Friends of the Panel:
The Evolution of *Amicus* participation in International Investment Arbitration

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I. Introduction

Since November 25, 1959, when the world first witnessed the signing of a Bilateral Investment Treaty ("BIT"), the growth and influence of BITs and other International Investment Agreements ("IIAs") has proven nothing short of extraordinary. As of 2009 more than 2600 such treaties existed,[2] with the majority of the world's states being a party to at least one and most countries having signed many more.[3] Considering the rapid growth of such treaties and the ever-increasing international web of capital, trade and Foreign Direct Investment ("FDI"), the expanding influence of such treaties can only be expected to continue.

It is difficult to overstate the importance of these "agreements between two countries for the reciprocal encouragement, promotion and protection of investments in each other's territories

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2 Damon Vis-Dunbar and Henrique Suzy Nikiema, *Do Bilateral Investment Treaties Lead to More Foreign Investment*, Investment Treaty News, April 30, 2009, available at <http://www.iisd.org/itn/2009/04/30/do-bilateral-investment-treaties-lead-to-more-foreign-investment/>

3 Calvin A. Hamilton & Paula I. Rochwerger, *Trade and Investment: Foreign Direct Investment through Bilateral and Multilateral Treaties*, 18 N.Y. Int'l L. Rev. 1, 3 (2005).

by companies based in either country."[4] To start, they are vital in ensuring investor confidence that rules surrounding investments will be predictable for the foreseeable future. Without such confidence both public and private FDI into developing countries could sharply decrease. The risk aversion of private investors could be particularly damaging to developing economies based on the tremendous percentage of FDI that comes from the private sector.[5]

While increased investment and investor confidence are the primary purposes of BITs, the fact that such agreements often have considerable implications beyond the realm of FDI cannot be escaped. Actions are often brought that seek to invalidate various government actions and policies through provisions in BITs. Such policy challenges can have far-reaching implications regarding human rights, environmental, social and other issues (collectively "Public Interest").

It is this inescapable reality that is the purpose for this paper. Over the past few years arbitral tribunals have begun to accept the submissions of non-disputing parties ("NDPs") to assist tribunals in understanding the policy implications of tribunals aiming only to make decisions on financial agreements. The acceptance of such submissions has also helped tribunals to respond to complaints regarding their lack of transparency and perceived lack of legitimacy.[6]

4 *What are BITs?*, U.N. Conf. on Trade & Dev, http://www.unctadxi.org/templates/Page____1006.aspx (last updated Aug. 17, 2004).

5 See Generally: Laura Alfaro, *Foreign Direct Investment and Growth: Does the Sector Matter?*, Harvard Business School (2003), available at < http://www.51lunwen.org/UploadFile/org20110131090106326O/20110131090106459.pdf>

6 See Generally: International Institute for Sustainable Development, *Amicus Curiae Submission,* March 9, 2004, available at < http://www.iisd.org/pdf/2004/trade_methanex_submissions.pdf > (hereinafter "IISD Submission in *Methanex*").

The paper will continue as follows; Part II of this paper will provide a brief history of the acceptance of NDP submissions in international arbitral tribunals. Part III will provide an introduction to what has been termed the "third generation"[7] of BITs and discuss the differences between such documents and their predecessors. Further, part IV will explain why the third generation of BITs must make future arbitrations more reliant on NDP submissions. Finally, in part V, the all important themes of legitimacy and efficiency will be discussed.

II. History of NDP Submissions in International Arbitration Tribunals

It was in *Methanex v. United States* ("*Methanex*")[8] where an arbitral tribunal first allowed the submission of NDPs. Since that time various tribunals have allowed *amicus* briefs to be submitted. [9] For the purposes of this paper it is necessary to examine procedural aspects of the submissions regarding *Methanex* in front of a North American Free Trade Agreement ("NAFTA") tribunal, the *United Parcel Service of America v. Canada* ("*UPS*") case, also in front of a NAFTA tribunal, the *Suez, Vivendi v. Argentina* ("*Suez/Vivendi*")[10] decision by the International Centre for Settlement of Investment Disputes ("ICSID") and the *Piero Foresti et al*

7 Mary E. Footer, *Bits and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment*, 18 Michigan State University Journal of International Law 33, 42 (2009). (hereinafter "Footer").

