



***Amicus Curiae* participation in investor-state arbitration:
Enhancing transparency and procedural legitimacy of
investment dispute resolution**

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Words : 14985

August-2013

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INTRODUCTION

Privacy and confidentiality are major concerns in international commercial arbitration. However, in investor-state arbitrations, where the disputes concern public interests and involve the money of taxpayers, people reject secrecy and prefer more transparency in the proceedings.

Certainly, investors expect to obtain profits from their investments and for the State to execute a project that would not be possible without the help of an investor, it is a win-win situation indeed. Investor-state arbitrations often involve sensitive subject matter related to the exploitation of natural resources, such as oil and gas, mining, forests and freshwater resources, as well as the construction of mega infrastructure, such as highways, pipelines, sanitation, power generation, and water reservoirs, among other things.

As a result, a third group with interests in the execution of the project may appear: the stakeholders. These include the population who live in proximity to the project, who may feel affected in their health, safety and/or living conditions due to the impact of the works on their community and the pollution that the project may generate. It also includes third persons concerned about the protection of public interests such as the environment, energy, human rights, and some governmental regulatory measures or laws taken by the State.

Under these circumstances, the figure of the *amicus curiae* may appear in investor-state arbitrations.

According to Black's Law Dictionary, an *amicus curiae* is a person who is not party to a lawsuit but who petitions the court or is requested by the court to file a brief in the proceeding since that person has a strong interest in the subject matter.¹ Nevertheless, the *amicus curiae* is different from an expert witness, and the tribunal can accept its participation during the course of the proceeding as it is not remunerated for its services and neither does it have a contractual relationship with the parties to the arbitration nor have any potential liability.

The arbitral tribunal in *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal v Republic of Argentina* (Suez case) held that 'the traditional role of an amicus in an adversary proceeding is to help the decision maker arrive at its decision by providing the decision-maker with arguments, perspectives, and expertise that the litigating parties may not provide'.² The author believes that the main role of an *amicus curiae* in investor-state arbitration is to contribute by bringing a new perspective to the arbitral tribunal, in order for it to render a well-informed and fair award.

¹Black's Law Dictionary (2009, 9th edn) 98.

²Suez Case, Procedural Order in Response to a Petition for Participation of Amicus Curiae, 17 March 2006, para 13 <<https://icsid.worldbank.org/>> accessed 2 July 2013.

Therefore, the role of the *amicus curiae* arises to protect the rights of the community or to alert the tribunal about the real consequences and interests behind the investment project that is in discussion before it and which the parties may not disclose during the proceedings. There are, however, some questions regarding the effectiveness of the participation of an *amicus curiae* in investment arbitration, the benefits and costs that may result for the parties, as well as its independence and funding.

The *amicus curiae* may contribute actively in investor-state arbitrations by filing written submissions and petitions for access to documents and information created in the arbitration and may also participate in the hearings. In response to growing demand, the principal forums in investor-state arbitration have adopted new amendments to their arbitration rules to satisfy this new demand. Investor-state arbitration rules are those set by the International Centre of Investment Dispute Resolution (ICSID), ICSID Additional Facilities, the North American Free Trade Agreement (NAFTA), Bilateral Trade Agreements (BITs) and UNCITRAL Rules are not alien to this transparency revolution either.

The present dissertation examines the participation of an *amicus curiae* in investor-state arbitration, focusing on its relevance and the key role that it performs nowadays to contribute to open and transparent arbitral proceedings. The principal institutions in investor-state arbitrations have recognised the participation of *amicus curiae* in arbitral proceedings, although analyses of the acceptance of *amici* briefs have taken different

approaches. The present work analyses and discusses the new movement to harmonise standards and procedural rules for the participation of *amici curiae*. To that end, this dissertation will proceed in three chapters.

Chapter 1 explains the difference between commercial arbitration and investment arbitration and problems related to the demand for more transparency, and the participation of third parties versus the confidentiality and right to privacy of the disputing parties. The main role and stages of participation of the *amicus curiae* in investor-state arbitration in international forums such as the International Court of Justice (ICJ), the Convention of the European Court of Human Rights (ECtHR) and World Trade Organization (WTO) are analysed.

Chapter 2 traces the evolution of the participation of the *amicus curiae* in investor-state arbitration, then identifies and analyses relevant cases under Chapter 11 of the NAFTA, the ICSID Arbitration Rules, ICSID Additional Facilities, UNCITRAL Rules and Bilateral Investment Treaties (BITs).

Finally, in Chapter 3 the new trends in investor-state arbitrations are critically analysed along with the current arbitration rules that allow the participation of third parties in arbitration proceedings, addressing the main rules and venues such as ICSID, CAFTA, NAFTA, BITs and US Free Trade Agreement. Likewise, the new UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration adopted by the United Nations

Commission on International Trade Law are discussed in depth. Further, this chapter critically analyses the main advantages and disadvantages of transparency and *amicus curiae* participation and predictions are made about its future intervention in investor-state arbitrations.

Chapter 1 – An overview of international arbitration and third-party participation

One of the advantages of international arbitration is the privacy and confidentiality of the proceedings. However, when a State is involved in investment arbitration, the question whether privacy and confidentiality should be upheld has not been answered unanimously among scholars and practitioners. In this chapter, the main interventions of third parties in international arbitration proceedings are identified, and the parties' rights to privacy and confidentiality are analysed.

1.1 Parties' rights to privacy and confidentiality. Comparison between international commercial arbitration and investment arbitration

Privacy is defined as the right of the parties to restrain the participation of third parties in arbitral hearings and in the proceedings in general.³ Confidentiality is the obligation of the parties, including their employees, arbitrators and institutions, not to disclose information regarding the arbitration proceedings to third parties.⁴

The level of privacy and confidentiality observed during an international commercial arbitration will depend on the consent of the parties and the institutional rules of the

³ G Born, *International Arbitration Law and Practice International Arbitration: Law and Practice* (1stedn, Kluwer Law International 2012) 195.

⁴ibid.

arbitration, or the rules agreed by the parties while drafting the arbitration agreement.⁵ Traditionally, in order to accept the participation of third parties or the release of documents, the arbitral tribunal will analyse the powers conferred by the parties in the arbitration agreement and the rules that govern the arbitration. In the majority of cases, the tribunal has declined to allow the participation of third parties or the disclosure of information, protecting the parties' desire for confidentiality over the public demand for transparency.

There has been a tendency over the past 20 years to publish sanitised awards without the consent of the parties, including the legal analysis but excluding any reference to the parties' names. As a result, arbitration has gained acceptance as an autonomous area of study and research. For instance, the ICC publishes in the ICCA Yearbook of Arbitration and the ICC Bulletin several awards for research purposes without the disclosure of the names of the parties.⁶

According to the findings of the 2010 International Arbitration Survey, conducted by the School of International Arbitration of Queen Mary University of London (SIA-QMUL), confidentiality is important for users of arbitration, but it is not the essential reason for preference for arbitration over other methods of dispute resolution.⁷ This raises the

⁵See UNCITRAL Rules, art 17(1), art 28(3); AAA ICDR, art 34; LCIA, art 30; WIPO Rules, art 73-76; IBA Rules of Ethics, rule 9.

⁶ L Mistelis, 'Confidentiality and Third-Party Participation: UPS v. Canada and Methanex Corp. v. USA' (2005)21 (2), *Arbitration International* 211, 216.

⁷See <www.arbitrationonline.org/research/2010/index.html> accessed 12 June 2013.

question whether confidentiality is still a major characteristic of arbitration; we believe that investors are adapting themselves to the requirement of more transparent proceedings to remain in the market,⁸ and States are doing so to ensure public trust and accountability. The secrecy in the arbitration is shifting towards a more open and transparent approach.

In addition, national arbitration laws commonly do not provide a specific provision about confidentiality or publication of awards. Besides, there is no harmonisation among and within common and civil law jurisdictions regarding the duty of confidentiality in international commercial arbitration.⁹ For example, in Australia¹⁰ and the United States of America¹¹ the confidentiality of the arbitration proceeding is respected only if the parties have expressly requested it in the arbitration agreement. On the contrary, in England¹² and France¹³ confidentiality is implied.

⁸In the case of investors, if they want to participate on large building and civil engineering contracts under International Competitive Bidding procedures under the auspices of the World Bank, according to the Standard Prequalification Document, one of the requirements of the pre-qualification of the bidder is to make a statement regarding the historical non-performance of the contract in the past years, based on information on fully settled disputes (including arbitration) or litigation. This information once submitted is of public access to third-parties. See:<<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:23007913~menuPK:84284~pagePK:84269~piPK:60001558~theSitePK:84266~isCURL:Y,00.html>> accessed 12 June 2013.

⁹Y Fortier, 'The Occasionally Unwarranted Assumption of Confidentiality' (1999) 15 (2), *Arbitration International* 131,132.

¹⁰See *Esso Australia Resources Ltd v Plowman* [1995] 128 ALR 391.

¹¹See *United States v Panhandle Eastern Corp* 118 F.R.D. 346 (D. Del.1988).

¹² See *City of Moscow v Bankers Trust Co and International Industrial Bank* [2004] EWCA Civ 314, at para 2.

¹³ See *Aita v Ojeh* Judgment of 18 February 1986, [1986] *Revue de L'arbitrage* 583.

However, some cases¹⁴ have shown that the level of the duty of confidentiality between English and French courts is different. Under English law, the courts ensure equilibrium between the protection of confidential information and due process, maintaining an implied duty of confidentiality with necessary private interest exceptions.¹⁵ On the other hand, French law demands a higher level of confidentiality¹⁶ and it is subject to a statutory right of information.

According to Professor Loukas Mistelis, the concept of *amicus curiae* is well established in practice, especially in common law jurisdictions, although it has no clear expression or reflection in international commercial arbitration.¹⁷ This is a reflection of the high concern of the parties to maintain certain information out of the scope of the public due to the effects that it may have, since sensitive information – such as the amount of the disputed sum involved, the nationalities of the shareholders of the parties and the terms and conditions of the contract – may lead to the disapproval of third parties that could be affected by the agreement and the arbitral proceeding itself. However, a series of reforms

¹⁴See, e.g., *Dolling-Baker v Merrett* [1991] 2 All ER 890; *Hassneh Insurance Co of Israel & Ors v Stuart J Mew* [1993] 2 Lloyd's Rep 243; *London and Leeds Estates Ltd v Paribas Ltd (No 2)* [1995] 2 EG 134, [1995] 1 EGLR 102; *Ali Shipping Corp v Shipyard Trogir* [1998] 2 All ER 136, [1999] 1 WLR 314, [1998] 1 Lloyd's Rep 711; *Glidepath BV and Others v John Thompson and Others* [2005] EWHC 818 (Comm).

