법학석사학위논문

Consideration of Public Interest in Investor-State Dispute Resolution: Enhancing Systemic Legitimacy through *Amicus Curiae* Participation

국제투자분쟁해결절차상의 공익적 고려에 관한 연구:

외부조언자 의견제출권을 통한 체계적 정당성 강화를 중심으로

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서울대학교 대학원

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김 미 라

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Abstract

Consideration of Public Interest in Investor-State Dispute Resolution: Enhancing Systemic Legitimacy through *Amicus Curiae* Participation

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Investment agreements routinely provide for the right of a foreign investor to directly bring claims against the host state before an arbitral tribunal for violations of treaty provisions. Investment treaty arbitration is conducted pursuant to international arbitral rules, which adopted various aspects of commercial arbitration model, such as the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules or other sets of rules originally designed for the resolution of commercial disputes, including International Chamber of Commerce Rules of Arbitration and United Nation Commission on International Trade Law (UNCITRAL) Arbitration Rules. As a result, the principle of confidentiality, strongly embedded in commercial arbitration, has also been largely applicable to investment treaty arbitration.

However, confidentiality of proceedings in investment treaty arbitration has engendered considerable concerns because of the presence of public interest in the dispute, the resolution process of the dispute as well as the outcome of the arbitration. The legitimacy of the system has been challenged for dispensing justice with broad public implications, behind closed door.

Amicus curiae participation was introduced as a part of a transparency effort to mitigate the legitimacy challenges to the investment treaty arbitration mechanism by injecting transparency and accountability into the system. Already an established practice in several domestic and international jurisdictions, *amicus curiae* participation was introduced in investment treaty arbitration by the seminal case of *Methanex Corp. v. United States.* North American Free Trade Agreement (NAFTA) tribunals' acceptance of *amicus curiae* briefs was followed by the Statement on Non-Disputing Party Participation of the Free Trade Commission, providing a detailed guideline for the receipt of *amicus curiae* submissions. It set out four criteria with which the tribunals are to consider *amicus curiae* petitions: (i) the assistance the *amicus curiae* brief would provide to the tribunal; (ii) the scope of the brief; (iii) the interest of the *amicus curiae* in the arbitration; and (iv) the public interest of the subject-matter.

The NAFTA experience inspired changes within the ICSID framework. Despite initial inconsistencies in the ICSID tribunals' approach to *amicus curiae* participation, ICSID modified its Arbitration Rules in 2006 to include a specific reference to the practice and prescribe the terms under which tribunals may grant leave to file *amicus curiae* briefs. The ICSID amendment shares the same requirements as the NAFTA guideline, except for the last criteria of public interest. Since the amendment, a number of tribunals have allowed a diverse range of *amici curiae* to participate in the proceedings.

Ad hoc arbitration rules in a number of latest generation investment agreements and model BITs have also incorporated the practice of *amicus curiae* participation. Amendment initiatives have been made within the context of the UNCITRAL although other commercial arbitration institutions have not taken a comparable stride towards relaxation of the confidentiality rule.

Amicus curiae participation in investment treaty arbitration aims to promote systemic legitimacy of the mechanism as well as contributing to the

improvement of legal quality of awards and assisting the development of international investment law. Above all, it is a medium through which public interests are represented in the arbitral proceedings. The practice however, is not without negative consequences including the costs associated with the loss of confidentiality, the possibility of procedural inefficiency and impairment of integrity of dispute resolution as well as the deficiency of legitimacy on the part of a prospective *amicus curiae.* Nevertheless, the shortcomings of *amicus curiae* participation may be minimized by procedural safeguards adopted by tribunals in order to preserve the efficiency of arbitration and equality of parties.

Balancing the competing interests held by various stakeholders in the arbitration is thus indispensable in consolidating *amicus curiae* participation as a vital means to enhance the legitimacy of investment treaty arbitration regime. A comprehensive set of formalized criteria which broadens, albeit with caution, *amicus curiae* participation should be adopted across the board by all investment treaty arbitration frameworks. The systemic approach to *amicus curiae* participation should, above all, encourage and strengthen the practice, while qualifying the mode of participation to neutralize any potential adverse effects. An institutionalized and predictable process would contribute to the public acceptance and effectiveness of *amicus curiae* participation and in turn, international treaty arbitration as a dispute resolution mechanism.

Key words: *amicus curiae* participation, investment treaty arbitration, public interest, legitimacy, transparency, civil groups

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I. INTRODUCTION

The last few decades have seen an exponential expansion of international investment agreements (hereinafter "IIA") and a corresponding proliferation of investor-state dispute resolution in the form of investment treaty arbitration (hereinafter "ITA"). Introduced in the 1960's, commitment to arbitration became a regular feature in BITs over a span of a few decades, to finally emerge as a standard provision for international investment agreements in the 1990's.[1] This procedure bears unique attributes in that it allows private persons or corporations to pursue arbitration for injuries resulting from the host state's violation of its substantive obligations under the treaty.[2] Under this revolutionary innovation an aggrieved investor may bring claims directly against a sovereign state, pursuant to the procedures prescribed in the treaty before the International Centre for Settlement of Investment Disputes (hereinafter "ICSID"), an investment-specific arbitral body affiliated with the World Bank, the International Chamber of Commerce (hereinafter "ICC") or other arbitration institutions as well as *ad hoc* arbitrations applying the United Nation Commission on International Trade Law Arbitration Rules (hereinafter "UNCITRAL Arbitration Rules")[3].

The already existing arrangements for international commercial arbitrations were transplanted into the drafting of ITA, despite the difference in the primarily private commercial nature of disputes of international commercial arbitration and ITA's investment disputes arising *from* the exercise of state

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[1] Luke E. Peterson, *All Roads Lead Out of Rome: Divergent Paths of Dispute Settlement in Bilateral Investment Treaties*, NAUTILUS INSTITUTE FOR SECURITY AND SUSTAINABLE DEVELOPMENT, at 5 (International Sustainable and Ethical Investment Rules Project , 2002).

[2] J. Anthony VanDuzer, *Enhancing the Procedural Legitimacy of Investor-State Arbitration through Transparency and Amicus Curiae Participation*, 52 MCGILL L. J. 681, 688 (2007).

[3] UNCITRAL Arbitration Rules, G.A. Res. 65/22, 65th Sess. (2011).

authority. In particular, international commercial arbitration's legacy of privacy and confidentiality of proceedings has proven to be controversial in the context of ITA whose salient feature is its public character. An investment dispute subject to ITA arises from the breach of substantive obligations set by relevant IIAs and public international law. The regulatory nature of disputes emanating from the public sphere[4] is often found in investment disputes between the foreign investor and the respondent state. Investment conflicts typically involve a broader range of actors extending beyond the two disputing parties and the ramification of the outcome is far more widespread than that of a purely private commercial dispute.

This *sui generis* nature of investment dispute conflicts with the fundamental precept of commercial arbitration and has incurred mounting public concerns over the legitimacy of resolving such disputes behind closed doors away from the public scrutiny. As a result, the problem of transparency and democratic accountability has emerged as a major source of structural vulnerability within the institution of ITA.

As a response, a number of measures have been contemplated to reform the secretive private process. *Amicus curiae* participation, a form of intervention by a non-disputing third party in the arbitral proceeding, became a part of the effort to shift the emphasis on confidentiality to a more transparent proceeding. *Amicus curiae,* translated as "friends of the court"[5], refers to "a person with strong interest in or views on the subject matter of an action, [who] may petition the court for permission to file a brief, ostensibly on behalf of a party but actually

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[4] G. Van Harten & M. Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EJIL 121, 148, 149 (2006).

[5] Lance Bartholomeusz, *The Amicus Curiae Before International Courts and Tribunals*, 5 NON-STATE ACTORS & INT'L L. 209, 211 (2005).

to suggest a rationale consistent with its own views".[6] They represent and articulate social interests pertaining to the issues of fact or law present in the dispute.[7] While participating in the dispute resolution process gives an *amicus curiae* important advocacy role to play, it does not thereby confer them any substantive rights.[8]

Amicus curiae participation generally takes the form of a formalized submission.[9] However it is not by definition limited to written briefs and may be broadened to include attendance at oral hearings, access to key documents and even limited cross-examination of witnesses.[10] The U.S. courts and European Court of Human Rights have on instances extended *amicus curiae* participation to the oral parts of the proceedings.[11] These precedents suggest *amicus curiae* participation is not inherently limited to the means of written briefs.

To establish the parameters of this article, submission of written briefs by third parties (hereinafter "*amicus curiae* brief") will be its primary focus. However, the efficacy of *amicus curiae* briefs is intricately linked to the availability of other forms of *amicus curiae* participation or transparency in a broader sense (hereinafter "transparency measures"). Accordingly these

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[6] BRYAN A. GARNER (ed.), BLACK'S LAW DICTIONARY 93 (8th ed.) (Thomson West, 2004)

[7] Alec S. Sweet, *Investor-State Arbitration: Proportionality's New Frontier,* 4(1) L. & ETHICS HUM. RTS. 47, 62 (2010).

[8] Advocates for International Development, *A "How" to Guide to Amicus Curiae & International Investment Arbitrations*, at 6, *available at:* <http://a4id.co.uk/content/amicus-*curiae*-+-international-investment-arbitrations.pdf>. (Last visited: Dec. 26, 2011).

[9] *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. And The Republic of Argentina*, Petition for Transparency and Participation as Amicus *Curiae*, Jan. 27, 2005 (hereinafter "*Suez/Vivendi I* Petition").

[10] Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT'L L. 775, 807 (2008).

[11] Eugenia Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 29(1) BERKELEY J INT'L L 200, 207 (2011).

measures will also be examined in so far as they contribute to the quality and impact of *amicus curiae* briefs.

Amicus curiae participation is an already established practice in some domestic and international jurisdictions.[12] However, the budding development and subsequent attempts to expand the practice in ITA have been met with varying degrees of success. In this regard this paper seeks to analyze the role of *amicus curiae* participation in enhancing legitimacy and transparency in ITA. To this end Part II recapitulates the distinctive features of arbitration and its relations to the legitimacy concerns in ITA. Part III explores the evolution of *amicus curiae* participation in ITA as a means of balancing public concerns with investment interests. Having chronicled the development in the framework of ITA, Part IV extensively analyzes the nature, role and other issues surrounding the practice of *amicus curiae* participation. Part V, by identifying the challenges and benefits of *amicus curiae* participation, assesses the practice and addresses the concern for balancing the competing interests surrounding *amicus curiae* participation. With Part V as its reference point, Part VI highlights the need for a formalized criteria governing *amicus curiae* participation and examines elements and standards pertinent to the possible improvement in the practice. It concludes in Part VII with a discussion on the role of *amicus curiae* participation in securing the legitimacy of ITA as a resolution mechanism for investment disputes involving public interests.

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[12] *Amicus curiae* participation, recognized in several legal systems, has been known since the ancient Roman law. It is used most prominently in the US but is also present in other common law and civil law jurisdictions. Recent years have also seen a wave of *amicus* participation on the international plane. International judicial institutions such as the International Court of Justice, International Tribunal for the Law of the Sea, European Court of Justice, European Court of Human Rights, International Criminal Court, International Criminal Tribunal for the former Yugoslavia, International Criminal Tribunal for Rwanda and World Trade Organization have, with a varying degree of acceptance, allowed *amicus curiae* participation.

II. LEGITIMACY CHALLENGES IN INVESTMENT TREATY ARBITRATION

Amongst the multitude definitions of legitimacy, one that is particularly pertinent to this paper is the definition made by a prominent legal scholar, Thomas M. Franck who characterized legitimacy as "the aspect of governance that validates institutional decisions as emanating from right process."[13] In the empirical sense, legitimacy derives from the acceptance on the part of the citizens of the system as justified and worthy of support.[14] On a normative level, core democratic values such as transparency and accountability are critical pillars of legitimacy in sustaining a system of governance.[15]

Accountability which may be defined as "[t]he obligation to render an account of, and accept responsibility for, one's actions, both the results obtained and the means used"[16] is based on the relationship between the decision makers and the broad public whose lives are substantially affected by the actions of the former. However, as with contemporary democracies on a domestic level and other international organizations, the classical model of democratic accountability cannot be applied in its strictest sense in the framework of international investment law. The increasing need for decisions based on specialized expertise necessitates the involvement of unelected agents. Thus,

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[13] Thomas M. Franck, *Democracy, Legitimacy and the Rule of Law: Linkages*, N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Working Paper Series, Working Paper No. 2, at 1 (1999), *available at*: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=201054>.(Last visited: Mar. 20, 2012).

[14] Stein, *supra* note 14, at 493-4; Jeffrey L. Dunoff, *Constitutional Conceits: The WTO's ' Constitution' and the Discipline of International Law*, 17 EUR. J. INT'L L. 647, 674 (2006).

[15] Choudhury, *supra* note 10, at 784.

[16] Report of the Auditor General of Canada, Matters of Special Importance – 2004, 2 (2004) , *available at*: <http://www.oag-bvg.gc.ca/domino/reports.nsf/html/20041100ce.html>. (Last visited: May. 20, 2012).

democratic accountability in the context of ITA may be achieved when the public, however indirectly, shape the decision making process and its outcomes.[17]

Legitimacy also encompasses the notion of transparency, a broad term with both the procedural and substantive aspects. Transparency entails openness in the decision making process by permitting public access to key information, open discussion or citizen involvement. Transparency is particularly important in a system in which clear public interests exist and public oversight of the decision-making process has direct bearing on the accountability and predictability of the mechanism. Imparting democratic values to the process in turn legitimizes the process in the eye of the public.[18]

The public aspect of investment disputes calls for a meaningful input by the populace because the outcome of the process may affect a significant portion of a society and its fundamental values.[19] As stakeholders in the outcome of the disputes, citizens have an interest in critiquing and interjecting their voices in the process. As such, transparency does not only benefit the parties to the dispute but also adds to the legitimacy of the system as a whole, ensuring its continued vigor. Given that relentless insistence on opacity only attracts criticisms and harms the systemic legitimacy, transparency in the long term is an essential precondition to its sustainable success.[20]

Since *amicus curiae* participation is proposed as a means to enhance the legitimacy of ITA, it is first necessary to examine the features characteristic of ITA and illustrate how they figure in the legitimacy dialogue of such institution. Based on the observation, the development of *amicus curiae* participation

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[17] Craig Forcese, *Does the Sky Fall?: NAFTA Chapter 11 Dispute Settlement and Democratic Accountability*, 14 Mich. St. J. Int'l L. 315, 317 (2006).

[18] Choudhury, *supra* note 10, at 809.

[19] Choudhury, *supra* note 10, at 809.

[20] Fulvio Fracassi, *Confidentiality and NAFTA Chapter 11 Arbitrations*, 2 CHI. J. INT'L L. 213, 221 (2001).

specifically directed at resolving the legitimacy crisis of ITA will be discussed in the next part.

A. Distinctive Features of Investment Treaty Arbitration

"De-politicization" of international disputes

Preceding the implementation of ITA was a period when powerful western capital-exporting states frequently sought to resolve investment disputes by dispatching a contingent of warships to the coast of the offending state.[21] States began concluding treaties of Friendship, Commerce and Navigation (hereinafter "FCN") which included protection of foreign investment were the precursor of investment regulation.[22] More advanced forms of IIAs with the inclusion of alternative dispute resolution clauses that followed suit prevented politicization of intergovernmental disputes by bettering the prospects of reaching a mutually acceptable solution. This in turn facilitated establishment of long-term collaborative relationship between investors and host states.[23] For instance, appointing neutral facilitators contributes to the perception of independence and impartiality of the tribunal and elicits a more positive reception of its decision. One notable illustration of de-politicization is evinced in the ICSID experience where the majority of the cases registered tend to be settled by the disputing parties before the award is rendered.[24]

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[21] L. Yves Fortier, *Arbitrating in the Age of Investment Treaty Disputes,* 31(1) UNSW LAW JOURNAL VOLUME 282, 290 (2008).

[22] David R. Adair, *Investors' Rights: The Evolutionary Process of Investment Treaties,* 6 TUL. J. COMP. & INT'L L. 195, 196 (1999).

[23] L. Michael Hager & Robert Pritchard, *Deal Mediation: How ADR Techniques Can Help Achieve Durable Agreements in the Global Markets,* 14 ICSID REV. 1, 2-4 (1999).

[24] Ernst-Ulrich Petersmann, *Justice as Conflict Resolution: Proliferation, Fragmentation, and*

Efficiency of proceeding

Operating outside of domestic judicial system allows ITA to proceed with the process in a more expedited fashion. The efficiency of this dispute settlement mode is also prominent in juxtaposition with the pre-existing normative framework applicable in intergovernmental disputes. Under the traditional mechanism of diplomatic protection, exercise of which permits a state to afford protection to its citizens who are injured by acts contrary to international law committed by another state,[25] an individual must have exhausted all available local remedies in the host state's domestic level.[26] The fulfillment of this requirement could mean that remedies only become available years after the occurrence of the original dispute.[27] The Convention on the Settlement of Investment Disputes between States and Nationals of Other States ICSID Convention (hereinafter "ICSID Convention") however, provides the option of waiving the prior exhaustion of local remedies rule for its conciliation or arbitration proceedings,[28] allowing the possibility of reaching a decision faster than resorting to the ICJ. Limiting or removing the traditional requirement

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Decentralization of Dispute Settlement in International Trade, 27 UPAJIEL 273, 330 (2006).

[25] R.B. LILLICH, THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW 12 (Manchester University Press, 1984); Jonathan Shirley, *The Role of International Human Rights and the Law of Diplomatic Protection in Resolving Zimbabwe's Land Crisis*, 27 B.C. INT'L & COMP. L. REV. 161, 169 (2004).

[26] *Interhandel* (Switzerland v. US), Preliminary Objections, 1959 I.C.J. 6, 27, Mar. 21, 1959; *Case Concerning Electronica Sicula S.p.A.* (U.S. v. Italy), 1989 I.C.J. 15, 42, July 20, 1989.

[27] The decision in the *Case Concerning Elettronica Sicula S.p.A*, adjudged by the ICJ for example, was rendered in 1989 25 years after the dispute between the US investors and Italy arose.

[28] Convention on the Settlement of Disputes Between States and Nationals of Other States of 1965, art. 26, Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 (U.N.T.S. 160 (No. 8359)), *reprinted at* 4 I.L.M. 532 (1965) (hereinafter "ICSID Convention").

also means international legal remedies have become independently available to investors irrespective of the host state's legal deficiencies or miscarriage in justice. Curtailing the process has thus rendered ITA regime more accessible to and appropriate for private entities in directly seeking reparation for the respondent state's wrongful treatment.

Flexibility of procedure

Flexibility of international arbitration proceedings can give parties and tribunals the ability to craft the proceedings to meet the specific needs of each case. Much autonomy is left to the disputing parties and arbitrators to determine the manners in which proceedings should be conducted. Article 15(1) of the UNCITRAL Arbitration Rules provides for the broad powers of the tribunal to shape the arbitral procedures. The same philosophy resonates in the arbitration rules of the ICSID Convention (hereinafter "ICSID Arbitration Rules")[29] and the arbitration rules under the ICSID Additional Facility (hereinafter "ICSID Additional Facility Rules")[30]. This customization stands in stark contrast to domestic court litigation procedure.

Confidentiality of arbitration

A salient feature of international commercial arbitration that has been transplanted to the mechanism of investment dispute settlement is the notion of

[29] ICSID Rules of Procedure for Arbitration Proceedings, in ICSID Convention, Rules and Regulations, at 99, ICSID Doc. ICSID/15 (Apr. 2006) (hereinafter "ICSID Arbitration Rules").

[30] Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes, ICSID Doc. ICSID/11, (Apr. 2006) (hereinafter "ICSID Additional Facility Rules").

confidentiality.[31] While confidentiality is one of the central pillars and attractions of ITA, whether it is an inherent principle underlying the system is controversial.[32] Even the UNCITRAL Model Law, applicable for cases of international commercial arbitration, refrains from prescribing a specific standard on confidentiality, instead pairing it with the principle of party autonomy so the disputing parties can configure the associated procedures to suit their particular circumstances.[33] Tribunals have also confirmed in a number of cases the absence of general obligation of confidentiality applicable to ITA.[34]

According to IIAs public disclosure depends on either the arbitral rules the parties choose to abide by or their expressed intention in case there is a lacuna in the agreed upon rules. Most arbitral rules contain provisions regarding the confidentiality and publication of awards but under a few exceptional rules a confidentiality agreement between disputing parties may establish procedures regarding the type of material to be kept confidential, measures and procedures employed in ensuring confidentiality and circumstances under which confidentiality may be waived.[35]

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[31] Levine, *supra* note 11, at 204.

[32] The courts in England underscore the importance of protecting secrecy. Meanwhile Australian courts expectation of confidentiality must be curtailed in matters concerning the public interest. Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 PENNSTLR 1269, 1287 (2009).

[33] Secretariat of the UNCITRAL, UNCITRAL Model Law on International Commercial Arbitration: Note by the Secretariat, at 32, U.N. Doc. A/CN.9/207 (May 14, 1981); Peter Malanczuk, *Confidentiality and Third-Party Participation in Arbitration Proceedings under Bilateral Investment Treaties*, 1(2) CONTEMP. ASIA ARB. J. 183, 187 (2008).

[34] *Metalclad Corp. v. Mexico*, Decision on a Request by the Respondent for an Order Prohibiting the Claimant from Revealing Information Regarding, ICSID case No. ARB/(AF)/97/1, Oct. 27, 1997, para. 13 (hereinafter "*Metalclad*"); *S.D. Myers, Inc. v. Canada*, UNCITRAL, Procedural Order No. 16, May 13, 2000, paras. 8-9 (hereinafter "*S.D. Myers*"); *The Loewen Group, Inc. & Raymond L. Loewen v. United States*, Decision on Hearing of Respondent's Objections to Competence and Jurisdiction, ICSID case No. ARB(AF)/98/3, Jan. 5, 2001, para. 26.

[35] UNCITRAL Model Law on International Commercial Arbitration: Note by the Secretariat,

On the other hand the ICSID or UNCITRAL arbitration rules provide for the privacy of proceeding with limited access to third parties. Lifting or preservation of confidentiality is in large part subject to the preferences of the disputing parties. The amended ICSID and ICSID Additional Facility Rules for instance allows the attendance of third parties to the hearings only with the consent of both parties[36] ICSID Additional Facility Rules allows the disclosure of minutes of the hearings without the consent of the parties[37] while ICSID Convention prohibits the publication of awards without the consent of the parties.[38] In a similar vein, the UNCITRAL rules stipulate the default use of in-camera hearings and the non-disclosure of awards unless parties agree otherwise.[39] Arbitral proceedings governed by the UNCITRAL rules also tend to acknowledge a restricted access for non-disputing parties to the documents exchanged during arbitration.[40]

All three sets of aforementioned rules dictate hearings to be conducted in privacy unless the parties decide otherwise and require the consent of the parties for the publication of awards. Uniformity is also found in the lack of a general duty of confidentiality with regards to pleadings.[41] Overall however, the ICSID regime can be deemed more susceptible to transparency than the UNCITRAL proceedings. The ICSID rules contemplates the possibility of non-disputing party

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supra note 33, at 32.

[36] ICSID Arbitration Rules, *supra* note 29, art. 32(2); ICSID Additional Facility Rules, *supra* note 30, art.39(2).

[37] ICSID Additional Facility Rules, *supra* note 30, art.44.

[38] ICSID Convention, *supra* note 28, art. 48 (5).

[39] UNCITRAL Arbitration Rules, *supra* note 3, art. 28(4), 34(5)

[40] LOUKAS MISTELIS, Confidentiality and Third-Party Participation: UPS v. Canada and Methanex Corp. v. USA, in INTERNATIONAL INVESTMENT LAW AND ARBITRATION 169 (Todd Weiler ed., 2005).

[41] Asha Kaushal, *Reconciling the public interest: third-party participation, confidentiality and privacy in NAFTA Chapter 11 arbitrations,* 9(6) INT. A.L.R. 172, 179 (2006).

attendance on a case-by-case basis and unlike UNCITRAL requires the Center to publish excerpts of the tribunal's legal reasoning[42] as well as disclosing registered claims on its website.[43]

B. Concerns over the Legitimacy of Investment Treaty Arbitration

1. Distinction between investment treaty arbitration and commercial arbitration

International commercial arbitration is, *inter alia*, a private resolution process for commercial disputes arising between private entities.[44] As a primary alternative to litigation before national court, commercial arbitration utilizes informal procedures whereby the usual courtroom rules are simplified and often tailored by mutual undertakings of both parties.[45] ITA between a sovereign party and private entity on the other hand is a hybrid which retains both the characteristics of international commercial arbitration and inter-state arbitration.[46]

Similarities between international commercial arbitration and ITA are evident. First, both involve a claim by a private entity before a tribunal of arbitrators appointed by the parties. Second, ITA is governed by rules and culture originated in private arbitration which allows disputing parties and tribunals

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[42] ICSID Arbitration Rules, *supra* note 29, art.48(4); ICSID Additional Facility Rules, *supra* note 30, art.53(3).

[43] ICSID Administrative and Financial Regulations, in ICSID Convention, Rules and Regulations, at 51, regs 22, 23, ICSID Doc. ICSID/15 (Apr. 2006).