8 *Methanex Corporation v. United States of America*, In the Matter of An Arbitration under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules, Final Award of the Tribunal, August 7, 2005. <Available at http://www.naftaclaims.com/disputes_us_6.htm> (hereinafter "*Methanex*").

9 For the purposes of this paper, "*Amicus* briefs" will be regarded as entirely synonymous with "NDP Submissions." They will both be taken to mean merely the submission of briefs regarding both legal and non-legal issues to tribunals that are submitted by parties other than those taking part in the dispute.

v. South Africa ("*Piero Foresti*")[11] arbitration in front of an ICSID tribunal. The section will conclude with a brief discussion of the various substantive legal and factual elements addressed by *amicus* submissions.

1. *METHANEX*

In the 2000 arbitration of *Methanex v. United States* in front of a NAFTA tribunal, Methanex, a Canadian methanol producer, was challenging the California legislature's decision to phase out the use of MTBE, an additive in unleaded gasoline.[12] It was the argument of the state of California that MTBE was damaging the drinking water in the state, and therefore it was a public health necessity that it be banned.[13]

Shortly after the opening of the arbitration, the International Institute for Sustainable Development ("IISD") and Earthjustice submitted a petition for permission to submit *amicus* briefs. This petition was quickly opposed by Methanex, who claimed that the panel did not have the authority to accept such a submission.. The NAFTA countries were split on the legality and

10 *Compagnia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Arg. Republic*, ICSID Case No. ARB/97/3, Award (Aug. 20, 2007), available at <http://ita.law.uvic.ca/documents/VivendiAwardEnglish.pdf> (hereinafter "*Suez/Vivendi*")

11 *Piero Foresti, et al. v. Republic of S. Afr*., ICSID Case No. ARB(AF)/07/1, Award of the Tribunal (Aug. 4, 2010), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded (scroll to number 185; follow "English(Original)" hyperlink) (hereinafter "*Piero Foresti*")

12 International Institute for Sustainable Development, *Methanex Background*, available at < http://www.iisd.org/investment/bits/methanex_background.asp> (hereinafter "*Methanex* Background")

13 *Id.*

desirability of this issue. The United States and Canada formally supported the petition, while Mexico was opposed to the possibility.[14]

Over the next three years both the *Methanex* panel and the NAFTA Free Trade Commission would rule that the authority to accept such submissions existed with the panel.[15] Finally, on January 30, 2004, the panel published a press release that would, for the first time in history, create a process by which submission of *amicus* briefs in an international investment tribunal was possible. [16]

The *amicus* parties quickly met the standards imposed on them by the panel and submitted briefs that would inform the panel of legal and factual conditions that may be of relevance to the arbitration. It is important to mention that while the *amicus* parties were allowed to submit briefs, they were not allowed to see the written submissions of the disputing parties

14 *Id.*

15 *Id.*

16 International Institute for Sustainable Development, *Application for Amicus Curiae Status* 1, March 9, 2004, available at < http://www.iisd.org/pdf/2004/trade_methanex_application.pdf > (hereinafter "IISD Application in *Methanex*")

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and thus could not respond to specific allegations by either party. [17] Later the *amicus* parties would be allowed to witness (but not participate in) oral arguments.[18]

2. *UPS*

In the *UPS* arbitration, United Parcel Service of America claimed that the Canadian government was engaging in anti-competitive practices by allowing Canadian Post, the state owned mail firm, to use post offices but not allowing the United Parcel Service the same opportunity.[19] Several Canadian organizations were interested in *amicus* submission on behalf of the Canadian government.

The submissions were allowed under the same process discussed above. The major difference, and the only thing added to current jurisprudence by the *UPS* arbitration, is the agreement of the parties to allow the NDPs to see the full record. With the consent of the parties, the record was shown to the *amicus* groups.