¹⁵In *Ali Shipping Corp v Shipyard* (n 14), the court set out the following exceptions to confidentiality: (i) disclosure pursuant to express or implied consent of the party who produced the material; (ii) by an order of the court generated by arbitration for the purposes of a later court action; (iii) leave of the court is granted; (iv) when it is reasonably necessary for the protection of legitimate interests of an arbitration party; (v) due to the public interest.

¹⁶In *Aita v Ojeh*, the French court ruled that disclosing an arbitral award previously rendered by trying to challenge the award in a French court violated the implied obligation of confidentiality of information; likewise attempting to challenge the previous award in a French national court was jurisdictionally improper.

¹⁷Mistelis (n 6) 218.

have been made to the arbitration rules of the principal arbitral institutions to allow third-party participation.

In investment treaty arbitrations, due to the increase of bilateral investment treaties (BITs) in the past decade, and the involvement of states, there are more concerns regarding the transparency of arbitral proceedings. Thus, an increasing number of requests for transparency in investment arbitrations due to the public interest in their outcome have appeared.

The issue of transparency may be distinguished into three different types that appear in different stages of the arbitration: (i) pre-award disclosure; (ii) post-award disclosure; and (iii) participation of *amicus curiae* in the proceedings, which is related more to privacy than to transparency itself.¹⁸ The pre-award disclosure means that non-parties have access to oral and written submissions or documents presented by the parties during the arbitration proceeding, which includes several features, such as the publication of basic information related to the dispute, circulation of pleadings, and open hearings. In the post-award disclosure, the main concern is related to publication of the award and documents created during the proceedings.¹⁹ The most important kind of transparency for the present work is the participation of a third party in investor-state arbitration.

¹⁸ N Rubins, 'Opening the Investment Arbitration Process: At What Cost, for What Benefit?' (2006) 3 TDM <www.transnational-dispute-management.com> accessed 10 June 2013.

¹⁹ *ibid.*

In investment arbitration, the first generation of BITs did not contain provisions related to transparency or the participation of third parties. Recently amendments made to the principal BITs (i.e. US BIT Model 2004 and 2012) include provisions that address these concerns. Furthermore, the ICSID Arbitration Rules and UNCITRAL Arbitration Rules and the recent UNCITRAL Transparency Rules complement the application of the provisions of the BITs by increasing the transparency of proceedings and setting the rules before the proceedings start. Tribunal decisions under ICSID Rules and ICSID Additional Facilities have also eased transparency and the participation of *amicus curiae* in investment arbitration, as we will analyse in the following chapters.

1.2. The participation of *amicus curiae*: a comparison within international forums

The participation of *amicus curiae* certainly is not new in international courts and tribunals.²⁰ In the International Court of Justice (ICJ) there is no formal regime of participation of third parties in proceedings.²¹ The ICJ recognises the right of non-disputing parties to appear before the Court but only in exceptional circumstances, such as (i) intervention by a state if it has an interest of a legal nature which may be affected by the decision of the case²²; (ii) whenever the construction of a convention of other states may

²⁰J Viñuales, 'Amicus Intervention in Investor-State Arbitration' (2006) 61 (4) DRJ 72,73; N Blackaby and others, '*Amicus Curiae*: A Panacea for Legitimacy in Investment Arbitration?' in Michael Waiber and other (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2009) 258.

²¹L Bastin, 'The Amicus Curiae in Investor-State Arbitration' (2012)1 (3) CJICL 208, 209.

²²Statute of the ICJ, art 62.

affect the third-party state's interests²³; (iii) an individual, body, bureau, commission, or other organisation requested to provide an expert opinion or to carry out an enquiry²⁴; (iv) relevant information provided by a public international organisation²⁵; (v) advisory opinion of third-party states entitled to appear before ICJ and international organisations regarding a question that ICJ will be prepared to receive²⁶; (vi) submission of a written statement and/or document in an advisory opinion prepared by a non-governmental organisation made of its own volition.²⁷

It is important to notice that the ICJ has been reluctant to accept submissions from non-disputing parties.²⁸ This is not the case for the European Convention of Human Rights (ECtHR), however, where Article 36 includes specific provisions for *amicus curiae* participation.

Additionally, the Dispute Resolution Body (DRB) of the WTO in several cases has admitted the restricted participation of an *amicus curiae*, as well as recognising that the

²³Statute of the ICJ, art 63.

²⁴Statute of the ICJ, art 50.

²⁵ The meaning of 'public international organisation' applies only to an international organisation of states, according to the Court's Rule 69(4).

²⁶Statute of the ICJ, art 66.

²⁷Practice Direction XII amended on 20 January 2009 and 21 March 2013. The Court adopted the Practice Directions for use by States as additional to the Court Rules which were adopted as a result of the Court's reviewed of its own working methods. <<http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0>> accessed 14 June 2013.

²⁸ The ICJ refused NGO participation in the Namibia case whereas submissions were accepted in the Gabčíkovo-Nagymaros Dam Project case.

WTO Panel had the authority to use this information.²⁹ In the Shrimp/Turtle case, the WTO Appellate Body stated that under Article 13 of the Dispute Settlement Understanding (DSU), the WTO Panel had the power to accept *amici* briefs from NGOs or other interested parties.³⁰

In the Lead and Bismuth case³¹ the WTO Appellate Body noted that the DSU and the Working procedures do not provide that the Appellate Body may accept and consider submissions or briefs from sources other than the disputing parties in the proceedings during an appeal, but there is no explicit prohibition on accepting or considering *amicus* briefs.³² The Appellate Body, after analysing Article 17 (9) of the DSU³³ and Article 16(1) of the Working Procedures,³⁴ considered that it had sufficient power to admit *amicus* briefs whenever it found them pertinent and useful.

²⁹Viñuales (n 20) 74.

³⁰ United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, Report of the Appellate Body (12 October 1998) <www.wto.org/english/tratop_e/dispu_e/58abr.pdf> accessed 15 June 2013.

³¹Lead and Bismuth Case, Appellate Body Report (10 May 2000) <www.wto.org/english/tratop_e/dispu_e/cases_e/ds138_e.htm> accessed 15 June 2013.

³²ibid para 39.

³³art 17.9 DSU stipulates that the Appellate Body shall draw up its working procedures in consultation with the Chairman of the Dispute Settlement Body and the Director-General, and communicate it to the Members for their information.

³⁴art 16(1) DSB Working Procedure: ‘In the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a division may adopt an appropriate procedure for the purposes of that appeal only, provided that it is not inconsistent with the DSU, the other covered agreements and these Rules. Where such a procedure is adopted, the division shall immediately notify the parties to the dispute, participants, third parties and third participants as well as the other Members of the Appellate Body.’.

Subsequently, in the EC-Abestos case³⁵ the WTO Appellate Body set the procedure for third-party submissions. Thus, according to the rules set by the WTO Appellate Body, the *amicus curiae* shall disclose its activities and sources of funding, its relationship with the parties to the dispute and its specific interest in the matter, as well as stating clearly its potential contribution to the proceeding. Likewise, the Appellate Body had clearly stated that it reserves the right to consider or not the issues raised by the *amicus* when making its report.³⁶

During the General Council Meeting of the WTO Members, held in the Centre William Rappard on 22 November 2000, the majority of the member states considered that the additional procedural rules introduced to allow *amicus curiae* submissions were unacceptable.³⁷ However, in the EC/Sardines case the Appellate Body stated that it had the authority to appoint *amici* from private individuals or organisations, and concluded that it was equally entitled to consider submissions from other WTO member states since there is no prohibition in the DSU. In addition, the Appellate Body held that the participation of an *amicus curiae* is not a legal right; on the contrary, it has the discretion to decide whether to accept any *amicus curiae* application.³⁸

³⁵EC-Abestos Case, Communication from the Appellate Body WT/DS 135/9 (8 November 2000), <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds135_e.htm>, accessed 15 July 2013.

³⁶Viñuales (n 20) 75; F Stumpe, 'Participation of Amicus Curiae in Investment Treaty Arbitration' [2009] 1 TDM <www.transnational-dispute-management.com/article.asp?key=1318> accessed 15 June 2013; EC-Abestos Case (n 34) 50-57.

³⁷General Council, Minutes of Meeting WT/GC/M/60 (22 November 2000).

³⁸ EC-Sardines, AB-200-3, Appellate Body Report WT/DS231/AB/R (26 September 2002) 164-167.

It is necessary to emphasise that, regardless of the current controversy related to the admission of *amici curiae*, according to the WTO Dispute Settlement Training Module, the Appellate Body has never considered any unsolicited submissions to be pertinent or useful, and accordingly it has never considered any that have been submitted.³⁹ Despite this fact, the Appellate Body, during proceedings and whenever it finds it reasonable, may evaluate future *amici* applications and if the circumstances are appropriate these submissions may be accepted and used in resolving the proceedings.

³⁹ WTO Dispute Settlement System Trading Module, Chapter 9.3., available in <www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c9s3p1_e.htm#txt1> accessed 16 June 2013.

Chapter 2– *Amicus curiae* in investment arbitration: Past experience, role and effectiveness

The agreement between the parties to arbitrate their disputes is the key to initiating successful arbitration proceedings. In this regard, in investor-state arbitrations the state could have given its consent directly in the arbitration agreement, as well as fulfilling the requirements of the arbitration rules of the institution chosen, or due to the existence of a BIT.⁴⁰

In the case of *amicus curiae*, the acceptance of its participation and the requirements for the submission of its briefs shall be stated, as in the case of the consent to arbitrate, in the same documents that support the procedural rules of the arbitration. However, since the participation of third parties in investor-state arbitration has only recently appeared, in 2001, at first arbitral tribunals had to adjust to these new requirements of investment arbitration practice. At the same time, they had to enlighten the path which led to a continuous reformulation of arbitral proceedings under international treaties such as NAFTA, ICSID, BITs and UNCITRAL rules.

