35.

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intensely criticized in some scholarly writings[126] and other publications,[127] which also presented contradicting evidence.[128]

3.1.4 Pathways of influence

The above discussion reveals that the recent changes regarding the increasing application of human rights in international investment law, and particularly reforms in investment arbitral system undertaken by the EU, have been influenced by social movements' operations. Civil society groups employed a broad variety of means (notably the internet and social media, the mass media, petitions, street protests and petitions)[129] and their pathways of influence are intertwined (and thus, cannot be neatly separated). Those movements' activities influenced public opinion against ISDS and the TTIP,[130] which influenced some EU member states,[131] and EU states (as well as public opinion) influenced EU institutions to pursue the Investment Court initiative.[132] In addition to their indirect impact (through public opinion and EU member states), civil society groups influenced the EU Commission to reform the investment arbitral system via the public consultation held in 2014. As previously noted, the vast majority of replies were collectively submitted through NGOs (which provided pre-prepared answers), and the EU Commission's Investment Court System followed the publication of the results of the public consultations.[133]

The new frame conveyed by the social movements turned public attention to the effects of foreign investments on the rights of individuals and local communities, reversed the conventional asymmetric structure pervasive in the investment law doctrine, and highlighted the role which arbitrators and law firms played in international investment law.[134] The EU's Investment Court initiative was prompted by criticism levelled by social movements, but the rules included in the ICS initiative address part of the concerns raised by these civil society groups;[135] mainly those relating to procedural rules that concern the independence of tribunals, the role of law firms,

[126]See, e.g., C. N. Brower and S. Blanchard, 'From "Dealing in Virtue" to "Profiting from Injustice": The Case Against "Re-Statification" of Investment Dispute Settlement', (2013) 55 HILJ 45. See also K. Hober, 'Investment Treaty Arbitration and Its Future – If Any', (2015) 7 *Yearbook on Arbitration and Mediation* 58.

[127]See, e.g., EFILA, 'A response to the criticism against ISDS', 7 May 2015, available at efila.org/wp-content/uploads/2015/05/EFILA_in_response_to_the-criticism_of_ISDS_final_draft.pdf; N. Lavranos, 'Countering Anti-ISDS Propaganda with Facts: An Uphill Battle', *Kluwer Arbitration Blog*, 8 June 2015, available at arbitrationblog.kluwerarbitration.com/2015/06/08/countering-anti-isds-propaganda-with-facts-an-uphill-battle/. For additional publications of the EFILA see Publications, available at efila.org/publications/.

[128]These responses will not be presented here due to space limitations and the objectives of this study.

[129]On the diverse means employed by social movements, see Section 3.1.2 above.

[130]On the significant influence of civil society groups on public opinion against ISDS and TTIP see L. J. Eliasson, 'Transatlantic Trade Negotiations, Civil Society Campaigns and Public Opinion', in D. Dialer and M. Richter (eds.), *Lobbying in the European Union: Strategies, dynamics and trends* (2019), 375, at 380–4; K. Hübner, A.-S. Deman and T. Balik, 'EU and trade policymaking: the contentious case of CETA', (2017) 39 *Journal of European Integration* 843, at 853; Buonanno, *supra* note 83, at 801–3; Duran and Eliasson, *supra* note 88, at 23–5. See also Eliasson and Huet, *supra* note 44, at 102; P. G. Duran and L. J. Eliasson, 'The Public Debate over TTIP and Its Underlying Assumptions', (2017) 51 *Journal of World Trade* 23, at 23–5.

[131]On the influence of civil society groups on some EU member states see, e.g., Hübner et al., ibid., at 847, 852; Eliasson, ibid., at 375, 379; J. Greenwood, 'Interest Representation in the EU: An Open and Structured Dialogue', in D. Dialer and M. Richter (eds.), *Lobbying in the European Union: strategies, dynamics and trends* (2019), 21, at 27; Eliasson and Huet, ibid., at 108.

[132]On the influence of social movements' operation on the EU Commission see e.g., Eliasson, *supra* note 130, at 383–4; N. Gheyle and F. De Ville, 'Outside Lobbying and the Politicization of the Transatlantic Trade and Investment Partnership', in D. Dialer and M. Richter (eds.), *Lobbying in the European Union: Strategies, dynamics and trends* (2019), 339, at 348; Greenwood, ibid., at 27.

[133]See Section 3.1.2 above. See also K. Yiannibas, 'Democratizing International Trade and Investment Agreements in the European Union', in B. Pérez De Las Heras (ed.), *Democratic Legitimacy in the European Union and Global Governance: Building* (2017), 353, at 354; Gheyle and De Ville, ibid., at 339; Greenwood, ibid., at 27.

[134]See Section 3.1.3 above.

[135]On the opposition of civil society groups to the EU investment court initiative see, e.g., Corporate Europe Observatory, 'The zombie ISDS', 17 February 2016, available at corporateeurope.org/en/international-trade/2016/02/zombie-isds.

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and reversing the conventional asymmetric structure of investor relations. The new ICS procedural rules notably aim to address concerns regarding the independence of adjudicators and avoiding conflicts of interest, as well as lack of transparency.[136] As to the expected influence of these procedural changes on the application of human rights by tribunals, the new requirement that judges in the prospective tribunals be barred from working as legal counsels in any other investment dispute (while acting as a judge) is expected to generate a change in the composition of investment tribunals (which often include investment lawyers who work in commercial law firms and serve as arbitrators). As discussed in Section 4 below, the private law background of many investment arbitrators tends to influence their approach regarding the application of human rights law. As to substantive rules, the new ICS provisions concerning the right to regulate are related to the above frame change which reverses the conventional asymmetric structure in favour of foreign investors; the new rules support the right of host states to adopt measures designed to achieve legitimate public objectives, which include better protection of human rights of local individuals and communities residing in the host states.