3. *SUEZ/VIVENDI*

Suez/Vivendi was the first time that an ICSID tribunal took a similar step to *Methanex* above. It involved a case under which a group of foreign investors had been granted a thirty year

17 Howard Mann, Opening the Doors, at Least a Little: Comment on the Amicus Decision in Methanex v. United States, 10 REV. OF EUR. CMTY. & Int'l ENVTL. L. 241, 243 (2001) (The order did allow for the procurement of arbitration documents via procedures under domestic law. It is possible the documents could be received via the American Freedom of Information Act.)

18 *Id.*

19 *NAFTA Ruling Against UPS May Curb Investor Suits vs. State Run Firms,* Inside U.S. Trade 25, June 22, 2007. available at <http://www.canadians.org/media/documents/NAFTA_Ruling_IUST_06-07.pdf>.

concession to create and maintain the water and waste-water system surrounding the Argentinean capital, Buenos Aires. This concession was granted in 1993.[20] Unfortunately, less than a decade into the concession period, Argentina experienced a financial crisis.[21] In the wake of the financial crisis, the government instituted measures that the investment group claimed rendered their concession deal virtually worthless.[22]

Four Argentinean non-governmental organizations ("NGOs"), along with one international NGO, petitioned for *amicus* status with the hope of providing legal guidance to the panel regarding sustainable development, environmental law and the human right to clean water.[23] The tribunal determined that its determination as to whether to accept an NDP submission would be based on three criteria. Those criteria were 1) whether the subject matter lent itself to NDP submissions; 2) the suitability of the petitioning NDP; and 3) the procedure of submissions.[24]

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20 Lise Johnson, *Argentina on the hook for breach of Fair and Equitable Treatment,* Investment Treaty News, Sept. 23, 2010. Available at <http://www.iisd.org/itn/2010/09/23/awards-and-decisions/>.

21 See Generally: *Q & A: Argentina's Economic Crisis*, BBC News, Feb. 12, 2003. Available at < http://news.bbc.co.uk/1/hi/business/1721061.stm>.

22 Lise Johnson, *Argentina on the hook for breach of Fair and Equitable Treatment,* Investment Treaty News, Sept. 23, 2010. Available at <http://www.iisd.org/itn/2010/09/23/awards-and-decisions/>.

23 *Id.*

24 Center for International Environmental Law, *Order In Response to a Petition by Five Non-Governmental Organizations for Permission to make an Amicus Curiae Submission* 12, Feb. 12, 2007. available at < http://www.ciel.org/Publications/ICSID_Response_12Feb07.pdf >.

Using these criteria as a guide, the tribunal welcomed the submissions from the NDPs over the objections of Suez, Vivendi and the other claimants. It is worth noting that between the initial order by the tribunal on May 19, 2005 and the final acceptance of February 12, 2007, ICSID rule 37 was drafted for the acceptance of NDP submissions. This rule further clarified the position of the tribunal, allowing for *amicus* briefs that assist the panel in any legal or factual issues. The panel used this new rule to reject the argument of the claimants that legal *amicus* briefs were unwelcome and only those that provided new facts should be accepted.[25]

Similar to the determination in *Methanex*, the NDPs in *Suez/Vivendi* were not given access to the arbitration record. It was determined that while "…as a general proposition, an *amicus curiae* must have sufficient information on the subject matter of the dispute to provide 'perspectives, expertise and arguments' which are pertinent and thus likely to be of assistance to the Tribunal.,"[26] these particular NDPs had already received enough information from other sources including public information.[27] Thus the issue as to whether future NDPs should be granted access to the record need not be decided.[28]

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25 *Id* at 20.

26 *Id* at 24.

27 *Id* at 25.

28 *Id* at 25.