⁴⁰R Dolzer and others, *Principles of International Investment Law* (2ndedn, OUP 2012) 260-264.

2.1. The experience of the intervention of *amicus curiae* in investor-state arbitration: Case studies and implications

2.1.1. NAFTA-UNCITRAL Rules Cases

A. METHANEX v United States of America

The first case of third-party participation in investment arbitration was *Methanex Corporation v United States of America* (Methanex case) in 2001. A dispute arose regarding an environmental regulation adopted by the State of California prohibiting the use of the fuel additive methanol, which Methanex, a Canadian corporation, produced. Methanex initiated arbitration against the US under Chapter 11 of NAFTA, claiming compensation for losses due to the restrictive measure adopted.⁴¹

A group of NGOs jointly requested permission to (i) review the parties' pleadings and documentation; (ii) attend the hearings; and (iii) make written as well as oral presentations. The submissions were requested due to the public interest of the environmental issue and potential ratifications on environmental law in the NAFTA countries.⁴²

⁴¹Methanex Case, documents available in <http://naftaclaims.com/>.

⁴²See Application for Amicus Standing-IISD (25 August 2000); Supplemental Application for Amicus Standing – IISD (6 September 2000); Final Submission in support of Application for Amicus Standing (16 October 2000); Application for Amicus Standing – Communities for a Better Environment, the Bluewater Network of Earth Island Institute and CIEL (13 October 2000).

While analysing the acceptance of the participation of the *amicus curiae*, the arbitral tribunal considered *amicus* briefs as a procedural matter governed by Article 15(1) of the UNCITRAL Rules.⁴³ The tribunal held that it had the power to accept such submissions since UNCITRAL Rules vested it with broader powers than those of the WTO Appellate Body under Article 17(9) of the DSU. Moreover, if the Appellate Body accepted *amicus* submissions, then ICSID Tribunals certainly had the power to accept them as well. Nevertheless, the tribunal did not have the power to accept the request for *amicus curiae* to attend the hearings and to make oral submissions without the previous consent of the parties, according to Article 25(4) of the UNCITRAL Rules. Finally, the tribunal argued that the dispute implied public interest and that Chapter 11 allowed for more open and transparent proceedings.⁴⁴

While the arbitration was still pending, the member states of NAFTA released the ‘Statement of the Free Trade Commission on non-disputing party participation’ (FTC Statement).⁴⁵ The FTC Statement indicated that an *amicus curiae* may be allowed to submit written submissions in NAFTA arbitrations. It also set the criteria for the tribunal when analysing the application, in particular that the *amicus curiae* should assist the tribunal to gain a new perspective of the facts, or provide particular knowledge different from the submissions of the parties but within the scope of the dispute, as well as to prove

⁴³art 15(1) of the UNCITRAL Rules, now art 17(1), provides: ‘Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate’.

⁴⁴Methanex Case, Decision of the Tribunal on Petitions from Third Persons to intervene as ‘Amici Curiae’ (15 January 2001) para 24.

⁴⁵Statement of the FTC, <www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Nondisputing-en.pdf>, accessed 15 May 2013.

not only its own significant interest in the arbitration but also a public interest in the dispute. Further analysis of the FTC Statement and investment arbitration rules will be presented in Chapter 3.

As a consequence, the NAFTA tribunal accepted the *amicus curiae* submissions from NGOs at the merits stage of the proceedings. However, it is not clear whether the non-disputing party's brief contribute with the decision-making of the award, yet in the part II, chapter C, section 10 of the award, the tribunal mentioned that *amicus* briefs were duly accepted and considered.⁴⁶

B. UPS v Canada

The second case was *United Parcel Service of America Inc. v Canada* (UPS case), the dispute concerned Canadian measures which were said to restrict the postal services market, undermining the rights of UPS, a US company. As a consequence, the latter sought compensation for damages.

The arbitral tribunal faced the joint submission made by the Canadian Union of Postal Workers and the Council of Canadians who sought to intervene challenging the tribunal's jurisdiction. The *amicus curiae* brief was analysed by the tribunal, who considered the

⁴⁶Methanex Case, Final Award of the Tribunal in Jurisdiction and Merits (8 March 2005) <www.state.gov/documents/organization/51052.pdf>, accessed 15 May 2013.

public interest of the matter and whether a third party could provide assistance with respect to procedural issues, including the jurisdiction of the tribunal. The tribunal held that the *amici* are not supposed to go beyond from the parties and that it had the expertise to rule regarding its jurisdiction.

Following the above decision, the tribunal set strict directions on the participation of *amicus curiae*, pointing out that the submissions had to be confined to issues raised by the disputing parties.⁴⁷ The tribunal tried to avoid the potential abuse by third-parties acting as *amicus curiae* that aim to conceal or protect their own motives rather than public concerns.

At the merits stage of the proceedings, the tribunal granted leave to the third parties to: (i) file submissions; and (ii) have access to documents of the proceedings. Acting as in the Methanex case, the tribunal held that it had the power to accept the submission of third parties but it refused them access to oral hearings and arbitral documents since that required the consent of the parties.⁴⁸

C. Glamis Gold Ltd v United States of America

⁴⁷UPS Case, Direction of the Tribunal on the Participation of Amici Curiae (1 August 2003).

⁴⁸UPS Case, Decision of the Tribunal on Petitions for Intervention and Participation of Amicus Curiae (17 October 2001).

In *Glamis Gold Ltd v US* (Glamis Gold case), the dispute related to the implementation of certain regulatory measures issued by the State of California in order to preserve and protect the land of the indigenous population and their cultural heritage. Open-pit mining projects draw particular attention and general rejection from the Quechan Indian Nation (QIN) due to their location in an area sacred to the Native American tribe.

The claimant considered that the State of California's measures were arbitrary and discriminatory, since their real purpose was to block the mining project rather than genuinely address cultural and environmental concerns. The implementation of the requirements ordered by the measures would detract from the value of the project, affecting its legitimate expectations.

In March 2005 the QIN requested permission to file its application and submission after the presentation of the parties' memorials to the tribunal. However, the tribunal rejected the application stating that the submission would be accepted only if it 'did not present undue burden or cause delay'.⁴⁹ Subsequently, the parties agreed that non-disputing party submissions could be filed roughly a month following the submission of the counter-memorial.⁵⁰

⁴⁹Glamis Gold, Award (6 August 2009)para 274
<www.state.gov/documents/organization/125798.pdf>accessed 13 June 2013.

⁵⁰ibid para 278.

Following the authorisation given by the parties, the National Mining Association, Friends of the Earth, Sierra Club and Earthworks requested permission to file submissions. Likewise, the QIN applied to submit a second file including an expert report; however, they requested that the expert report remain confidential, out of the public eye. The tribunal did not accept the latest petition of confidentiality made by the *amicus curiae*, explaining that ‘...transparency of Chapter Eleven tribunals is of particular importance to the member states of ... (NAFTA)’⁵¹, but it allowed the QIN to present certain parts of the expert report.

The tribunal decided to consider the *amicus curie* submission applying the criteria agreed in the FTC Statement, adding that ‘...given the public and remedial purposes of non-disputing submissions, leave to file and acceptance of submissions should be granted liberally’.⁵² Likewise, the tribunal stated that the acceptance of the participation of *amicus curie* did not require it to address the submission at any point in the arbitration, nor did it enable the third party to make further submissions in the arbitration.

Procedural Order No. 11, *inter alia*, explained the details of public access to the hearing, which was requested by the group of *amici curiae*. The parties consented to invite the public to view the proceedings in a separate room via closed-circuit television. In addition, the QIN representatives were invited to view the proceedings in a different location with a

⁵¹Glamis Gold Case, *ibid* para 282.

⁵²Glamis Gold Case, *ibid* para 286.

separate video feed which allowed them to hear the testimony on cultural locations in a restricted form.⁵³

D. Merrill & Ring Forestry v Canada

In *Merrill & Ring Forestry L.P. v Canada* ('Merrill Case'), the claimant alleged a breach of section A, chapter 11 of the NAFTA, including the principles of National Treatment, Most-Favoured Nation Treatment and Minimum Standard Treatment, as well the obligations related to Performance Requirements and Expropriation. Merrill argued that Canada administered a restrictive regime of log exportation that only applied to logs grown on privately-owned forestlands in British Columbia.

The Energy and Paperworkers Union of Canada, the Steelworkers and the British Columbia Federation of Labour requested permission to file a joint written submission. The tribunal informed the petitioners that the criteria and procedural requirements of the submission should be governed by section B of the FTC Statement. Even though the file of the *amicus curiae* was submitted after the deadline set by the tribunal, the parties consented to accept the late submission.⁵⁴

⁵³Glamis Gold Case, Procedural Order No. 1 (9 July 2007) <www.state.gov/documents/organization/88173.pdf> accessed 18 June 2013.

⁵⁴Merrill Case, Award (31 March 2010) para 22<<http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/merrill-09.pdf>>, accessed 19 June 2013.

During the development of the proceedings, the parties had shown willingness to accept the participation of third parties, making the arbitration more transparent and encouraging submissions of third parties.⁵⁵ Nevertheless, the tribunal mentioned *amicus curiae* intervention in the proceedings, yet it is not clear whether the Tribunal used the allegations submitted by the non-disputing parties while making the award.

E. Grand River Enterprises v United States of America

In *Grand River Enterprises Six Nation Ltd et al. v United States of America* (Grand River case), the claimants were three natural persons, members of Native American tribes, who sought to recover damages for losses caused to their Canadian company. The claimants argued that the actions taken by the US government in the Master Settlement Agreement (MSA) to settle litigation against domestic cigarette manufacturers had a negative impact on their smaller-scale tobacco company, breaching NAFTA Chapter 11.

The peculiarity of this arbitration is that the tribunal received an unsolicited letter from the National Chief of the Assembly of First Nations (NCAFN) supporting the position of the claimants without requesting permission to participate in the proceedings as *amicus curiae*.

⁵⁵ The website of the claimant's law firm published a summary and the principal documents of the proceedings. See: <www.appletonlaw.com/files/Merrill/Cases-Merrill%20&%20Ring_27Nov08.pdf> accessed 19 June 2013.