The moderate influence of social movements' operations on investment tribunal *jurisprudence* (see Section 2 above) and limited internalization of the new frame in investment awards (discussed further below) highlight the limits of social movements' framing activities.[137] In addition to changing frames of investment relations, civil society groups took part in social control processes which also explain the above legal changes.

3.2 Social control mechanisms

The second sociological factor shedding light on the increasing application (though tempered) of human rights in investment law concerns international social control mechanisms. Every social group deploys some means to encourage and enforce conformity with social norms, involving a multitude of formal and informal means (such as expressions of social disapproval, contempt, or threats of isolation).[138] Although such mechanisms often tend to *preserve* existing social patterns, they may also pressure people to adopt new types of behaviour. In this context, social pressure operates to promote conformity with norms associated with the above-mentioned new frame and associated criticism against the current situation in international investment law.

The previously discussed social movements criticize investment tribunals for prioritizing the protection of corporations' property rights over humans and environmental protection in host states,[139] and for adopting a restrictive approach regarding the application of human rights law.[140] Civil society groups[141] and additional actors pressure states, public bodies, and arbitrators to incorporate human rights norms into international investment law. Pressure to apply human rights law has also been exerted by significant international institutions; including UN human rights bodies (like the Committee on Economic, Social and Cultural Rights,[142] the Human Rights Council,[143] and the Independent Expert on the Promotion of a Democratic and

[136]On the ICS initiative see Section 2.2 above.

[137]The explanation for the limited influence of social movements' framing operations on investment arbitrators is discussed in Section 4 below.

[138]See, e.g., Macionis, *supra* note 53, at 63, 194.

[139]See, e.g., Olivet and Eberhardt, *supra* note 105, at 7.

[140]Ibid., at 48–9.

[141]See, e.g., ibid., at 72; European Parliamentary Research Service, 'Investor-State Dispute Settlement (ISDS) State of play and prospects for reform', Briefing PE 545.736, (January 2015), at 7, available at europarl.europa.eu/RegData/etudes/BRIE/2015/545736/EPRS_BRI(2015)545736_EN.pdf.

[142]on Economic, Social and Cultural Rights (CESCR), General comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, UN Doc. E/C.12/GC/24 (2017), at 13.

[143]See, e.g., UN Human Rights Council, 'Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights', available at ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx.

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Equitable International Order[144]), independent human rights experts,[145] as well as some academic scholars.[146] The combined effect of those critical publications and statements supporting the incorporation of human rights law constitutes an international social control process pressuring policy-makers and investment arbitrators[147] to increase the application of human rights in investment law.

4. The limits of social movements' framing and impediments to socio-legal change

4.1 The limits of social movements' framing

The recent legal changes regarding reforms in investment arbitral system (conspicuously the EU initiative), as well as the increasing application of human rights law in some new international treaties and Model BITs, have been significantly influenced by the social movements' activities described above. It is impossible to accurately measure the impact of the above-cited social movements' framing operations and social control processes, but as discussed above,[148] there are some significant indications that they contributed substantially to the legal changes in international investment law. Lavranos (one of the main critics of anti-ISDS groups and Secretary-General of EFILA)[149] observed in October 2016:

> [i]n the past two to three years the critics of investor-to-state dispute settlement (ISDS) have been tremendously successful in setting up an [sic] effective propaganda, which has managed to scare and misinform the general public, media, and politicians.
>
> This propaganda has not only turned around once pro-ISDS countries like Germany, The Netherlands and France, but has also brought the TTIP negotiations regarding ISDS to a halt.
>
> But above all, the anti-ISDS groups have managed to convince the European Commission to turn its back on the 50 years long tested ISDS system and develop a proposal for a kind of hybrid semi-permanent court like body. This investment court system (ICS) proposal has even made it into CETA and the EU-Vietnam FTA and has been proposed to the US for inclusion in TTIP.[150]

The above framing and social control processes took place primarily in the public realm and significantly influenced public institutions, the EU, international institutions, and states. The resulting legal change has been notable with regard to the EU Investment Court initiative, reforms undertaken by international arbitral institutions, and new investment treaties referring to human

[144]See, e.g., Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order, UN Doc. A/70/285 (2015).

[145]OHCHR, Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises, OL ARM 1/2019, 7 March 2019, available at ohchr.org/Documents/Issues/Development/IEDebt/OL_ARM_07.03.19_1.2019.pdf.

[146]See, e.g., A. Angelini et al., 'An Open Letter to the Chair of UNCITRAL Working Group III Concerning the Reform of the Investor-State Dispute Settlement: Addressing the Asymmetry of ISDS', 13 February 2019, available at www.eur.nl/en/news/erasmus-institute-public-knowledge.

[147]As discussed in Section 4 below, this pressure was less influential within the investment arbitration community.

[148]See Section 3.1.4 above.

[149]On European Federation for Investment Law and Arbitration (EFILA), see Section 3.12 above.