4. *PIERO FORESTI*

Piero Forest et al v. South Africa is another arbitration brought in front of an ICSID tribunal. This case considered the interests of foreign investors in the South African mining sector. Upon the nation's transition to democracy, the mining law was changed from a situation where any land owner owned the natural resources on his or her land to a system where natural resources were owned by the government and licenses would be granted for their extraction.[29]

In addition to this element of the Minerals and Petroleum Resources Development Act of 2002 (MPRDA), the new law contained a Black Economic Empowerment provision that required Black South African enterprises to own a significant percentage of the nation's mining interests.[30] A number of foreign companies that had held mining interests under the apartheid regime challenged the MPRDA, alleging that the two above provisions were tantamount to expropriation and therefore illegal under both the Italian and Belgo-Luxembourg BITs.[31]

This particular arbitration was instituted after the creation of ICSID chapter IV rule 37 governing NDP submissions, and, as such, used the submission process laid out in *Suez/Vivendi*. Two separate *amicus* submissions were made. The first was by a group of four Human Rights and Environmental NGOs that sought to clarify the factual circumstances that would be affected

29 Damon Vis-Dunbar, *South African court judgment bolsters expropriation charge over Black Economic Empowerment legislation in the mining sector*, Investment Treaty News (Mar. 23, 2009), http://www.investmenttreatynews.org/cms/news/archive/2009/03/23/south-african-court-judgment-bolsters-expropriation-charge-over-black-economic-empowerment-legislation.aspx.

30 See *Piero Foresti*, *supra* note 10 at 54.

31 *Piero Foresti* at 1.

by the arbitration. The second petitioning party was the International Commission of Jurists that sought to clarify the status of international law. The case's significance in the development of *amicus* submissions in international investment tribunals is that it marks the first time that the arbitration record was disclosed to NDPs without the consent of the disputing parties.[32]

Further, the tribunal stated that it would invite feedback from both the NDPs and the disputing parties on the methods used for NDP participation.[33] The panel also agreed to discuss the influence of the *amicus* submissions in its written award decision.[34] Unfortunately, neither of these was possible as the arbitration was settled without a determination by the tribunal, thus leaving the possibility of such actions in the future unsettled.

5. SUBSTANTIVE LAW ADDRESSED

To this point the main focus of the section has been on the procedural aspects of the *amicus* submissions to international arbitral tribunals. Over the last decade there have been tremendous strides in that area. The greatest reason why the focus above has been procedural is the tremendous variety of information provided via the NDP submissions.

The first example, the *amicus* brief submitted in *Methanex* addressed the law surrounding expropriation, national treatment and government intent. Additionally, it addressed various issues

32 Iain Byrne, *Piero Foresti, Laura de Carli and Others v Republic of South Africa,* The International Centre for the Legal Protection of Human Rights. Available at <http://www.interights.org/foresti>.

33 *Id.*

34 *Id.*

concerning the burden of proof and the costs of this type of litigation.[35] The submissions from *UPS* addressed the fundamental differences between state-run firms and their private counterparts. The submissions in *Suez/Vivendi* were in an effort to clarify the human right to water in the context of privatization, as well as the environmental effects of poorly managed waste-water systems. Finally, in *Piero Foresti* there were two submissions. The first attempted to explain the human rights implications of decisions to the tribunal, as well as explaining the positive domestic constitutional obligations of the democratic South African government. The second attempted to explain the South African government's obligations under international law.

It is precisely this issue diversity that makes the participation of NDPs so vitally important. The prominence of international investment arbitration will continue to rise with the expansion of BITs and increased world capital flows. No doubt, this expansion will touch more and more areas of public interest. No investment tribunal can be expected to maintain competence that includes such widely differing areas of the public interest.

III. The "Third Generation" of BITs

Since the world's first BIT between Germany and Pakistan mentioned above, there has been significant progress in their form and function. While the initial documents were intended to merely encourage foreign investment, as the above arbitrations have shown, they have had many consequences outside this realm. Recent BITs have made more effort to address this and to

35 IISD Application in *Methanex* supra 15 par. 16-17

create a greater balance between the right of investors to be protected and the rights of the state to regulate for the public interest.[36] These newer BITs have been termed the "third generation."[37]

Such documents often make references to such wide ranging issues as environmental, social, cultural and labor rights.[38] Examples can be found in both the United States and Canadian Model BITs.[39] These references generally take two different forms, the first is exceptions to the general restriction on performance requirements and the second is through the use of "non-lowering of standards" clauses.