Nevertheless, the USA treated the letter as an *amicus* submission, the tribunal analysed it as evidence, and it was submitted to support an exhibit of the claimant.⁵⁶

In other words, the participation of the NCAFN was not considered as an *amicus curiae* document nor did the tribunal evaluate it as such, regardless of the opinion of the parties. The question is whether, if the parties had decided to treat and recognise a non-disputing party as *amicus curie*, the qualification of the tribunal should be restricted to such terms. At first glance, the tribunal had the general powers to avoid ineffective procedural matters that would not help to solve the dispute, but at the same time it should respect the consent and willingness of the parties while managing the procedural rules of the arbitration, otherwise the function of the arbitration would be distorted.

F. Apotex Inc v United States of America

In *Apotex Inc. v USA* (Apotex case) the claimant, a Canadian pharmaceutical corporation, argued that the US courts and administrative agencies had wrongly interpreted federal laws that would allow the registration of a generic version of the drug Pravachol®. Apotec held that the decisions of the US Food and Drug Administration and the US courts were contrary to statutory law and conflicted with precedents from the D.C. Circuit District Court, acting in violation of NAFTA Article 1102 (national treatment) and Article 1105 (minimum standard of treatment under international law). Furthermore, Apotex also

⁵⁶Grand River Case, Award (12 January 2011) para 60.

claimed that the abovementioned decisions affected its property and was an indirect expropriation of its investment, violating NAFTA Article 1110.⁵⁷

After the invitation for non-disputing parties to participate pursuant to Procedural Order No. 1, an NGO⁵⁸ requested permission to submit a written brief. The tribunal refused the petition on the basis that the submission did not fulfil the requirements set in the Procedural Order nor in the FTC Statement, and held that no indication was given of any knowledge, experience or expertise, although that is the major function of *amicus curiae* intervention. Neither was the petitioner's significant interest in the arbitration explained, nor the particular public interest it would be seeking to address through its submission. The tribunal also confirmed that procedural matters are beyond the scope of *amicus curiae*.⁵⁹

Tribunal have thus become stricter and critically analysed the acceptance of requests for *amicus curiae* intervention, in order to avoid unnecessary delays and extra costs in the proceedings. However, there are some doubts regarding the judicialisation of the arbitration.

2.1.2. ICSID-BIT arbitrations

⁵⁷Apotex Case, Notice of Arbitration (06 May 2009) <www.state.gov/s/l/c31326.htm> accessed 20 June 2013.

⁵⁸Apotex Case, Procedural Order No. 2 on the Participation of a Non-Disputing Party (11 October 2011) para 4 <<http://www.state.gov/documents/organization/176602.pdf>> accessed 19 June 2013.

⁵⁹*ibid* para 20-36.

A. Aguas del Tunuari v Republic of Bolivia

The first case under the ICSID Arbitration Rules to receive a petition for an *amicus curiae* was *Aguas del Tunari v Republic of Bolivia* (AdT case). The dispute was related to the operation of a concession for the public potable water and sewer service for the city of Cochabamba in Bolivia which generated opposition from the population who lived in the area of the project. Due to public protest, Bolivia rescinded the concession agreement in 2000; the claimant had to abandon the project and commenced proceedings against Bolivia claiming that the latter had violated the terms of The Netherlands-Bolivia BIT.⁶⁰

During the jurisdictional phase, an environmental NGO, juridical civil associations and individuals petitioned the tribunal to be included in the proceeding as a party, or failing that to participate as *amicus curiae*. The application for leave to act as *amicus curiae* included leave to: (i) make submissions concerning the procedures by which the arbitration is conducted; (ii) make submissions concerning the jurisdiction of this tribunal and, once they are fully known, the eligibility of the matter of the dispute for arbitration; (iii) make submissions concerning the merits of the claimant; (iv) attend the hearings of the tribunal; (v) make oral presentations during the hearings; (v) have immediate access to all submissions made to the tribunal.⁶¹ Furthermore, the petitioners requested public

⁶⁰AdT Case, ICSID Case No. ARB/02/3 (25 February 2002) <<https://icsid.worldbank.org/ICSID/FrontServlet>> accessed 1 July 2013.

⁶¹AdT Case No. ICSID ARB/02/3, Petition from Third Persons to Intervene as an Intervening Party or Amicus Curiae (29 August 2002) para 63 <<http://www.italaw.com/sites/default/files/case-documents/ita0018.pdf>> accessed July 1 2013.

disclosure of important documents delivered in the arbitration, as well as opening all the hearings to the public, and that the tribunal visit Cochabamba.⁶²

The tribunal decided to reject the petition on the basis that: (1) the request was beyond the power of the tribunal; (2) there was no consent of the parties to allow the participation of a non-disputing party in the proceedings; (3) there was no need at the jurisdictional stage to call witnesses or seek supplementary non-party submissions.⁶³ The decision was limited to what was specifically stated in the BIT and treaties that governed the dispute. The tribunal made it clear that its duties derived from the treaties that govern the arbitration proceedings. The tribunal acted in a very restricted way and without analysing new procedural aspects that may help the proceedings. Later decisions have taken an opposite view, as we will analyse further below. It is important to add that the tribunal applied the former ICSID Rules, before their modification in 2006.

B. Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal v Republic of Argentina

In *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal v Republic of Argentina* (Suez case), the claimants, Spanish and French nationals and shareholders in a water and sewerage concession in Buenos Aires, sought economic compensation due to

⁶²ibid.

⁶³AdT Case, Letter of the Tribunal in Response to the Petition to Participate as an Intervening Party or Amicus Curiae <www.italaw.com/sites/default/files/case-documents/ita0019_0.pdf>, accessed 1 July 2013.

the measures taken by Argentina during its economic crisis which caused that the public utility rates charged by the investor to be frozen indefinitely under the Argentinean national currency rather than in US dollars, as was agreed in the concession agreement, breaching the Argentina-France and the Argentina-Spain BITs⁶⁴.

The arbitral tribunal was required to accept a petition for transparency and public participation as *amicus curiae* presented by five organisations of users and consumers and human rights organisations. The petitioners requested: (i) the tribunal to allow *amicus curiae* participation; (ii) open hearings of the tribunal; (iii) disclosure of all documents produced in the arbitration. Argentina consented to the *amicus* participation but the investors opposed it.

While analysing the petition, the arbitral tribunal took the same approach as the NAFTA tribunal in the Methanex case, in the sense that neither the ICSID Convention nor the ICSID Arbitration Rules explicitly refer to written submissions made by third parties. However, it also determined that under the general powers conferred by Article 44 of the ICSID Convention, the tribunal had sufficient powers to accept *amicus curiae* submissions, whereas for access to the hearings the consent of the parties was required.⁶⁵ The ICSID Tribunal held that in order to accept a non-disputing party's submission, first it must consider the appropriateness of the subject matter of the dispute, as well as the suitability

⁶⁴ Suez Case, ICSID ARB/03/19, <<https://icsid.worldbank.org/>> accessed 2 July 2013.

⁶⁵ Suez Case, ICSID ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae (19 May 2005) para 8-9 <<https://icsid.worldbank.org/>>, accessed 2 July 2013.

of the third party to act as an *amicus curiae* and to fulfil the procedural rules set by the tribunal.⁶⁶

The tribunal considered that the dispute involved a public interest since the investment issue was related to water distribution and sewerage in Buenos Aires and neighbouring municipalities, which could raise a variety of complex public and international law questions, including human rights considerations. Likewise, the tribunal found that the acceptance of written submissions by third parties could have the benefit of increasing transparency in an investor-state proceeding. However, access to open hearings was refused since the consent of the parties was required according to the ICSID Rules. Access to case materials was deferred until the NGOs formally applied to make *amicus curiae* submissions, at which point the tribunal would decide the matter.⁶⁷

In the subsequent application, the tribunal allowed the petitioners to submit a joint *amicus curiae* application, since it satisfied the criteria set in the first procedural order. Regarding the access to case materials, the tribunal considered that the applicant third parties were already sufficiently well-informed, therefore it refused this element of the petition. Likewise, the tribunal set procedural rules for the written submissions.⁶⁸

⁶⁶ *ibid* para 17-25.

⁶⁷ *ibid* para 33.

⁶⁸ Suez Case, ICSID ARB/03/19, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to make an Amicus Curiae Submission, 12 February 2007 <<https://icsid.worldbank.org>> accessed 2 July 2013.

The decision of the ICSID Tribunal was the first to allow *amicus curiae* participation in ICSID arbitrations, regardless of the consent of the parties, and thus set a precedent. The reasoning was made with the past ICSID Arbitration Rules before their amendment in 2006. It is remarkable that the Tribunal ordered the third parties to request permission to be accepted as *amicus curiae* and to provide information about their identity, background, nature of interest in the case, and the reasoning why the tribunal should accept their submission, using similar criteria to those set out in the FTC Statement of NAFTA.

C. Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v The Republic of Argentina

In *Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v Republic of Argentina* (InterAguas case), the subject matter of the dispute was like that of the Suez Case and shared the same composition of the arbitral tribunal.

A petition for participation as *amicus curiae* was filed by a NGO and three individual experts in law, human rights and development. The petitioners requested: (i) access to and the presentation of oral arguments at hearings in the case; (ii) the opportunity to make submissions in the form of *amicus curiae* briefs; and, (iii) access to documents and other

information in the case.⁶⁹ The tribunal considered that a similar petition was requested in the Suez case, which had already decided the procedural rules and considerations to take into account in a petition for *amicus curiae* participation. Despite the fact that the order in the Suez case did not apply in the present dispute, the tribunal added that the issues raised by the petition in the case were virtually identical to those raised in the Suez case, and thus it decided to use the set criteria.⁷⁰

The application of the Suez case criteria led to the conclusion that the petitioners had neither proved that their experience, expertise and perspective would assist the tribunal nor provided sufficient specific information and reasons to qualify them as *amicus curiae* in this case. However, the tribunal noted that if in the future the petitioners filed another petition to act as *amicus curiae* which fulfilled the set criteria it may be considered.⁷¹

D. BiwaterGauff v Tanzania

BiwaterGauff (Tanzania) Ltd v United Republic of Tanzania (BiwaterGauff case) concerned water and sewerage infrastructure in Dar es Salaam, the capital city of Tanzania, due to the termination of certain agreements with the Tanzanian public corporation in charge of the project. After several disagreements between the investor and the public

⁶⁹ InterAguas Case, ICSID No ARB/03/17, Order in Response to a Petition for Participation as *Amicus Curiae*, 17 March 2006, para 1 <<https://icsid.worldbank.org/>> accessed 2 July 2013.