[150]N, Lavranos, 'Profiting from Anti-ISDS Propaganda', *Kluwer Arbitration Blog*, 11 October 2016, available at arbitrationblog.kluwerarbitration.com/2016/10/11/profiting-anti-isds-propaganda/. See also Duran and Eliasson, *supra* note 88, at 23–5; Eliasson and Huet, *supra* note 44, at 101–2. On the influence of anti-ISDS NGOs on the EU Commission's initiative (discussed in Section 2.2 above, see, Lavranos, '2019: The Year of the Big Harvest!', *supra* note 93. On the influence of NGOs' pressure on the Netherlands (regarding the new Dutch Model BIT discussed in Section 2.1 above) see N. Lavranos, 'A Rollercoaster: The First Half Of The Year 2018 For Bits And ISDS', *Kluwer Arbitration Blog*, 9 July 2019, available at arbitrationblog.kluwerarbitration.com/2018/07/09/rollercoaster-first-half-year-2018-bits-isds/.

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rights. An analysis of investment arbitration awards indicates, however, that social movements' framing and social control operations have only moderately influenced investment arbitrators. While human rights of *foreign investors* and the litigating parties' procedural rights belong to international human rights law, the fundamental conception of human rights protection concerns human rights of *weaker* individuals and local groups.[151] Consequently, we also examined whether investment awards delivered between 2010 and 2018 that expressed predominantly *positive attitudes* towards the incorporation of human rights[152] deviate from the traditional *inter-partes* frame, and pay attention to the rights and positions of individuals and local groups residing in host states. This analysis revealed that only 35.7 per cent of the decisions (10/ 28 decisions) included in this relatively *favourable group* reflect the 'third party' frame and paid attention to the rights or interests of local individuals and communities.[153]

Thus, social movements' new frame, zooming-in on local communities and individuals, does affect public opinion and public bodies but has not meaningfully cascaded from the public sphere to the investment arbitration community. Most investment awards generally supporting the application of human rights law do not pay significant attention to the effects of foreign investors on local individuals and communities. As discussed in Section 2.1 above, while there is some increase in the application of human rights in investment awards, it is clear that human rights law is far from being mainstreamed in investment jurisprudence. The following section briefly discusses some socio-legal features of the investment arbitration community impeding meaningful incorporation of human rights law into investment jurisprudence.

4.2 Resilient frames and impediments to socio-legal change

The previous discussion indicates that social movements' framing operations and social control processes have influenced public frames of investment arbitration which, in turn, have applied pressure on public bodies (EU members, EU institutions, and international institutions) to reform investment law. An examination of the limited influence of these social factors on investment jurisprudence requires us to explore some features of the arbitrators' professional community and its legal culture. While the investment arbitration community has been well aware of the new public frame and mounting criticism against investment arbitration, this social group is less permeable to public pressure,[154] and the changing frame of investment relations has been slowly penetrating this professional group.[155]

[151]On the exceptional employment of human rights law to protect 'third party interests' by investment tribunals see Steininger, *supra* note 22, at 52–3, 55 (see also 48–9). See also Kube and Petersmann, *supra* note 22, at 93–4.

[152]For a discussion of investment awards included in Group 1 see Section 2 above.

[153]*El Paso v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011, paras. 369, 401, 649; *EDF v. Argentina*, *supra* note 8, paras. 1059, 1172; *Philip Morris v. Uruguay*, *supra* note 8, paras. 302, 304, 395; *Suez v. Argentina*, *supra* note 17, paras. 28, 71, 255; *Urbaser v. Argentina*, *supra* note 2, paras. 726, 1097, 1206; *Grand River v. USA*, *supra* note 10, paras, 186, 211–12, 220; *Total v. Argentina*, *supra* note 9, paras. 64, 79, 163; *Quiborax v. Bolivia*, *supra* note 9, paras. 13, 26, 249; *Aven v. Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, 18 September 2018, para. 420; *South American Silver v. Bolivia*, PCA Case No. 2013-15, Award, 22 November 2018, paras. 561, 640. It is noteworthy that while the tribunals in these cases took into the account the positions and rights of local groups and individuals, they did not necessarily find that these rights or positions justified the particular governmental measures vis-à-vis foreign investors.

[154]On the 'lethargic' response of investment arbitration to reform attempts see M. Langford and D. Behn, 'Can Investment Arbitration Fix Itself?', *EJIL:Talk!*, 31 October 2018, available at ejiltalk.org/can-investment-arbitration-fix-itself/. On the 'less-responsive' reaction of investment arbitrators to public opinion see M. Langford and D. Behn, 'Managing Backlash: The Evolving Investment Treaty Arbitrator?', (2018) 29 EJIL 551, at 579 (see also 576–7).

[155]It is noteworthy that the members of the investment arbitration community are somewhat indirectly influenced by social movements and public pressure. As discussed in Section 3.1.4 above, civil society groups criticizing ISDS influenced public opinion, which, in turn, influenced the position of EU member states and EU institutions concerning investment arbitration. The EU institutions and EU member states influenced investment arbitrators; e.g., through new treaty provisions (discussed in Section 2.1 above). In addition, arbitrators are also somewhat influenced by public opinion (see Section 3.2 above regarding civil society groups taking part in social control processes).