[44] American Arbitration Association, Drafting Dispute Resolution Clauses: A Practical Guide 5 (2007), *available at:* <http://www.adr.org/sp.asp?id=29159>. (Last visited: Dec. 26, 2011).

[45] *Id.* at 6.

[46] Jack J. Coe, Jr., *Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods*, 36 VNJTL1381, 1389 (2003).

significant latitude in shaping and conducting the proceeding. Lastly, an award of damages is the principle remedy for both systems and the enforcement is often based on the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[47]

Despite its origin, ITA exhibits a marked departure from its private counterpart on a number of important facets: the authority in which the arbitration derives from, the nature of disputes and parties as well as the governing law. ITA is "to be distinguished from a typical commercial arbitration on the basis that a State [is] the Respondent, the issues [have] to be decided in accordance with a treaty and the principles of public international law and a decision on the dispute could have a significant effect extending beyond the two Disputing Parties."[48] While commercial arbitration derives its authority from the autonomy of individuals to regulate their private affairs as according to their preferences and needs,[49] ITA on the other hand rests upon the consent of the state to refer the dispute to a particular mode of adjudication.[50] Even though both commercial arbitration and ITA are established by the consent of the parties, the two types of consent differ in its nature. The advance consent by the state party allows a broad range of potential investment disputes to be adjudicated under the mechanism of ITA. On the other hand, mutual agreement of private parties to submit their dispute to a commercial arbitration is specific to a particular dispute and does not extend beyond their reciprocal relationship.[51]

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[47] ICSID constitutes an exception in that an award rendered in pursuant to the ICSID Convention is binding on its party states.

[48] Methanex Corporation v. United States of America, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as *Amici curiae Curiae,* January 15, 2001, para. 17 (hereinafter "*Methanex* Decision").

[49] ALAN REDFERN & MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 5 (5th ed.) (Sweet & Maxwell, 2009).

[50] Harten & Loughlin, *supra* note 4, at 140.

[51] *Id*. at 143.

The dynamic between the parties under the two systems of arbitration are differentiated by one of the disputing parties acting in the capacity of a sovereign state in ITA, compared to both parties acting in private capacity in international commercial arbitration. A major divergence can also be observed in the subject matter, particularly with regard to the issue of arbitrability, or whether a matter should be adjudicated in public rather than a private forum. In general, the existence of public interest restricts the arbitrability of disputes in commercial arbitration to ensure sensitive public policy issues are litigated in the domestic courts.[52] In contrast, arbitrability in ITA, sometimes limiting adjudication of matters involving intellectual property[53] and taxation[54], does not prohibit the arbitration of disputes involving public policy objectives. Rather, treaty violations by state measures in ITA often flow directly from the exercise of superior governmental authority and concern the society at large.

In the field of investment law, ITA largely supplants the traditional doctrine of discretionary espousal of claims by the home state on behalf of its aggrieved national. The resolution of investment disputes has been transferred from inter-state dispute settlement forum to the ITA mechanism which confers direct arbitral standing to the wronged investor. The transference of control to the actor with concrete interests to better the predictability of outcome nevertheless, does not alter the nature of dispute—constituted by a sovereign act. ITA in this sense more intimately resembles domestic judicial review of

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[52] LOUKAS A. MISTELIS & STAVROS L. BREKOULAKIS EDS., ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 8 (Wolters Kluwer, 2009).

[53] U.S.-Uruguay BIT, Article 6.

[54] Treaty between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment in US model BIT, art. 21 (hereinafter "US Model BIT"); North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States, 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 (entered into force 1 January 1994), art.2103 (hereinafter "NAFTA").

regulatory state conducts than commercial arbitration.[55]

2. Value of confidentiality and its limitation

One of the perceived benefits of arbitration as distinct from litigation in public court system is the preservation of confidentiality. Confidentiality is often cited as one of the main attractions of arbitration for various reasons. First, confidentiality protects the integrity of procedure and facilitates the proceeding in an efficient and objective manner.[56] Second, confidentiality preserves trade secretes or sensitive information by protecting proprietary or privileged information. Third, as the tribunal in *Metalclad v. Mexico* has noted, privacy preserves working relations between the parties by keeping emotions at low levels and avoiding aggravation of the dispute.[57] Fourth, parties may wish to avoid negative publicity by preventing certain allegations—bad faith, misrepresentation, incompetence, lack of adequate financial resources—from being made public.[58] Finally, parties to the dispute, especially governments who are answerable to their constituencies, may have an interest in concealing their position.[59]

However, arbitral proceedings may be made more transparent without undermining the foundational underpinnings of arbitration.[60] A study conducted on a sample of attorneys and their clients concerning their perceptions of the

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[55] Harten & Loughlin, *supra* note 4, at 140.

[56] G.B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2279 (Kluwer law International, 2009).

[57] *Metalclad, supra* note 34, para. 10; *Id.* at 2279.

[58] REDFERN & HUNTER, *supra* note 49, at 27.

[59] Cindy G. Buys, *The Tension between Confidentiality and Transparency in International Arbitration*, 14 AM REV INT'L ARB 121, 123 (2003).

[60] *Id*. at 122.

arbitration process reveals a relatively low ranking of importance of privacy as compared with other factors such as fairness and justice of the process, receipt of a monetary award, speed, cost, arbitrator expertise and finality.[61] Thus, even though confidentiality is a highly valued aspect of arbitration it is not as though confidentiality cannot be restricted and coexist with transparency.

3. Presence of public interest

The very presence of a sovereign state as a disputing party entails the possibility of public implications, particularly when *acta jure imperii* is concerned. The citizens of the state have vested interest in its government's conduct during the arbitration, the outcome of the proceedings and its effect on domestic decision makings. Under international law compliance with domestic law does not negate state responsibility for failure to comply with its international obligations.[62] Even constitutionally mandated regulatory measures for the protection of public safety or environment were not found to constitute valid defense.[63] Consequently foreign investors are able to challenge government regulations formulated through democratic process if they believe they suffered an injury as a result of a state regulation in breach of treaty obligation.[64] Since state regulations adopted under domestic legal framework are generally devised to implement public value, ITA often extends beyond purely

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[61] Richard W. Naimark & Stephanie E. Keer, *What do parties really want from international commercial arbitration?*, 57 AAA DISP. RESOL. J. 78 (2002)

[62] Vienna Convention of the Law of Treaties, art. 27, 1155 UNTS 331, 8 I.L.M. 679, entered into force Jan. 27, 1980.

[63] *Compania del Desarollo de Santa Elena, S.A. v. Costa Rica*, Final Award, Feb. 17, 2000, 29 I.L.M. 1317, para. 72.

[64] Bill Moyers, Trading Democracy - A Bill Moyers Special (PBS television broadcast Feb 1 2002), *available at:* <http://www.pbs.org/now/transcript/transcript_tdfull.html>. (Last visited: Dec. 26, 2011).

investment issues to impact the host state citizen's welfare and rights. Certain critics of North American Free Trade Agreement (hereinafter "NAFTA") Chapter 11 have censured it for its role in repeatedly challenging environmental laws that have adverse economic consequences for foreign investors.[65] Apprehension over subsequent chilling effect on beneficial and much needed public interest regulations has been raised and tribunals, too, have acknowledged its significance.[66] Thus inadequate respect for and reflection of the public nature of disputes in both the procedural and substantive aspects of ITA could impinge on ITA's claims to legitimacy.

(a) Types of public interest present in investment disputes

The concept of 'public interest' can be defined in terms of a state and its constituents to denote "general welfare of the public that warrants recognition and protection" or "[s]omething in which the public as a whole has a stake".[67] It can also refer to the common interest of mankind, such as protection of the environment or human rights.[68]

The intersection between public and investment issues has been documented in several ITAs. The public interests implicated in these decisions address general public welfare issues sometimes with far-reaching domestic impacts: regulatory expropriations especially in the context of environmental protection; public services concerning hard rock minerals, forests, freshwater

[65] Howard Mann & Konrad von Moltke, International Institute for Sustainable Development, *NAFTA's Chapter 11 and the Environment: Addressing the Impacts of the Investor-State Process on the Environment*, Working Paper, at 3-4 (1999), *available at:* <http://www.iisd.org/pdf/nafta.pdf>. (Last visited: Dec. 26, 2011).

[66] Coe, Jr., *supra* note 46, at 1437-9.

[67] GARNER, *supra* note 6, at 1266.

[68] Choudhury, *supra* note 10, at 791.

resources, fisheries, oil and gas, electricity, transport systems, telecommunications, waste management services, power generation, dams or major built infrastructure such as supplies regarding water, sanitation, roads and other transport[69]; labor standard; minority rights, race discrimination and policies of affirmative action[70]; and economic hardship.[71] The citizens of the host government have a legitimate stake in preserving the domain of sovereign prerogative and maintaining the efficacy and integrity of the policies in which their values and interests lie.

(b) Fiscal accountability

A broader legitimacy and accountability crisis in relation to the outcome of the arbitration arises for the host state. Regardless of the state's success in defending itself before the arbitral tribunal, ballooning costs of arbitration sometimes result.[72] Amounts of damages claimed by the investor tend to be substantial and directly impact state budget. Adverse decisions leading to an increasingly large amount of damages—exhibited in the spate of claims against Argentina[73]—are paid out by public's tax revenue. Staggering amounts of legal

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[69] International Institute for Sustainable Development, *Revising the UNCITARL Arbitration Rules to Address Investor-State Arbitrations*, at 4 (2007), *available at:* <http://www.iisd.org/pdf/2007/investment_revising_uncitral_arbitration_september.pdf>. (Last visited: Dec. 26, 2011); Daniel B. Magraw Jr. & Niranjali M. Amerasinghe, *Transparency and Public Participation in Investor-State Arbitration*, 15 ILSAJICL 337, 339 (2009).

[70] ALESSANDRA ASTERITI & CHRISTIAN J. TAMS, *Transparency and Representation of the Public Interest in Investment arbitration*, SCHILL, S.W. ED., INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 792 (Oxford University Press, 2010).

[71] Choudhury, *supra* note 10, at 792, 821-2.

[72] Franck, Susan D., The *Legitimacy Crisis in Investment arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005).

[73] Magraw Jr. & Amerasinghe, *supra* note 69, at 339.

Another notable example is the case of *CME Czech Republic B.V. v. The Czech Republic* under

fees for defense have also been documented in past cases, exacerbated by protracted proceedings lasting for years.[74] In the case of *Aguas del Tunari, S.A.* against the Republic of Bolivia for example, Bolivia had expended US$1.6 million in legal fees by the time the arbitration was finalized.[75] Moreover even when the claim is unsuccessful tribunals are not required to award the state its costs.[76] NAFTA Chapter 11 tribunals for instance, have frequently declined to do so citing their discretion in the matter.[77] Without the home state distinguishing worthy grievances from frivolous claims through the exercise of diplomatic protection, the host government and ultimately its public may be left vulnerable to the burden of unmeritorious complaints and the associated economic costs.

(c) Value as precedents

The accruing cases of ITA contribute to the growing corpus of international investment law by serving as *de facto* precedents. Even though no rule of *stare decisis* exists in any major dispute resolution forum, references to the reasoning in prior decisions of similar cases have been frequent.[78] Given the

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the Netherlands-Czech Republic BIT in which Czech Republic was ordered to pay $355 million, one of the largest awards ever made in arbitration proceeding, to Central European Media Enterprises.

[74] Coe, Jr., *supra* note 46, at 1456.

[75] Paul Harris, Bechtel, Bolivia Resolve Dispute: Company Drops Demand Over Water Contract Canceling, S.F. Chron., Jan. 19, 2006, *available at:* <http://articles.sfgate.com/2006-01-19/news/17278905_1_aguas-del-tunari-bolivian-government-bechtel/2>. (Last visited: Dec. 26, 2011).

[76] ICSID Convetnion, art. 41; ICSID Additional Facility Rules, *supra* note 30, art. 58.

[77] Jack K. Coe, Jr., *The State of Investor-State Arbitration-Some reflections on professor Brower's plea for sensible principles*, 20 AM. U. INT'L L. REV. 929, 932 (2005).

[78] Jorge E. Viñuales, *Human Rights and Investment Arbitration: The Role of Amici Curiae*, 8 INTERNATIONAL LAW: REVISTA COLOMBIANA DE DERECHO INTERNACIONAL 231, 238 (2006).

de facto precedential value, the public has an interest in overseeing the increasing body of cases which may potentially influence future disputes.

4. Implication of concerns over legitimacy

ITA's inception before the maturation of the modern regulatory state suggests that regulatory implications of ITA were not a consideration during the modeling of the architecture of ITA.[79] The public's "right to know" or conversely the applicability of confidentiality is not a natural corollary to choosing a less public venue for investment disputes. Incorporation of transparency measures is rather a procedural adaptation against the backdrop of increasing public interests found in investment disputes.

Problems surrounding the presence of public interests in ITA are compounded by a lack of openness in the system. The exercise of regulatory authority is subject to the principle of good governance which requires states to ensure transparency and public participation in governmental activities and decision making process.[80] Depriving the citizens of essential knowledge regarding public affairs is contrary to the basic requirements of the principle which has become the chief rationale behind the transparency movement in ITA. Enhancing transparency and accountability does not only benefit the citizens of the host state but also strengthen the credibility of the regime, particularly in the eyes of its detractors.

[79] Magraw Jr. & Amerasinghe, *supra* note 69, at 339.

[80] International Institute for Sustainable Development, *supra* note 69, at 7.

III. DEVELOPMENT OF *AMICUS CURIAE* PARTICIPATION IN INVESTMENT TREATY ARBITRATION AS A SOLUTION TO THE LEGITIMACY CHALLENGES

A. *Amicus Curiae* Participation as a Means of Enhancing Legitimacy

1. Measures to enhance legitimacy in investment treaty arbitration

A number of ways have been contemplated in the judicial context to achieve the appropriate level of transparency required to ensure the legitimacy of a system whilst preserving its integrity. The imprecise nature of the concept has spawned a broad spectrum of modalities of public access which is similarly applicable in the investment-specific context. The least intrusive mode arguably is the access to information that a dispute is pending.[81] The ICSID, for instance, lists all pending cases on its website.[82] ICSID also allows access to files compiled during the process such as the pleading of the parties, access to the evidence as well as attendance at open hearing, possibly via a live closed-circuit broadcast.[83] Transparency measures may extend to the timely publication of the tribunal's procedural rulings and awards or at the least summary of the awards.[84] ICSID again is required to publish excerpts of the legal reasoning of the Tribunal[85] and a substantial number of awards are published in full on the ICSID

[81] Bjorklund, *supra* note 32, at 1287.

[82] However ITAs administered under the UNCITRAL Rule or other institutional rules need not be made public.

[83] JOACHIM DELANEY & DANIEL B. MAGRAW, *Procedural Transparency*, in PETER MUCHLINSKI ET AL EDS., THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 743-6 (Oxford University Press, 2008).

[84] *Id*. at 775-6.

[85] ICSID Arbitral Rules, art. 48(4); ICSID Additional Facility Rules, *supra* note 30, art. 53(3).

website and in ICSID Reports. In the NAFTA context, following the Statement of the Free Trade Commission of 2001, the three state parties disclose rulings on their respective websites.[86] Another significant development in the field and the main focus of this Article is submission of *amicus curiae* briefs. Some commentators go further as to argue that oral submissions at the hearing and cross-examination of witnesses should be allowed in a limited capacity.[87]

Third party participation, in a broad sense of the term, refers to all of the above initiatives. For the purpose of this Article however, third party participation shall only refer to the active intervention on the part of the non-litigants—mostly public interest groups—in the form of *amicus curiae* submission. The importance of this particular modus of non-disputing party access to ITAs lies with the opportunity for the public to have a meaningful say in the dispute resolution process and potentially impact its outcome.

2. Rationale behind *amicus curiae* participation

Although arbitrators are experts in their own respective fields and the disputing parties clearly consider them sufficiently qualified and credible to decide the outcome of the disputes, they nonetheless operate with incomplete information that only parties present to the tribunal. As has been observed above, the complexity of the disputes increasingly extends beyond purely investment issues to touch on public policy questions, posing a challenge for the arbitral tribunal. Submission of *amicus curiae* briefs assists the tribunal by adducing different legal perspectives, useful technical or background information, broader policy implications pertaining to a possible outcome.[88]

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[86] DELANEY & MAGRAW, *supra* note 83, at 775.

[87] Kaushal, *supra* note 41, at 175.

[88] Paul M. Collins, Jr., *Lobbyists before the U.S. Supreme Court: Investigating the Influence of*

Some commentators question the necessity of *amicus curiae* participation in ITA given that arbitral tribunals are already privy to the opinions of expert witnesses and non-disputant states.[89] The significance of *amicus curiae* participation, however, lies with the voluntary nature of public participation aimed specifically at broader societal ramifications. The importance of participation can be found not only in the presented argument or opinion itself; the fact that it is open to the general public buttresses the overall persuasiveness of the ITA regime. Reviews of governmental conducts held in secrecy by the party-appointed arbitrators have come under intense scrutiny in recent years, threatening to delegitimize outcomes of ITA and the system as a whole.[90] The potential of ITA to usurp sovereign decision-making powers particularly in areas of significant public interest has generated substantial concern over its legitimacy[91] and if left unaddressed these misgivings could fester and propel states to step away from ITAs forcing investors to rely on the ineffective traditional mechanism of diplomatic protection.[92]

The potential benefits of *amicus curiae* participation will be discussed in full in Part IV C. below.

3. Implications of *amicus curiae* participation in investment treaty arbitrations

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Amicus Curiae Briefs, 60 (1) POL RES. Q. 55, 58 (2007).

[89] Jack J. Coe, J., *Transparency in the Resolution of Investor-State Disputes—Adoption, Adaptation, and NAFTA Leadership*, 54 KANSAS LAW REVIEW 1339, 1362 (2006).

[90] Statement by the OECD Investment Committee, OECD, *Transparency and Third Party Participation in Investor State Dispute Settlement Procedures*, Working Papers on International Investment No. 2005/1, at 1 (June 11, 2005).

[91] Levine, *supra* note 11, at 205.

[92] Alexis Mourre, *Are Amici Curiae the Proper Response to the Public's Concerns on Transparency in Investment Arbitration?*, 5 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 257, 266 (2006).

Admission of *amicus curiae* briefs in investment disputes entails more complex considerations than other types of transparency measures such as open hearings or publication of awards would, due to its potential influence on the scope, complexity, length, and ultimately the cost of the process.[93] The admission of *amicus curiae* briefs into the arbitral proceeding is not a self-executing process but requires extensive management on the part of the tribunal to avoid duplication in submissions[94] and unjustifiably expanding the scope or redirecting the focus of the dispute.[95] Moreover the implications of *amicus curiae* participation are not limited to a particular tribunal given the *de facto* precedential value afforded on ITA cases in practice.[96]

The transference of *amicus curiae* participation from domestic legal system to the ITA has not been seamless in practice and encountered reluctance from a number of states, NGOs and general observers.[97] Hence it is not unexpected of forums which accommodate *amicus curiae* participation in their procedures to accord substantial discretion to the individual tribunal in its treatment of *amicus curiae* participation. As discussed below, tribunals regard as their prerogative to admit as well as to decline submissions.[98] Firmly entrenched

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[93] Meg Kinnear, *Transparency and Third Party Participation in Investor-State Dispute Settlement,* Making the Most of International Investment Agreements: A Common Agenda, Symposium Co-Organized by ICSID, OECD and UNCTAD, at 5 (Dec. 12, 2005).

[94] CHRISTINE CHINKIN & RUTH MACKENZIE, *Intergovernmental Organizations as "Friends of the Court",* in BOISSON DE CHAZOURNES *ET AL.* EDS, INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL DISPUTE SETTLEMENT: TRENDS AND DISPUTES—TRENDS AND PROSPECTS 137 (Transnational Pub, 2002).

[95] Coe, J., *supra* note 89, at 1363.

[96] Viñuales, *supra* note 78, at 238.

[97] Coe, J., *supra* note 89, at 1364.

[98] Coe, J., *supra* note 89, at 1364.

is also the belief that *amicus curiae* participation is not a right.[99]

Given the ITA's far-reaching nature of implications, it is necessary to delve into the recent development and juridical nature of *amicus curiae* participation in ITA rules and practices to understand its repercussions, both positive and negative, for the broader context of investment norms. The conditions set for the admission of *amicus curiae* briefs and the possibility of developing formalized criteria can also clarify the role *an amicus curiae* should play in these proceedings and the long term prospects for *amicus curiae* petitions in ITA.

B. Evolution of *Amicus Curiae* Participation in Investment Treaty arbitration

The ICSID Convention, Arbitration Rules and Additional Facility rules which are strongly inspired by the commercial arbitration model are exclusively applicable to the resolution of investment disputes. An array of state and international institutions also provides for arbitration rules which, though established for commercial arbitrations, are generally applicable to ITA. The ICC Rules of Arbitration, the UNCITRAL Arbitration Rules, the LCIA Arbitration Rules and the SCC Arbitration Rules are amongst the most well known. Treaty regimes, most prominently the NAFTA, generally prescribe such set of rules to be chosen by the disputing parties on a case-by-case basis.

Amicus curiae participation has not been traditionally permitted in ITA.[100] Increasingly palpable legitimacy deficits in ITA however have prompted

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[99] Tomoko Ishikawa, A Global Network for Dynamic Research and Publishing, *NGO Participation in Investment arbitration*, at 109, *available at:* <http://www.inter-disciplinary.net/wp-content/uploads/2010/02/EJGC7ver2050210.pdf#page=112>. (Last visited: Dec. 26, 2011).

[100] Choudhury, *supra* note 10, at 814.

a number of initiatives aimed at reinforcing transparency and accountability of the regime. The procedural development of *amicus curiae* participation in granting rights intervene to non-litigants in ITA has been at the center of the movement, garnering both appreciation and apprehension along the way.

In terms of greater transparency and *amicus curiae* participation ICSID has been most keen to incorporate such demands. However it was the experience within the NAFTA framework that has paved way for greater transparency and inclusiveness, inspiring the development in ICSID, especially its 2006 amendment. In particular the evolution of rules and practices regarding *amicus curiae* participation has been prominent in recent years in the NAFTA and ICSID context. Attempts to encompass transparency demands have also been made in various arbitration rules, most notably the UNCITRAL Rules. These efforts to accommodate the public law dimension of ITA have not progressed to tangible changes at the same pace or elicited identical response, thus accounting for the different level of transparency in various arbitration frameworks.

1. NAFTA

NAFTA came into force on January 1, 1994. The Chapter 11 includes extensive panoply of investment protection provisions and ITA procedures. Under NAFTA Chapter 11 Section B, an investor may initiate investment disputes on the basis of one of the following sets of predetermined arbitral rules: the ICSID Arbitration Rules, ICSID Additional, or the UNCITRAL Arbitration Rules. In NAFTA practice disputes are most commonly resolved under the *ad hoc* arbitration pursuant to the rules of the UNICTRAL.[101] Since the U.S. is the

[101] Tomoko Ishikawa, *Third Party Participation in Investment arbitration*, 59(2) I.C.L.Q. 373, 378 (2010).

only contracting state to the ICSID Convention,[102] Chapter 11 disputes cannot be commenced under the ICSID Arbitration Rules. Although disputes between the US and Mexico or Canada may be resolved by arbitration pursuant to the ICSID Additional Facilities Rules, those between Mexico and Canada cannot be adjudicated within the realm of ICSID.

Transparency and public interest questions have been raised in the early cases of *Ethyl* and *Metalclad*. *Metalclad*, criticized by NGOs and public interest groups for its lack of regard for concerns of environment and sustainable development[103], led them to engage in a systemic effort to rectify this perceived failure. *Amicus curiae* petitions were made under the NAFTA Chapter 11 arbitration in the subsequent case of *Methanex* for the first time. This seminal case effectively inaugurated the practice in ITA and was shortly afterwards followed by a statement of the Free Trade Commission of NAFTA (hereinafter "NAFTA FTA"). NAFTA FTC, comprising of cabinet-level representatives from each state, is responsible for supervising the implementation and overseeing further elaboration of the NAFTA, and resolving disputes that may arise regarding its interpretation or application.[104] FTC has the formal authority to converge the opinion of the three states which in turn has binding power on Chapter 11 tribunals.[105] It elucidates previously unclarified NAFTA policy and unifies the approach taken by individual tribunals. With regard to amicus curiae participation, NAFTA FTC in 2003 detailed the procedures according to which non-disputing party submissions are to be dealt with by individual tribunals.

Since *Methanex* and the clarification by NAFTA FTC, the civil society increasingly established itself as the *amicus curiae* in position to address the far-

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[102] Canada has signed but not ratified the ICSID Convention and Mexico is not a signatory.

[103] *Methanex* Decision, *supra* note 48, para. 6.

[104] NAFTA, *supra* note 54, art. 2001(2).

[105] NAFTA, *supra* note 54, art. 1131(2).

reaching implications of public interests within the ITA mechanism. This section will examine the chronological development of *amicus curiae* participation in Chapter 11 arbitration and assess its significance within the wider framework of ITA.