⁷⁰ *ibid* para 4.

⁷¹ InterAguas Case, *Ibid* para 13-38.

authority representative of the Republic of Tanzania which not only led to the deportation of a senior manager of the investor but also the expropriation of its investment, the investor sought compensation for damages, invoking breaches of the Agreement between the United Kingdom of Great Britain and Northern Ireland and the United Republic of Tanzania for the Promotion and Protection of Investments of 1994 and the Tanzanian Investment Act of 1997.⁷² Even though the arbitration was initiated before the amendments to the ICSID Arbitration Rules, the parties agreed the proceedings should be conducted in accordance with the new Rules, which include Rule 37 (2) regarding *amicus curiae* written submissions.

The arbitral tribunal received a petition to participate in the proceedings as *amicus curiae* from five NGOs, claiming that the dispute involved issues related to sustainable development, the environment, human rights and governmental policy, in which the petitioners had experience.⁷³ The petitioners requested, under the new amended ICSID Rules: (i) the status of *amicus curiae*; (ii) access to the key arbitration documents; and (iii) permission to attend the oral hearings when they take place, and to reply to any specific questions of the tribunal on the written submissions⁷⁴.

While Tanzania did not oppose the petition, the claimant investor objected, considering it irrelevant for the purpose of the case, and emphasising the misunderstanding of the core of

⁷²BiwaterGauff Case, ICSID ARB/05/22, Introductory Note <<https://icsid.worldbank.org/>> accessed 5 July 2013.

⁷³ibid 152.

⁷⁴BiwaterGauff Case, ibid (n 72) 153

the dispute. The tribunal considered that it was mandated to resolve claims between the parties, but also recognised that the arbitration raised a number of issues of concern to the wider community in Tanzania, thus it allowed the participation of interested non-disputing parties.⁷⁵

Regarding the application for *amicus curiae* status, the arbitral tribunal held that the ICSID Rules do not provide this kind of status, nor give a non-disputing party the privilege of standing in the arbitration with the full range of procedural privileges and rights a disputing party might have. However, the ICSID Rules regulate two specific types of participation by non-parties: (i) to file a written submission, under Rule 37 (2); and (ii) to attend hearings, under Rule 32 (2).⁷⁶

Furthermore, the tribunal held that the application for *amicus curiae* status should be determined on a case-by-case analysis, and in order to ensure that the parties were not unduly burdened, it also ordered a number of procedural safeguards, in a two-stage process: (1) joint submission of a written brief limited to a maximum of 50 pages, without evidence or documentation attached but could be identified and the tribunal could request such a written submission of its own initiative if considered appropriate; and (2) set out

⁷⁵BiwaterGauff Case, ICSID ARB/05/22, Procedural Order No 5 para 33-36 <<https://icsid.worldbank.org/>>, accessed 6 July 2013.

⁷⁶ *ibid* para 46.

procedural and conduct rules for the parties for the submission of observations to the petition.⁷⁷

Regarding the request for access to the key documents in the arbitration, the tribunal found that Procedural Order No. 3 imposed certain limitations on the disclosure of documents to the public to preserve the integrity of the process while emphasising that the dispute had been widely reported in the public domain and was well-known by the NGOs, thus the tribunal did not consider it necessary at that stage to allow the disclosure of documents, but this could be revisited after the hearings.⁷⁸

Finally, the arbitral tribunal denied the request to attend to the hearings, since the faculty of the tribunal to allow it was conditional on no objection of either party and as in the present case the claimant had opposed the petition, the tribunal had no power to grant this particular application.⁷⁹ The power of the tribunal was still subject to the consent of the parties regarding a procedural matter that would help with the outcome of the proceedings.

The tribunal recognised in the award that the NGOs approached the issues in the case with *‘expertise, and perspectives that have been demonstrated to materially differ from those of the two contending parties, and as such have provided a contribution to these*

⁷⁷ Biwater Gauff Case (n 72) para 60-61.

⁷⁸ *ibid* para 62-68.

⁷⁹ Biwater Gauff Case *ibid* (n 72) para 69-71

proceedings'.⁸⁰ Furthermore, after great consideration and analysis in 36 paragraphs in the award, the tribunal noted that the observations of the *amicus* were useful and that the submissions informed its analysis of the claims and were relevant.⁸¹ However, there are some doubts if the *amicus* brief was relevant to determine the outcome of the dispute, since the breach of the BIT was proved by the claimant, although no compensation was rendered in its favour. Nevertheless, this case certainly represents a victory for the *amicus* and its legitimacy and function in investor-state arbitrations.

⁸⁰BiwaterGauff Case, ICSID ARB/05/22, Award, para 359 <<https://icsid.worldbank.org/>> accessed 7 July 2013.

⁸¹*ibid* para 392.

Chapter 3 – A critical analysis of the intervention of *amicus curiae*: the new beginning

3.1. Who were and who may be *amicus curiae*: new trend analysis

In the cases discussed above it is observed that the majority of *amicus curiae* who participated in investor-state arbitrations were NGOs and civil society groups who claimed to represent public interests such as health, sustainable development and environmental matters that were related to the dispute. In the Glamis Gold case, the tribunal accepted participants beyond the general concept of civil society groups; the participation of the Quechan Indian Nation, as well as business associations such as the National Mining Association, broadened the spectrum of who can be considered as *amicus curiae*.

The main purpose of the *amicus curiae* is to attract the attention of the tribunal to main concerns and public interests that the parties could have omitted. However, a new scenario appeared in ICSID arbitration under the Energy Chapter Treaty using the ICSID Rules. A petition by the European Commission (EC) to appear as *amicus curiae* in *AES Summit Generation Limited and AES-Tisza ErőműKft v Republic of Hungary* (AES case),⁸² was unprecedented due to the substantial legal interest that the EC had in the case. Since the contract between the parties was alleged to violate EU competition law, the EC sought to challenge the tribunal's jurisdiction, with an unsuccessful result.

⁸²AES Case, ICSID ARB/07/22, Award <www.italaw.com/sites/default/files/case-documents/ita0014_0.pdf> accessed 8 July 2013.

The AES case shows that in some degree the intervention of third parties with a personal and direct interest in the dispute as *amicus curiae* could also be accepted in investment arbitrations. Indeed, it could be alleged that this kind of intervention should not be considered as an *amicus curiae* as such since it goes beyond the purpose of the existence of an *amicus curiae*, but it is also true that there is no other kind of participation available for non-disputing parties in the proceedings.

There are some opposing arguments regarding the acceptance of the EC's participation as *amicus curiae*. As stated by Triantafilou in a well-known blog on investor-state arbitration: 'The EC sought to assert the relevance of its legally prescribed mandate, which is replete with policy implications for the entire European Union, and to address the consequences of a conflict between that mandate and the tribunal's jurisdiction'.⁸³ Others state that the proper forum for the EC to pursue the violation of EU law and its consequent sanctions is before the European Court of Justice. However, it was also noticed that the procedure is lengthy and in the meantime the tribunal could render an award with *res judicata* effects for the members of the ICSID Convention and which should be recognised without any exception. This situation if it occurred would undermine the integrity of the European Community system.⁸⁴

⁸³E Triantafilou, 'A More Expansive Role for Amici Curiae in Investment Arbitration?' (Kluwer Arbitration Blog, 11 May 2009) <<http://kluwerarbitrationblog.com/blog/2009/05/11/a-more-expansive-role-for-amici-curiae-in-investment-arbitration/>> accessed 9 July 2013.

⁸⁴E Levine, 'Amicus Curiae in International Investment Arbitration: Implications of an Increase in Third-Party Participation' (2011) 29 (1) Berkeley J. Int'l Law 200, 216.

The lack of regulation of non-disputing parties and differentiation from *amicus curiae* in investor-state arbitrations means that a party with a personal interest in the proceedings has to adapt its status and petition for standing as *amicus curiae*, thus changing the real purpose of that role. We considered that the participation of a non-disputing party with personal and direct interest in the dispute should not be considered as *amicus curiae* but rather as a sub-category of non-disputing party with a wider involvement in the proceedings.

In recent arbitrations under the auspices of ICSID, several NGOs have taken an active role to participate as *amicus curiae* in the proceedings. However, the arbitral tribunals have arrived at different conclusions regarding the acceptance of *amicus curiae* participation depending on their respective arbitration rules.

In *Piero Foresti et al. v Republic of South Africa* (Piero Foresti case), Italian and Luxembourg nationals brought actions under the ICSID Additional Facilities Rule 41 (3), acting according to the BITs subscribed between the South African government and the investors' states. The claimants alleged that the South African government had extinguished its ownership rights in mining interests without adequate compensation. Four NGOs filed a petition for limited participation in the proceedings as non-disputing party; subsequently another request to participate was made by the International Commission of

Jurists.⁸⁵ The petitioners requested: (i) permission to present written submissions; (ii) access to documents of the proceedings; and (iii) permission to attend and to make oral submissions at the hearings.

The tribunal allowed the NGOs to participate as non-disputing parties and to file written submissions, and gave directions for the disclosure of documents submitted by the parties in order to focus their submissions upon the issues arising in the case, bearing in mind that non-disputing parties should not use the proceedings just to obtain information from the parties. However, the tribunal did not permit the NGOs to attend or to make oral submissions at the hearing stage, and although it stated that after all the submissions were made it would invite the parties and non-disputing parties to offer comments on the fairness and effectiveness of the procedures adopted for the non-disputing parties' participation in the case,⁸⁶ no further analysis was made in the award.⁸⁷

In *Pac Rim Cayman LLC v Republic of El Salvador* (PacRim case)⁸⁸ initiated under CAFTA-DR, the ICSID arbitral tribunal received a petition from several NGOs (a coalition of community organisations, research institutes and environmental human rights campaigners who collectively aim to improve public policy dialogue concerning metals mining) for leave to submit a joint written submission, and to attend and make oral

⁸⁵PieroForesti Case, ICSID ARB(AF)/07/1, Award (4 August 2010) <www.italaw.com/cases/documents/447> accessed 10 July 2013.

⁸⁶PieroForesti Case, Letter regarding Non-Disputing Parties (05 October 2009)<www.italaw.com/cases/documents/447> accessed 11 July 2013.