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The opposition of some investment tribunals to an extensive application of human rights law in investment awards,[156] and the limited internalization of the frame highlighting the rights of local individuals and communities[157] can be explained by the private legal culture prevailing in the investment arbitration community[158] and resilient cognitive frames that reflect and reinforce this culture. One of the cornerstones of this private legal culture is the *inter-partes* model[159] which forms not only a legal model but also an influential cognitive frame – or *schema* – in this social group. The constraining effect of frames on individuals is emphasized by the more recent cognitive sociological (and social cognition) literature, that uses the similar concept of 'schema'. The terms '*frame*' (developed in social movements scholarship) and '*schema*' (mainly developed in social cognition and cognitive sociological literature) are not identical, although both refer to cognitive frameworks affecting perception, interpretation, and organization of information.[160] As noted above, early sociological literature on frame analysis presented frames as 'frameworks or schemata of interpretation'.[161]

Schemata are both representations of existing knowledge and information-processing mechanisms,[162] thus constituting cognitive lenses through which people perceive and interpret their social environment. Schemata allow people to 'fill in the blanks' and make sense of new experiences. Schemata and culture are closely interrelated,[163] and culturally infused schemata affect our perception, interpretation and memory.[164] Recent cognitive sociological scholarship highlights that socio-cognitive patterns (including schemata) vary not only across distinct cultures but also across sub-cultures and professional groups.[165]

While the above social movements literature emphasizes the agentic nature of frames as amenable to *change* by social movements, the more recent cognitive sociological literature underlines the *constraining* nature of schemata, transmitted and enforced by social processes like socialization and social control mechanisms.[166] The recent cognitive-sociological literature emphasizing the constraining effect of frames on individuals sheds light on the impediments to meaningful application of human rights in investment jurisprudence. Numerous issues arising in investment disputes involve human rights aspects; for example, arguments concerning expropriation under investment law involve the human right to property, and arguments regarding 'fair and equitable treatment' under investment law involve investors' procedural human rights (e.g., regarding 'due process').[167]

The overlooking of human rights issues in most investment awards[168] may be explained by the constraining effect of the *inter-partes* frame dominating the investment legal culture. Many

[156]See Section 2.1 above.

[157]See Section 4.1 above.

[158]On the private legal culture prevalent in the investment arbitration community see Hirsch, *Invitation to the Sociology of International Law*, *supra* note 51, at 148–52.

[159]See, e.g., T. Wälde, 'The Present State of Research Carried Out by the English-Speaking Section of the Centre for Studies and Research', (2007) *Hague Academy Report on International Investment Law* 63, at 75–6; See also *Glamis v. United States*, UNCITRAL, Award, 8 June 2009, para. 3; *Romak v. Uzbekistan*, PCA Case No AA280, Award, 26 November 2009, para. 171.

[160]On the concept of *'frame'* see Section 2.1.1; *Schema* constitutes generalized knowledge structure and abstract guidelines; assisting people in perceiving, interpreting and remembering items in the social world. See M. Hirsch, 'Cognitive Sociology, Social Cognition and Coping with Racial Discrimination in International Law', (2019) 30 EJIL 1319, at 1327 et seq., and see the references therein.

[161]See Section 3.1.1.

[162]P. DiMaggio, 'Culture and Cognition', (1997) 23 *Annual Review of Sociology* 263, at 269.

[163]See, e.g., ibid., at 269.

[164]K. Cerulo, 'Mining the Intersections of cognitive sociology and neuroscience', (2010) 38 *Poetics* 115, at 125–6.

[165]With regard to professional groups see, e.g., E. Zerubavel, *Social Mindscapes; An Invitation to Cognitive Sociology* (1997), at 33; E. Zerubavel, *Hidden in Plain Sight*: *The Social Structure of Irrelevance* (2015), at 66.

[166]See, e.g., Zerubavel, *Social Mindscapes,* ibid., at 14–15; Zerubavel, *Hidden in Plain Sight,* ibid., at 62–6.

[167]See, Dolzer and Schreuer, *supra* note 104, at 154 et. seq.

[168]See Section 2.1 above.

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members of the investment arbitration community work in commercial law firms and have been socialized into the private legal culture and its accompanying socio-cognitive characteristics, and these arbitrators and lawyers are constrained by deeply ingrained frames prevalent in this community. From this perspective, the private legal culture and its central *inter-partes* model also constitute a mental lens tending to focus the attention of many investment arbitrators and lawyers on the rights of the two litigating parties, relegating to the background the needs and rights of local communities and individuals. On the other hand, private law aspects of investment relations (such as contractual and semi-contractual arrangements) fit well into this frame and are more likely to capture the attention of arbitrators and be stored in their memory.

The strained relations between the investment arbitration community and the human rights community[169] further diminish the receptiveness of many arbitrators to the new frame conveyed by social movements. These relations were aggravated by the civil society groups' blistering criticism of investment arbitrators. Thus, for example, while the fundamental values of the investment arbitration community include fairness, even-handedness, and impartiality,[170] the above NGOs present investment tribunals as failing to act fairly and impartially.[171] This social movements frame alienates many members of the investment arbitration community from human rights groups.

In sum, while social movements performed well in the important public domain, some deeply ingrained features of the investment arbitration culture (particularly the *inter-partes* frame) and strained relations between the groups impede the capacity of social movements to reach across to the investment arbitration community and generate therein meaningful socio-legal change regarding the importance of human rights of local actors.

5. Making local actors visible in investment arbitration: Legal strategies supporting socio-legal change

The preceding discussion indicates that while human rights issues are frequently involved in investment disputes, deeply rooted frames prevalent in the investment arbitration culture lead many investment arbitrators and lawyers to overlook or undervalue the human rights of local individuals or communities. Such frames, and particularly the *inter-partes* model, may explain why the private legal culture is relatively stable and resilient to a rapid change regarding the application of human rights law. It would be naïve to assume that the mere establishment of new human rights provisions in new investment treaties would be sufficient to engender a dramatic socio-cultural change regarding mainstreaming human rights of local actors in investment jurisprudence. Thus, for example, given the existing private-legal culture and its accompanying socio-cognitive patterns, the mere insertion of general human rights provisions into investment treaties may lead many arbitrators to rigorously protect the human rights of foreign investors (e.g., in the framework of 'fair and equitable treatment' clauses); while granting less protection to the rights of individuals and local communities harmed by foreign investments.