Briefly, the former refers to certain clauses in IIAs, most notably NAFTA article 1106(6),[40] that allow for the derogation of BIT responsibilities by states for certain reasons

36 Footer *supra* 6 at 46.

37 *Id* at 42.

38 *Id* at 46.

39 *Id.*

40 Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in paragraph 1(b) or (c) or 3(a) or (b) shall be construed to prevent any Party from adopting or maintaining measures, including environmental measures:

(a) necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;

(b) necessary to protect human, animal or plant life or health; or

(c) necessary for the conservation of living or non-living exhaustible natural resources.

regarding the public interest.[41] The latter refers to clauses that forbid state parties to BITs from "lowering" their standards regarding labor, environmental or other regulation.[42] This is in an effort to avoid a race to the bottom where standards would be lowered to attract investment and the burden would fall on the environment, individual workers or other citizens.

For the purposes of this essay, the derogation clauses are much more important and must be analyzed in detail. While there is no unified test as to what qualifies under performance requirement exceptions, they are generally required to be "necessary" for the achievement of the applicable goal and must not be "arbitrary."[43] There have also been international arbitrations that have required that the legislation be "primarily aimed" at or "reasonably related" to the policy goal.[44]

IV. The Increased Relevance of NDP Submissions

While the lack of a universal test for such policy goals creates problems in interpretation, it is clear that there will always be a balance between the right of the government to protect legitimate public interests and the right of an investor to have his or her rights protected.[45] One

41 Footer *supra* 6 at 43.

42 *Id* at 44.

43 *Id* at 42.

44 *Id* at 43.

45 *Id*.

element of this balancing act should always be narrowing. That is, it should always be a requirement that the legislation is narrowly tailored in an effort to only affect the policy goals and not other areas, including the rights of foreign investors.

Predictably, this is the area where the importance of *amicus* briefs is most likely to increase. As more and more IIAs are written with provisions that provide for public interest derogation from responsibilities, assistance will be required to determine what is necessary for the public interest. An investment tribunal sitting in Switzerland, Washington or Belgium cannot be expected to understand what is necessary in the developing world. With the third generation of BITs, understanding what is necessary is no longer a normative exercise, it is a legal requirement.

Similarly, an important element of any broadness constraint is the viability of narrower options to achieve the desired policy goals.[46] Civil society, as *amicus curiae*, are well positioned to inform investment tribunals on other options, as well as whether legislation is "primarily aimed" at or "reasonably related" to the desired policy goals.

V. Legitimacy and Efficiency

Through the last five decades there has been a tremendous increase in the influence of BITs and other IIAs. There are many factors that predict this trend will continue. Often, conflicts arising under such treaties have tremendous implications outside the world of investment. There

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46 See Generally: *Maine v. Taylor*, 477 U.S. 131 (1986).

has been a varied response to this fact. While some decisions have been made with direct citation to human rights cases, others have used such cases in dicta or merely in the remedies phase or have omitted such citations in applicable circumstances.[47] As the influence of investment tribunals continues to grow, it will be vital for both the legitimacy and efficiency of IIA regimes that *amicus* participation is allowed to play a greater role.

As previously mentioned, international investment tribunals have had a perceived lack of legitimacy throughout their existence. This has come from a lack of citizen participation and a lack of transparency.[48] Without a doubt, the increased participation of NGOs would address the perceived lack of legitimacy. In addition to the obvious remedy coming along with greater citizen participation, NGOs that have taken part in past arbitrations have tended towards making information publicly available.[49] This has included briefs filed by the groups, synopses of case statuses and indeed, at least one disclosure of previously confidential arguments advanced by disputing parties.[50] *Amicus* participation has increased transparency exponentially in the various investment arbitration regimes.

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47 Valentina Vidi, *Critical Comparisons: The Role of Comparative Law in Investment Treaty Arbitrations,* 39 Denver Journal of International Law and Policy 67, 93-94 (2010).