(a) NAFTA text and legitimacy concerns

The NAFTA text contains minimal references to the treatment of privacy or *amicus curiae* participation. Article 1137(4) and Annex 1137.4 govern the public disclosure of awards. United States and Canada allow the disputing party state or the foreign investor to make an award public whereas Mexico simply provides that relevant arbitration rules apply to the publication of an award. The public is however excluded from the review of the pleadings, evidence, or other written arguments and no provisions exist to govern *amicus curiae* participation. Article 1119 requires the disgruntled investor to deliver a written notice of intent to submit a claim to arbitration to the host state. There is no confidentiality requirement applicable to the notice and the state complained against may reveal the notice of intent to the public. Crucial for an *amicus curiae* to participate, the knowledge of impending claims against Canada and Mexico have been made on respective governments' websites, though not always in a timely fashion. Most cases against the US have been made aware through private websites rather than official channels.[106] Even though Article 1126(13) requires the NAFTA Secretariat to maintain a public register of arbitration claims it can only be accessed in the Secretariat office of the respondent state. A more practical access point is the government website but to the detriment of a prospective *amicus curiae*, there are usually a significant lag between the filing of the claim and

[106] VanDuzer, *supra* note 2, at 702.

actual posting.[107] Disclosure measures, particularly after the commencement of the arbitration, will be further discussed below in Part III B. 1. (d).

Neither NAFTA nor any of the arbitral rules contemplated in Chapter 11 explicitly provides for *amicus curiae* participation although Article 1127-1129 addresses the participation of the non-disputant NAFTA state. The scarcity of NAFTA provisions directly attending to public interest, third party participation and transparency led a horde of critics to voice doubts as to the legitimacy of the NAFTA regime and call for greater openness in Chapter 11 proceedings.[108] Apprehension over the legitimacy of NAFTA arbitrations have been answered by a number of tribunals that permitted *amicus curiae* participation after and even before the NAFTA Free Trade Commission issued two clarifying statements in 2001 and 2003.

(b) *Methanex Corp. v. United States*[109]

Background

Methanex is a case between Canadian-based Methanex Corporation and the US. Methanex is a major producer of methanol, a key ingredient for Methyl Tetra Butyl Ether (MTBE) which is a gasoline additive. Methanex was banned from supplying methanol in the US when the Governor of the State of California issued an executive order[110] in 1999 prohibiting the use of MTBE in gasoline by

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[107] VanDuzer, *supra* note 2, at 702-3.

[108] Naveen Gurudevan, *An Evaluation of Current Legitimacy-Based Objections to NAFTA's Chapter 11 Investment Dispute Resolution Process, Comment*, 6 SAN DIEGO INT'L L.J. 399, 425-7 (2005).

[109] *Methanex* Decision, *supra* note 48.

[110] Executive Order D-5-99 (March 25, 1999), cited in *Methanex Corporation v. United States*, UNCITRAL, Final Award, Aug. 3, 2005, Part II, Chap. A, para. 9.

2002 after safety concerns were raised over its carcinogenicity and contamination of drinking water supplies. The Governor reasoned that the ban was a necessary measure for the protection of health and the environment.

Methanex sought compensation of US$970 million arguing that the regulatory action taken by the Governor was tantamount to expropriation and unduly influenced by the donation the largest ethanol producer in the US, Archer Daniels Midland, had made to the Governor's election campaign. Accordingly Methanex challenged the ban by invoking NAFTA's provisions on expropriation (Article 1110) and minimum standard of treatment (Article 1105). The US has also allegedly violated the NAFTA's national treatment provision (Article 1102) for benefiting its national, ADM economically at the expense of a foreign investor, Methanex.

Amicus curiae petitions

Three NGOs, International Institute for Sustainable Development (hereinafter "IISD"), Communities for a Better Environment and Earth Island Institute sought to participate in the proceedings. The NGOs requested permission to present written and oral submissions, attend the hearings with observer status and review the pleadings and documents generated during the proceedings.[111]

The requests were based on a two-part reasoning: legal and policy.[112] As to the legal aspects, the NGOs invoked Article 15(1) of the UNCITRAL Rules, a provision conferring a discretionary power to the tribunal to "conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each

[111] *Methanex* Decision, *supra* note 48, paras. 5, 7.

[112] Viñuales, *supra* note 78, at 250.

party is given a full opportunity of presenting his case." In the absence of any rules or practices of NAFTA Chapter 11, WTO and the US and Canadian domestic courts to the contrary, it was argued that the tribunal had the procedural discretion to allow *amicus curiae* participation under this article.[113] For the policy arguments the third parties advanced the position that the environmental issues involved in the case is of significant public interest and that the outcome of the dispute would likely impinge on the regulatory ability of the member states to protect the environment.[114] It was also argued that third party participation would help alleviate public disquiet regarding the confidential nature of Chapter 11 arbitration.

Views of the member states

In light of the petition, the tribunal requested views from the member states; the US and Canada supported the petition while Mexico did not. According to the US and Canada, departing from the practices developed in relation to commercial arbitration with respect to *amicus curiae* participation is not only within the ambit of the tribunal's power but the failure to do so would prolong the perception that Chapter 11 arbitration was an "exclusionary and secretive process"[115] It was maintained that despite the potential additional burden, the contribution of *amicus curiae* was far too valuable.

Mexico on the other hand opposed the application for the following

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[113] *Methanex Corp. v. United States*, UNCITRAL, Petitioner's Final Submissions – Regarding the Petition of the International Institute for Sustainable Development to the Arbitral Tribunal for Amicus *Curiae* Status, Oct. 16, 2000, paras. 31-7, *available at:* <http://www.state.gov/documents/organization/3934.pdf>. (Last visited: Dec. 26, 2011) (hereinafter "*Methanex* Submission").

[114] *Methanex* Submission, *supra* note 113, para 38.

[115] *Methanex* Decision, *supra* note 48, para. 22.

reasons[116]: (i) participation under Chapter 11 is restricted to the NAFTA parties; (ii) *amicus curiae* participation is only found in common law and not civil law jurisdictions so the incorporation of the practice would be disruptive to the balance of the two legal conventions within NAFTA; (iii) an *amicus curiae* would enjoy a greater degree of participation than a non-disputant state would under Article 1128 which allows the latter to address the question of interpretation of NAFTA; (iv) the UNICTRAL Rules provide for the confidentiality of proceedings; (v) admitting *amicus curiae* participation is equivalent to adding another party and endowing the *amicus curiae* with substantive rights; (vi) public interest claimed by the *amici curiae* can adequately be addressed by the non-disputing state through the use of Article 1128 and; (vii) the considerable increase in the cost of proceedings adds to the already taxing process.

Ruling on amicus curiae participation

The tribunal ruled in its Decision of the Tribunal of 15 January 2001 on Petitions from Third Persons to Intervene as *Amici Curiae*, that it has the jurisdiction to receive *amicus curiae* briefs but not to allow petitioners access to proceedings or attendance at hearings[117]. The tribunal accepted the written submission by the *amici curiae* because it had the authority to do so and not because the *amici curiae* had the right to participate. In granting application for the submission of *amicus curiae* brief, the tribunal addressed the following

[116] *Methanex Corp. v. United States*, UNCITRAL, Submission of Mexico Re Petitions for Amicus Statues, Nov. 22, 2000, *available at:* < http://www.state.gov/s/1/c5821.htm>. (Last visited: Dec. 26, 2011).

[117] The hearings on the merits were eventually opened to the public via a live, closed circuit television broadcast, but only with the consent of the parties.

questions.[118]

First, the tribunal determined if the receipt of written briefs falls within the ambit of the Article 15(1) of the UNCITRAL Rules. The tribunal interpreted Article 15(1) as imparting to individual tribunals the broadest procedural flexibility, which nevertheless is confined to procedural matters. The acceptance of *amicus curiae* briefs that does not accord the third person with any substantive rights is not akin to treating non-parties as Disputing Parties or as NAFTA Parties which is clearly beyond the scope of procedural questions. Tribunal concluded with reference to similar precedents from the Iran-US claims tribunal and the WTO Appellate Body that permitting third parties to file written submissions is a procedural matter the tribunal has the power to decide.[119]

Second, with respect to the concern that admission of *amicus curiae* briefs could undermine the principle of equal treatment of the Disputing Parties delineated in Article 15(1), the tribunal conceded it was a potential risk. This burden however, is neither inevitably excessive nor unequally distributed between the Disputing Parties. The tribunal furthermore suggested it is the role of the tribunal to safeguard the rights of the parties by adopting measures to mitigate any potential risks related to the *amicus curiae* participation.[120]

The third question concerned whether other provisions of the UNICTRAL Rules modify the application of Article 15. It was clear to the tribunal that UNCITRAL Rules 25(4) requiring the confidentiality of hearings as a default rule circumscribes the flexibility of Article 15(1). This qualification however applies only to the petitioner's request for observer status at the hearing, access to parties' pleadings and files and oral presentation; it does not extend to

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[118] *Methanex* Decision, *supra* note 48, para. 28.

[119] *Methanex* Decision, *supra* note 48, paras. 29-34.

[120] *Methanex* Decision, *supra* note 48, paras. 35-37.

the submission of written briefs.[121]

Following the adoption of the FTC Statement on Non-Disputing Party Participation (hereinafter "FTC Statement") in 2003, which will be discussed in detail below, parties agreed that the Statement provided a useful guideline and that the tribunal adopted the recommended procedure in its treatment of *amicus curiae* participation. The tribunal also issued a press release announcing the procedures to be followed in the future application for *amicus curiae* participation.

The tribunal ultimately received in 2004 an *amicus curiae* brief from IISD and another joint *amicus curiae* brief from Bluewater Network, Communities for a Better Environment and Center for International Environmental Law.

Contribution of Methanex

Though the petitioners were highly regarded and their input acknowledged as "carefully reasoned" by the *Methanex* tribunal[122], it is quite unlikely that their participation affected the outcome.[123] The position advanced by the *amici curiae* was for the most part consistent with that of the US which was ultimately included in the award.

This is not to say that the initiation of *amicus curiae* participation in *Methanex* was fruitless. Quite the contrary, *Methanex* has been pivotal in instilling accessibility and openness into the NAFTA arbitral proceedings. In rendering its decision, the tribunal was acutely aware of the risk of a blanket refusal of *amicus curiae* participation on the public image of Chapter 11

[121] *Methanex* Decision, *supra* note 48, paras. 40-46.

[122] The tribunal described the NGOs' credentials as "impressive."

[123] Coe, J., *supra* note 89, at 1375.

arbitration.[124] *Methanex* was the first case in which the tribunal invoked its discretion under Article 15(1) of the UNCITRAL Rules to admit *amicus curiae* briefs. En route to this conclusion the *Methanex* tribunal sheds substantial light on the legal basis for and limits in admitting *amicus curiae* briefs in the NAFTA context.

(c) *United States Parcel Services of America v. Canada*[125]

Background

United Parcel Service of America, a US parcel delivery service provider sought compensation against Canada for damages incurred as a result of a monopoly granted by Cananda to the Canadian Postal Service. UPS alleged this anti-competitive measure enabling CPS to compete unfairly against UPS violates Article 1102 (national treatment) , 1105 (minimum standard of treatment), 1502 and 1503 of NAFTA.

Amicus curiae petitions

The Canadian Union of Postal Workers, an employees' union and the Council of Canadians, a citizen's organization, petitioned seeking standing as parties in the proceedings, and in the alternative the right to participate as *amicus curiae*.[126] Petitioners contended their direct interests and unique perspectives on

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[124] *Methanex* Decision, *supra* note 48, para. 49.

[125] *United Parcel Service of America Inc.* v. *Government of Canada,* UNICTRAL, Decision of the Tribunal on Petitions for Intervention and Participation as Amici *Curiae*, October 17, 2001 (hereinafter "*UPS* Decision").

[126] *UPS* Decision, *supra* note 125, para. 1,

the case qualified them to contribute to its broader policy implications and as such were entitled to the party status which would authorize them to lead evidence, call witnesses, and argue law.[127] Should it be denied, the petitioners requested the right to participate as *amicus curiae*. The interveners also applied for the disclosure of materials generated in the case and the right to make submissions concerning the place of arbitration, the Tribunal's jurisdiction and the arbitrability of the matters raised by *UPS*.

Views of the member states

As in the *Methanex* case, the United States and Canada acknowledged the tribunal's power to receive *amicus curiae* briefs while Mexico disagreed. The disputing parties however, opposed the third parties' request concerning the party standing for the tribunal lacks the jurisdiction to add them as parties to the arbitration. It was argued that no basis exists as for the tribunal to admit submissions regarding procedural issues including the jurisdiction of the tribunal and the place of arbitration

Ruling on amicus curiae participation

Ten months after the *Methanex*, the tribunal delivered its verdict in the Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae* of 17 October 2001. Employing the same approach as the *Methanex* tribunal, the *UPS* tribunal ruled that it had the authority to receive non-disputing party submissions under Article 15(1) of the UNCITRAL Arbitration Rules. The tribunal interpreted the power accorded by Article 15(1) to extend to the

[127] Kaushal, *supra* note 41, at 180.

investigation and determination of the subject matter in a just and efficient fashion.[128]

The tribunal however elucidated the procedural limits of *amicus curiae* participation with respect to the observance of the requirement of equality and the parties' right to present their cases before the tribunal. According to the tribunal, *amicus curiae* brief may not unduly burden the parties or unreasonably protract the arbitral process.[129] In this regard third parties are not entitled to call witnesses and the disputant parties and other NAFTA member state are given an opportunity to submit response to such *amicus curiae* briefs. The tribunal issued further directions in 2003 according to which the admission of written briefs is hinged on the likelihood the submissions will be able to provide assistance beyond that provided by the disputing parties. Moreover the *amici curiae* cannot introduce new issues or extend the scope of the case as defined by the disputing parties.[130]

With respect to all the other aspects in the application the tribunal denied the *amici curiae*'s requests. Concerning the possibility of *amicus curiae* input for procedural issues the tribunal reasoned that it possessed all the requisite capacity to determine the relevant matters without the assistance of a third party. Similarly the request for party status was rejected for it regarded the addition as parties of non-disputing third persons as lying beyond the power conferred on it by NAFTA. In another word, the tribunal's mandate covers only the deciding of the substantive dispute at hand and does not extend to the determination of the legal status of third parties. Reiterating the *Methanex* decision on Article 15(1), the tribunal ruled treating non-parties as disputing parties or as NAFTA parties is

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[128] *UPS* Decision, *supra* note 125, para. 27.

[129] *UPS* Decision, *supra* note 125, para. 69.

[130] *United Parcel Service of America Inc.* v. *Government of Canada*, UNICTRAL, Direction of the Tribunal on the Participation of Amici *Curiae*, Aug. 1, 2003.

not a procedural matter and thus falls outside of Article 15(1) and the tribunal's procedural discretion.

Contribution of UPS

UPS tribunal addressed the request for procedural intervention and party status which was not sought in *Methanex*. This request illuminates the inherent dilemma of *amicus curiae* participation in ITA. The generally salutary contribution of *amicus curiae* participation particularly in cases of public character can be counteracted by an excessive interference in the proceedings that undermines the underpinnings and rationale of arbitral procedure, detracting from its effectiveness as a dispute resolution mechanism. It can ultimately drive investors away from ITA. The tribunal's circumspect approach to the possibility of a broad intervention, specifically with respect to the determination of procedural matters thus lies with the fundamental concern that the *amicus curiae* is not to usurp the role of the disputing parties.[131] In this respect *amici curiae* were more of an advocate than expert whose role is limited to shedding insight on the public ramification of *UPS* tribunal's decision.[132]

(d) FTC Statement of 7 October 2003

With respect to transparency issues, the FTC has adopted the Notes of Interpretation of Certain Chapter 11 Provisions (hereinafter "FTC Notes of Interpretation") in 2001 and the FTC Statement in 2003.

The FTC Notes of Interpretation provides clarifications regarding

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[131] *United Parcel Service of America Inc.* v. *Government of Canada,* UNICTRAL, Canada: Submission on the Amicus Petitions, May 28, 2001, para. 44.

[132] Viñuales, *supra* note 78, at 254.

transparency provisions in NAFTA, in particular access to documents. In particular, the FTC Notes of Interpretation reaffirmed the absence of a general duty of confidentiality on the part of the parties under NAFTA. It confirmed the commitment of the parties to make all documents submitted to or issued by the arbitral tribunal available to the public in a timely manner, subject to redaction of confidential business information and privileged or otherwise protected information.[133] FTC Notes of Interpretation, however, is incomplete in two aspects. Firstly, the specific materials available to non-disputing parties may vary from case to case depending on the tribunal's decision since the disclosure is subject to limited specific exceptions set forth expressly in the relevant arbitration rules.[134] For instance, under the ICSID Arbitration Rules and Additional Facility Rules as well as the UNCITRAL Arbitration Rules, setting the procedural matters is left to the individual tribunal.[135] Secondly, the FTC Notes of Interpretation failed to address open hearings, perhaps due to the party consent requirement in the applicable arbitration rules above.[136] This limitation was redressed when in 2003 Canada, followed by Mexico and the US in 2004 declared its commitment in a joint FTC statement to allow the attendance of the public at oral hearings.[137]

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[133] NAFTA Free Trade Commission, Notes of Interpretation on Certain Chapter 11 Provisions, July 31, 2001, para. A.2.(b) (2001) (hereinafter "FTC Notes of Interpretation"), *available at*: < http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en&view=d>. (Last visited: Dec. 26, 2011).

[134] FTC Notes of Interpretation, *supra* note 133, para. A.1.

[135] UNCITRAL Arbitration Rules, *supra* note 3, art. 15; ICSID Arbitration Rules, *supra* note 29, art. 20; ICSID Additional Facility Rules, *supra* note 30, arts. 27-35.

[136] UNCITRAL Arbitration Rules, *supra* note 3, art. 25(4); ICSID Arbitration Rules, *supra* note 29, art. 32; ICSID Additional Facility Rules, *supra* note 30, arts. 39.

[137] NAFTA Free Trade Commission, Joint Statement (July 16, 2004), available at: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/js-sanantonio.aspx?lang=en&view=d>. (Last visited: Dec. 26, 2011).

The FTC Statement on the other hand provides a recommended process for Chapter 11 tribunals in their treatment of *amicus curiae* submissions and criteria for its permission. The FTC Statement was issued after the tribunals in *Methanex* and *UPS* have already articulated their positions on the matter.

Prefacing with the confirmation that nothing in NAFTA limits a tribunal's discretion to accept written submissions from a person or entity that is not a disputing party, the FTC Statement sets out a detailed guidance regarding the form, content and criteria of *amicus curiae* submissions. Tribunals in determining whether to grant leave to file a non-disputing party submission are to consider the extent to which (i) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (ii) the non-disputing party submission would address 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.[138] These non-exclusive criteria in determining the admissibility of *amicus curiae* brief refer to public interest but do not further elaborate on what constitutes the concept. The FTC Statement also urges tribunals to ensure that non-disputing party submission does not disrupt the proceedings and that the disputing parties are not unduly burdened or unfairly prejudiced by such submissions.

The recommendation closely delimits the role, extent and procedure for *amicus curiae* participation in Chapter 11 arbitration. The applicant must be a national of, or have significant presence in, one of the disputing parties. Additionally it is required to disclose its affiliation with any disputing party and

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[138] NAFTA Free Trade Commission, Statement of the Free Trade Commission on Non-disputing Party Participation, Oct. 7, 2003, 16 W.T.A.M. 167, para. B.6 (2004) (hereinafter "FTC Statement").

specify the nature of the interest that it has in the arbitration. The desire to expedite the process is exhibited in the requirements that both the application and the submission are to be of a limited length and filed simultaneously. The latter condition in particular places a burden on the applicant who must identify the specific issues of fact or law in the arbitration and present its position on the substantive issues of the case at an early juncture, without necessarily having the chance to acquaint itself with the case.[139] The tribunal also consults with the disputing parties in its acceptance of the submission.

With the adoption of the FTC Notes of Interpretation, FTC Statement and joint FTC statement on the three states' support of open hearings, much of the third party participation and privacy issues within the NAFTA context have been addressed. However, arbitral rules anticipating party consent as a precondition to open hearings and the possibility of "specific exceptions" to public access to documents in the FTC Notes of Interpretation inhibit a coherent approach to public access in Chapter 11 arbitration. The FTC Statement is also restrictive in that it does not extend *amicus curiae* participation to oral submissions or attendance at hearings.

(e) *Glamis Gold Ltd v. United States of America*[140]

Background

The claimant of the first case since the adoption of the FTC Statement is *Glamis* Gold Ltd., a Canadian firm engaged in a mining project in California. The claimant claimed the measure imposed by the federal government and the

[139] Coe, J., *supra* note 89, at 1379.

[140] *Glamis Gold Ltd v United States of America*, UNCITRAL, Decision on Application and Submission by Quechan Indian Nation, Sept. 16, 2005 (hereinafter "*Glamis* Decision").

State of California violated the expropriation and fair and equitable treatment provisions of NAFTA. The regulations required the mining company to backfill open-pit mines, recontour land after the mining operation ceases and grade mining activities near Native American sacred sites. The US invoked environmental concerns and aboriginal rights to defend the validity of its measures. The US contended that they were intended to: (i) ensure mined lands were reclaimed to usable condition and minimize adverse effect on the environment;[141] and (ii) protect sites sacred to a Native American tribe.

Amicus curiae petition

In August 2004 a petition was filed by the Quechan Indian Nation (QIN) who vehemently opposed the mining claims held by *Glamis*. The QIN argued that the mine was located on lands sacred to the Quechan tribe and that it could assist the tribunal by brining a unique insight in regards to the cultural, social, and religious values of the site and the severity of the potential impact of the mining activities on their ancestral lands. The QIN claimed the mining project impinged on their religious and cultural rights under, *inter alia*, Art 27 of the International Covenant on Civil and Political Rights.[142]

The tribe asserted it had 'significant interest' in the case based on the longevity of its existence in the area, the potential damage to its cultural heritage and way of life.[143] It also argued that the manner in which the issue will be dealt

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[141] *Glamis Gold Ltd v. United States of America*, UNCITRAL, Award, June 8, 2009, paras. 72-3 (hereinafter "*Glamis* Award").

[142] Article 27 of the ICCPR has been interpreted to protect the freedom of indigenous peoples to use land resources for traditional and cultural activities.
United Nations Human Rights Committee, General Comment No. 23 on Art. 27, Aug. 4, 1994, CCPR/C/21/Rev.1/Add.5, para. 7.

[143] *Glamis Gold Ltd v United States of America*, UNCITRAL, Quechan Indian Nation

with in the case could have a far-reaching impact on similar proceedings concerning indigenous people worldwide. Furthermore the tribe derived the public interest element from the possibility of, depending on the outcome of the case, rescission of the mining reclamation measures or increased cost to taxpayers for maintaining them.

In September 2005 within a month of the tribunal' decision to allow the QIN submission, Friends of the Earth Canada/Friends of the Earth United States (joint submission) and later in October 2006 Sierra Club/Earthworks (joint submission) petitioned to intervene as *amici curiae*. The public interest invoked in the application filed by the advocacy groups extended beyond the QIN's direct interest in the preservation of the sacred sites to include broader public concerns. The potential discouraging effect of the outcome of the case on investments in US mining operations and governmental regulations on public health, safety and the environmental issues have been expressed in the Friends of the Earth submission. It also claimed that the investor is not entitled to make claim under Chapter 11 as a dual national of Canada and the US.[144] In this regard Friends of the Earth submission went beyond what previous *amicus curiae* briefs in NAFTA have addressed.

In October 2006 the National Mining Association (NMA), an industry association representing the American mining sector also filed a petition with the tribunal. NMA based its argument on its interest in preventing potential negative

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Application for Leave to File a Non-Party Submission and Submission, Aug. 19, 2005, at 4, *available at:* <http://www.naftaclaims.com/Disputes/USA/*Glamis*/*Glamis*-Amicus-Quechan-01--19-08-05.pdf>. (Last visited: Dec. 26, 2011).

[144] The Friends of the Earth submission touched not only on the merits of the dispute but also on the tribunal's jurisdiction to hear the investor's claim.

Glamis Gold Ltd v United States of America, UNCITRAL, *Amicus Curiae* Submissions of Friends of the Earth Canada and Friends of the Earth United States, Sept. 30, 2005, at 12-14, *available at:* <http://www.naftaclaims.com/Disputes/USA/*Glamis*/*Glamis*-Amicus-FOE-01B--30-09-05.pdf>. (Last visited: Dec. 26, 2011).

consequences for the US mining industry, a vital stake for both its members and the public.[145]

Views of the disputing parties

The US supported the QIN submission while *Glamis* deferred to the rulings of the tribunal.

Ruling on amicus curiae participation

The tribunal accepted all the petitions as satisfying the principles set out in the FTC Statement. The discretion of the tribunal to permit *amicus curiae* briefs was not questioned for the proceeding began after the NAFTA issued the FTC Statement which clarified the issue.[146]

The tribunal had initially requested the *amici curiae* to file their written briefs prior to the submission of the disputing parties' memorials. Concerns were raised by the non-disputing parties that marshalling their views for meaningful submissions would be difficult without first examining the disputing parties' memorial and counter-memorial. As a response the disputing parties agreed that *amicus curiae* briefs could be filed contemporaneously with any submission by a party state on a question of interpretation of the NAFTA Agreement under Article 1128 which is filed after the submission of the respondent's counter-memorial.[147] In its decision the tribunal addressed the need to grant ample

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[145] *Glamis Gold Ltd v United States of America*, UNCITRAL, Application for Leave to File a Non-Diputing Party Submission by the National Mining Association, Oct. 13, 2006, at 1-3 (hereinafter "*Glamis* NMA Application").