Mutual interactions between culture and cognitive patterns suggest, however, that the *inter-partes* frame and additional private law cultural features are not immune to change. Some legal mechanisms may promote awareness by members of the investment arbitration community towards new frames transmitted by social movements and public opinion. Such desirable legal strategies could take the form of new rules included in investment treaties,

[169] M. Hirsch, 'The Sociological Dimension of International Arbitration: The Investment Arbitration Culture', in T. Schultz and F. Ortino (eds.), *Oxford Handbook of International Arbitration* (forthcoming), at Section III.

[170] See, e.g., S. Nappert, 'Defining (And Defending) Values in International Arbitration', (2019) *The 2019 International Arbitration and Dispute Resolution Symposium*, at 4.

[171] See Section 3.1.3 above.

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arbitral institutions' procedural rules, or appropriate interpretation of already existing legal rules applying to arbitral proceedings. Generally, increasing the influence of public pressure on arbitrators regarding the role of human rights is likely to be supported by robust transparency rules; and enhancing the participation of social movements representing local actors in arbitral processes is expected to mitigate the *inter-partes* frame. It is noteworthy that the legal strategies discussed below are not aimed at addressing civil society groups' critique against investment arbitrators (discussed above) or granting full rights to social movements in investment disputes (e.g., regarding remedies); the objective is rather making largely invisible local communities[172] visible on arbitrators' cognitive maps.

5.1 Transparency rules

Confidentiality[173] is traditionally considered one of the major principles of international commercial arbitration,[174] and the default rule is conducting arbitral proceedings in a confidential and private manner.[175] Transparency rules embracing observation of arbitral hearing and access to submitted documents are significant both for enhancing the permeability of investment tribunals to public opinion's pressure as well as mitigating the *inter-partes* frame that tends to diminish the weight of local actors' rights. The prevailing atmosphere of confidentiality in most investment arbitral proceedings[176] tends to intensify adjudicators' *inter-partes* frame and highlight their role as settling a specific dispute between the two litigating parties. The presence of local actors' representatives in the arbitral hearing and enabling them to make submissions regarding the interpretation or application of treaties)[177] are expected to better position local actors' rights and needs within arbitrators' frames.

Existing arbitral rules regarding attendance at hearings and access to documents are extremely diverse. Generally, broader access to third parties is allowed under the 2014 UNCITRAL Rules on Transparency[178] and Canada's economic treaties;[179] while the existing ICSID Arbitration Rules are generally more restrictive.[180] The expected contribution of

[172]On these invisible local communities see Perrone, *supra* note 123.

[173]On the historical evolution of transparency rules in international law see T. Neumann and A. Peters, 'Transparency', *Max Planck Encyclopedia of International Procedural Law* (2019), at 9–25.

[174]See, e.g., Dolzer and Schreuer, *supra* note 104, at 286.

[175]E. De Brabandere, 'Amicus Curiae (Investment Arbitration) 2018', in *Max Planck Encyclopaedia of International Procedural Law* (2019), at 13.

[176]See, e.g., Dolzer and Schreuer, *supra* note 104, at 287; F. El-Hosseny, *Civil Society in Investment Treaty Arbitration* (2018), 90. See also J. A. Maupin, 'Transparency in International Investment Law: The Good, the Bad and the Murky', in A. Bianchi and A. Peters (eds.), *Transparency in International Law* (2013) 142, at 161–2, 171.

[177]On *amicus* submissions see Section 5.2 below. Only a small minority of modern investment treaties expressly provide for the right of third parties to make a submission on a question of interpretation or application of a treaty. L. E. Peterson, 'An In-Depth Look At ICSID'S Proposed Transparency Changes (Including Non-Disputing Party Participation)', *Investment Arbitration Report*, 6 August 2018, available at www.iareporter.com/articles/an-in-depth-look-at-icsids-proposed-transparency-changes-including-non-disputing-party-participation/.

[178]Prominently, Art. 6(1) regarding the hearing and Art. 3(1) regarding access to documents, UNCITRAL Transparency Rules, *supra* note 39.

[179]See, e.g., 2008 Canada-Colombia Free Trade Agreement, Art. 830(2) regarding open hearing and Art. 830(1) regarding access to documents, available at www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/08.aspx?lang=eng. See also 2009 Canada-Romania BIT Annex C, Arts. A(1) and A(3) regarding public access to hearings and documents (respectively), available at treaty-accord.gc.ca/text-texte.aspx?id=105170&lang=eng. For an application of Art. 830(2) of the Canada-Colombia Free Trade Area see, e.g., *Eco Oro v. Colombia*, Procedural Order No. 6 – Decision on Non-Disputing Parties' ICSID Case No. ARB/16/41, Application, 18 February 2019, paras. 38–40.

[180]See 1965, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for Settlement of Investment Disputes) [ICSID Convention] 575 UNTS 159 Arts. 31(1)–(2). For the proposed amendment of the ICSID Arbitration rules in this sphere see Proposals for Amendment of the ICSID Rules, ICSID Working Paper No. 3, 2 August 2018, at rules 61–65, available at icsid.worldbank.org/sites/default/files/amendments/WP_3_VOLUME_1_ENGLISH.pdf. See also Maupin, *supra* note 176, at 153–4.