48 See Generally: IISD Submission in *Methanex*.

49 IISD and EarthJustice have posted information regarding *Methanex* on their websites. The briefs filed by the NGOs involved in *Piero Foresti* have been posted online by the various human rights NGOs. Similar efforts have been taken in nearly all of the arbitrations discussed above.

50 *Methanex* Background *supra* 11.

The increased participation of NDPs in the arbitration process will similarly increase the efficiency of the system. It has always been considered a strength of arbitration that it is faster and more efficient than traditional litigation. This efficiency and relative speed is an important incentive to using arbitration regimes. As the third generation of BITs becomes more common, knowledge of what is "necessary" for the propagation of public interest policy goals becomes a legal requirement of the arbitral tribunals, not merely a normative exercise for scholars.

This legal requirement means that, one way or the other; it is an imperative of the tribunal to discover what is "necessary." Simply put, the increased participation of *amicus* parties is the most efficient means by which to procure this information. While other options are available, such as detailed research and analysis, including site visits as suggested in ICSID rule 37(1), or expert witnesses, allowing NDP participation would be considerably less costly and less onerous on the tribunals.

VI. Conclusion

Currently, the international investment system relies heavily on BITs and other IIAs. Whenever disputes emerge under such documents, arbitration tribunals are used, either in regimes such as NAFTA or ICSID or on an *ad hoc* basis. NAFTA and ICSID have developed an impressive body of jurisprudence regarding the use of *amicus* briefs and the participation of NDPs. To date, NAFTA has allowed for brief submissions and has allowed parties to watch oral arguments. Panels have also allowed for the disclosure of arbitration filings, but only with the consent of the disputing parties. In addition to the steps taken by NAFTA, ICSID has also forced parties to disclose their arbitration filings without their consent.

In addition to this case law, both NAFTA and ICSID have addressed NDP submissions in their rules. ICSID chapter IV, article 37 now allows for the acceptance of NDP submissions

based on a totality of the circumstances test that includes the level of assistance provided by the NDP, the amount that the submission would address an issue within the "scope of the dispute," and the amount of interest the NDP has in the proceeding, along with any other relevant factors.[51] Identical allowances are made in the ICSID Additional Facilities rules.[52] While no such rule exists under Chapter 11 in NAFTA, the panels mentioned above were willing to accept such submissions under broad powers given to them by the UNCITRAL rules.[53]

Additionally, at least the ICSID panels have seemed to embrace the input of NDPs, and the unique expertise that can be provided through their submissions. The most recent such arbitration, *Piero Foresti*, gives reason for hope. As mentioned previously, the panel promised to not only address the impact that the NDP submissions had on the award, but also to provide opportunities for feedback on how the system could be improved in the future. While the arbitration settled and thus the feedback was impossible, it gives hope for the continued role of civil society in investment tribunals.

This does not, however, imply that the system has fully accepted the participation of NDPs. If the purpose of oral arguments is, as it often is claimed, to clarify the points made in

51 ICSID rule 37(2)

52 ICSID additional facilities 41(3)

53 Ignacio Torterola**,** *The Transparency Requirement in the New UNCITRAL Arbitration Rules: A Premonitory View*, Sept. 23, 2010. Available at <http://www.iisd.org/itn/2010/09/23/the-transparency-requirement-in-the-new-uncitral-arbitration-rules-a-premonitory-view/>.

submissions,[54] and the purpose of *amicus* briefs is to clarify legal and factual points that are necessary for the arbitration,[55] then it stands to reason that the *amicus* parties should be allowed to participate fully in oral arguments. If NDPs are allowed to participate in an effort to expand the competence of panels, then the panels should be allowed to question NDPs on points of law and fact raised in briefs. Only through full participation by NDPs will arbitral panels be able to fully accept the implications of their decisions beyond international investments and take full advantage of the expertise of civil society.

54 See Generally: Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 Iowa L. Rev. 1 (1986).

55 See Generally: Paul M. Collins, Jr. and Lisa A. Solowiej, *Interest Group Participation, Competition and Conflict in the Supreme Court*, 32 Law & Soc. Inquiry 955 (2007).