[146] *Glamis* Decision, *supra* note 140, para. 9.

[147] *Glamis Gold Ltd v United States of America*, UNCITRAL, Procedural Order No.6, Oct. 15, 2005, paras. 11-12 (hereinafter "*Glamis* Procedural Order No. 6").

opportunity for the *amici curiae* to file meaningful and useful submissions.[148]

(f) Conclusion

Despite its shortcomings, Chapter 11 arbitration has undeniably been a testing ground for *amicus curiae* participation in ITA. The ground breaking decision of *Methanex*, followed by *UPS* has affirmed the tribunal's power to accept *amicus curiae* brief, explicated factors involved in the exercise of such discretion and established limits of *amicus curiae* participation. In both—and later *Glamis*—administered under the UNCITRAL Rules, the tribunals read Article 15(1) to allow the receipt of *amicus curiae* brief. The FTC Statement standardized the procedure in the treatment of third party participation within the NAFTA context. Tribunal decisions and the FTC Statement institutionalized *amicus curiae* brief as a legitimate form of public participation in ITA and despite NAFTA tribunals' limited jurisdiction their decisions had influence on other arbitral forums including ICSID tribunals.

2. ICSID

(a) ICSID texts and legitimacy concerns

The first multilateral treaty to establish compulsory arbitration jurisdiction to investment disputes between the host state and foreign investor, ICSID was established in 1965 under the auspices of the World Bank. ICSID arbitration rules, dedicated to the settlement of investment disputes are outlined in the ICSID Convention, the Administrative and Financial Regulations, Rules of

[148] *Glamis* Procedural Order No. 6, *supra* note 147, para. 13.

Procedure for the Institution of Conciliation and Arbitration Proceedings (hereinafter "Institution Rules") created by the ICSID Administrative Council pursuant to arts. 6(1)(a) to (c) of the ICSID Convention as well as the Rules of Procedure for Arbitration Proceedings. ICSID provides facilities for the settlement of investment disputes between Contracting States and nationals of other Contracting States[149] and its jurisdiction extends to legal disputes arising out of investment which the foreign investor and the state complained against have consented to submit to the Center.[150]

In 1978 the Administrative Council of ICSID created the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings to permit filing before the Center, disputes that are outside its jurisdiction because either the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State.[151]

As states increasingly consented to the jurisdiction of ICSID in a multiplicity of treaties and domestic legislations, arbitration under ICSID has extended beyond the traditional commercial sphere to expand into the public law domain.[152] Some commentators even claim, buttressed by the ever more significant weight arbitration carries in the settlement of regulatory investment disputes and control of the exercise of governmental authority, ITA constitutes an emerging body of global administrative law.[153] ITA as a manifestation of global administrative law and its relevance in formulating a standard for the acceptance of *amicus curiae* participation will be discussed in length in the later sections. This section focuses on the public aspect of the ICSID arbitration and in

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[149] ICSID Convention, *supra* note 28, art. 1(2).
[150] ICSID Convention, *supra* note 28, art. 25.
[151] ICSID Additional Facility Rules, *supra* note 30, art. 2.
[152] Harten & Loughlin, *supra* note 4, at 126-7.
[153] Harten & Loughlin, *supra* note 4, at 127.

particular its influence on the *amicus curiae* participation within the ICSID framework.

ICSID's approach traditionally has been to favor confidentiality, as considerable part of its jurisprudence is related to the interpretation of private contracts between the disputing parties.[154] According to the ICSID Convention, public disclosure of awards must be preceded by the consent of the parties.[155] Arbitration Rules stipulate that arbitrators are obliged to sign a declaration stating that "I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any award made by the Tribunal"[156] and deliberations must take place in private and remain secret.[157] Unless the tribunal rules otherwise, only members of the tribunal and no other person can participation in the deliberations.[158] With the consent of both parties, the tribunal may allow other persons besides the parties to attend or observe the hearings.[159]

Where the rules are silent, individual tribunals have discretion to determine the appropriate procedure to govern the confidentiality of proceedings.[160] For example in AMCO v. Indonesia the tribunal had decided, upon a request by Indonesia to prohibit AMCO from disseminating information about the case to the press, that the Convention and Rules did not anticipate an implied duty of confidentiality between the parties. Moreover the Center regularly publishes the existence of disputes pending before the Center and key

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[154] Amanda L. Norris & Katina E. Metzidakis, *Public Protests, Private Contracts: Confidentiality in ICSID Arbitration and the Cochabamba Water War*, 15 HVNLR 31, 45-6 (2010).

[155] ICSID Convention, *supra* note 28, art. 48(5).

[156] ICSID Arbitration Rules, *supra* note 29, art. 6(2).

[157] ICSID Arbitration Rules, *supra* note 29, art. 15(1).

[158] ICSID Arbitration Rules, *supra* note 29, art. 15(2).

[159] ICSID Arbitration Rules, *supra* note 29, art. 32(2).

[160] ICSID Convention, *supra* note 28, art. 44.

legal holdings of all awards on its website, pursuant to ICSID Arbitration Rule 48(4). Though precluded from publishing the award without the consent of the parties under Article 48(5) of the ICSID Convention, the Center actively seeks and usually obtains the consent of the parties to publish full text of the awards.[161]

The development of third party participation in ICSID began with the case of *Aguas del Tunari*, S.A. v. Republic of Bolivia which was shortly followed by the decision of *Suez*, Sociedad General de Aguas de Barcelona, S.A., and *Vivendi* Universal S.A. v. The Argentina (*Suez*/*Vivendi*, first petition) and Aguas Provinciales de Santa Fe, *Suez*, Sociedad General de Aguas de Barcelona, S.A. and *Interaguas* Servicios Integrales del Agua S.A. v. Republic of Argentina (*Suez*/*Interaguas*). In the absence of any explicit rules regarding the treatment of *amicus curiae* participation in the ICSID Convention and its supplementing Rules and Regulations, the tribunals reached inconsistent decisions. Against this backdrop changes to the ICSID Rules 32 and 37 were made in 2006, instituting the "three-part test" for the acceptance of *amicus curiae* briefs. *Biwater Gauff Ltd. v. United Republic of Tanzania*, *Suez, Sociedad General de Aguas de Barcelona, S.A.*, and *Vivendi Universal S.A. v. The Argentina* (*Suez*/*Vivendi*, second petition) applied the modified rules on *amicus curiae* participation and *Electrabel s.a. v. Republic of Hungary*, *AES Summit Generation Limited* and *AES-Tisza Erőmű Kft. v. Republic of Hungary* saw for the first time, participation of a supranational organization as a non-disputing party to the arbitral proceeding.

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[161] ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration*, Discussion Paper, at 8 (2004), *available at:* <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=14_1.pdf>. (Last visited: Dec. 26, 2011).

(b) *Aguas del Tunari, S.A. v. Republic of Bolivia*[162]

Background

Aguas del Tunari, S.A., a subsidiary of Bechtel Corporation was granted a 40-year concession to operate the sewage and water system in Cochabamba, Bolivia in 1999. The company imposed a raise of water rate by an average of over 50%, resulting in widespread protests which were countered by military force killing 1 and injuring 175 others. When the forcible measures failed to repress the protests, Aguas del Tunari abandoned its operation and left the country with the Bolivian government announcing its unilateral cancellation of the contract.

Aguas del Tunari has brought a claim against Bolivia for a breach of the Bolivia – Netherlands BIT in 2001 under the ICSID Additional Facility Rules, seeking to recoup damages of $25 million for anticipated profits lost in the water privatization scheme due to its unexpected departure.

Amicus curiae petitions

In 2002 over 300 public interest organizations and individuals filed a joint petition to the tribunal. They sought to, *inter alia*, intervene as parties on the merits of the case or failing that, to participate as *amici curiae* and file submissions on the procedural aspects, jurisdiction of the tribunal, and the arbitrability and merits of the claim. They also requested open hearings and

[162] *Aguas del Tunari, S.A. v. Republic of Bolivia,* David D. Caron, President of the ICSID Tribunal, Letter in Response to Petition, Jan. 29, 2003, available at: <http:// www.earthjustice.org/library/references/ICSIDResponse.pdf.> . (Last visited: Mar. 20, 2011) (hereinafter "*Aguas del Tunari* Letter").

access to documents compiled over the course of the case.[163] The petitioners legitimized their applications on the basis of their unique expertise and knowledge that would facilitate the tribunal in the resolution of the dispute, their specific and direct interests in the claim as well as the broad policy concerns the tribunal's award is likely to generate.

Ruling on amicus curiae participation

The tribunal denied all the above applications. The tribunal reasoned that the requests were beyond the power of the Tribunal to grant. Access to hearings and materials absent the consent of the disputing parties were outside the authority of the tribunal. As for the question of *amicus curiae* participation, the tribunal opined that at the jurisdictional phase seeking supplementary *amicus curiae* submissions was premature.

The proceedings were discontinued in 2006 when the disputing parties settled the dispute before an award could be made.

Contribution of Aguas del Tunari

The public scrutiny surrounding the case was colored by layers of public interest and secrecy that were embedded in the dispute itself as well as its resolution process. The privatization water resource was not favored by the Bolivian citizens and it raised concerns about the transparency of process since

[163] *Aguas del Tunari, S.A. v. Republic of Bolivia,* Petition of La Coordinadora para la Defensa del Agua y Vida, La Federación Departamental Cochabambina de Organizaciones Regantes, Semapa Sur, Friends of the Earth-Netherlands, Oscar Olivera, Omar Fernandez, Father Luis Sánchez, and Congressman Jorge Alvarado to the Arbitral Tribunal, Tunari, ICSID case No. ARB/02/3, Aug. 29, 2002, 20 ICSID Rev. Foreign Investment L.J. 450, 453 (2005).

the initial negotiation of the project. Vociferous hostility ensued when, despite intense opposition, the *Aguas del Tunari* instituted a rate hike which for some amounted to 25% of their incomes.[164] Brought against South America's poorest country, the amount of damages *Aguas del Tunari* sought to recover was estimated to significantly exceed the value of the abrogated investment.[165] Despite the nature of the dispute heavily laden with public implications, the tribunal rejected application from the third parties to intervene as *amici curiae*.

Such a perceived lack of transparency has not only engendered a backlash against ITA from the public but also incurred challenges directed at the BIT regime administered by the ICSID.[166] For instance, the Bolivian President Evo Morales encouraged Venezuela and Nicaragua to relinquish their ties with the ICSID, claiming "the multinationals always win".[167] In short, the *Aguas del Tunari* case demonstrates the vulnerability of the ITA regime against public's demands for transparency.

(c) *Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v. The Argentina* (*Suez/Vivendi I)* [168]

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[164] Norris & Metzidakis, *supra* note 154, at 38.

[165] United Nations Development Program, Human Development Report: Beyond scarcity: Power, poverty and the global water crisis, at 292 (2006), *available at:* <http://hdr.undp.org/en/media/HDR_2006_Tables.pdf.>. (Last visited: Dec. 26, 2011).

[166] Franz Chavez, Bolivia: The Story Behind Gas Nationalisation, Inter Press Serv., May 13, 2006, *available at:* < http://ipsnews.net/news.asp?idnews=33227.>. (Last visited: Dec. 26, 2011).

[167] Sadaf Afzal, Latin Nations Suspending World Bank Arbitration, Money Times, Apr. 30, 2007, *available at:* <http://www.themoneytimes.com/articles/20070430/latin_nations_suspending_world_bank_arbitration-id-103414.html>. (Last visited: Dec. 26, 2011).

[168] *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. And The Republic of Argentina*, Order in Response to a Petition for Transparency and Participation as Amicus *Curiae*, ICSID case No. ARB/03/19, May 19, 2005 (hereinafter "*Suez/Vivendi I* Order").

Background

In 1992 Argentina granted a thirty-year concession to a consortium comprised of, among others, Sociedad General de Aguas de Barcelona, S.A. (AGBAR), a Spanish company, and *Vivendi* Universal S.A. and *Suez*, both French companies (the "Claimants") in the process of its water distribution and waste water treatment privatizations in the city of Buenos Aires. Argentina's measures to attract foreign capital also included conclusion of BITs with major western capital-exporting countries, and the adoption of the Convertibility Law by which it "pegged" the value of the Argentine Peso to the US Dollar.

However, in an effort to curb the deteriorating economic and financial situation at the turn of the millennium, Argentina enacted a series of emergency legislative measures including de-linking the Argentine peso from the US Dollar and renegotiating public service contracts. The Claimants began to sustain large losses when despite significant depreciation of the Argentine Peso the government refused to allow an adjustment of the tariff during the renegotiation of the contract. When four years of renegotiation attempts proved fruitless, the claimant filed a claim to ICSID, invoking the France-Argentina BIT (*Suez* and *Vivendi*) and the Spain-Argentina BIT (AGBAR).

Amicus curiae petitions

Five NGOs petitioned the tribunal in 2005 for leave to submit *amicus curiae* briefs, attend the hearings and have unrestricted access to case documents.[169] The petitioners requested the tribunal, in construing the rights and obligations relevant to the controversial subject matter of the arbitration, to take

[169] *Suez/Vivendi I* Petition, *supra* note 9, at 1

into consideration international and domestic standard relating to public health, essential services, adequate quality of life, housing, consumers' defense and human rights law implications, in particular the right to water and right to life.[170]

Ruling on amicus curiae participation

The tribunal decided for the first time that it had the authority under the ICSID Convention Article 44 to grant leave to file *amicus curiae* briefs by asserting the procedural authority vested in them.[171] Employing reasoning similar to that of the *Methanex* decision the tribunal explained its discretion derives from the power of the tribunal to determine procedural questions under which *amicus curiae* participation is subsumed.[172]

Amicus curiae participation contributes to the acknowledgement by the general public in regards to the legitimacy of investment arbitral proceedings involving concerns of public interest.[173] Drawing from the WTO and NAFTA experiences the tribunal observed that participation of civil society in the proceedings will help enhance public understanding of the process and its functions.[174]

In a similar vein to the FTC Statement, the tribunal set forth three basic criteria for the admission of *amicus curiae* brief: (i) the appropriateness of the subject matter of the case; (ii) the suitability of a given non-party to act as *amicus curiae* in that case; and (iii) the procedure by which the *amicus curiae*

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[170] *Suez/Vivendi I* Petition, *supra* note 9, at 1; *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. And The Republic of Argentina*, Amicus *Curiae* Submission, ICSID case No. ARB/03/19, Apr. 4, 2007, at 4-9.

[171] *Suez/Vivendi I* Order, *supra* note 168, para. 11.

[172] *Id.* para. 12.

[173] *Id.* para .14.

[174] *Id.* paras. 9, 20.

submission is made and considered.[175]

With respect to the first requirement the tribunal recognized the public character of the subject matter in the case as well as the involvement of international responsibility of a state. The public interest present in the case was particularly noteworthy in that it involved grave human rights considerations, provision of essential public services and far-reaching consequences for the public. According to the tribunal, the second condition would be determined by the suitability of the *amicus curiae*'s expertise, experience, and independence to participate in the proceedings of the case.[176] The tribunal granted an opportunity to apply for a leave to file an *amicus curiae* brief in accordance with the requirements.[177] The tribunal did not deem necessary to formulate a procedure for the acceptance of *amicus curiae* brief before granting a leave to file one but did elaborate that such a procedure should enable the approved *amicus curiae* to present its views, preserve the procedural and substantive rights of the parties and maintain a fair, balanced, and expeditious process.

Meanwhile the tribunal denied the request to be present at arbitral hearings on the ground that ICSID Rule 32(2) barred the Tribunal from permitting such access without both parties' consent.[178] The tribunal deferred decision on the access to documents until an appropriate third party had been grant permission to submit an *amicus curiae* brief.[179]

(d) Aguas Provinciales de Santa Fe, *Suez*, Sociedad General de Aguas de Barcelona, S.A. and *Interaguas* Servicios Integrales del Agua S.A. v. Republic

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[175] *Id.* para. 17.
[176] *Id.* para. 24.
[177] *Id.* para. 33.
[178] *Id.* paras. 5-8.
[179] See *infra* (g).

of Argentina (*Suez*/*Interaguas*)[180]

Background

Suez, incorporated in France, and Sociedad General de Aguas de Barcelona S.A. (AGBAR) and Interaguas, both incorporated in Spain, formed a consortium in 1995 to participate in the bidding for the concession to operate water distribution and waste water services in the Province of Santa Fe, Argentina. The consortium formed Aguas Provinciales de Santa Fe S.A. (APSF), an Argentine company to hold and operate the concession. APSF was selected as the concessionaire in 1995. With the deterioration of the Argentine economy and the ensuing measures to counteract the declining situation[181], the parties sought to renegotiate the concession but to no avail. Following the termination of the concession in 2006, Suez, AGBAR, InterAgua and APSF (the Claimants) requested arbitration under the auspices of the ICSID based on the Argentina–France BIT (Suez) and Argentina-Spain BIT (AGBAR and Interaguas).

Amicus curiae petitions

An environmental NGO and several individuals filed an application for leave to participate at the hearings, present oral arguments, make *amicus curiae* submissions, and access the materials generated in the case.

Ruling on amicus curiae participation

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[180] *Suez, Sociedad General de Aguas de Barcelona S.A., and Interaguas Servicios Integrales del Agua SA v Argentina*, Order in response to a Petition for Participation as Amicus *Curiae*, ICSID case No. ARB/03/17, March 17, 2006, paras. 30, 34 (hereinafter "*Suez/InterAguas* Order").

[181] See *supra* (c)

The *Suez*/*Interaguas* tribunal applied the principles and standards outlined in the decision of the former. The commonality in both cases has also led the *Suez*/*Interaguas* tribunal to acknowledge the public dimension of the subject matter in the case. The tribunal however declined to grant the petitioners leave to make *amicus curiae* submissions. It was unable to determine, due to a lack of sufficient specific information, if the applicants possessed the expertise and experience to qualify as an appropriate *amicus curiae*[182]. The tribunal left open the possibility that in the event a new application with appropriate information was filed, the eligibility of petitioners as *amici curiae* might be reconsidered. As of the end of 2011 the case is still pending and second petition has not been presented to the tribunal.[183]

(e) 2006 amendments to the ICSID Rules

Effective April 10, 2006, the ICSID Arbitral Rules were amended to incorporate procedural innovations concerning provisional measure, preliminary objections, transparency rules and regulations governing arbitrators. The modifications reflected the specific recommendations contemplated in the 'Possible Improvements of the Framework for ICSID Arbitration (Discussion Paper)' published by the ICSID Secretariat in 2004.[184] The amendment, a product of extensive consultations with the interested parties including the ICSID member states, the business community, civil society, arbitration experts and other arbitral institutions, intended to promote greater confidence in the

[182] *Suez/InterAguas* Order, *supra* note 180, para. 30.
[183] *Suez/InterAguas* Order, *supra* note 180, paras. 30, 34.
[184] ICSID Secretariat, *supra* note 161, at 9, 11.

procedure by incorporating transparency measures.[185]

The inconsistencies between the *Aguas del Tunari* and the two subsequent decisions led to the revision in the ICSID Rules 32 (open hearings), 37 (*amicus curiae* briefs) and 48 (publication of awards)[186] as well as in the corresponding provisions of the Additional Facility Rules. The amendment mirrored the proposal delineated in the Discussion Paper which called for the mandatory publication of excerpts from the awards, admission of third party submissions and open hearings.

Article 32[187] and Article 48[188] were devised to confer explicit authorization to tribunals in permitting public attendance or observance of the hearings in the absence of objections from either party and to promote prompt publication of excerpts of the legal holding in every award.[189] The requirement of timeliness in publication was also newly instituted.

Article 37(2)[190] stipulates an express power of the tribunal to accept *amicus curiae* participation. It clarifies the terms under which the tribunal may grant leave to file *amicus curiae* briefs. In conjunction with consulting both parties, the tribunal must consider the extent to which (a) the submission would assist the tribunal in the determination of a factual or legal issue, (b) the

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[185] Gary Born *et al.*, Investment arbitration: ICSID Amends Investor-State Arbitration Rules (2006), *available at:* <http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=3165>. (Last visited: Dec. 26, 2011).

[186] ICSID Senior Counsel, Introductory note to the *Aguas del Tunari SA v Republic of Bolivia* case, *available at:* <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC628&caseId=C210>. (Last visited: Dec. 26, 2011).

[187] Corresponding provision in article 39 of the ICSID Additional Facility Rules.

[188] Corresponding provision in article 53 of the ICSID Additional Facility Rules.

[189] Prior to the changes, positive consent from the parties as a precondition to access to hearings was required and the Centre was authorized, but not obligated to publish excerpts from the awards.

[190] Corresponding provision in article 41 of the ICSID Additional Facility Rules.

submission would address a matter within the scope of the dispute and (c) the third party has a significant interest in the proceeding in order to determine the permissibility of the brief (the "three-part test"). Unlike the NAFTA FTC Statement, Article 37 does not require the involvement of public interest in the subject matter of the case. Concerns as to the disruptive effect of *amicus curiae* submission on proceedings or imposition of undue burden or unfair prejudice on either party expressed in the NAFTA Statement, similarly circumscribe *amicus curiae* participation in ICSID. Furthermore, both parties are assured an opportunity to present their position in regards to the *amicus curiae* submission.

The first major revision of its *modus operandi* since its initiation in 1966, the 2006 refinement of the Arbitral Rules has far-reaching implications as it applies to all investment disputes referred to ICISD. Keeping abreast with the NAFTA practice on transparency and *amicus curiae* participation, the amendment consolidated a fledging arbitration practice on greater access by third parties and increased stakeholder input in the arbitration dialogue. It marked a departure from secret arbitrations and advanced ICSID's role as the front-runner in the field of *amicus curiae* participation in ITA.

(f) *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*[191]

Background

The *Biwater* dispute arose out of a cancellation of a 10-year contract in 2005 between the government of Tanzania and City Water, owned by British company Biwater, to supply water and sewage services to its capital city Dar es Salaam. The government claimed dissatisfactory service for the reason behind

[191] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Procedural Order No. 5, ICSID case No. ARB/05/22, Feb. 2, 2007 (hereinafter "*Biwater* Procedural Order No. 5").

the termination. In response, Biwater initiated arbitration before the ICSID based on the UK-Tanzania BIT.

Amicus curiae petitions

On November 27, 2006, three Tanzanian-based legal NGOs and two international NGOs filed a joint petition for *amicus curiae* status. The NGOs sought the tribunal's order granting i) the status as *amicus curiae* in the arbitration, ii) access to the key documents and iii) permission to attend the oral hearings and to respond to any questions of the tribunal on the written briefs. The petitioners argued the outcome of the dispute would be of crucial interest to the local community and potentially to other developing states in the process of privatization of natural resources and infrastructure services. Citing the *Aguas Argentinas v.Argentina* holding, the petitioners maintained that disputes surrounding water services agreement necessarily involved concerns for basic human rights. From the stance of sustainable development, the implication of the arbitration had world-wide relevance.[192] The petitioners claimed they had genuine interest and renowned expertise in the matters of public interests.[193]

The petitioners furthermore argued the broad confidentiality order contained in Procedural Order No. 3 prohibiting publication of documents containing legal and factual details of the dispute precluded the petitioners from ascertaining the scope of their intended legal submissions. Accordingly they were unable to fulfill the conditions set forth under the three-part test in Article

[192] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Petition for Amicus *Curiae* Status, ICSID case No. ARB/05/22, Nov. 27, 2006, at 7, 8 (hereinafter "*Biwater* Petition"), *available at:* <http://ita.law.uvic.ca/ documents/investment_petition_arb0522.pdf>. (Last visited: Dec. 26, 2011).

[193] *Id.* at 9.

37(2). Thus, it appears the NGOs were petitioning the tribunal to either allow the petition and grant access to materials needed to make a submission, or provide the documents in order that they might be able to demonstrate the petition's observance of the legal test.[194] The petitioners noted the collaborative effort behind the joint petition would help alleviate the burden on the tribunal in sifting through numerous *amicus curiae* petitions and submissions.[195]

In addition to the non-exhaustive list of factors delineated in Article 37, the NGOs noted, as relevant to the admissibility of *amicus curiae* submission, the lack of abuse of the process in spite of its growing instances and significance in ITA.[196] The correlation between *amicus curiae* participation and increasing credibility of the process has also been highlighted in the petition.[197]

Views of the parties

The parties agreed for the arbitration to be conducted in accordance with the Arbitral Rules as amended in 2006, even though the arbitration began before the amendment came into effect. In the disputing parties' observations on the joint petition, the investor claimant opposed the petition. According to the claimant, the fact that the background of the dispute is related to water does not inevitably engender environmental concerns and issues of sustainable development.[198] On the other hand, the respondent state maintained a more favorable approach towards *amicus curiae* submissions. Tanzania based its view on the concern for transparency, derivable from the nature of ICSID arbitration,

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[194] Kyla Tienhaara, *Third Party Participation in Investment-Environment Disputes: Recent Developments*, 16 (2) REV. EUR. CMTY. & INT'L ENVTL. L. 230, 237 (2007).