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rigorous transparency rules to the application of human rights law[181] supports the establishment of a *presumption of transparency* whenever human rights of non-litigants are involved in investment arbitration. As Peters explains:

> [a] presumption of transparency means that the non-release of documents and the closure of meetings to the public must be specifically justified on the basis of legal exceptions which have been clearly defined and circumscribed ... the burden of explaining and of proving the need for secrecy is thereby placed on the institution itself – not on those outsiders who request access.[182]

Such a presumption of transparency is valuable for the interpretation of transparency rules that include exceptional clauses designed to restrict transparency in particular circumstances (e.g., regarding confidential business information or information protected under a treaty or domestic law).[183] To attain the aims of increasing tribunals' exposure to public opinion and mitigating the *inter-partes* frame, it is desirable to include broad transparency rules in investment treaties and arbitral institutions' rules, and to apply the suggested presumption in favour of transparency while interpreting transparency provisions. Even where some restrictions on transparency are justified, they should not necessarily completely block access to arbitral hearings or documents. Some arrangements determined by the tribunal may allow access with some reasonable limits (such as delayed broadcasting of the tribunal hearing, to allow protection of confidential information brought during the hearing).[184] Transparency in investment arbitration (including access to documents) is also significant for realizing the benefits of *amicus curiae* submissions.[185]

5.2 *Amicus curiae* submissions

Enhancing the participation of social movements in investment arbitration proceedings is expected to mitigate the *inter-partes* frame and enhance the protection of human rights of local individuals and communities. Currently, direct participation of civil society groups in arbitral proceedings is most often undertaken through third-party submissions.[186] The infancy period of *amicus curiae* submissions was characterized by the absence of expressed legal regulation; with investment tribunals shaping the early rules in this sphere[187] through reliance on their discretionary power to interpret vague provisions included in the ICSID Convention[188] and the 1976 UNCITRAL Arbitration Rules.[189] The seminal decision of the *Methanex* tribunal (2001) to allow written *amicus curiae* submissions[190] was

[181] On additional justifications for transparency in international adjudication see A. Peters, 'Towards Transparency as a Global Norm', in A. Bianchi and A. Peters (eds.), *Transparency in International Law* (2013), 534, at 558–70; Neumann and Peters, *supra* note 173, at 30–44.

[182] Peters, ibid., at 596–7.

[183] See, e.g., Arts. 6(2) and 7, UNCITRAL Transparency Rules, *supra* note 39.

[184] For the use of delayed broadcasting of arbitral hearing see, e.g., *Gabriel Resources v. Romania*, ICSID Case No. ARB/15/31, Procedural Order No. 19, 7 December 2018, paras. 73–4.

[185] See N. Butler, 'Non-Disputing Party Participation in ICSID Disputes: Faux Amici?', (2019) 66 *Netherlands International Law Review* 143, at 172–3.

[186] De Brabandere, 'Amicus Curiae (Investment Arbitration) 2018', *supra* note 175, at 3; E. De Brabandere, 'NGOs and the Public Interest: The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes', (2011) 12 *Chicago Journal of International Law*, 85, at 94–5.

[187] On the evolution of rules in this sphere see El-Hosseny, *supra* note 176, at 97 et seq.; De Brabandere, 'Amicus Curiae (Investment Arbitration) 2018', *supra* note 175, at 5–11; De Brabandere, 'NGOs and the Public Interest', ibid., at 101.

[188] See Art. 44, ICSID Convention, *supra* note 180.

[189] 1976 Arbitration Rules (United Nations Commission on International Trade Law) [UNCITRAL Rules], UN Doc. A/31/98, Art. 17(1).

[190] *Methanex v. United States*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae', 15 January 2001, paras. 52–3.

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followed by new procedural rules adopted by international arbitral institutions (such as ICSID and UNCITRAL),[191] new investment treaties,[192] and model BITs[193] – explicitly allowing tribunals to accept third party submissions.[194]

Contemporary treaty provisions and jurisprudence provide for diverse rules regarding *amicus curiae* submissions, and De Brabandere elucidates four common requirements for such non-disputing party submissions:[195] (i) certain formal requirements (e.g., regarding the language or maximum length of the written submissions); (ii) that the submission address a matter within the scope of the dispute; (iii) that the submissions represent an interest different from that of the parties' interests; and (iv) that the non-disputing party have an interest in the dispute.[196] These common criteria include some vague criteria (such as 'the scope of the dispute' or third party 'interest') that leave significant room for arbitrators' discretion, and the interpretation of these requirements often involves some value-laden considerations.

The above deeply rooted *inter-partes* frame in the investment arbitration culture often results in an inclination by arbitrators to focus their attention on the rights of the two litigating parties and relegating to the background the rights of third parties absent from the arbitral proceedings. The detrimental effect of this inclination on local actors' human rights protection justifies countering this tendency by setting a legal presumption in favour of *amicus curiae*. Thus, where significant human rights of local individuals or communities are involved, it is desirable to apply this presumption favouring the acceptance of non-disputing parties' submissions representing the rights of these 'absent' actors in investment relations.[197] This suggested approach militates against conditioning *amicus curiae* submission on the consent of the two litigating parties.[198]

It is, thus, advisable that broad provisions regarding *amicus curiae* submissions would be included in future investment treaties and arbitral institutions' rules. Such rules, coupled with tribunals' liberal interpretation of these rules according to the presumption favouring non-disputing parties' submissions, are expected to enhance social movements' capacity to directly present information and legal arguments regarding human rights of local individuals; mitigate the *inter-partes* frame prevalent in the investment arbitration community, and foreground the fundamental rights of these largely absent – but significant – actors in investment arbitral proceedings.