⁸⁷PieroForesti Case (n 85).

⁸⁸PacRim Case, ICSID ARB/09/12<<http://italaw.com/cases/documents/1641>>, accessed 16 July 2013.

submissions at the hearing on jurisdiction. However, the tribunal decided to allow only the request for the written submission, rejecting the other petitions.⁸⁹ Despite this decision, the oral hearing of the case was webcast live, making the procedure public in both Spanish and English.⁹⁰

Before the submission of the *amicus curiae* application, the arbitral tribunal released a procedural order stating that the written application should, *inter alia* (i) identify and give the background of the applicant, the nature of any membership and the nature of any relationship to the disputing parties and any contracting party; (ii) disclose whether the applicant has received, directly or indirectly, any financial or other material support from any disputing party, contracting party or from any person connected with the subject matter of the arbitration; and (iii) specify the nature of the applicant's interest in the arbitration prompting its application.⁹¹ However, it was never stated that human rights and environmental issues were beyond the scope the tribunal, the relevance and admission of the submission will be determined by the fulfilment of the requirements of the procedural order.

An opposite view was taken in the conjoint ICSID arbitral proceedings in *Bernhard von Pezold et al. v Republic of Zimbabwe* and *Border Timber Limited et al. v Republic of*

⁸⁹PacRim Case, ICSID ARB/09/12, Procedural Order No 8 (23 March 2011) <<http://italaw.com/sites/default/files/case-documents/ita0615.pdf>> accessed 16 July 2013.

⁹⁰ The video recordings of the proceeding are still available in <<https://icsid.worldbank.org/>>

⁹¹PacRim Case, ICSID ARB/09/12, Procedural Order Regarding Amici Curiae (2 February 2011) <<http://italaw.com/sites/default/files/case-documents/ita0608.pdf>>accessed 16 July 2013.

Zimbabwe (Pezold case). The claimants alleged breaches of the BITs signed by the Republic of Zimbabwe with the governments of the investors, Germany and Switzerland, due to new regulations related to the forestry and timber processing industry that affected their investments.

In the proceedings, the European Centre for Constitutional and Human Rights, a NGO and four indigenous communities of Zimbabwe filed a petition as *amicus curiae*,⁹² requesting: (i) leave to file written submissions; (ii) access to key documents; and (iii) permission to attend the hearings and respond to questions set by the tribunal.⁹³ The petitioners supported their request with an analysis of the interdependence of international investment law and international human rights law, stating that any decision made in the proceedings which neglects the content of the international human rights norms will be incomplete. Accordingly, the petitioners requested the tribunal ‘*to give due consideration to the duties of the States and the responsibility of companies with respect to the rights of indigenous communities*’.⁹⁴

The tribunal rejected the petition to participate as *amicus curie*, since it failed to satisfy the requirements of Rule 37 (2); however, the tribunal provided considerations to take into account when determining such a petition. Firstly, the tribunal confirmed that it had the power to allow the filing of a submission by non-disputing-parties even if one or both of

⁹²Pezold Case, ICSID ARB/10/25, Procedural Order No 2 (26 June 2012) <<http://www.italaw.com/cases/documents/1483>>, accessed 11 July 2013.

⁹³*ibid* para 14.

⁹⁴Pezold Case *ibid* (n 92) para 27

the parties had objected so long as the requirements of Rule 37 (2) were satisfied.⁹⁵ Secondly, the legal and factual issues raised by the petition should be related to the dispute, and should provide evidence of the allegations especially when affirming the interdependence of international investment law and international human rights.⁹⁶ Thirdly, the independence of the *amicus curiae* is implicit in Rule 37(2)(a), which requires it to bring a perspective, particular knowledge or insight that is different from the parties.⁹⁷ Fourthly, the apparent lack of independence or neutrality of the *amicus curiae* is a sufficient ground to deny the request.⁹⁸

Likewise, the tribunal considered that the *amicus curiae* submission addressed matters beyond the scope of the dispute since the dispute was related to allegedly unlawful measures taken by the Republic of Zimbabwe against the claimants and their investments, but the petitioners sought to make a submission on the putative rights of the indigenous communities as ‘indigenous people’ under international human rights law.⁹⁹ What was the purpose of the arbitral tribunal with this decision? Should it be interpreted as meaning that human rights affected by the investment in dispute (including environmental concerns) are beyond the scope of its jurisdiction and thus *amicus curiae* participation would be denied?

⁹⁵Pezold Case *ibid* (n 92) para 6.

⁹⁶Pezold Case *ibid* (n 92) *ibid* para 57-58.

⁹⁷Pezold Case *ibid* (n 92) *ibid* para 49.

⁹⁸Pezold Case *ibid* (n 92) *ibid* para 56.

⁹⁹Pezold Case *ibid* (n 92) para 60.

The decision of the tribunal in the Pezold case may generate some difficulties for the future intervention of *amici curiae* in investor-state arbitrations. Although we welcome the analysis of independence and neutrality that an *amicus curiae* should have, it is also true that stakeholders that seek to protect public interests may not be allowed to participate in the arbitration since they normally take and support one side of the disputing parties.

Also, it could be understood that an *amicus* is forbidden to raise human rights issues unless the BIT contains an express provision that allows it, or with the consent of the parties, otherwise it would be considered as not related to the subject matter or within the scope of the proceedings. Does this mean that the AdT decision should be restored as the new trend? Certainly, we are far from knowing the real impact of the Pezold case in future proceedings and who could be considered as *amicus curiae*. Although, since the principle of precedents does not exist in ICSID, we predict that the Pezold case will prove to be an isolated case and further tribunals will consider and give importance to the submissions made by *amicus curiae* regardless of their human rights and environmental interests.

Furthermore, the ICSID Arbitration Rules and UNCITRAL Arbitration Rules do not contain any provisions that restrain any form of natural or legal person from participating as a non-disputing party nor the activities, industry, business or sector in which they may be involved. In theory, anyone (including any form of juridical person or natural person) may file a petition to act as *amicus curiae*. The assessment of whether or not to grant the

permission will be at the discretion of the arbitral tribunal,¹⁰⁰ and the analysis is made case-by-case, using criteria similar to or different from previous cases, considering the independence and neutrality of the *amici*.

3.2. Benefits and concerns of accepting *amicus curiae*

3.2.1. Benefits

The participation of *amicus curiae* promotes procedural openness, making the investor-state arbitration more transparent in the public's eyes and contributing to the public legitimacy of the arbitral proceedings.¹⁰¹ It is well known that stakeholders, including native or indigenous communities affected by the execution of a project, play a great role during the whole process, from the preliminary stages, to promoting the project to be sold to the investor, passing through the bidding process and the execution of the project itself. Certain projects have been paralysed due to public concerns, putting in danger the execution of the project. The transparency of the project that the public perceive is a key point for the continuance of the investment.¹⁰² Thus, information about the project is posted in websites of the national entities in charge of the projects¹⁰³.

¹⁰⁰ M Zachariasiewicz, 'Amicus Curiae in International Investment Arbitration: Can It Enhance the Transparency of Investment Dispute Resolution?' (2012) 29 (2) Journal of International Arbitration 205, 220.

¹⁰¹ Levine (n 84) 217.

¹⁰² In Peru a major mining project named, Conga, was held back by the community due to lack of information from the government and the investor. See Trefis Team, 'Newmont's Conga Project in Peru

In this sense, if third -parties have access to important documentation in the execution of the project, why should they not have access in the post-execution and dispute resolution stage? We believe that transparency is a civil right of the population and is a weapon for accountability of a democratic government¹⁰⁴ while promoting a better communication mechanism between the investor, the state and the civil society, legitimating the arbitration process and encouraging the disputing parties to fulfil the award.

Another benefit is that transparency will improve the quality and accuracy of the awards rendered in investor-state arbitrations,¹⁰⁵ contributing to a ‘*systematic development of investment arbitration as a whole*’.¹⁰⁶ Disputing parties will disclose the information that supports their interests and hide the negative aspects that may influence the tribunal while rendering the award. An *amicus curiae* could provide further information to the tribunal that it otherwise could not have known. In the AES case, the European Commission alerted the arbitral tribunal that the contract itself and the proceedings were made in violation of EU law. Likewise, in the BiwaterGauff case apparently the arbitral tribunal used the legal arguments presented by the *amicus curiae* regarding fair and equitable treatment and the

Faces Uncertain Fate’, in Forbes (2013) <www.forbes.com/sites/greatspeculations/2013/04/12/newmonts-conga-project-in-peru-fates-uncertain-fate/> accessed 16 July 2013.

¹⁰³ See e.g. Peru: Promotion Investment Agency <www.proinversion.gob.pe>; France: Plate-forme des achats de l’état <www.marches-publics.gouv.fr/>; Mexico: Secretaría de la Función Pública <<https://compranet.funcionpublica.gob.mx>>

¹⁰⁴ Inter-American Convention of Human Rights art 13 recognises that access to information is a human right. See also The Rio Declaration on Environmental and Development Principle 10.

¹⁰⁵ D Magraw Jr. and others, ‘Transparency and Public Participation in Investor-State Arbitration’, [2008-2009] ILSA Journal of International & Comparative Law 337, 345.

¹⁰⁶ Levine (n 84) 217.

investor responsibility.¹⁰⁷ In fact, this extra information will contribute to generate a well-reasoned and fair award that will support the arbitral tribunal's decision and make it more valuable.

Furthermore, the expertise and specialised knowledge in certain areas that an *amicus curiae* have puts it in a better position than the arbitral tribunal. Thus, its contribution will enlighten the tribunal during the decision-making process. In the Suez case, the tribunal granted permission to act as *amicus curiae* to five NGOs since they had expertise in water distribution and sewerage systems that were the core of the dispute. It is true that an expert could be called by the tribunal to provide a neutral opinion; however, the parties will have to pay for these services. On the contrary, with the participation of the *amicus curiae*, the arbitral tribunal would receive an accurate report, specialist analysis of certain topic, free of charge.

An important contribution of the *amicus curiae* mentioned by scholars is to prevent the fragmentation of international law.¹⁰⁸ Indeed, investment arbitration should not be isolated from other systems that have a tremendous influence on the outcome of the dispute. Organisms such as the ICJ, the ECtHR, the EC and the WTO may have given decisions about certain issues that an arbitral tribunal must know before rendering an award, in order to avoid contradictory judgements or infringement of statutes or rules that are recognised

¹⁰⁷ Biwater Gauff Case, ICSID Case No ARB/05/22, Award, para 370-378.