[195] *Biwater* Petition, *supra* note 192, at 9.

[196] *Biwater* Petition, *supra* note 192, at 13.

[197] *Biwater* Petition, *supra* note 192, at 14.

[198] *Biwater* Procedural Order No. 5, *supra* note 191, paras. 10,11.

as distinguished from that of private commercial arbitration. The parties' reactions regarding the issue of whether to relay the parties' observations to the petitioners prior to the rendering of the award were similarly divergent.[199]

Ruling on access to case materials

Procedural Order No. 3 was issued prior to Procedural Order No. 5 on *amicus curiae* petition, in response to the claimant's request for provisional measures to preserve confidentiality. The claimant argued the production of documents, which the Respondent government unilaterally posted online along with the minutes of the first session of the tribunal, threatened procedural integrity and aggravated the dispute. The tribunal found neither a general rule of confidentiality nor that of transparency, but instead identified the balance between the two competing interests of transparency and 'procedural integrity' as the central factor in the decision. The tribunal categorized case materials into six types in its application of the balancing test: i) awards; ii) decisions, orders and directions of the tribunal; iii) minutes or records of hearings; iv) documents disclosed in the proceedings; v) pleadings/written memorials; and vi) correspondence between the parties and/or the arbitral tribunal. The tribunal held that decisions regarding the publication of ii) would be made on a case-by-case basis while iii) would not be disclosed in the absence of the parties' agreement or the tribunal's direction. With respect to iv), documents produced by the opposing party are subject to restriction on distribution. Both v) and vi) do not warrant wide distribution and should be kept confidential. The tribunal ordered a provisional measure for iii) ~ vi) but clarified that the parties could generally discuss the case in public, provided that, it is restricted to what is necessary and

[199] *Biwater* Procedural Order No. 5, *supra* note 191, paras. 8, 9

non-antagonistic in its manner and purpose.

Ruling on amicus curiae participation

In line with the previous decisions, the tribunal granted the petitioners an opportunity to file *amicus curiae* briefs but not access to documents and hearings. The tribunal considered the legal requirements under Article 37(2) and recognized that the petitioners retained reasonable potential to assist the tribunal, indicated their submissions would address matters within the scope of the dispute and held sufficient interest in the proceeding. Overall, the acceptance of *amicus curiae* submission was seen as a notable element in reinforcing broader confidence in the arbitral process.[200] The tribunal clarified that the new provision does not provide for an *amicus curiae* status but rather delimited the practice by allowing specific participation on an *ad hoc* basis.[201] The tribunal was also reluctant in distributing the parties' observations to the petitioning NGOs prior to the tribunal's ruling.[202] To prevent undue burden on the disputing parties, the tribunal imposed procedural safeguards including restricting the length of the joint submission to 50 pages.

With regard to the request for access to arbitration documents, the tribunal reasoned that the dispute was already public and widely reported, negating the need for an additional disclosure for the third parties to become well acquainted with the dispute. The tribunal however noted this issue may be revisited in a later phase as Procedural Order No 3's restriction on certain disclosure was put in place to preserve procedural integrity and not necessarily confidentiality. Once the hearings conclude, concerns regarding procedural

[200] *Biwater* Procedural Order No. 5, *supra* note 191, para. 50.
[201] *Biwater* Procedural Order No. 5, *supra* note 191, para. 45.
[202] *Biwater* Procedural Order No. 5, *supra* note 191, para. 10.

integrity may be altered and cease to be an impediment for the disclosure of legal documents.[203]

Finally as to the request for open hearings, the tribunal held that the failure to obtain the claimant's consent to the presence of third parties at hearings precludes the tribunal from opening the proceedings.[204]

Contribution of Biwater

Biwater Procedural Order No. 5 concerning *amicus curiae* submission should be interpreted in tandem with Procedural Order No. 3 on provisional matters regarding confidentiality. The differentiated treatment of various types of case materials set forth in Procedural Order No. 3 reflects careful policy considerations for the nature of ITA and interests of both the disputing and non-disputing parties in terms of the tension between transparency and confidentiality. This balanced approach which shaped Procedural Order No. 3 is nonetheless clouded by the concern over its failure to fully eradicate the apprehension surrounding wide discretion of individual tribunals.[205] However, the tribunal's teleological approach, especially with its focus on procedural integrity and not confidentiality *per se.* in its categorization of documents as well as the subsequent interpretation of its holding in Procedural Order No. 5 suggest the tribunal, at least partially, acknowledged the need and the possibility of public disclosure as a prerequisite to a quality *amicus curiae* submission.

As a result of the Procedural Order No. 5, the Petitioners filed their joint

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[203] *Biwater* Procedural Order No. 5, *supra* note 191, paras. 65, 66

[204] *Biwater* Procedural Order No. 5, *supra* note 191, paras. 70, 71

[205] Christina Knahr & August Reinisch, *Transparency versus Confidentiality in International Investment Arbitration – The Biwater Gauff Compromise*, 6 LAW & PRAC. INT'L CTS. & TRIBUNALS, 97, 118 (2007).

amicus curiae submission on 26 March 2007. In the award, rendered on 24 July 2008, the tribunal declared the arguments on investor responsibility, *Biwater*'s alleged failures and alleged renegotiation strategy presented by the petitioners whose expertise and perspectives substantially diverged from that of the disputing parties, a useful contribution to the proceedings.[206]

(g) *Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v. The Argentina* (*Suez/Vivendi II*)[207]

Amicus curiae petitions

On December 1, 2006 the same five NGOs as the first *Suez*/*Vivendi amicus curiae* petition asked, in the Petition for Permission to Make an *Amicus Curiae* Submission, to make a single joint *amicus curiae* brief in addressing the matters of public interest relevant to the arbitration. Specifically, the petitioners requested i) to be granted an opportunity to present a written *amicus curiae* submission in the form and time that the Tribunal deems appropriate and ii) to be given timely, sufficient, and unrestricted access to the materials engendered throughout the arbitration. In the event that the tribunal would deny such requests, the NGOs asked to be granted access to the parties' pleadings.[208]

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[206] *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*, Award, ICSID case No. ARB/05/22, July 24, 2008, paras. 359, 370-392.

[207] *Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Univers al S.A. v. The Argentina*, Order in Response to a Petition by Five Non-governmental Organizations for Permission to Make an Amicus *Curiae* Submission, Feb. 12, 2007, para. 7 (hereinafter "*Suez/Vivendi II* Order*"), available at:* <http://ita.law.uvic.ca/documents/Suez*Vivendi*amici.pdf>. (Last visited: Dec. 26, 2011).

[208] *Suez/Vivendi II* Order, *supra* note 207, para. 7.

Views of the parties

In the parties' observation on the petition, the claimants argued against both requests, while the respondent government raised no objection. The *Suez* claimants' objection was based on the assertion that the NGOs sought only to offer legal arguments inappropriate for a non-party and was tardy in its application.

Ruling on amicus curiae participation

Ten days after the *Biwater* tribunal's order, the *Suez/Vivendi II* tribunal reached a similar decision. Even though the new Rule 37(2) was not applicable to the case, since it did not come into effect until after the parties consented to arbitration,[209] the tribunal took care to note that the amendment is in accord with the criteria identified in the *Suez*/*Vivendi* First Order on *Amici*. The tribunal found that the petition was consistent with the three criteria and granted the NGOs the authorization to file joint submission with the tribunal. The tribunal found that the petitioners were respected NGOs whose expertise included matters of human rights, the environment, and the provision of public services.[210] In terms of the appropriateness of the subject matter, the tribunal held that the nature of public interest demonstrated in the dispute warranted the receipt of *amicus curiae* briefs.[211] The tribunal then set forth the procedure by which the *amicus curiae* submission should be made and considered the petition with the conditions stipulated in Article 37(2) in mind. The petitioners were permitted to submit, in observance of a certain deadline, a single joint *amicus curiae* brief of

[209] ICSID Convention, *supra* note 28, art. 44.
[210] *Suez/Vivendi II* Order, *supra* note 207, para. 16.
[211] *Suez/Vivendi II* Order, *supra* note 207, para. 3.

30 pages in length and in both English and Spanish. The submission would be forwarded to the parties, upon which the parties are invited to comment on the submission.[212] The tribunal answered the objections raised by the claimant by holding that an *amicus curiae* could provide arguments or perspectives relating to law, facts, or the application of law to the facts. The tribunal disagreed with the claimant's argument as to the tardiness of the petitioners and ensured an appropriate schedule with its procedural safeguard on deadlines.

The tribunal rejected the request for disclosure of legal documents. Although access to sufficient information on the subject matter of the arbitration is in principle essential to properly serve the purpose of *amicus curiae* submission, the tribunal held that a dearth of available information was not the case for the present dispute. NGOs had other sources from which they could obtain much needed information and their role as *amici curiae*, and not challengers to the disputing parties' arguments, could be carried out without access to arbitration records.

(h) *Piero Foresti, Laura de Carli and others v. Republic of South Africa*[213]

Background

Luxembourg based Finstone, a holding company of South Africa's major granite producers Marlin, Kelgran and Red Graniti, and other Italian investors challenged South Africa's Mineral and Petroleum Resources and Development

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[212] *Suez/Vivendi II* Order, *supra* note 207, para. 27

[213] *Piero Foresti, Laura de Carli and others v Republic of South Africa*, Award of the Tribunal, ICSID case No. ARB(AF)/07/1, Aug. 4, 2010, para. 28 (hereinafter "*Foresti* Award"), available at: <http://www.lrc.org.za/images/stories/CaseRelatedDocs/20090717granitipetition.pdf>. (Last visited: Dec. 26, 2011).

Act of 2002 (MPRDA), claiming it effectively expropriated their mining rights. The MPRDA attempted to encourage historically disadvantaged South Africans to take greater ownership of mining industry assets, by vesting all mineral rights with the state and calling existing owners to apply for permission to convert their "old order rights" into "new order rights", which is less valuable. As a condition to conversion, the applicants were required to demonstrate their commitment to the Black Economic Empowerment operation with specific social, labor and development agendas. As a result, proceedings before the ICSID were brought by the claimants pursuant to the Italy-South Africa BIT and the Benelux-South Africa BIT.

Amicus curiae petition

On 17 July 2009 two South Africans NGOs and two international NGOs filed with the tribunal a petition seeking leave to participate in the proceeding as *amici curiae*. The group of NGOs requested i) leave to submit a written brief ii) access to key arbitration documentation and iii) permission to attend and present key submissions at the oral hearings. The petition for participation is 'limited' in the sense that the NGOs requested for access to materials, subject to redaction of any commercially confidential or otherwise privileged information that holds no bearing to the petitioners' interests as *amici curiae*.[214]

The petitioners argued that a number of issues directly relevant to the South African people as well as the international community arise from the arbitration. MPRDA, central to the dispute, is a legislation enacted to further public policy goals including human rights advancement, sustainable development, environmental protection, sound management of the nation's

[214] *Piero Foresti, Laura de Carli and others v Republic of South Africa*, Petition for Limited Participation as Non-Disputing Parties, Jul. 17, 2009, para. 1.1 (hereinafter "*Foresti* Petition").

natural resources and the need to proactively rectify the exploitative labor practices, product of the apartheid. The petitioners adverted to the South African Constitutional mandate, various international human rights treaties as well as the importance of establishing harmonious relationship between domestic and international law as a justification of the MPRDA.[215]

A month later, the International Commission of Jurists also filed for leave to participate as an *amicus curiae*.

Ruling on amicus curiae participation

The tribunal decided to allow the non-disputing parties to submit *amicus curiae* briefs. The tribunal asked that the parties disclose to the third parties redacted versions of the Memorial and Counter-Memorial, redacted versions of legal opinions and a list of witnesses and experts that had provided evidence. The tribunal reasoned that the knowledge of the issues related to the dispute and the position of the parties those documents would inform was material in the third parties' attempt to make a pertinent submission. However, redaction is necessary and disclosure is limited to certain documents since the very purpose of *amicus curiae* participation is to give the *amici curiae* the opportunity to provide useful information, rather than for them to obtain information from the parties. Furthermore, *amicus curiae* participation must be effective and compatible with the rights of the disputing parties, without impairing the fairness and efficiency of the proceedings.[216]

The proceedings were, however, discontinued in the beginning of 2010 pursuant to the agreement between the claimant and the respondent state.

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[215] *Id.* paras. 4.1, 4.7.

[216] *Foresti* Award, *supra* note 213, para. 28.

(i) *Electrabel S.A. v. Republic of Hungary, AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary*[217]

Background

In 2007 two energy firms, Electrabel S.A. and AES Summit Generation (hereinafter "AES") brought claims against Hungary for their losses of over US$352 million and US$30 million respectively. They argued the losses occurred due to a series of measures Hungary introduced between 2006 and 2008 as a part of its commitment to comply with the EU competition law in the wake of Hungary's EU accession.

AES, a majority shareholder of previously state-owned AES Tisza, argued that the adoption of regulated pricing for generator prices by the Hungarian parliament and subsequent decrees to fix the prices for each generator have decreased the company's profitability and are in breach of the Power Purchase Agreement (PPA) governing the sale of electricity from AES owned Tisza II power generating station. AES claimed the politically motivated statutory termination of long-term PPA, seeking to allay public outrage over high profits generated by private energy sectors, violated fair and equitable treatment standard and impaired its investments by means of unreasonable or discriminatory measures.

Electrabel S.A. likewise argued the unlawfulness of statutory revocation of long-term power sale and purchase agreement under the Energy Charter Treaty (hereinafter "ECT").

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[217] *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary*, Award, ICSID case No. ARB/07/22, Sept. 23, 2010 (hereinafter "*AES Summit* Award"); *Electrabel S.A. v. Republic ofm Hungary*, Procedural Order, ICSID case No. ARB/07/19, Apr. 28, 2009 (non-public) (hereinafter "*Electrabel S.A.* Order").

Amicus curiae petition

In September 2008 the European Commission, the executive branch of the EU and also a party to the ECT, filed an application to submit *amicus curiae* briefs to both tribunals. This is the first time a supranational entity has sought participation in ITA as a non-disputing party. The European Commission argued that the long-term PPAs negotiated between Hungary and foreign investor prior to the Hungary's accession to the EU were inconsistent with the EU law. In a press release, the European Commission insisted that long-term PPAs constitute unlawful state aid to the power generators which stifle competition by hindering new entrants to the market.[218] In addition to defending Hungary's action as being required by law, the European Commission also sought to challenge the jurisdiction of the tribunal by reason of EU's jurisdiction over the contract from which the dispute arose.[219] The European Commission's interest in intervening in the proceedings as an interpleading party lies in its desire for a uniform enforcement of the European Community law.

Ruling on amicus curiae participation

On November 26, 2008, the *AES Summit* tribunal ruled that the European Commission may file a legal brief with the tribunal. The tribunal however circumscribed the subject matter of the submission to the specific topics

[218] State aid: Commission requests Hungary to end long-term power purchase agreements and recover state aid from power generators, June 4, 2008, *available at:* <http://europa.eu/rapid/press ReleasesAction.do?reference=IP/08/850>. (Last visited: Dec. 26, 2011).

[219] Geoffrey Antell *et al.*, The European Commission and Investment Treaties, *available at:* <http://www.globalarbitrationreview.com/reviews/22/sections/81/chapters/829/the-european-commission-investment-treaties/>. (Last visited: Dec. 26, 2011).

related to the discussion of the European Community law and its perceived relevance to the ECT dispute, its own state aid investigation on the PPAs and the effect of its decision on EU member states. The European Commission was also barred from invoking jurisdictional objections.[220] In the award of the *AES Summit* case, the tribunal acknowledged the efforts made by the European Commission and took care to note that it had duly considered the EU's positions outlined in the brief.[221]

The *Electrabel S.A.* tribunal also permitted the submission of *amicus curiae* brief by the European Commission on 28 April, 2009.[222]

3. Changes in *ad hoc* arbitration rules

(a) *Ad hoc* arbitration rules in investment treaties and model BITs

While a vast majority of the developing jurisprudence on *amicus curiae* participation practices occurred within the framework of ICSID and NAFTA, until recently other international instruments were largely silent on the subject. A number of latest generation investment agreements and model BITs providing template for their negotiation however, contain express and specific reference to pro-transparency regulations. Transparency provisions included in investment treaties are significant in that jurisdictional basis for ITAs are found in those treaties, which in turn makes them likely to take precedence over any conflicting institutional arbitration rules or supplement the rules if such rules are silent on

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[220] Luke Eric Peterson, ICSID tribunal will permit European Commission to file legal brief in Energy Charter Treaty arbitration, Investment Arbitration Reporter, Dec. 11, 2008, *available at:* <http://www.iareporter.com/downloads/20100107_12>. (Last visited: Dec. 26, 2011).

[221] *AES Summit* Award, *supra* note 217, para. 8.2.

[222] *Electrabel S.A.* Order, *supra* note 217. See Luke Eric Peterson, European Commission moves to intervene in another ICSID arbitration, Investment Arbitration Reporter, May 1, 2009.

the issue.[223]

i) Bilateral investment agreements

NAFTA member states

The comprehensive transparency rules contained in the 2004 US Model BIT[224] and 2004 Canadian Model Foreign Investment Protection Agreement (FIPA) are much informed by the corresponding procedures in NAFTA Chapter 11. In accordance with the commitments undertaken under the FTC Notes of Interpretation the model BITs explicitly provide for open hearings and freely available case documents.[225] The US Model BIT Article 29(1) for example details disclosure of various work products with express inclusion of hearing minutes and *amicus curiae* submissions. Mexico also transitioned from a pro-confidentiality stance evidenced in its NAFTA practice to a more transparency-embracing approach. In some areas the model BITs take a more extensive approach than envisioned in NAFTA. For instance the US and Canada's endorsement of NAFTA principle of "right to transparency" which allows considerable discretion concerning disclosure, stand in stark contrast to the rule of "duty of transparency" adopted in the model BITs.[226] Transparency under the

[223] Federico Ortino, Society of International Economic Law, *External Transparency of Investment Awards*, SIEL Inaugural Conference Geneva Working Paper No. 49/08, at 6 (2008).

[224] These provisions of the new Model BIT have already been incorporated into the FTAs and BITs with Chile, the Central Americas, Morocco, Singapore, Uruguay, Columbia, Peru and Korea.

[225] US Model BIT, *supra* note 54, art. 29; Agreement between Canada and _____ for the Promotion and Protection of Investments in Canadian model FIPA (hereinafter "Canadian Model FIPA"), art. 38.

[226] On the other hand Mexico's approach as found in the 2004 Mexico-Japan Agreement for the Strengthening of the Economic Partnership (EPA) mirrors NAFTA's right to transparency.

model BITs are mandatory and not subjugated to the applicable arbitral rules. In particular under the Model FIPA, the duty of transparency is non-derogable even with disputing parties' agreement.[227]

With regard to non-disputing party participation, the Canadian Model FIPA closely tracks the FTC Statement.[228] The Canadian government, a staunch proponent of *amicus curiae* participation in NAFTA arbitration, prides in the institutionalization of *amicus curiae* submission and regards it as the most significant improvement in the re-modeled FIPA.[229] In the US version a less elaborate provision provides for *amicus curiae* submission and does not make specific reference to the considerations outlined in the FTC Statement.[230] These transitions have not been without resistance from investors who demanded reversing the situation to that of pre-FTC Statement.[231]

Other countries

Norway's 2007 Model BIT prefigures a comparable degree of transparency.[232] Based similarly on the principle of "duty of transparency," Articles 17(1) and 19 requires prompt public disclosure of all decisions and

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[227] Article 38(4) requiring public release of the award expressly excludes the application of article 38(3), which exempts disclosure in light of parties' agreement.

[228] Canadian Model FIPA, *supra* note 225, art. 39.

[229] Tienhaara, *supra* note 194, at 233.

[230] US Model BIT, *supra* note 54, art. 28(3).

[231] United States Subcommittee on Investment, *Report of the Subcommittee on Investment Regarding the Draft Model Bilateral Investment Treaty (Presented to: The Advisory Committee on International Economic Policy)* (Jan. 30, 2004), at 2, *available at:* <http://www.ciel.org/Publications/BIT_Subcmte_Jan3004.pdf>. (Last visited: Dec. 26, 2011).

[232] Draft Version 191207, Agreement Between the Kingdom of Norway and _____ for the Protection and Promotion of Investments, art. 19 (Dec. 19, 2007), *available at*: <http://www.pca-cpa.org/upload/files/01c03%20Norway%20Draft%20Model%20BIT%202007%20(E).pdf>. (Last visited: Dec. 26, 2011).

documents submitted or issued by the tribunal.

For the first time in Australia provisions on public access have been incorporated in the Australia-Chile FTA. Non-disputing parties are empowered to make *amicus curiae* submission but it must be in both Spanish and English.[233] It also provides for disclosure of certain documents including the notice of arbitration, pleadings, minutes of hearings and any other documents submitted to the tribunal.[234] Hearings must be conducted in public unless confidential or privileged information is presented.

Not all countries have partaken in the development, however. The Japan-Thailand EPA, like most BITs, is silent on the matter, deferring its determination to the tribunals constituted under the relevant arbitral rules.

Korea-US FTA

The recent backlash against the ratification of *Korea-US* FTA by the Korean National Assembly derived from the failure to establish overall consensus on the agreement and to dispel public apprehension regarding its drawbacks. Although the criticism focused predominantly on the validity of ITA, transparency and *amicus curiae* participation rules, crucial elements in the strengthening and legitimizing of the process have however largely gone unobserved in the controversy.

Korea-US FTA contains a transparency provision akin to the one included in the 2004 US Mode BIT. It requires release of documents regarding the notice of intent and arbitration, pleadings, memorials, and briefs submitted to the tribunal, minutes of hearings as well as orders, awards, and decisions of the

[233] Australia-Chile FTA, art. 10.20(2).
[234] *Id.* art. 10.21(2).

tribunal.[235] Hearings must be open to the public in principle.[236] Even those who opposed the institution of ITA hailed the inclusion of transparency rules during the negotiation stage.[237] In addition to the U.S. Model BIT provisions, Article 11.21.4(e) reflecting the Korean government's demand for reinforced adaptation of exemption to the disclosure requirement was included.[238] In case either party wishes to overturn the tribunal's rejection in designating particular information as protected information, a Joint Committee[239] could issue a binding decision to that effect.[240]

As to the *amicus curiae* submission, the US argued, based on the language of its Model BIT, no limitation should be imposed on the third party regarding the mode of submission and suitability of petitioners. The Korean government however insisted on the ICSID model for its adoption could enhance procedural efficiency by synchronizing individual treaty provisions with the ICSID rules.[241] As a result provision mirroring ICSID Rule 37(2) was included in the *Korea-US* FTA. This is contrary to the recent US practice evinced by the US-Chile FTA and US-Singapore FTA.

Whether the transparency and *amicus curiae* participation provisions are persuasive enough to allay the disquiet surrounding the *Korea-US* FTA, and in particular ITA, is yet to be determined. Undeniable however, is the step taken

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[235] Korea-US FTA, art. 11.21.1.

[236] *Id.* art. 11.21.2.

[237] SOOBONG CHEONG, STUDY ON THE INVESTMENT SECTOR OF THE KOREA-US FTA 270 (Ministry of Justice, 2008).

[238] *Id.* at 273.

[239] Joint Committee is formed by officials of each party state, with the authority to supervise the implementation of the FTA and resolve disputes arising out of interpretation of the FTA amongst other things. The composition and authority of the Joint Committee are delineated in Article 22.2 of the Korea-US FTA.

[240] Korea-US FTA, *supra* note 235, art. 11.21.4.(e).

[241] CHEONG, *supra* note 237, at 274.

toward the realization of a more open and accountable system of ITA for the resolution of potential future Korea-US investment disputes.

ii) Regional investment agreements

In 2007 Common Market for Eastern and Southern Africa (COMESA) adopted transparency and *amicus curiae* participation provisions in the Investment Agreement for the COMESA Common Investment Area. Article 28 of the Investment Agreement provides for the release of certain documents including pleadings, evidence and decisions and public oral hearings. It also empowers the tribunal to receive *amicus curiae* submissions.

The Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DA) signed in 2004 contains extensive transparency provisions reflecting the sentiment and language of the 2004 US Model BIT.[242] Article 10.20.2 provides that a non-disputing State Party may "make oral and written submissions to the tribunal regarding the interpretation of this Agreement." Non-party state participation is facilitated by Article 10.21 stipulating the obligation of the respondent state to make documents publicly available and share with non-disputing state parties.

(b) *Ad hoc* arbitration rules by commercial arbitration institutions

i) UNCITRAL Arbitration Rules

① Overview

[242] Dominican Republic-Central America-United States Free Trade Agreement, art. 10.21.