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[191]See, e.g., 2006 ICSID Convention Regulations and Rules, rule 37(2); Art. 4(1), UNCITRAL Transparency Rules, *supra* note 39 and Art. 2, 2014 UN Convention on Transparency in Treaty-based Investor-State Arbitration, *supra* note 40.

[192]See, e.g., 2019, European Union-Vietnam Investment Protection Agreement, Art. 3.51(2), available at investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5868/download; 2006, Canada–Peru Agreement for the Promotion and Protection of Investments, Art. 39, available at investmentpolicy.unctad.org/international-investment-agreements/treaty-files/626/download. On recently concluded investment treaties' provisions regarding *amicus curiae* submissions see El-Hosseny, *supra* note 176, at 114–19; De Brabandere, 'Amicus Curiae (Investment Arbitration) 2018', *supra* note 175, paras. 26–8.

[193]See, e.g., Art. 20(13), The Netherlands model Investment Agreement 2019, *supra* note 31; 2004, US Model BIT Art. 28(3) (as well as Art. 28(3) of the 2012 US Model BIT); available at ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.

[194]For an examination of investment tribunals' decisions regarding *amicus curiae* petitions see Butler, *supra* note 185, at 152–71; El-Hosseny, *supra* note 176, at 119–33. See also E. Levine, 'Amicus Curiae in International Investment Arbitration', (2011) 29 *Berkeley Journal of International Law* 200, at 208–12.

[195]De Brabandere, 'Amicus Curiae (Investment Arbitration) 2018', *supra* note 175, paras. 29–44. See also, e.g., *Gabriel Resources v. Romania*, *supra* note 184, para. 51.

[196]In addition, the *amicus curiae* should not disrupt or unduly burden the arbitral proceedings, and the disputing parties should be given reasonable opportunity to present their observations on the submission; De Brabandere, 'Amicus Curiae (Investment Arbitration) 2018', ibid., para. 30.

[197]Such approach is discernible in Art. 20(13), The 2019 Netherlands Model Investment Agreement, *supra* note 31.

[198]Compare *Aguas de Tunari v. Bolivia*, ICSID Case No. ARB/02/3, Letter to NGO regarding petition to participate as *amici curiae*, 29 January 2003.

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5.3 Institutionalizing the participation of local actors in arbitral proceedings

In the absence of any organization requesting to represent the rights of local individuals and communities, the question arises whether it is desirable for future instruments to institutionalize the authority of investment tribunals to take the initiative and invite some regional or global human rights organization to represent those 'invisible' actors. The invited organization may, for example, nominate some expert of its own staff or from another appropriate institution to attend the arbitral hearing and/or submit *amicus curiae*. Such a development significantly deviates from the classical adversarial nature of international arbitration, and it is doubtful whether current investment tribunals can rely on their discretional powers and spontaneously (*proprio motu*) invite the representatives of such third parties.[199] Such a departure from the *inter-partes* arbitral model, however, may be justified in exceptional cases involving grave violations of human rights of unrepresented local communities or individuals. In such extreme cases where, for example, the local community or individual is unaware of the grave risk to their fundamental human rights (e.g., because of the proceedings' confidentiality), the tribunal may well be justified in undertaking such a measure.

The discussion on institutionalizing the participation of local actors' representatives brings to the fore difficult questions regarding the outer limits of third parties' representation in an arbitral system inherently deriving from the *inter-partes* model, and regarding concerns over transforming arbitral proceedings into court-like proceedings. Answering these fundamental questions involves a discussion on whether investment disputes implicating grave human rights issues are 'arbitrable' (as part of 'public policy')[200] in *inter-partes* arbitral proceedings (a discussion exceeding the limits of this study). The legal response developed by investment tribunals has sought to reconcile the need to adjudicate investment disputes with the need to consider their effects on the public interest, by enhancing transparency and allowing potentially harmed third parties to participate in proceedings.[201] The vital need to advance this cause of reconciling investment arbitral procedures and the adjudication of disputes involving grave human rights issues justifies, it is submitted, to take a further step and institutionalize the participation of local actors' representatives in such serious cases. Generally, regarding the three suggestions discussed here, more severe threats to fundamental human rights should justify granting greater participatory rights to third parties representing local individuals and communities, and the application of more rigorous transparency rules.

6. Concluding Remarks

Recent changes in international investment law concerning the moderately increased application of human rights law and significant reforms to investment arbitration rules were influenced by social movements' framing activities as well as social pressure exerted by diverse actors. The latter framing and social control processes primarily took place in the public realm, and significantly influenced public opinion and public institutions (such as EU member states, EU institutions, and various UN actors). While social movements' new frame (zooming-in on local communities and individuals) does affect public opinion and public bodies, it has not meaningfully cascaded from

[199] I. Uchkunova, 'Not Arbitrary – Part II: Special Case of Application Of Arbitral Discretion. Functions Exercisable Proprio Motu In ICSID Arbitration', *Kluwer Arbitration Blog*, 4 February 2013, available at arbitrationblog.kluwerarbitration.com/2013/02/04/arbitral-not-arbitrary-part-ii-special-case-of-application-of-arbitral-discretion-functions-exercisable-proprio-motu-in-icsid-arbitration/.