¹⁰⁸ Levine (n 84) 218.

by the states but unknown to the arbitral tribunal and that a disputing party in bad faith could have omitted intentionally.

To sum up, the *amicus curiae* sheds light on certain aspects that are out of reach of the arbitral tribunal, and even though the real contribution of its work is still pending from public recognition, what is certain is that its mere presence contributes to putting some kind of pressure on the arbitrators and disputing parties to act fairly during the whole proceeding, since the public will scrutinise their behaviour and performance, making its own judgment which in the end is what matters the most.

3.2.2. Concerns

The principal concern of the admission of *amicus curiae* participation in investor-state arbitration is the increase of cost and duration of the proceedings. The cost certainly will increase for each party while responding to the arguments presented by the *amicus*, as well as altering the cost-effectiveness of the proceeding itself, since the arbitral tribunal has to review and analyse the *amicus* petition, and make the procedural orders stating, *inter alia*, the requirements of the petition, the time schedule, and the scope of the intervention of the *amicus*.¹⁰⁹

¹⁰⁹K Tienhaara, 'Third Party Participation in Investment-Environment Disputes: Recent Developments' (2007) 16 Review of European Community and International Environmental Law 230, 240; CfN Rubins, 'Opening the Investment Arbitration Process: At What Cost, for What Benefit?' (2006) 3 TDM <www.transnational-dispute-management.com> accessed 10 June 2013.

In the Glamis Gold case, more than five documents were submitted by the *amici* and the disputing parties in order to address the arguments and counterarguments of all the participants in the arbitral proceeding. As a consequence, the proceedings were lengthy and the arbitral tribunal took more than five years to render an award. Arbitration is normally considered a fast and efficient dispute resolution mechanism, but with the admittance of third parties in the proceedings, the judicialisation of the arbitration and the length of the proceedings become true concerns for those involved in investment arbitration.¹¹⁰

The loss of the consensual nature of arbitration is also a major concern among scholars.¹¹¹ The participation of non-disputing parties in the proceedings is leading to a denaturalisation of arbitration, and its major characteristic: the consent of the parties. In practice, although one of the parties is against the participation of the *amicus curiae*, tribunals have been granted greater powers to accept an *amicus* of their own volition. Thus, a limitation to the parties' consent and autonomy to lead the proceedings has occurred, generating a possible loss of confidentiality and privacy of documents which could affect the attractiveness of arbitration as a dispute resolution mechanism.¹¹²

¹¹⁰ See SIA-QMUL-PWC Survey 2012: Corporate Choices in International Arbitration Perspectives <<http://www.arbitrationonline.org/docs/pwc-international-arbitration-study2013.pdf>>, accessed 20 July 2013.

¹¹¹ See A Newcombe and A Lemaire, 'Should Amici Curiae Participate in Investment Treaty Arbitrations?', (2001) 5 *Vindobona Journal of International Commercial Law and Arbitration* 22, 30; A Boralessa, 'The Limitations of Party Autonomy in ICSID Arbitration' (2004) 15 *American Review of International Arbitration* 253.

¹¹² Levine (n 84) 220.

The re-politicisation of the dispute is also a concern. It is said that opponents of the government could take advantage of the transparency of the arbitral proceeding in order to use the information released by the arbitral tribunal to attack the government, the investment project itself and the legal strategy taken during the proceeding. It is possible that the application to act as *amicus curiae* could be just a charade to attract the attention of the population to the proceeding, concealing the real purpose behind the *amicus* status. Attacking the legal strategy adopted by the government publicly will not only cause the population to be misled about the investor-state dispute, but also endanger the legal defence adopted by the government during the proceedings.¹¹³ The neutral mechanism for resolution of investment disputes could disappear, introducing political and ideological views to the proceedings, affecting the nature of the institution.¹¹⁴

The lack of independence of the *amicus* is another concern in the investor-state arbitration: hidden interests could affect the arbitral proceedings, creating unbalanced arbitration.¹¹⁵ In the Suez and InterAguas cases requirements related to the independence of the *amicus curiae* were adopted and subsequent arbitral tribunals followed the same instructions. Even though the *amicus curiae* in its petition disclosed certain information related to its independence, it is also true that the petitioners could omit facts relevant to their interests in the same way the parties did. Major analysis and investigation of the background,

¹¹³ E Silva, 'Confidencialidad y Transparencia en el arbitraje internacional' (2013) 5 Lima Arbitraje 35, 53 <<http://www.limaarbitration.net/LAR5/Revista.pdf>>accessed 20 July 2013.

¹¹⁴ L Bastin, 'The Amicus Curiae in Investor-State Arbitration' (2012) 1 (3) Cambridge Journal of International and Comparative Law 208, 226.

¹¹⁵ *ibid.*

shareholders, area of involvement, funding and nationality of the *amicus curiae* will be required.

Notwithstanding these concerns, there is no factual evidence that investors may be discouraged from using investor-state arbitrations because of the possibility of *amicus curiae* intervention. On the contrary, the SIA-QMUL Survey 2010¹¹⁶ showed that confidentiality is one of the concerns of the parties but not the principal one. Furthermore, the intervention of third parties in the proceedings could affect the cost and timely manner of the arbitration, but the negative aspects are overcome by the benefits that an *amicus curiae* brings to investor-state arbitration. In our view, an *amicus curiae* not only brings transparency in the proceedings but also legitimises the proceedings itself, since the arbitral tribunal is more aware of the consequence of its decision, as well as the public's recognition or disapproval of it.

3.3. Developing harmonised criteria for *amicus curiae* participation in investor-state arbitration: a long way to the light

Third parties have requested leave to participate as *amicus curiae* in several proceedings in almost every investor-state arbitration forum. Although the arbitration rules did not formerly have an express direction regarding the acceptance of the participation of

¹¹⁶See <www.arbitrationonline.org/research/2010/index.html> accessed 12 June 2013.

amicus curiae, arbitral tribunals have, with few exceptions, interpreted their rules favourably to allow its participation. The increment of investment arbitrations and third-party petitions have contributed to organisations and arbitral institutions such as NAFTA, ICSID and UNCITRAL to adapting their rules to this new circumstance, and although some amendments, as in ICSID, are considered to be only first steps,¹¹⁷ others such as the New UNCITRAL Rules of Transparency, approved in July 2013, are considered unique due to the innovative considerations and wide acceptance of *amicus curiae* participation and the harmonisation effect that it may lead to current or future arbitral proceedings.

The first attempt to harmonise the criteria to accept the participation of the *amicus curiae* in investor-state arbitrations was introduced by NAFTA member states, notwithstanding the lack of express reference to *amicus curiae* in NAFTA Chapter 11. The Statement of the Free Trade Commission on non-disputing party participation, known as the FTC Statement, was released in October 2003. Although, it has no binding effect since it is only a recommendation, tribunals in subsequent arbitral proceedings have followed the criteria.¹¹⁸

Subsection 1, section B of the Procedures of the FTC provides: ‘Any non-disputing party that is a person of a Party, or that has a significant presence in the territory of a Party that wishes to file a written submission with the Tribunal ... will apply for leave from the

¹¹⁷ J VanDuzer, ‘Enhancing the Procedural Legitimacy of Investor State Arbitration through Transparency and Amicus Curiae Participation’ (2007) 52 McGill Law Journal 681, 713.

¹¹⁸ *ibid* 720.

Tribunal to file such a submission'.¹¹⁹The FTC also considers the minimum requirements that the submission should fulfil, *inter alia* (i) a description of the petitioner including, where relevant, memberships and legal status, general objectives, nature of activities, parent organisation, direct and indirect control of shares; (ii) disclosure of whether the applicant has any affiliation, direct or indirect with the parties; (iii) identification of financial supporters or any kind of assistance in preparing the submission; (iv) nature of the interest that the applicant has in the arbitration; (v) explanation of the importance of the submission to be accepted by the arbitral tribunal; (vi) be dated, signed and concise; and (vii) only address matter within the scope of the dispute.¹²⁰

The FTC indicates that the tribunal is empowered to permit *amicus curiae* participation if: (i) the submission would assist the tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (ii) the submission addresses matters within the scope of the dispute; (iii) the non-disputing party has a significant interest in the arbitration; and (iv) there is a public interest in the subject-matter of the arbitration. Moreover, the arbitral tribunal has to ensure that the submissions will not disrupt the proceedings and that the parties will not be unduly burdened or unfairly prejudiced.¹²¹

¹¹⁹ Statement of the FTC (n 44)

¹²⁰ Statement of the FTC Ibid

¹²¹ Statement of the FTC Ibid (n 121)

The FTC set the route to enhance the participation of *amici curiae* in investor-state arbitration not only in the context of NAFTA Chapter 11, but also under ICSID arbitrations. The openness towards third-party participation motivated the ICSID Secretariat to propose an amendment to the ICSID Arbitration Rules and the Additional Facilities Rules, in order to give express empowerment to tribunals to permit and analyse the submissions of third parties in the arbitration.¹²² After further consideration and revised working papers, the ICSID Arbitration Rules and the Additional Facilities were amended and came into effect on 10 April 2006.

According to Rule 32 of the New ICSID Arbitration Rules, the arbitral tribunal is empowered to allow the access and observation to hearings by non-disputing parties, previous consultancy with the ICSID Secretary General and unless any objection of the parties. Likewise, the tribunal has sufficient power to arrange procedural measures for the protection of proprietary or privileged information.¹²³

Moreover, Rule 37 of the New ICSID Arbitration Rules empowers the arbitral tribunal to allow the written submissions of non-disputing parties, after previous consultation with the parties. The tribunal will accept the *amicus* submission if it is within the scope of the dispute and on considering whether: (i) the non-disputing party submission would assist on

¹²²ICSID Secretariat, Possible Improvements of the Framework for ICSID Arbitration; ICSID Secretariat Discussion Paper (22 March 2004) <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=14_1.pdf>, last accessed 23 July 2013.

¹²³ICSID Arbitration Rules, available at <<https://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp>>

a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the parties; (ii) the submission would address a matter within the scope of the dispute; and (iii) the non-disputing party has a significant interest in the proceedings. Likewise, the arbitral tribunal, as in the FTC Statement, is also responsible for ensuring that the submission will not disrupt the arbitral proceeding and the parties are not unduly burdened or unfairly prejudiced.