The UNCITRAL Model International Commercial Arbitration Rules (UNCITRAL Rules) adopted in 1976 and revised in 2010 provides for a general set of predetermined arbitral rules to be used in commercial disputes, not limited to those relating to investment. One of the most popularly invoked rules in ITA, the accurate number of ITA under the UNCITRAL rules is unknown for the rules do not require publicizing of the arbitration. The UNCITRAL Rules were adopted before the influx of investment treaties, and thus not specifically tailored for semi-public ITAs. This deficiency renders the rules particularly vulnerable from the procedural perspective for the involvement of public law issues necessitates distinctive procedural arrangements. Under the vast majority of investment treaties which do not authorize individual tribunals to amend the rules when necessary or set out particular arrangements, the parties to the dispute must rely on guidance from elsewhere to resolve such problems.[243] The presence of a state as a party to the dispute and the ensuing public implications require a transparent process through which the people may monitor the development of the case. The UNICTRAL rules designed primarily for private commercial disputes thus fall short of its requisite role in ITA.

② Transparency provisions

UNCITRAL Rules as revised in 2010 embodies the general principle of confidentiality in commercial arbitration. Article 25(4) and 32(5) provides that hearings shall be held in camera unless the parties agree otherwise and award may be made public only with the consent of both parties. The respondent state must obtain approval from the foreign investor in order to publish the award for

[243] Jan Paulsson & Georgios Petrochilos, Revision of the UNCITRAL Arbitration Rules, para. 6 (2006) (hereinafter "UNCITRAL Report"), *available at:* <http://www.uncitral.org/pdf/english/news/arbrules_report.pdf >. (Last visited: Dec. 26, 2011).

its people. Without an express provision addressing the publication of materials produced during the course of the arbitration including pleadings of the parties and orders of the tribunal, it is left at the discretion of the parties and tribunals to make the decisions on an *ad hoc* basis. Also silent on the issue of *amicus curiae* participation, Article 15(1) has nevertheless been interpreted by the NAFTA tribunals to allow *amicus curiae* briefs. The fact that the power under Article 15(1) is discretionary and subordinate to other regulations in the rules however, calls for a more explicit and compulsory provision for authorization of *amicus curiae* participation under the UNCITRAL Rules.

③ Proposed reforms

The UNCITRAL Commission embarked on a transition to greater transparency in its rules in 2006. Insertion of specific provisions on disclosure of the notice of arbitration and the composition of the arbitral tribunal on the UNCITRAL website (Article 3), publication of all documents received or issued by the arbitral tribunal (Article 15(3)), discretion of the arbitral tribunal to allow third parties to submit *amicus curiae* briefs (Article 15(4)), public hearings (Article 25(4)) and systematic publication of awards (Article 32(5)) has been suggested.[244] Following this proposition an unofficial report by Paulsson and Petrochilos, commissioned by the UNCITRAL Secretariat to encourage dialogue on rules revision, recommended a more specific change.[245] New article 15(5) would expressly allow tribunals to accept *amicus curiae* submissions while qualifying the tribunals' discretion with considerations regarding the presence of public interest that can benefit from third party participation, the extent to which

[244] Report of Working Group II (Arbitration and Conciliation) on the work of its forty-sixth session (Feb. 5-9, 2007), para. 61, UN Doc. A/CN.9/619.
[245] UNCITRAL Report, *supra* note 243, paras. 21-286.

the *amicus curiae* can assist the tribunal and the existence of significant and legitimate interest on the part of the *amicus curiae*.[246] The provision however stipulates for the parties' consent as a precondition to the tribunal's admission of *amicus curiae* brief. Moreover the new Article 15ter provides for an explicit confidentiality of all materials in the proceedings.[247] These recommendations are problematic in that party consent requirement in Article 15(5) is incompatible with the concept of *amicus curiae* participation while Article 15ter detracts from the effectiveness of *amicus curiae* participation.[248] The Paulsson and Petrochilos Report also recommended Article 25(4) be clarified to empower the tribunal, after consulting the arbitrating parties, to allow third parties to attend hearings and to issue directions. This provision would particularly be pertinent in case the tribunal accepts the *amicus curiae*'s assistance.

Amendment efforts within the UNCITRAL context have been met considerable resistance. In 2008 a Working Group mandated by the UNCITRAL to streamline the rules and instill greater efficiency in the arbitral process noted a general agreement as to the desirability of infusing ITA with transparency ideals.[249] It also recorded reservations regarding the suitability of including transparency provisions at the cost of the generic nature of the rules. In short, conversion to full transparency is questionable due to the rules' broad applicability beyond investment-related conflicts to private commercial disputes.[250] The Working Group cautioned against embarking on the revision of

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[246] UNCITRAL Report, *supra* note 243, paras. 132-6.

[247] UNCITRAL Report, *supra* note 243, para. 148.

[248] Andrew P. Tuck, *Investor-State Arbitration Revised: A Critical Analysis of the Revisions and Proposed Reforms to the ICSID and UNCITRAL Arbitration Rules*, 13-Fall L. & BUS. REV. AM. 885, 918 (2007).

[249] Report of the Working Group on Arbitration and Conciliation on the work of its forty-eighth session (Feb 4-8, 2008), para. 7, UN Doc. A/CN.9/646.

[250] *Id.* paras. 57-60.

transparency rules at the current stage, but left open the possibility of special provisions with limited applicability to ITA.[251]

In recognition of the importance of ensuring transparency in ITA, Working Group II was tasked in 2010 by the UNICTRAL Commission to develop rules in compliance with it.[252] The Working Group identified development of rules annexed to the generic UNCITRAL arbitration rules and applicable only to ITA as the optimal mode for ensuring transparency within the UNICTRAL framework.

Its proposed public access to information includes publicity regarding the initiation of arbitral proceedings, release of certain documents and open hearings. Privileged or protected information are exempt from disclosure. In terms of *amicus curiae* submission, the proposed legal annex expressly confers on the tribunals the power to accept *amicus curiae* briefs. Its criteria are modeled after the four requirements outlined in the FTC Statement. The Working Group also considered several restrictions detailed in the Statement including revealing the identity of the third party, the nature of its membership and its relationships to the disputing parties.[253] The Working Group felt individual tribunal's consultation with the disputing parties was necessary before the tribunal rendered its decision on the submission.[254] Given that the quality of *amicus curiae* participation is largely contingent on the level of disclosure of case materials the Working Group contemplated differentiated treatment of access to documents for the following three categories of third parties. The first category is the general public. The second category consists of third parties with an interest in the

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[251] *Id.* paras. 62, 68-9.

[252] Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-fourth session (Feb. 7-11, 2011), paras. 1, 3, UN Doc. A/CN.9/717.

[253] *Id.* para. 122.

[254] *Id.* para. 125.

dispute and whose access to the documents may enhance their contribution to the arbitral tribunal's decision making process. The third category includes parties whose personal interests in the outcome of the arbitration might warrant their participation in the proceedings.[255]

In the Working Group report of 2011, strong support was expressed for listing the types of documents to be made publicly available and allowing third parties to request access to any other documents and tribunals the discretion to grant such access.[256] The Working Group agreed on the discretionary power of the arbitral tribunal to order publication of additional documents and a right for third persons to request access to such documents.[257] The propositions were regarded as a compromise between access to documents and the arbitral tribunal's exercise of discretion.[258] The Working Group also agreed that, in line with the practice of ICSID, certain information including the names of the parties and the field of activity at issue should be conveyed to the public via a registry by a neutral institution.[259] Despite views expressed in favor of prompt publication of the notice of arbitration, particularly in connection with *amicus curiae* participation, the majority was against the publication prior to the constitution of the arbitral tribunal.[260] As to *amicus curiae* participation, the report endorsed the approach taken in the previous report and noted the draft provision should take after Article 37 (2) of the ICSID Arbitration Rules while complemented by the conditions—including page limits and disclosure of

[255] *Id.* paras. 126-7.

[256] Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-fifth session (Oct. 3-7, 2011), paras. 57-64, UN Doc. A/CN.9/736.

[257] *Id.* paras. 54-66.

[258] *Id.* para. 58.

[259] *Id.* paras. 43-44.

[260] *Id.* paras. 47-53.

affiliations—delineated in paragraph B.2 of the FTC Statement.[261] The report also contemplated a separate provision for non-disputing party state submission and defined the scope, nature and concept of third party. [262]

Although the most recent report of the Working Group does not contain any discussion regarding *amicus curiae* participation it details the shaping of provisions for the publication of documents in general and information at the commencement of the arbitral proceedings. Consistent with the previous report, the Working Group concluded the general information of the arbitral proceedings should be released to the public at an early stage and the publication of the notice of arbitration, after the constitution of the arbitral tribunal.[263] With the exception of few suggestions of modifications, the Working Group was largely in concurrence with the previous proposals concerning the publication of documents.[264]

④ Evaluation

The modification of the UNICTRAL rules is an ongoing project. An adoption of a structured framework, akin to the NAFTA FTC Statement and the ICSID amendment, is necessary despite the interpretation of NAFTA tribunals on Article 15(1). Under an express provision on *amicus curiae* participation third parties may dispense with having to contend for *amicus curiae* status in every dispute. It encourages and broadens participation by public interest representatives, thereby increasing the chances of participation by the relatively

[261] *Id.* para. 70.
[262] *Id.* paras. 78-97.
[263] Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-sixth session (New York, 6-10 February 2012), paras. 103, 109, UN Doc. A/CN.9/741.
[264] *Id.* paras. 111-115.

disadvantaged organizations. Explicit reference to *amicus curiae* participation not only confers on the tribunal an opportunity to consider views other than those represented by the parties in dispute but also help disperse challenges directed at the opacity of the process.[265]

The incremental reform of the UNICTRAL Rules reflect a painstaking balance between the effort to keep abreast with the new development within ITA, pioneered by the ICSID and NAFTA and to meet the need of its end-users whose relationship dynamics could easily be that of private commercial nature. In this respect, the proposition for separate transparency rules governing ITA is an optimal compromise. Although its efficacy can only really be put to test when implemented in practice, the revision efforts of the UNCITRAL further validate and consolidate the transparency practices of ITA.

ii) Other frameworks

Arbitration rules of other international and domestic commercial arbitral bodies have not taken a comparable stride towards transparency and *amicus curiae* participation. A strict adherence to the principle of confidentiality is evidenced in the ICC Rules of Arbitration as revised in 2012. Article 34(2) of the Rules prohibits the ICC Secretariat from releasing the award to any third party and Article 1(4) of the Internal Rules of the International Court of Arbitration, which oversees ICC arbitrations, proscribes the disclosure of any documents submitted to the Court. With regard to the arbitral decisions, the ICC's publication of redacted extracts from the awards can be construed as an adoption of partial confidentiality and no general provision for privacy applicable to the parties suggest the parties enjoy a 'right to transparency'.

[265] Choudhury, *supra* note 10, at 818.

Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Arbitration Rules) impose a 'duty of confidentiality' on the arbitral tribunal and the SCC Institute, while tolerating a 'right to transparency' for the parties. On the other hand Article 30 of the Arbitration Rules of the London Court of International Arbitration (LCIA Arbitration Rules), which insists on the non-disclosure of case-related information, extends a 'duty of confidentiality' to the arbitral tribunals as well as the parties. Under the Arbitration Rules of the Australian Centre for International Commercial Arbitration (ACICA) and Japan Commercial Arbitration Association (JCAA), disclosure of documents is permissible only with the consent of the parties. These predominantly commercial arbitration rules retain the secrecy of the proceedings and preclude any prospect for the receipt of *amicus curiae* submissions.

iii) Conclusion

The arbitration rules UNCTIRAL and other domestic arbitration institutions were drafted to cater to the expectation of private parties regarding confidential, swift and efficient resolution of their commercial disputes. The generic rules that reflect these needs can conflict with the semi-public character of ITA especially with respect to the values of democratic governance. Efforts, if any, to incorporate measures to infuse the process with enhanced accountability, transparency and *amicus curiae* participation have yet to produce tangible results. It is important that these institutional arbitration rules accommodate a systemic approach to a more inclusive model of arbitral procedure applicable to ITA in order to strengthen the process in the eyes of the public and render the tribunal acutely aware of matters of public interests.

C. Evaluation – Analysis of *Amcius Curiae* Participation Practice to Date

In order to grasp the effect of third party participation and to formulate its future path in ITA an examination of its core features and policy considerations is necessary.

1. Juridical nature of the *amicus curiae* participation

(a) Nature of *amicus curiae*

An amicus curiae refers to a third party to the dispute whom the tribunal grants permission to intervene in the legal proceedings. *Amicus curiae* is not considered a party and thus conducts itself in a procedural capacity lesser than that of the disputing party. A number of NAFTA tribunals have testified to this effect. *Amicu curiae* is also to be distinguished from experts and witnesses; the *Methanex* tribunal observed *amicus curiae* is an advocate rather than an expert.[266] The *UPS* tribunal later stated that assistance an *amicus curiae* offers could overlap with the contribution of independent experts on specialized factual matters but was more likely to introduce distinct issues—particularly pertaining to law— from a unique perspective.[267]

(b) Forms and contents of *amicus curiae* participation

Written or oral submissions, attendance at oral hearing, access to documents and cross-examination of witnesses each form a type of *amicus curiae* participation. The four different forms of participation are interrelated to

[266] *Methanex* Decision, *supra* note 48, para. 38.
[267] *UPS* Decision, *supra* note 125, para.62.

the extent that public hearing, access to case materials and cross-examination of witnesses serve as a basis for an effective and appropriate *amicus curiae* submission which is the main focus of this article. For example, information on the existence of an arbitration is a prerequisite to seeking *amicus curiae* status. Further access to case materials can also provide strategic benefits for the *amicus curiae* in focusing its effort on the questions most pertinent to the case. The degree of transparency thus has direct bearing on the value the *amicus curiae* submission may have for the tribunal.

At the least, *amicus curiae* submission extends to the presentation of written brief to the tribunal. Generally parties are invited to offer comments on the submission which may cover both factual and legal dimensions of the case. However, given the varying degrees of access to work materials and hearings, the level of accommodativeness and overall efficacy of *amicus curiae* submission in each investment framework cannot be determined solely by the *amicus curiae* participation provision, but must be interpreted in conjunction with the governing rules and actual practices of transparency.

(c) 'Third-parties' in *amicus curiae* participation

i) NGO involvement

In principle, any individual, entity, organization and state not directly involved with the dispute may file an application for leave to intervene in the arbitral process as an *amicus curiae*. In practice, the overwhelming majority of *amici curiae* are civil society groups, both international and domestic, whose expertise frequently involves environmental, health, sustainable development, international law and human rights issues. The most active ones to appear as

amicus curiae have been the environmental-oriented NGOs[268], such as the Center for International Environmental Law[269] and IISD[270]. NGOs, in their capacity as watchdogs, have been at the forefront of the evolving practice of *amicus curiae* participation in ITA. Although advocacy groups have already been participating in the proceedings of several international courts and tribunals, including the European Court of Justice, European Court of Human Rights, Inter-American Court of Human Rights, World Trade Organization, and—in a limited capacity—International Court of Justice,[271] NGO involvement in ITA is a comparably recent phenomenon.

Methanex was the first case in which an NGO successfully petitioned to participate in the proceedings. The ICSID followed, extending *amicus curiae* status to *Suez/Vivendi* petitioners for the first time. Undeniable has been the significance of NGOs' input in raising awareness for public interest issues in ITA. Though a relatively recent phenomenon, NGO participation in ITA continues the better established tradition of NGO contribution to the development of public international law. The participation of domestic or local advocacy groups whose causes and influences are more border-bound than internationally operated organizations, is another notable progress.[272]

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[268] G. VAN HARTEN, INVESTMENT ARBITRATION AND PUBLIC LAW 109 (Oxford University Press, 2007)

[269] CIEL is a Washington DC-based nonprofit organization that provides legal services in the area of international and comparative environmental law in order to protect the environment and ensure a sustainable society.

[270] IISD is a public policy research institute based in Canada whose goal is to promote global sustainable development through innovation and research.

[271] Agenda 21, Report of the United Nations Conference on Environment and Development, UN Doc. A/CONF.151/26/Rev.1, Vol. 1, Ann. II (1992).

[272] AMOKURA KAWHARU, *Participation of Non-governmental Organization*, in MICHAEL WAIBEL *ET. AL*. EDS., THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 282 (Kluwer Law International, 2010).

However, the cause-specific nature of NGO participation may also entail undesirable consequences of distorting the overall picture of the dispute. The negative implications of NGO's involvement in the ITA process will be further discussed in Part IV A.

ii) Beyond NGOs

Amicus curiae in ITA was not envisioned to be limited to civil society organizations but was meant to include individuals and entities of broad range of nature and roles, including business associations and other states parties to the investment treaty concerned.[273] Although presently small in number, *amicus curiae* participation in ITA has been progressively expanding to embrace third parties beyond NGOs.

Three individuals requested permission from the *Suez/Interaguas* tribunal to intervene as *amici curiae* but were denied due to a lack of sufficient supporting information. In the *Glamis* case, the tribunal allowed submission from the QIN, a federally recognized American Indian Nation and the NMA, a trade organization that represents the interests of the mining industry. The QIN's reason for participation was based on the international obligation of state to preserve sacred aboriginal sites while the NMA's interest was in its opposition to government regulations undermining mining opportunities. The QIN was able to demonstrate a more concrete and direct interest as opposed to broad public interests represented by NGOs, for the outcome of the case would have affected the condition of their sacred lands to which it held legally protected rights. The NMA's participation was the first time a business association with direct ties with the claimant (Glamis Gold Ltd is a member of the NMA) petitioned the

[273] ICSID Secretariat, *supra* note 161, at 9.

tribunal to participate as an *amicus curiae*. NMA submission is noteworthy in that, contrary to the generally acknowledged goal of *amicus curiae* submission—providing new perspectives, expertise and arguments rather than outright espousal for either party's position—the NMA professed its support for the claimant.[274] Unlike most third parties' reasoning that is, by and large, in line with the respondent state's argument, NMA participation deviated from this practice.

Another notable development was brought by the European Commission's participation in the *AES* and *Electrabel S.A.* case. Central to the *AES* dispute and the European Commission's interest in intervening as an *amicus curiae* were the issues of interaction between the ECT and the EC Treaty's competition provisions and the application of EU competition law among EU member states.

Non-disputing states may also have a legitimate role as a third party to the arbitration. In case of a participation by a non-disputing party state to an investment treaty, such as NAFTA or CAFTA-DR, the state may have useful and unique interpretation of the treaty to offer as guidance. Since a state party is obligated to fulfill its duties under the treaty and is liable for damages and lawsuits in case of breach, such state has compelling interest in how the treaty provisions are interpreted and subsequently effect its domestic policy making and society at large. Since the underlying rationale behind commitment to investment treaty is to establish a credible investment protection regime, a non-disputing state party has legitimate interest in ensuring a cohesive jurisprudence and maintaining its systemic integrity.[275] Under NAFTA Article 1128, a non-disputing party may make a submission on a question of interpretation of NAFTA interpretation, but not to address specific facts. Similar practice is

[274] *Glamis* NMA Application, *supra* note 145, at 1.

[275] Kinnear, *supra* note 93, at 8.

foreseen in the US Model BIT (Article 28), the Canada's Model FIPA (Article 35), the CAFTA treaty (Article 10.20.1) and the ICSID Rules (Article 37). Non-disputing state participation occurred on numerous occasions in the NAFTA tribunals, including the *Methanex* and *UPS* and three times in the CAFTA-DR context.[276] The US also petitioned the ICSID tribunal to make *amicus curiae* submission in *Siemens A.G. v Argentine Republic*.[277]

(d) Arbitral tribunal's discretion

Investment treaties and arbitration rules envisage broad procedural discretionary power of individual tribunals in governing the manner in which *amicus curiae* submission is to be considered. In case a specific provision on *amicus curiae* participation is provided for, the tribunal has the discretion whether or not to allow the submission of *amicus curiae* brief. NAFTA Chapter 11 tribunals are only required to permit third party's submission if a disputing party adopts it as its own.[278] Arbitral tribunals are given considerable latitude with respect to the specific forms, scope and weight of *amicus curiae* submission. Tribunals routinely stipulate page limits and invite the parties to present their observations on *amicus curiae* briefs.

Even if an *amicus curiae* is permitted to present its written brief, tribunals are not obliged to consider it in good faith or address its substantive points and values in the final award. For instance in the *UPS* award, the NAFTA tribunal did not make any explicit or implicit reference to the NAFTA

[276] Alicia Cate *et al.*, Non-Disputing State Party Participation in Investor-State Arbitration under CAFTA-DR, (July 1, 20011) *available at:* <http://kluwerarbitrationblog.com/blog/2011/07/01/non-disputing-state-party-participation-in-investor-state-arbitration-under-cafta-dr/>. (Last visited: Dec. 26, 2011).

[277] Advocates for International Development, *supra* note 8, at 6.

[278] Bartholomeusz, *supra* note 5, at 276.

interpretation made by the Chamber of Commerce or the arguments on the right of the Canadian postal workers made by the CUPE and Council of Canadian. In *Glamis*, another NAFTA arbitration, it was the opinion of the tribunal to address the arguments in the *amicus curiae* brief that had bearing on its final decision. In this case, however, the tribunal dispensed with the reference to the particulars in the *amicus curiae* brief in dismissing the investor's claim for it did not reach did not reach the issues addressed by the NGOs.[279] Although the ICSID tribunal in *Biwater* provided a detailed summary of the *amicus curiae* brief in the award and recognized its usefulness, the specific arguments were left unanalyzed. Thus in the absence of a clear legal obligation of the tribunals regarding *amicus curiae* submissions, third persons cannot reasonably expect that the tribunal will invariably, upon due consideration, respond to its concerns articulated in the brief.[280]

(e) Functions discharged by *amicus curiae* participation

Third party interveners have four major functions. First, an *amicus curiae* can offer legal expertise for the benefit of the tribunal. This function, akin to that of an expert, can help de-fragmentatize foreign investment law by contributing to the coherence across multiplicity of ITA regime.[281] Second, a third party can make submission on factual matters to the arbitral tribunal. In this capacity the non-disputing party assumes the role of a witness. Third, *amicus curiae* participation provides an opportunity for individuals or entities that cannot otherwise become involved to access the process. Particularly significant when the outcome of the dispute directly affects those parties, the practice is

[279] *Glamis* Award, *supra* note 141, para. 8.
[280] Bartholomeusz, *supra* note 5, at 277-8.
[281] See Part IV C. 2.

evidenced in the Canadian Union of Postal Workers' participation in the *UPS* case or QIN's participation in the *Glamis* case. Lastly, an *amicus curiae*, especially NGOs, may fulfill its function as an advocate for broader public interest mandates.

A closely related question, and an intriguing one at that, is whether or to what extent an *amicus curiae* must be impartial, independent and neutral.[282] Generally in municipal jurisdictions such as the US, the traditional concept of *amicus curiae* as a neutral bystander providing assistance to the court, over time, evolved to a more advocacy-oriented role through which an *amicus curiae* can support either party, represent its own interest or speak for a worthy cause.[283] Similarly in the *Methanex* case the NAFTA tribunal distinguished *amicus curiae* from experts and delegated to it the role of partisan, insofar as it advances a particular case.[284] Such an indication that an *amicus curiae* may act as a non-independent advocate nevertheless, does not mean it can derogate from the responsibility entrusted to it as more a friend of the court than an agent of the party. Despite the ICSID amendment requiring *amicus curiae* to have "significant interest in the proceeding", the *Suez/Vivendi* tribunal administered under ICSID made clear that for the purpose of *amicus curiae* submission, an *amicus curiae* should sufficiently establish that it has, along with expertise and experience, independence.[285] The second *Suez/Vivendi* tribunal also held to this effect, advising *amicus curiae* to refrain from contesting arguments or evidence presented by the parties.[286] Perhaps in contrast to the *Methanex* tribunal, the FTC Statement guideline obliges a prospective third person or organization to

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[282] Bartholomeusz, *supra* note 5, at 279.

[283] CHINKIN & MACKENZIE, *supra* note 94, at 136.

[284] *Methanex* Decision, *supra* note 48, para. 38.

[285] *Suez/Vivendi I* Order, *supra* note 168, para. 24.

[286] *Suez/Vivendi II* Order, *supra* note 207, para. 25.

disclose any affiliations or financial ties to the disputing parties. However, given that *amicus curiae* is generally a group with defined inclinations and agendas, requiring complete neutrality is impractical and unrealistic. Ultimately, the degree of impartiality or independence required of an *amicus curiae* would depend on the function it is assuming. For instance, an *amicus curiae* presenting factual information to the tribunal can be expected to be more neutral than an *amicus curiae* with a direct interest in the dispute and thus leaning towards one particular party.[287]

2. Policy considerations of *amicus curiae* participation

(a) Development as a response to judicialization of investment treaty arbitration

The surge of interest in *amicus curiae* participation may be, in part, attributed to the fact that the recent development is a reaction against the creeping judicialization of ITA. At the forefront of this phenomenon is ICSID, whose accretion of increasingly sophisticated case law and structural features enable *ad hoc* tribunals to function as an adjudicative institution with the potential to administer global governance.[288] The precedential value afforded on individual cases partially stems from the practice of parties building their cases primarily in terms of the case law.[289] The entrenchment of specialized knowledge shared exclusively by a pool of experts contributed to the legitimacy concerns over the traditionally closed system of ITA. Whereas citizens of a particular state are entitled, as a part of good governance, to access the decision

[287] Bartholomeusz, *supra* note 5, at 280.
[288] Sweet, *supra* note 7, at 47, 57, 58.
[289] Sweet, *supra* note 7, at 58.

making process that institutionally shape its domestic public policy,[290] ITA did not allow such participation by the large.[291] Accordingly accountability and transparency, two indispensable elements of institutional legitimacy, were largely unfamiliar in the context of ITA.