[200] On 'arbitrability' of public policy issues see, e.g., I. Bantekas, 'The Foundations of Arbitrability in International Commercial Arbitration', (2008) 27 *Austrian YBK of International Law* 193, at 195.

[201] On the fundamental link between the public interest and *amicus curiae* submissions in investment proceedings see, e.g., *Methanex v. United States*, *supra* note 190, para. 49; De Brabandere, 'Amicus Curiae (Investment Arbitration) 2018', *supra* note 175, para. 15; El-Hosseny, *supra* note 176, at 37–45; K. F. Gomez, 'Rethinking the Role of Amicus Curiae in International Investment Arbitration', (2012) 35 *Fordham International Law Journal* 510, at 543–5.

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the public sphere to the investment arbitration community. The limited internalization of the new frame highlighting the rights of local individuals and communities is explained by the private legal culture prevailing in the investment arbitration community and certain deeply rooted socio-cognitive patterns reflecting and reinforcing this culture. The private legal culture and the *inter-partes* frame dominating the investment arbitration legal culture also constitute a mental lens tending to focus the attention of many investment arbitrators and lawyers on the rights of the two litigating parties, relegating to the background the rights and needs of local communities and individuals.

Certain legal reforms in investment arbitral procedures are likely to promote the awareness of investment arbitrators towards the new frame transmitted by social movements, as well as increase the permeability of the investment arbitration community to public opinion supporting an extensive application of human rights law in investment jurisprudence. Informed by the sociological literature described here, this study suggests the establishment of new legal provisions and presumptions in investment treaties, international arbitral institutions' rules and investment tribunals' jurisprudence. The suggested rules include robust provisions concerning transparency of investment arbitral proceedings, *amicus curiae* submissions, and institutionalizing the representation of local actors in such proceedings. It is recommended that investment tribunals (even in the absence of newly enacted rules) exercise their discretion in the procedural field and broadly interpret existing legal provisions relating to these significant issues. Such legal changes, if meaningfully implemented, are expected to mitigate the *inter-partes* frame prevalent in the investment arbitration culture and make the largely invisible rights of local individuals and communities visible on arbitrators' cognitive maps.

Annex: List of Cases

1. *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, UNCITRAL, Partial Award on the Merits (30 March 2010)
2. *Merrill & Ring Forestry L.P. v. The Government of Canada*, ICSID case No. UNCT/07/1, Award (31 March 2010)
3. *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID case No. ARB/07/24, Award (18 June 2010)
4. *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Republic of Cyprus*, ICSID Case No. ARB/13/27, Award (26 July 2010)
5. *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability (30 July 2010)
6. *Enron Creditors Recovery Corp. Ponderosa Assets, L.P v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Annulment (30 July 2010)
7. *Piero Foresti and others v. The Republic of South Africa*, Case No. ARB(AF)/07/1, Award (4 August 2010)
8. *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment (10 August 2010)
9. *RosInvestCo UK LTD. v. The Russian Federation*, SCC Arbitration V Case No. 079/2005, Award (12 September 2010)
10. *Eureko B.V. v. The Slovak Republic*, PCA case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension (26 October 2010)
11. *Frontier Petroleum Services LTD. v. Czech Republic*, Award (12 November 2010)
12. *Nations Energy Inc., Electric Machinery Enterprises Inc. and Jaime Jurado v. The Republic of Panama*, ICSID Case No. ARB/06/19, Award (24 November 2010)
13. *Balkan Energy Limited v. The Republic of Ghana*, PCA Case No. 2010-7, Interim Award (22 December 2010)

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14. *Fraport Ag Frankfurt Airport Services Worldwide v. Philippines*, (ICSID Case No. ARB/03/25), Decision on Annulment (23 December 2010)
15. *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability (27 December 2010)
16. *Grand River Enterprises Six Nations, LTD., et al. v. United States of America*, UNICITRAL, Award (12 January 2011)
17. *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award (28 March 2011)
18. *M. Meerapfel Söhne AG v. Central African Republic*, ICSID case No. ARB/07/10, Award (12 May 2011)
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21. *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID case No. ARB/06/8, Award (2 September 2011)
22. *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Decision on Annulment (16 September 2011)
23. *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011)
24. *White Industries Australia Limited v. The Republic of India*, UNICITRAL, Award (31 November 2011)
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28. *EDF International S.A v. Argentine (aka Saur v. Argentina)*, ICSID Case No. ARB/03/23, Award (11 June 2012)
29. *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID case No. ARB/09/16, Award (6 July 2012)
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31. *Daimler Financial Services AG v. Argentine Republic*, ICSID case No. ARB/05/1, Award (22 August 2012)
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40. *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (8 April 2013)
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42. *Yuri Bogdanov and Yulia Bogdanova v. Republic of Moldova*, SCC Arbitration Case No. V(091/2012), Award (16 April 2013)
43. *The Rompetrol Group N.v. v. Romania*, ICSID Case No. ARB/06/3, Award (6 May 2013)
44. *Convial Callao S.A. and CCI - Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru*, ICSID case No. ARB/10/2, Award (21 May 2013)
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51. *Metal-Tech LTD. v. The Republic of Uzbekistan*, ICSID case No. ARB/10/3, Award (4 October 2013)
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64. *Al Warraq v. Indonesia*, UNICITRAL, Award (15 December 2014)
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