BITs are not outsiders of the new movement to allow *amicus curiae* in investor-state arbitrations. For instance, Article 28 of the US BIT Models of 2004 and 2012 states that non-disputing parties can make oral and written submissions to the tribunal regarding the interpretation of the treaty, and expressly grants the tribunal power and authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing-party.¹²⁴ Furthermore, Article 29 of both BITs expressly provides that the public have access to: (i) the notice of intent, (ii) the notice of arbitration; (iii) pleadings, memorials, and briefs submitted to the tribunal by disputing parties and non-disputing parties and *amici*; (iv) minutes or transcripts of hearings of the tribunal; and (v) orders, awards and decisions of the tribunal. Also, it is regulated that the tribunals will conduct open hearings to the public, and in coordination with the parties will determine the appropriate logistical arrangements for this purpose. Appropriate measures to protect information from disclosure should be taken by the tribunal when it is needed. These provisions have been

¹²⁴ See 2004 US BIT Model, <<http://www.state.gov/documents/organization/117601.pdf>> and 2012 US BIT Model <<http://www.state.gov/documents/organization/188371.pdf>> accessed 23 July 2013.

included in recent Free Trade Agreements (FTAs) concluded by the US with Chile, Singapore, Morocco and Peru.¹²⁵

In the CAFTA-DR the rules of transparency and intervention of *amicus curiae* are expressly regulated in Chapter 10. Investors have the possibility to choose between initiating proceedings under the ICSID Convention and ICSID Arbitration Rules or the UNCITRAL Arbitration Rules.¹²⁶ There are express provisions related to the disclosure of certain documents related to the proceedings, including the notice of arbitration, pleadings, claim, counterclaim, transcripts of hearings, and the award. Also, the CAFTA-DR provides for open hearings, encouraging stakeholders to participate as *amicus curiae* if considered necessary.¹²⁷

Under the current UNCITRAL Arbitration Rules, Article 17 (1) states that the arbitral tribunal has been empowered to accept *amicus curiae* submissions as it deems appropriate, guaranteeing that parties are treated with equality and are given a reasonable opportunity of presenting their cases.¹²⁸

¹²⁵See: 2004 US-Chile FTA, art 10.19; 2003 US-Singapore FTA, art 15.19; 2004 US-Morocco FTA art 10.19; 2006 US-Peru FTA art 10.20; available at <<http://www.ustr.gov/trade-agreements/free-trade-agreements>>, accessed 24 July 2013.

¹²⁶Central America-United States Dominican Republic Free Trade Agreement s B art 10(16)(3).

¹²⁷ibid art 10 (21).

¹²⁸ See UNCITRAL Arbitration Rules, <<http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>>, accessed 23 July 2013.

On 11 July 2013 the United Nations Commission on International Trade Law adopted the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ('UNCITRAL Transparency Rules' or 'the new Rules') which will come into effect on 1 April 2014. The UNCITRAL Transparency Rules have mandatory effect and will apply on a default basis to investor-state arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to future investment treaties concluded on or after 1 April 2014, unless the parties to such treaty have agreed otherwise.

In the case of investment arbitrations initiated before that date, the Transparency Rules will apply only with the consent of the disputing parties, or with the consent of the state of the investor and the respondent state. Likewise, in the case of investment arbitrations initiated under other arbitration rules or in *ad hoc* proceedings, the UNCITRAL Rules are also available to be applied.¹²⁹

The UNCITRAL Secretariat said the UNCITRAL Transparency Rules seek balance between the public interest in an arbitration involving a state, and the disputing-parties' interest to resolve their disputes using a fair and efficient mechanism.¹³⁰ The UNCITRAL Transparency Rules were adopted in response to pressure from civil society and stakeholders that have an interest in the investor-state disputes and have requested more

¹²⁹ See UNCITRAL Transparency Rules, <<http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/pre-release-UNCITRAL-Rules-on-Transparency.pdf>>, accessed 23 July 2013.

¹³⁰ See Press Release of the United Nations Information Service, available at <<http://www.unis.unvienna.org/unis/en/pressrels/2013/unisl186.html>>, accessed 24 July 2013.

transparent arbitration proceedings. The new rules adopted are in line with the transparency requirements policies adopted by certain states such as the US and Canada.

The new Rules provide not only public access to the majority of documents created during the arbitration but also open hearings, subject to certain exceptions to protect confidential information and preserving the integrity of the arbitral process. In addition, after consultation with the disputing parties, arbitral tribunals have the power to allow submissions regarding matters within the scope of the dispute from a non-disputing state-party to the treaty and third parties that are neither a disputing party nor a non-disputing state-party.¹³¹

The *amicus curiae* submission follows similar requirements to those set by the FTC Statement. An application to the arbitral tribunal is required, as well as a concise statement, without page limits, including the following, *inter alia*: (i) description of the third party's memberships, legal status, general objectives, nature of its activities, and any parent organisations, including any organisation that directly or indirectly controls the third party; (ii) disclosure of any connection, direct or indirect, with disputing parties; (iii) information on any government, person or organisation that provided financial or other assistance in preparing its submission, or substantial assistance in other ways in the two years preceding the application; (iv) description of the nature of the interest in the arbitration; (v) identification of the specific issues of fact or law in the arbitration that it wishes to address.

¹³¹See art 4 and 5 of the UNCITRAL Transparency Rules.

Besides, the arbitral tribunal has to take into consideration the significant interest of the third party in the arbitral proceeding, and the extent to which the submission is within the scope of the arbitral proceeding and will assist to bring a perspective, particular knowledge or insight different from that of the disputing parties.

The UNCITRAL Transparency Rules, when applicable, will be treated as supplementary to the arbitration rules chosen by the parties, and in the case of a conflict, the new rules will prevail. Transparency is certainly the new trend in investment arbitration, however, concerns related to the applicability of the new rules exist. Therefore, UNCITRAL has indicated that the Commission will prepare a convention in relation to the application of the new rules to disputes arising under the existing investment treaties.¹³²

Harmonisation of the rules regarding participation of *amicus curiae* in investor-state arbitration is certainly near to becoming a reality. Different forums in investor-state arbitration have recognised the necessity for more transparent and open arbitration proceedings in order to allow public participation and scrutiny, and in the majority have adopted similar provisions to empower the arbitral tribunal to permit the participation of an *amicus curiae* and the requirements for its submission. It seems clear that this new trend of harmonisation is legitimating investor-state arbitration proceedings and improving the quality of the arbitral awards.

¹³²UNCITRAL Press Release (n 130).

CONCLUSION

The increasing frequency of investor-state arbitrations in the past decades has contributed to attract more public concern about the disputes involved in the arbitrations. Unlike most international commercial arbitration, when a state is a party in a dispute the outcome will always have a significant impact on public interests, since it involves taxpayers money and concerns about the protection of environment and human rights are raised. Thus, the requests for more transparent and open procedures to facilitate *amicus curiae* participation have been heard and recognised by the principal institutions in investment arbitration which have adapted their arbitration rules in order to satisfy the public requirements and enhance the acceptability and procedural legitimacy of investor-state arbitration.

The main role of the *amicus curiae* is to aid the tribunal, providing a different insight, perspective and knowledge that were not otherwise known to the tribunal. However, in practice there are some valid doubts regarding the effectiveness and appropriate help that the *amicus* could provide during its participation in the proceeding. In the majority of the cases analysed, the arbitral tribunals mentioned the participation of the *amicus*, in procedural orders or in the award, but although the tribunals have stated that they duly considered the written submissions, yet there is no factual evidence that the submissions of non-disputing parties have been determinative in the decision making process. In part, we assume that the arbitrators are reluctant to show to the parties the influence of third parties

while drafting their decision, in order to maintain the independent and impartial position of the tribunal, avoiding any risk that the award or the tribunal could be challenged by the disputing parties.

It is also true that concerns about the participation of the *amicus curiae* still exist, issues related to the independence, funding, politicisation and judicialisation of the proceedings, among others, are the principal challenges to be faced by third parties. However, the benefits to allowing the participation of the *amicus curiae* outweigh the concerns, since it increases transparency, accountability and public scrutiny; closes the gap between public substantive concerns and private procedural aspects, and enhances the procedural legitimacy of investment arbitration.

Arbitral tribunals have been shown to be critical and strict when analysing the acceptance of *amicus curiae* in order to avoid unnecessary delays and extra costs in the proceedings. However, when the parties have decided to recognise a non-disputing party as an *amicus curiae*, in our opinion that the tribunal should respect the consent of the parties, otherwise, the arbitral proceeding would be distorted. In arbitration, the consent of the parties is stronger than the arbitral tribunal's opinion.

Furthermore, the presence of an *amicus curiae* puts the arbitrators and disputing parties under pressure to act fairly during the whole proceeding, since the public will scrutinise their behaviour and performance. Several states have accepted the participation of *amicus curiae* even before the amendments made to the ICSID, NAFTA and UNCITRAL Rules, strengthening the participation of third parties in the proceedings. The new FTAs and new generation of BITs are following this trend to open the procedure to the public, not only permitting written submissions by *amicus curiae*, but also allowing them to participate in open hearings and access to documents of the arbitration. Certainly, the effects of this transparency are yet to be tested in investor-state arbitrations under the US BIT Models and new FTAs, but we believe that it is better to have an expectation to participate in the proceedings rather than not have any opportunity at all, especially if we take into consideration that states should be one step closer to the requirements and needs of their people.

It seems clear that the harmonisation of the acceptance of *amicus curiae* in investor-state arbitrations is in a good way to becoming a reality. The recent approval of the UNCITRAL Transparency Rules has definitely set the new beginning of *amicus curiae* and its treatment, role, and means of participation in investor-state arbitration, since not only are written submissions permitted but also access to the hearings and records of the arbitration are automatically allowed. The call for greater transparency has undoubtedly been heard and more adjustments are still pending to the principal institutional arbitration rules and

existing BITs regarding the new ways of *amicus curiae* participation, but definitely it is in the hands of the arbitral tribunals to legitimise the *amicus curiae* work by determining and publishing how they make an effective use of *amici*'s submissions and whether *amicus curiae* has an active and key role in the decision-making process.

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