Amicus curiae participation is part of a continuing effort to enhance the overall legitimacy of the ITA regime by recognizing the presence of public element and infusing the system with its appreciation. On a similar note, the *Methanex* tribunal identified as a rationale for accepting *amicus curiae* brief, a concern that "arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's willingness to receive *amicus curiae* submissions might support the process in general and this arbitration in particular; whereas a blanket refusal could do positive harm."[292]

(b) Relationship between *amicus curiae* participation and the consent of the parties

Consent of the parties is the cornerstone of establishing the jurisdiction and the authority of the tribunal in the settlement of investment dispute. The prearranged sanction is usually contained in the provision of an investment treaty regulating submission of a claim to arbitration. In *Methanex* the tribunal allowed the *amicus curiae* submission regardless of the claimant's resistance. To this a commentator observed that it constituted a "new marginalization of the consent

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[290] Aníbal Sabater, *Towards Transparency in Arbitration (A Cautious Approach),* 5 BERKELEY J. INT'L L. PUBLICIST 47, 50 (2010).

[291] FABIEN GÉLINAS, *Investment Tribunals and the Commercial Arbitration Model: Mixed Procedures and Creeping Institutionalization*, in GEHRING *ET AL*. EDS., SUSTAINABLE DEVELOPMENT IN WORLD TRADE LAW 585 (Kluwer Law International, 2005).

[292] *Methanex* Decision, *supra* note 48, para. 49.

of the parties (une nouvelle marginalisation du consentement des Parties)".[293] In the advent of the NAFTA parties' approval behind the FTC Statement guideline expressly enabling the practice such "marginalization" is no longer an issue in the NAFTA context. The same goes with ICSID and investment agreements, such as the KORUS FTA, explicitly permitting *amicus curiae* participation.

[293] Brigitte Stern, *L'entree de la societe civile dans l'arbitrage entre Etat et investisseur*, 2 REVUE DE L'ARBITRAGE 329, 339 (2002), cited in Bartholomeusz, *supra* note 5, at 282.

IV. IMPLICATIONS OF *AMICUS CURIAE* PARTICIPATION IN INTERNATIONAL TREATY ARBITRATION – BENEFITS AND CHALLENGES

Amicus curiae participation expands the scope of standing before the arbitral tribunals such that non-disputing parties may monitor the workings of the process and voice their views in the proceedings. As a way of legitimizing and strengthening the process the degree of *amicus curiae* participation endorsed in each ITA regime varies. Such form of participation brings to the table both benefits and drawbacks, the accurate appreciation of which is necessary to determine the proper manner in approaching the practice in the future. The question of whether a broader participation or a reversal of the current situation is warranted should take into consideration competing interests in ITA as well as the advantages and disadvantages associated with *amicus curiae* participation in ITA.

A. Negative Consequences and Shortcoming

Cautionary approach to *amicus curiae* participation in ITA is based on a number of perceived disadvantages that is purported to threaten, or at the least weaken the ITA as an efficient dispute settlement mechanism. *Amicus curiae* participation is a double-edged sword which could undermine the very mechanism it aims to promote, by adulterating the fundamental basis of arbitration.[294]

1. Costs associated with loss of confidentiality

[294] Jorge E. Viñuales, *Amicus Intervention in Investor-State Arbitration*, 61 DISP. RESOL. J. 72, 75 (2007).

Confidentiality assumes a pivotal place in ITA. Privacy of proceedings has been an integral aspect in attracting both states and foreign investors to this institutional framework for two main reasons.

First, weakened confidentiality protection may lead to inadvertent disclosure of sensitive information, such as trade secrets, confidential business information and intellectual property for foreign investors and information related to national security and foreign relations for states. For instance, in *Aguas del Tunari* the foreign investor refused to disclose the financial model explaining its price increase, on the grounds that it constituted a commercial secret.[295] Even exposure of information without strict monetary value, such as regarding conduct of the investor or the host government, allegations parties make against each other, tribunal's findings of fact and law could tarnish the reputation and upset shareholders for the foreign investor and embarrass governmental officials, discourage potential investment opportunities and provoke similar claims by other investors for the host state.[296] Thus commercial operations and even states sometimes have strong interest in keeping the arbitration away from the public and media gaze.

Second, abridgement of privacy may re-politicize disputes which can distort the proceedings and decrease amicable settlement opportunities by aggravating the conflict. The ICSID Convention, for example establishes a neutral international forum in which investors have direct access to remedy without resorting to the mechanism of diplomatic protection. State consenting to

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[295] Emanuele Lobina & David Hall, Problems with Private Water Concessions: A Review of Experiences in Latin America and Other Regions, in Water Pricing and Public-Private Partnership in the Americas, at 44 (Cecilia Tortajada & Asit K. Biswas eds., 2003), *available at:* <http://*www.psiru.org/reports/2003-06-w-over.doc*>. (Last visited: Dec. 26, 2011).

[296] Federico Ortino, Society of International Economic Law, *External Transparency of Investment Awards*, SIEL Inaugural Conference Geneva Working Paper No. 49/08, at 13 (2008).

the ICSID jurisdiction signals its effort to encourage foreign investment within their borders by depoliticizing the dispute settlement process and subjecting it to objective legal criteria.[297] The involvement of special interest groups can however reduce the arbitral tribunal to political battleground and the court of public opinion. Possibilities have been raised that increased publicity and partisan group participation may lead to parties exaggerating allegations in order to claim "'nuisance value compensation" and compelled to see arbitration through to reach a substantive outcome.[298] Moreover arbitrators are not completely impervious to the effect of excessive exposure and the resulting negative public reaction.[299] As such the erosion of confidentiality, some commentators fear, may disincentive disputing parties from submitting disputes to an arbitration process.[300] A stronger sentiment underlies the concern that the loss of such valued attribute might ultimately induce scare away potential claimants, rendering arbitration superfluous.[301]

The notion of party autonomy is the hallmark of confidentiality and some commentators argue that if opting for arbitration derives from the parties' preference for lack of publicity surrounding the resolution their contractual disputes,[302] their priorities deserve deference.[303] A myriad of state-sponsored

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[297] CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 398 (Cambridge University Press, 2001).

[298] N. Rubins, *Opening the Investment Arbitration Process: At What Cost, for What Benefit?*, 3 TRANSNAT'L DISP. MGMT. 3, 8 (2006), cited in Tomoko Ishikawa, *supra* note 101, at 398.

[299] Tienhaara, *supra* note 194, at 240.

[300] Norris & Metzidakis, *supra* note 154, at 71.

[301] Gu Weixia, *Confidentiality Revisited: Blessing or Curse in International Commercial Arbitration?*, 15 AM. REV. INT'L ARB. 607, 630 (2004).

[302] One of the key reasons cited for favoring arbitration against litigation in the legal community is "lack of publicity surrounding hearings."
Nikki Tait, Arbitration Preferred in Cross-border Disputes, Fin. Times, May 16, 2006, *available at:* <http://www.ft.com/cms/s/0/5c00802c-e4f9-11da-80de-0000779e2340.html#axzz1gywycDxV> . (Last visited: Dec. 26, 2011).

investment agreements establish the jurisdiction of ITA in spite of the existing possibility of recourse to ICJ or WTO. As such it can be deduced that the original intention of states is to sidestep public adjudicative mechanism in favor of an alternative model structured as according to the parties will.[304] The *Aguas del Tunari* Tribunal adopted this approach in rejecting the request for *amicus curiae* participation. The tribunal identified that the consensual basis of arbitration forbids the tribunal from granting the requests without the parties' consent,[305] while some even contend that as a "creature of contract" arbitrators should not be forced to undermine such a basis.[306] In this respect, the sole role of arbitrators is to decide the outcome of the dispute irrespective of broader political and social backdrop.[307] An intriguing twist is added in the observation that confidentiality can serve public interests by means of providing attractive alternative dispute resolution for investment-related conflicts which in turn promotes FDI flows.[308]

2. Procedural inefficiency

Encompassing broader *amicus curiae* participation has been highlighted as a cause of rising costs and delays of already expensive and protracted process of arbitration. To the extent that the parties expend time and resources to review and respond to the *amicus curiae* briefs and the tribunal to evaluate the

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[303] Alexis C. Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 AM. U. INT'L L. REV. 969, 1019 (2001).

[304] Sabater, *supra* note 290, at 51.

[305] *Aguas del Tunari* Letter, *supra* note 162, at 1.

[306] Martin H. Malin, *Privatizing Justice - But by How Much? Questions Gilmer Did Not Answer*, 16 OHIO ST. J. ON DISP. RESOL. 589, 615 (2001).

[307] Nigel Blackaby, *Public Interest and Investment arbitration*, 1(2) OIL, GAS & ENERGY L. INTELLIGENCE 1, 105 (2003).

[308] *Id*. at 105.

permissibility of *amicus curiae* submission and reflect it in the final award, this additional imposition burdens not only the disputing parties but the tribunal as well. Administrative costs could also increase if *amicus curiae* petitions and submissions are required to be made publicly available and translated or the authorization of *amicus curiae* submission is to be complemented with rendering the workings of the process more accessible and transparent. Petitioners seeking and tribunals granting access to documents and oral hearings could further complicate manageability of the arbitral proceeding. Tribunals can become flooded with *amicus curiae* petition, a possibility exemplified in the *Aguas del Turnari* case which attracted an overwhelming number of aspiring *amici curiae*.[309]

The main appeal of arbitration, its cost-efficiency, may also be undermined by the interference of an *amicus curiae* attempting to defeat the objectives of ITA in protecting foreign investments.[310] Due to the no burden of proof for an *amicus curiae* and the subsequent lack of quality in *amicus curiae* briefs, the parties must expend additional time and effort on refuting prejudicial facts or argumentations.[311]

As such, the *Methanex* tribunal has warned against the risk of significant increase in the overall cost of the arbitration and extra burden on either party.[312] The pitfall of *amicus curiae* participation also resonates in the words of Judge Richard Posner addressing the *amicus curiae* participation practice in the US

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[309] *Aguas del Tunari, S.A. v. Republic of Bolivia*, Demand for Public Participation, ICSID case No. ARB/02/3, Aug. 29, 2002, paras. 4-12 (hereinafter "*Aguas del Tunari* Demand"), *available at:* <http://www.ciel.org/Publications/CITIZENS_Aug02l.pdf>. (Last visited: Dec. 26, 2011).

[310] Magraw Jr. & Amerasinghe, *supra* note 69, at 354-5.

[311] BRIGITTE STERN, *The Intervention of Private Entities and State as "Friends of the Court" in WTO Dispute Settlement Proceedings,* in PATRICK F.J. MACRORY *ET AL.*EDS., THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 1453 (Springer, 2005).

[312] *Methanex* Decision, *supra* note 48, para. 50.

domestic courts. He ruminates "after 16 years of reading *amicus curiae* briefs the vast majority of which have not assisted the judges" he found that "the vast majority of *amicus curiae* briefs are filed by allies of the litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigants' brief".[313] The effect of *amicus curiae* participation can therefore

3. Impairment of integrity of dispute resolution

Some forms participation can severely compromise the integrity, or the 'orderly working'[314] of the arbitral proceedings and disrupt the peaceful resolution of disputes. Public focus and input brought on by *amicus curiae* participation may in some instances aggravate the dispute. For example, the intense media attention and public pressure were suspected to be behind the investor's decision to withdraw from the arbitration in the *Aguas del Tunari* case.[315] In its request for a procedural order, Biwater in *Biwater* case, alleged the integrity of the process was undermined and dispute exacerbated by the campaigns of the World Development Movement and articles in the Investment Treaty Newsletters featuring the company in a negative light.[316] The tribunal granted the order reasoning that the non-aggravation of the dispute was necessary to preserve an even playing field and maintain a focus on the merits.[317]

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[313] *Ryan v. Commodity Futures Trading Commission*, On Petition for Review of an Order of the Commodity Futures Trading Commission: Motion to Reconsider Denial of Leave to File Brief as Amicus *Curiae*, 125 F.3d 1062, 1063 (7th Cir. 1997).

[314] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Procedural Order No. 3, ICSID case No. ARB/05/22, Sep. 26, 2006, paras. 12 (hereinafter "*Biwater* Procedural Order No. 3").

[315] Harris, *supra* note 75.

[316] *Biwater* Procedural Order No. 3, *supra* note 314, paras. 12, 15-17.

[317] *Biwater* Procedural Order No. 3, *supra* note 314, para. 163.

4. Legitimacy challenges of *amicus curiae*

The legitimacy of *amicus curiae* participation lies with the values of democracy and accountability civil society could infuse into the system of ITA. However, *amicus curiae* participation is not free from allegations of biased representation, found in unequal access and potential partiality of an *amicus curiae*. Such a distorted form of participation devoid of democratic elements could hinder the objective of securing the legitimacy of the ITA process.

According to critics, well funded special interest groups concerned with protecting their invested rights monopolize the arbitration to the detriment of the advocacy for the common good.[318] The well-monied predominantly North-based advocacy groups superior in their well organized structure and ample experience are in an advantaged position to promote their interests before the arbitral tribunal. The stark geographic divide was highlighted in the *Aguas del Tunari* case. Among the more than 300 would-be *amici curiae* a majority came from the developed countries including Australia, Belgium, Canada, France, Holland, New Zealand, the UK and the US.[319] Although the vast majority *amici curiae* to date advocated for the respondent—and often the developing—state's position, this well-meaning participation could nonetheless be construed as a paternalistic and unsolicited interference with the developing world's affairs. Equally possible and more problematic is that the broadening of *amicus curiae* participation likely galvanizes pro-investor organizations to intervene.[320]

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[318] Philip M. Nichols, *Extension of Standing in World Trade Organization Disputes to Nongovernment Parties*, 17 U.PA.J.INT'LECON.L. 295 (1996).

[319] *Aguas del Tunari* Demand, *supra* note 309, paras. 4-12.

[320] Andrea K. Bjorklund, *The Participation of Amici curiae Curiae in NAFTA Chapter Eleven Cases*, Paper prepared for the ad hoc experts group on Investment Rules, at 4 (2002), *available at:* <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/participate-e.pdf>. (Last visited: Dec. 26, 2011).

Impartiality and independence of NGOs are also often questioned. Although complete neutrality of an *amicus curiae* is unrealistic and perhaps unwarranted,[321] to certain extent it is not a wholly extraneous concern. Relationship between *amicus curiae* and arbitrators is difficult to detect for, unlike safeguards in place to prevent conflict of interest between parties and arbitrators, no such mechanism exists to detect similar incidence between the *amicus curiae* and arbitrators. Far from democratizing the arbitral process, the possibility of *amicus curiae* working in cahoots with either of the disputing parties or anyone with vested interest in the dispute, or its non-democratic internal decision making process would besmirch the entire rationale of *amicus curiae* participation. A related question, perhaps more fundamental is that the input by NGOs, which tend to support one side of the arbitration, is inherently partial and in some instances, biased. The disproportionate representation of special interests by advocacy groups and its differential impact on the arbitration could obscure a more balanced outlook on the matter at issue.

The lack of representability and unascertained credibility of the participating NGOs can also undermine the arbitral process. Without a screening process to determine the credibility of each aspiring *amicus curiae* and the relative value of submissions as according to the *amicus curiae's* representability—in numbers of members and political and social prominence—could further harm the legitimacy of ITA.

B. Rebuttals for Arguments on Negative Consequences and Shortcomings

1. Rebuttal for costs associated with the loss of confidentiality

[321] See Part III C. 1. (c).

Secrecy in ITA, despite its merits, is a double edged sword which can easily engender detrimental consequences for the realization of the very purpose it was meant to serve.[322] As has been argued by the petitioners in the *Aguas del Tunari* case, the perception of procedural injustice could fuel the growing public mistrust that investment tribunals are not legitimate forum for the resolution of investment claims. Negative repercussions of a lack of transparency can be evidenced by the aftermath of the *Aguas del Turani* case. Another notable example is the case of Argentina which was, following its financial collapse in 2001, inundated with arbitral claims. Subsequently the Argentine government resisted enforcing several awards against it and displayed reluctance to submit itself to ICSID jurisdiction for future disputes despite its obligations to do so under many BITs.[323] Negative reactions against ITA from a string of host states could hamper free flows of international investment, frustrating the *raison d'etre* of the international investment regime.

Empirical evidence suggests dire speculations regarding the effect of diminishing confidentiality on the possibility of commercial parties' renouncement of ITA and adverse impact on worldwide investment may not necessarily be correct. Bechtel, the major shareholder of *Aguas del Tunari* withdrew its claims against Bolivia but not before being subjected to pervasive publicity and intense public pressure. Whether negative exposure to the media prompted the company's decision cannot be ascertained,[324] but regardless of the motivation the publicity did not hinder its closing of two successive major water deals in Ecuador in 2001.[325] Furthermore a spate of unilateral attempts by the

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[322] See Part II B. 3.

[323] Barry Leon & John Terry, *Special Considerations When a State is a Party to International Arbitration*, 61-Apr. DISP. RESOL. J. 69, 76 (2006).

[324] Harris, *supra* note 75.

[325] William Finnegan, Leasing the Rain, The New Yorker, Apr. 8, 2002, *available at:* <http://www.newyorker.com/archive/2002/04/08/020408fa_FACT1>. (Last visited: Dec. 26,

South American countries at renegotiation of concessions or nationalization of natural resources have left many investors incensed,[326] suggesting under the current wave of state actions, expansion of ITA can be expected to continue irrespective of lowering bars on confidentiality. A direct correlation between the loss of confidentiality and diminution in trans-border investment flows or arbitration thus cannot be established.

Moreover, increased transparency does not necessarily entail breach of confidential information as those concerns can easily be addressed by adopting procedures or setting up a confidentiality agreement whereby such information is redacted from the publication.[327] A number of dispute settlement fora provide for a general provision to this effect. The ICC Rules for instance stipulates that the investor-state panel "may take measures for protecting trade secrets and confidential information."[328] ICISD does not put forward a formal position on the issue. However, it has been observed that the 2006 amendment does not negate the individual tribunal's discretion to set the terms applicable in each proceedings for the purpose of protecting proprietary information.[329]

In terms of politicization, the risk for politicization or exacerbation of disputes of public significance exists regardless of *amicus curiae* participation since any information on such a case can incur strong media reaction and public backlash. The more the process appears concealed, the more the public may become incensed as a result, such as in the case of *Aguas del Tunari*.

Lastly, the criticism centered on the notion of party autonomy is fraught

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[326] Michael S. Goldberg & Dev Krishan, Resource-Rich Nations are Reshuffling the Deck, Nat'l L.J., Aug. 7, 2006, 3 (2006), *available at:* <http://www.bakerbotts.com/file_upload/documents/NU_Goldberg_NLJ_article_August_2006.pdf>. (Last visited: Dec. 26, 2011).

[327] Weixia, *supra* note 301, at 632.

[328] International Chamber of Commerce, Rules of Arbitration, art. 20(7).

[329] ICSID Secretariat, *supra* note 161, at 11.

with pitfalls. Investor-state disputes concerning transaction involving a state that critically affects its public can rarely be private in nature. Accordingly the traditional concept of party autonomy cannot be applied unabridged.

2. Rebuttal for procedural inefficiency

Any concerns for procedural inefficiency can be minimized by the safeguards the tribunal adopts in order to regulate when and how *amicus curiae* submissions should be filed with the tribunal. Setting page limits and reasonably tight deadline reduce the amount of material the parties and tribunal have to assess and respond to, thereby curbing delay. NAFTA FTC Statement for example set five and twenty pages limit for the petition and the submission respectively. Likely, the ICSID tribunals have imposed page limits and deadlines to expedite the process. Limiting the subject matter also reduces delay by restricting the brief to focus on the important issues within the scope of the dispute.

Timely disclosure of key documents would assist the *amicus curiae* in efficiently and accurately framing their petitions and submission without reliance on less reliable sources. By reducing the delay in preparation for *amicus curiae* participation, it indirectly lowers the costs associated with the practice. Timely and economical dissemination of materials can be achieved via the internet and other electronic sources. For instance, following the FTC Notes on Interpretation, the NAFTA states have posted most related documents on their respective websites. ICSID awards and orders are also published on its website. On-line publication ensures timely disclosure of work products, incurring little or no financial costs and without delays to the arbitral proceedings.

Furthermore, the use of strategic collaboration by several aspiring

amici curiae can contain the financial costs entailing the procedure.[330] In *Biwater*, the petitioners noted the collaborative effort behind the joint petition would help alleviate the burden on the tribunal having to sift through a large number of *amicus curiae* petitions and submissions.[331] Therefore ordering of joint submissions can prevent floodgate of *amicus curiae* submissions.

More fundamentally, given that an *amicus curiae* do not require remuneration for its services the tribunal is in fact receiving an extra set of help at no added cost to the disputing parties.

3. Rebuttal for legitimacy challenges of *amicus curiae*

The NAFTA FTC Statement obliges the petitioners to reveal any affiliation with the disputing parties and the individual tribunals retain the authority to 'decide whether it will allow the litigation to be extended in the ways suggested by an *amicus*'.[332] It is thus possible for tribunals to bar participation by NGOs with dubious motivations or legitimacy, unascertained source of funding or lack of transparency. The burden of proof lies with the *amicus curiae* to convince the tribunal that its application for submission meet the criteria set out in the relevant rules. As such, the tribunal confirmed in the *Suez/InterAguas* case that it will only admit submissions from an *amicus curiae* which has been demonstrated to possess sufficient expertise, experience and independence to assist the tribunal[333] and rejected the petition at hand for lack of information attesting to the applicant's qualification. Even if, in practice, the partiality of *amicus curiae* participation cannot be removed, tribunals can take this into

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330 Magraw Jr. & Amerasinghe, *supra* note 69, at 354.

331 *Biwater* Petition, *supra* note 192, at 9.

332 CHINKIN & MACKENZIE, supra note 94, at 154.

333 *Suez/InterAguas* Order, *supra* note 180, para. 23.

consideration when evaluating an *amicus curiae* brief and avoid undue influence by a particular submission.

As to the concern regarding the extended participation of 'commercial' NGOs or industry-oriented organizations, the rationale behind *amicus curiae* participation is to furnish to tribunal with diverse perspectives and expertise. Precluding groups of certain proclivity is on the other hand, contrary to the principle of equality of the parties and deleterious to the equilibrium between the public interests of the host state and the economic interests of the foreign investor.

4. Concerns and solution for minimal impact of *amicus curiae* participation

The prospect for *amicus curiae* participation in ITA is clouded by doubts regarding the effectiveness of *amicus curiae* submissions without adequate transparency and circumscribed discretion of the tribunal in managing *amicus* submissions.

In principle, an *amicus curiae* must have sufficient information on the subject matter of the dispute to provide perspectives, expertise and arguments which are pertinent and useful to the tribunal.[334] Adequate knowledge on the dispute and the proceedings is a prerequisite for a prospective *amicus* to become aware of the arbitration, determine the suitability of its contribution and make a meaningful submission.[335] However, under the current process for the admission of *amicus curiae* the third parties are entitled to limited transparency. For example in *Suez/Vivendi II*, the tribunal declined to grant non-disputing parties full access to the arbitration record on the ground that the petitioners had gleaned

[334] *Suez/Vivendi II* Order, *supra* note 207, para 24.
[335] Ishikawa, *supra* note 101, at 401.

sufficient information from other resources.[336] Similarly in *Biwater*, the tribunal rejected the request reasoning that the particular dispute was widely reported and the broad policy issues with which the *amici curiae* were well acquainted and concerned are in the public domain.[337]Conversely, it is important to note that most tribunals save for *Aguas del Tunari* have contemplated the possibility of disclosing certain materials and the differentiated treatment outlined in the *Biwater* Procedural Order No. 3 calls for a 'structured discretion' of the tribunal regarding the publication of documents. Implementation of transparency measures as a buttress for *amicus curiae* participation cannot be applied uniformly to all ITAs but should take into account, considerations specific to each case to balance the varying interests involved.

The concern regarding the unbridled discretion of the tribunal refers to the lack of assurance to take the submissions into consideration in rendering its decision despite granting the leave to file *amicus curiae* briefs. The tribunal has complete discretion over whether to mention or examine the briefs in the final award and to what extent the submissions are considered or how much weight is given to them. It follows that empowering tribunals to accept *amicus curiae* submission is not enough to claim greater openness for it could end up as an empty pledge.[338] As such tribunals should be obligated to give good faith consideration to the *amicus curiae* submissions they accept.

C. Rationale and Potential Benefits

1. Promotion of systemic legitimacy

[336] *Suez/Vivendi II* Order, *supra* note 207, para 24.
[337] *Biwater* Procedural Order No. 5, *supra* note 191, para. 65.
[338] Ishikawa, *supra* note 101, at 404.

The legitimacy and credibility of the arbitration regime is particularly significant in the wake of the surge of the ITA and the increasing precedential value of arbitral decisions. The legitimacy of a system of governance refers to, in the 'normative-institutional' sense, administration of a set of predetermined rules by an impartial expert body and in the 'empirical-social' context, acceptance by the people.[339] *Amicus curiae* participation promotes a measure of due process by allowing access to persons or entities otherwise unable to participate in the proceedings as parties, despite their interest in the outcome of the dispute. The resulting enhancement in transparency and accountability confer legitimacy on the ITA system,[340] thereby strengthening the validity of the process as a dispute resolution mechanism and reducing the possibility of resistance towards the implementation of the decision.

Transparency is one of the defining attributes of *amicus curiae* participation. *Amicus curiae* participation promotes the dissemination of information and sheds light on many aspects of the process and the dispute. In the *UPS* case, Canada's support for *amicus curiae* participation was based on its acknowledgement of the role transparency assumes in instilling confidence in the ITA regime.[341] Since transparency is a prerequisite for a meaningful *amicus curiae* submission, extensive interest in *amicus curiae* participation entails broader transparency endeavors such as release of formerly confidential materials. Transparency facilitates awareness of the process thereby creating opportunities to rectify and improve problematic aspects. It reduces secrecy and as a corollary, defuses deep-seated disquiet regarding the ITA proceedings as a forum for the settlement of public disputes.

Accountability in the context of ITA has been difficult to attain due to its

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[339] Stein, *supra* note 14, at 494.

[340] Stein, *supra* note 14, at 493-4.

[341] *UPS* Decision, *supra* note 125, para. 51.

private nature of dispute resolution. Calls for greater accountability in ITA is in part a response to the growing demands for democratic governance requiring process with far-reaching public implications be held accountable towards the public. It has been suggested that public pressure on arbitrators to consider the larger picture of the outcome of the decision could be salutary and facilitate adept handling of the proceeding.[342] Moreover *amicus curiae*'s participation itself is accountable to the public since its intention, extent and substantive content of participation is disclosed in its petition and subsequent submission.

2. Improvement of legal quality of awards and assistance to the development of international investment law

Public participation by *amicus curiae* with relevant expertise in wider civil society interests can improve the legal quality of awards. Tribunals have underscored the importance of establishing the context of a dispute which without *amicus curiae* input may not otherwise be possible.[343] *Amicus curiae* often present the panel with factual information, experience or legal arguments as impartial bystander that the disputing parties cannot or will not provide the tribunal due to lack of incentive, insufficient knowledge or concern over the prejudicial effect to their case. Parties often do not paint the accurate background of the dispute as the public interests at stake may not pertain directly to the

[342] Vanesa Vujanic, *Amicus Curiae and Non-governmental Organizations in Investment Arbitration: Postivie or Negative?,* CENTER FOR ENERGY, PETROLEUM AND MINERAL LAW AND POLICY ANNUAL REVIEW 2009/2010**,** 6, *available at* : <http://www.dundee.ac.uk/cepmlp/gateway/?news=31255>. (Last visited: Dec. 26, 2011).

[343] *Methanex Corp. v. United States*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 44 I.L.M. 1345, Aug. 3, 2005, PART II paras. 26-29; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Award, ICSID case No. ARB/05/22, Feb. 2, 2007, paras. 355, 359, 392 (hereinafter "*Biwater* Award")

parties' investment-related concerns in the dispute. Their efforts in curbing the arbitration costs can similarly thwart a comprehensive analysis on the impact of the arbitration for the citizenry of the respondent state and its public policy considerations.

Civil society groups' function in introducing and highlighting new issues in ITA is particularly important on a practical note, since due to the age of arbitrators on ITA panels most are not familiar with the questions of regulatory issues that often constitute the focal point of the arbitration.[344] The broad spectrum of legal issues—from commercial to human rights—surrounding investment disputes may not be adequately answered due to the lack of expertise of arbitrators selected by the parties. Many public interest groups, on the other hand, with their specialized knowledge have the capacity to assist the tribunal to arrive at a more informed and defensible decision. Indeed in *Biwater*, the tribunal took *amicus curiae* submissions into consideration and their specific legal argumentations in determining the relevant threshold of fair and equitable treatment.[345] The tribunal extensively referred to the submission in the final award and lauded its relevance and assistance to the panel.[346] Improving the quality of the award is vital in ITA given its finality coming from limited opportunity for appeals.[347]

Amicus curiae participation and ensuing transparency also contribute to the maintenance of consistency across multiplicity of ITA forums by preventing fragmentation in international investment norms. This is particularly important given the still formative phase of ITA with considerable uncertainty and fluidity

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[344] Magraw Jr. & Amerasinghe, *supra* note 69, at 340.

[345] *Biwater* Award, *supra* note 343, para. 601.

[346] *Biwater* Award, *supra* note 343, paras. 370-392.

[347] For example, ICSID allows narrow grounds to challenge the final award under the annulment process.

surrounding important procedural and substantive issues. Development of coherent and predictable body of law is crucial in the initial period of flux for it is likely to characterize the burgeoning forum of dispute resolution particularly with high economic and political stakes involved.[348]

3. Protection of public interests

Amicus curiae participation assures a wide ventilation of viewpoints. Ideals typically represented are democratic values, principle of good governance, corporate social responsibility and the imperative of environmental protection and human rights. On a substantive level, an *amicus curiae* acts as a conduit of public interests illustrating for the tribunal a broader political, social and economic setting of the dispute and instilling in the process an appreciation for the previously disregarded aspects of investment conflicts.

Moreover, the act of participation itself is the realization of freedom of information, well-recognized as a cardinal facet of democratic governance on both domestic and international levels. Access to public information is a prerequisite for a functioning democracy[349] and such an ideal is embodied in Article 13 of the American Convention on Human Rights, Principle 10 of the Rio Declaration on Environment and Development as well as Convention on Access to Information[350] as well as the Convention on Access to Information,

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[348] Luke R. Nottage & Kate Miles, *'Back to the Future' for Investor-State Arbitrations: Revising Rules in Australia and Japan to Meet Public Interests*, 26(1) J. INT'L ARB. 25, 30 (2009)

[349] Access to Public Information: Strengthening Democracy, G.A. Res. 1932, para. 1, OAS Doc. AG/Res. 1932 (XXXIII-O/03) (June 10, 2003), *available at* <http://www.oas.org/juridico/english/ga03/agres_1932.htm>. (Last visited: Dec. 26, 2011).

[350] Rio Declaration on Environment and Development principle 10, June 14, 1992, 31 I.L.M. 874, *available at* <http://www.unesco.org/education/information/nfsunesco/pdf/RIO_E.PDF>. (Last visited: Dec. 26, 2011).

Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)[351]. Transparency promotes awareness of the dispute, arbitration process and the outcome while *amicus curiae* participation provides a channel of access to the decisions with the potential to critically impact the public. *Amicus curiae* participation therefore exemplifies the incremental democratization of investment dispute settlement mechanism and facilitates the institution of good governance in the system.

[351] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, preamble, art. 3, June 25, 1998, 2161 U.N.T.S 447, *available at* <http://www.unece.org/env/pp/documents/cep43e.pdf>. (Last visited: Dec. 26, 2011).

V. FUTURE PROSPECTS AND DEVELOPMENTS

A. Balancing Competing Interests

The review of *amicus curiae* participation practice in ITA suggests a lack of predictable, systematic approach in the ITA forums. *Amicus curiae* participation has first been introduced in ITA through interpretation by individual tribunals, while attempts at formalized criteria have been made only in the context of the FTC Statement, ICSID Rules, the Canadian Model FIPA and some investment agreements including the KORUS FTA. Moreover, the FTC Statement is a non-binding guideline and the sets of criteria in the above instruments are all limited to the receipt of written briefs. While the ICSID Rules employ the three-part test, FTC Statement and the Canadian Model FIPA include a fourth element of public interest in the criteria. While the increasing acceptance of *amicus curiae* participation practice suggests that it is on the road to becoming an entrenched feature of ITA especially when public policy considerations are at stake, scholars have voiced their concerns that the deficiency of a well-developed, formalized criteria in arbitral rules could protract the legitimacy crisis in ITA.[352]

Therefore as a first step, a set of comprehensive and legally binding list of exhaustive criteria should be adopted in the major rules that are most frequently utilized. It is important for *amicus curiae* participation to claim a legitimate status in ITA rather than remain a highly recommended procedure. Although the instruments are independent of each other, given the precedential value placed on the prior decisions, a developing practice of a regime tends to cross-fertilize other rules and practices, consolidating its status in ITA proceedings. Through the rules, *amicus curiae* participation should be broadened,

[352] Choudhury, *supra* note 10, at 720.

albeit with caution. Increased opportunities should be balanced with necessary safeguards put in place to neutralize its potential side effects and weaknesses. The specific content of the rules that is indispensable for the above purpose will be discussed in the section below.

B. Developing Formalized Criteria for *Amicus Curiae* Participation

Encouraging and strengthening participation

In order to strengthen *amicus curiae* participation in ITA, curtailing discretion in favor of a mandatory, thus broadened opportunity for *amicus curiae* should be considered. *Amicus curiae*, upon successfully demonstrating its fulfillment of all the requirements, should be guaranteed access to the process rather than subjecting the possibility of participation to the uncertain and flexible exercise of tribunal's discretion. A move away from the purely discretionary power of the tribunal is also necessary after the petition is accepted. The tribunal should be required to give due consideration to the submission that has passed the threshold and examine the arguments contained in the brief in its final decision.

The tribunal should also exercise 'structured discretion' in authorizing open hearings—and potentially oral arguments by an *amicus curiae*—and access to documents. Factors the tribunal should take into consideration in determining the mode and extent of access include the following: (i) the subject matter of the *amicus curiae*'s argumentations; (ii) the array of information available in the public domain; (iii) the knowledge already in the applicant's possession;[353] (iv) the existence of direct legal interest of the *amicus curiae* in the case; (v) the

[353] Ishikawa, *supra* note 101, at 401.

extent to which the petitioner can contribute to the quality of the final decision; and (vi) whether such contribution is dependent on a more expansive access to the records.[354] Especially in terms of access to key documents such as briefs, pleadings, transcripts, preliminary orders and final awards, the differentiated treatment delineated in the *Biwater* Procedural Order No. 3 can be of useful guidance.[355] Prompt and systemic disclosure should be ensured to facilitate applicants in framing an accurate, efficient and meaningful submission for the benefit of the tribunal.

Qualifying the mode of participation

The tribunal's role as a gate-keeper requires maintaining the balance between the advantages of accepting *amicus curiae* briefs and the importance of a timely and cost-efficient settlement of disputes. The tribunal should specifically be authorized to implement safeguards and procedures regarding setting the appropriate length for the submission, arranging the schedule and deadlines, protecting inherently confidential information and ordering joint submission.

Although placing page restriction may limit the petitioner's case thus compromising its value, by the same token it could facilitate consolidation of the strongest arguments and presentation in a succinct manner. In practice, NAFTA imposes a generally applicable page limit, whereas the ICSID tribunals set the limit on a case-by-case basis. While the institutional limit reduces the tribunal's resources by eliminating the need to determine the appropriate page limit in each case, it does not factor in the circumstances that may warrant an in-depth approach. Thus tribunals should have the flexibility to set the limit depending on

[354] Levine, *supra* note 11, at 222.

[355] See Part III B. 2. (f).

the case.

The tribunal should also have the latitude to arrange a reasonably tight schedule and impose deadlines by which the documents should be released to the public or the intervening third party and the *amicus curiae* submission must be filed.

Institutional procedure to protect sensitive business information and state secrets should be provided. Tribunals should be able to issue confidentiality orders or prepare appropriate logistical arrangements such as publication subject to redaction and closed proceedings for confidential or protected information.

Lastly, the practice of joint submission should be crystallized as a rule. Requiring a number of unrelated institutions to file a single *amicus curiae* brief could compromise the quality of arguments and diversity of perspectives, especially with the page limit rule. The process of collaboration for the participating NGOs can also be time-consuming and costly. The requirement is however, vital in preventing tribunals from becoming inundated with the cavalcade of *amicus curiae* petitions. Streamlining the procedure allows the parties and tribunal to avoid a large influx of petitions and repetitiveness of submissions while conferring on civil society groups from the developing countries a greater opportunity to participate by collaborating with the NGOs of the developed countries with better resources.

Ensuring the legitimacy of participation

Also important is the stipulation to disclose the source of funds with which the *amicus curiae* operates and any type of affiliation with the dispute, disputing parties or arbitrators to ensure its impartiality and independence. Such a requirement is necessary to prevent *amicus curiae* participation, introduced to enhance the systemic legitimacy, from spawning another source of legitimacy

dilemma by undermining procedural fairness.

Criteria ratione materiae

The participation of *amicus curiae* should hinge more on the interest of the tribunal than that of the petitioner seeking to intervene. In another words, the *amicus curiae* should assist the tribunal in the proper administration of justice.

① "Significant interest in the arbitration"

An element recognized in the established *amicus curiae* participation practice is the existence of "significant interest in the arbitration"[356] or "proceeding".[357] "Arbitration" or "proceeding" appears to refer broadly to both the subject matter and the outcome. The working paper drafted by the ICSID Secretariat prior to the amendment of the ICISD Rules suggest that the tribunal should ensure the *amicus curiae* has significant interest in the "dispute" [358] whereas in the *AES Summit*, the ICISD tribunal ruled the European Commission possessed interest in the "outcome of the case"[359].

Whether the interest must be direct or whether a more direct interest merit a broader participation has not been fully probed. The existence of direct interest determines the distinction between NGO participation and that of the

[356] FTC Statement, *supra* note 138, para. B.6.(c).

[357] ICSID Arbitration Rules, *supra* note 29, art. 37(2)(c).

[358] ICSID Secretariat, *Suggested Changes to the ICSID Rules and Regulations*, Working Paper of the ICSID Secretariat (2005), p.11.

[359] Epaminontas Triantafilou, *A More Expansive Role for Amici curiae Curiae in Investment Arbitration?*, KLUWER ARB. BLOG (2009), available at: <http://kluwerarbitrationblog.com/blog/2009/05/11/a-more-expansive-role-foramici-*curiae*-in-investment-arbitration>. (Last visited: Dec. 26, 2011).

third parties such as the European Commission in the *AES Summit*. Advocacy groups usually represent broad public concerns which may not directly pertain to the substantive legal issues at hand[360] whereas the European Commission had "significant, direct, legally protectable interest."[361] The European Commission has a compelling interest in securing consistent interpretation and application of its competition law across its jurisdiction and the award insufficiently addressing such concern could entail ramifications undermining the comprehensive resolution of the case, such as challenges against the award before an EU-bound court.[362] It is therefore desirable to contemplate granting a broader participation, such as in the form of a longer submission, to the entities with a more direct interest to the case.

② "Public interest in the subject-matter of the arbitration"

The requirement of "public interest in the subject-matter of the arbitration" is not as universally espoused as the criterion of significant interest. NAFTA FTC Statement, the UNCITRAL reform proposal and the Canadian Model FIPA contain the requirement whereas the ICSID Arbitration Rules, the US Model BIT and KORUS FTA do not. The absence of the requirement means the tribunal does not have to assess whether the dispute involves a matter of public interest. This is particularly significant as no singularly agreed upon interpretation of public interest exists and the salient features of the concept have not been conclusively identified in the arbitral practice. For instance in *Metalclad*, the NAFTA Chapter 11 arbitration conducted under the auspices of ICSID, the tribunal did not address the role of public interest in spite of the dispute arising

[360] Levine, *supra* note 11, at 215.
[361] Triantafilou, *supra* note 359.
[362] Triantafilou, *supra* note 359.

out of the Mexican government's failure to grant license for hazardous waste landfill and designation of an ecological zone.[363] In *S.D. Myers, Inc. v. Canada*, the case surrounding Canada's prohibition of transboundary export of PCB waste, the tribunal was again hesitant in acknowledging the involvement of health and environmental issues.[364] Thus the proof of public interest in the subject matter should not be required as a precondition to *amicus curiae* submission, to prevent vesting in the tribunal an unnecessarily wide discretion in declining *amicus curiae* participation. Moreover *amicus curiae* participation is not limited civil society groups but open to trade associations and corporations. The participation of diverse interest groups is justified since increased representation of relevant interests enhances democratic process and legitimacy of arbitration.

[363] *Metalclad*, *supra* note 34, para. 98.

[364] Choudhury, *supra* note 10, at 817; *S.D. Myers*, *supra* note 34, paras. 152, 161-2.

VI. CONCLUSION

Both host states and foreign investors regard fair treatment as a paramount priority in the arbitration process. Even so, states are in a unique position in that private individuals pursuing direct claims against sovereign states signifies a restriction on and deviation from state sovereignty in the traditional sense. States are also subject to greater pressure from their constituencies to enforce political and financial accountability. This trilaterality in ITA comprised of the claimant, respondent state and its public has largely been obscured in the traditional paradigm focused on the model of its commercial precursor.

Investment tribunals however, have increasingly taken into consideration the distinctive needs of the respondent states in their conceptualization of procedural justice and maintenance of the effectiveness of the system. Charles Brower, a renowned arbitrator for the Iran-United States Claims Tribunal since 1983 has observed that "tribunal [is] doing a number of things which may be very frustrating to the claimant but in the end are designed by the tribunal to insure that the award it ultimately renders is, in fact, accepted as legitimate by the parties and can be enforced by any relevant national court."[365] Removing misgivings about procedural impartiality aims to diminish or preclude potential attacks on the final awards and as a consequence on the regime of ITA.

Various measures mitigating strict insistence on confidentiality have been contemplated to this end and several have been successfully instituted in ITA. *Amicus curiae* participation is one of the more dramatic divergent from the traditional privacy oriented model of arbitration. Repercussion of the erosion of the fundamental basis in commercial arbitration has been magnified due to the unexpected success of ITA, drawing both criticisms and acclaims from each end

[365] Charles N. Brower, *Arbitrating Against Foreign Governments*, 6 J. TRANSNAT'L L. & POL'Y 189, 196 (1997)

of the spectrum.

On a positive note, the insertion of *amicus curiae* participation in the context of ITA has been considered as a corollary of the maturation of the regime through the incorporation of democratic principles and ideals of public interest. *Amicus curiae* participation which affects both the "internal conduct of the proceedings and the external perception of the disputes"[366] not only begets substantive changes to the outcome of the dispute but also contributes in the construction of a perceived impartiality and justice of the ITA mechanism. The legitimacy, both substantive and perceived, is the answer to assuaging the backlash against the ITA regime without undermining its prevalence or dominance and thus the ultimate goal of *amicus curiae* participation.

At the other end of the spectrum are apprehensions over the efficacy and negative consequences of opening the arbitral proceedings to the public. *Amicus curiae* participation could render ITA less appealing to foreign investors and cause further legitimacy concerns within the system. While it is unrealistic and undesirable to reject *amicus curiae* participation on the basis of traditionally closed model of arbitration, its negative impact should be mitigated through various safeguards. It is equally important to balance the interests of various stakeholders of ITA, including the foreign investor, State and the public of the State which each hold different priorities. As such, *amicus curiae* participation should be subject to necessary measures to preserve the efficiency, orderly progress of the arbitration and equality of parties. The delicate equilibrium between anticipating a more expansive role for *amicus curiae* participation and restricting the manner in which it may be realized, is needed to further its aim and consolidate its status as a mainstream practice in ITA. Furthermore, such an effort should be reflected in the relevant rules and agreements as a set guideline.

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[366] Bjorklund, *supra* note 32, at 1293.

An institutionalized and predictable process would contribute to the public acceptance and effectiveness of *amicus curiae* participation and in turn, ITA as a dispute resolution mechanism.

The recent manifestation of hostility towards the ratification of KORUS FTA and in particular the ITA mechanism has left some segments of the Korean society deploring the prospect of "[f]oreign investors … rul[ing] the country".[367] Although not a panacea, structural and policy changes built on a cautioned yet receptive approach to *amicus curiae* participation can contribute in alleviating speculative yet corrosive fears towards ITA and legitimacy concerns over the system. Balancing the promotion of transparency with the preservation of the benefits deriving from the traditional model of arbitration is the compromise required in order to instill ITA with a higher degree of legitimacy.

[367] Evan Ramstad, Kang: Will Fight Korea-US FTA To the End, WSJ Asia, Nov. 10, 2011, *available at:* <http://blogs.wsj.com/korearealtime/2011/11/10/kang-will-fight-korea-us-fta-to-the-end/>. (Last visited: Dec. 26, 2011).

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국문초록

국제투자분쟁해결절차상의 공익적 고려에 관한 연구: 외부조언자 의견제출권을 통한 체계적 정당성 강화를 중심으로

김미라

외국투자자가 투자유치국 정부를 상대로 소송을 제기할 수 있도록 한 국제투자분쟁해결절차는 국제상사중재제도를 모델로 하여 시작되었다. 국제상업회의소의 국제중재법원, 유엔국제무역법위원회(UNCITRAL) 중재규칙 등에 따른 임의중재는 본래 상사분쟁의 해결을 위한 절차적 근거규범이 투자분쟁해결까지 확장적용 된 경우이다. 국가와 타국국민의 투자분쟁의 해결에 관한 협약에 의하여 설립된 국제투자분쟁해결본부(ICSID)는 국제투자분쟁의 해결을 전담하는 기구이지만 당사자간의 합의에 따라 중재에 의하여 분쟁해결을 도모하는 국제상사중재제도에 기반하고 있다.

국제상사중재제도는 비공개로 진행되는 것이 원칙이며 이는 국제상사중재규칙에 따르는 투자자-국가간 중재는 물론 ICSID 중재에도 상당부분 반영되어 있다. 그러나 다중에게 영향을 미치는 환경, 인권, 공중보건 등의 공익 및 국가의 공공정책의 수립·시행과 밀접한 관련을 맺고 있는 투자분쟁이 밀실재판처럼 진행된다는 비판이 거세지면서 이러한 민주적 결함을 시정하고 투자자-국가간 중재의 체계적 정당성을 확보하기 위한 노력이 2000년대에 들어서 급물살을 타고 있다. 그 일환으로 제시되고 있는 것이 분쟁당사자 외의 제3자의 중재절차 참여이며 그 중 외부조언자 의견제출권은 시민단체 등 제3자가 중재판정부가 분쟁의 사실적·법적 쟁점을 판단하는데 도움이 될만한 의견을 제출할 수 있도록 한다.

투자자-국가간 중재에서 최초로 제3자 참여를 인정한 북미자유무역협정(NAFTA)의 경우 UNCITRAL 중재규칙에 따른 *Methanex Corp. v. United States*와 *United States Parcel Services of America v. Canada* 사건에서 판정부는 중재규칙 제15조 1항에 의하여 외부조언자 의견제출을 접수할 권한이 있다고 판단하였고 NAFTA 자유무역위원회는 그 후 이를 명시적으로 선언하였다. 이 선언에 따르면 외부조언자 의견제출의 허부 결정에 있어 판정부는 i) 제3자가 제공하는 다른 관점, 특정 지식, 통찰력이 사실·법적 쟁점 판단에 도움이 되는 정도, ii) 분쟁범위 내 사안인지 여부, iii) 절차에 중대한 이해관계를 가지는지 여부 및 iv) 공익과 관련되는지 여부를 고려해야 한다. 한편 ICSID의 경우 초기 사건들에서 나타난 다소 상충되는 결정들 이후 2006년 중재규칙 개정작업을 통하여 분쟁당사자와 협의 후 외부조언자 의견제출을 허용할 수 있도록 규정하고 NAFTA 자유무역위원회 선언의 네 가지 요건 중 마지막 요건을 제외한 "three-part test"를 도입하였다. UNCITRAL 중재규칙은 ICSID나 NAFTA보다 엄격한 비공개원칙을 유지하고 있지만 외부조언자 의견제출권을 규정하고 있는 개정안이 여러 번 제안되었고 현재도 개정 노력이 진행 중이다. 그러나 그 외의 상사중재규칙에는 이러한 내용이 반영되어 있지 않다.

외부조언자 의견제출권은 국제투자분쟁해결절차의 체계적 정당성을 강화하기 위하여 도입되었다. 이 제도는 판정의 질적인 향상과 국제투자법의 발전에 기여하며 특히 공익과 밀접한 관계를 맺는 투자자-국가간 중재에 시민사회의 참여를 보장한다. 반면 당사자의 부담 증가, 무분별한 의견제출로 인한 절차지연, 외부조언자의 정당성 결여 등 여러 가지 잠재적인 문제 또한 지니고 있다. 하지만 이러한 우려는 투자보호—공익보호, 기밀성—투명성, 중재의 효율성—제3자의 참여 이익 사이의 적절한 균형의 유지를 위한 노력으로 상당부분 완화될 수 있으며 이는 외부조언자 의견제출의 허용을 위한 체계화된 기준의 정립을 통하여 이루어져야 할 것이다. 외부조언자 의견제출권은 중재를 통한 국제투자분쟁해결 시스템의 체계적 정당성을

인정받기 위하여 다수의 이해관계인의 참여를 도모하는 제도인 만큼 이러한 목적과 부합하는 방향으로 관련된 이익의 균형 및 조율을 통하여 그 구체적인 구현방안을 모색하고 발전시켜 나가야 할 것이다.

주요어: 외부조언자 의견제출권, 투자자-국가간 중재, 공익, 체계적 정당성, 투명성, 시민사회

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