

LLM PERSPECTIVE

RETHINKING THE ROLE OF AMICUS CURIAE IN INTERNATIONAL INVESTMENT ARBITRATION: HOW TO DRAW THE LINE FAVORABLY FOR THE PUBLIC INTEREST

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INTRODUCTION

In 2008, foreign investment matters reached the incredible amount of US\$1.7 trillion.¹ During 2010, international companies such as Enron Corp., Siemens AG, Royal Dutch Shell PLC, Telefónica, S.A., Exxon Mobil Corp., CEMEX S.A.B. de C.V., and Total, S.A., were all involved in international investment arbitrations.² In these arbitrations, investors claimed that international treaties were violated and demanded that developing countries pay an average of US\$343 million in damages per case.³ In nearly half of the cases, arbitral tribunals recognized these investors' claims and awarded an average of US\$10 million.⁴

Public interest and human rights considerations usually arise in such investment arbitrations. To address these concerns, civil society has resorted to the institution of amicus curiae and has insisted that arbitral tribunals allow nonparties to make amicus curiae submissions.⁵

1. SUSAN D. FRANCK, INTERNATIONAL INVESTMENT ARBITRATION: WINNING, LOSING AND WHY, COLUMBIA FDI PERSPECTIVES, No. 7 (2009), available at <http://www.vcc.columbia.edu/content/international-investment-arbitration-winning-losing-and-why>; cf. U.N. CONF. ON TRADE AND DEV., WORLD INVESTMENT REPORT 2010: INVESTING IN A LOW-CARBON ECONOMY, U.N. Doc. UNCTAD/WIR/2010, U.N. Sales No. E.10.II.D.2 (2010), available at http://www.unctad.org/en/docs/wir2010_en.pdf (indicating that the global economic crisis has negatively affected foreign direct investment in the past two years).

2. Int'l Ctr. for Settlement of Inv. Disputes, *2010 Annual Report*, at 55–93 (June 30, 2010), available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnualReports&year=2010_Eng.

3. FRANCK, *supra* note 1, at 2; see J.E. Alvarez, *What I Did on My Summer Vacation (Part I): The Transparency of the International Investment Regime*, OPINIO JURIS (Sept. 27, 2010, 6:21 AM), <http://opiniojuris.org/2010/09/27/what-i-did-on-my-summer-vacation-part-i-the-transparency-of-the-international-investment-regime/> (suggesting that while a conflict between developed and developing country is still the typical case, the great evolution in recent decades of this international system of investment has also brought the following consequences:

Today's web of investment agreements is [not] easy to characterize Today, as many as one-third of BITs and FTAs are between countries of the Global South. Western states have entered into investment agreements among themselves (such as the NAFTA and the Energy Charter), and the ten states that have most frequently been sued by investors include Canada, the United States, the Czech Republic, and Poland. . . . States that some would expect to see among the top ten—such as poor African states with a history of investment problems—are not among the most frequent respondents).

4. FRANCK, *supra* note 1, at 2.

5. See *infra* Part II.A (explaining the benefits of accepting amicus briefs).

As will be presented, *Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal, S.A. v. Argentine Republic*⁶ is a paradigmatic case regarding the admission of amicus briefs in investment arbitration.⁷ The arbitral tribunal's May 19, 2005, order responded to a petition for transparency and participation filed by five international nongovernmental organizations ("NGOs") as amici curiae.⁸ The tribunal decided to allow the NGOS to apply for leave to make an amicus submission.⁹

This Article questions whether the regulation that currently exists on amicus briefs in international arbitration is optimal, or if these rules should be improved or even replaced by more efficient provisions. Part I discusses the importance of the amicus curiae institution in the national and international judicial spheres. Additionally, Part I shows that the use of amicus curiae has growing importance in the field of international investment arbitration, serving as a manifestation of the principle of transparency, which is being progressively introduced in this area. The analysis of a large number of provisions and some arbitration awards on this topic reinforces the idea that amicus curiae is a controversial institution, the importance of which is expected to further increase in the

6. *Suez, Sociedad General de Aguas de Barcelona, S.A., & Vivendi Universal, S.A. v. Arg. Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an *Amicus Curiae* Submission (Feb. 12, 2007), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC693_En&caseId=C19 [hereinafter *Suez, Amicus Decision*].

7. See *infra* Part I.D.2 (analyzing the admissibility of amicus briefs by the International Centre for Settlement of Investment Disputes ("ICSID")).

8. See *Aguas Argentina, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A., & Vivendi Universal, S.A. v. Arg. Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, ¶ 21 (May 19, 2005), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC516_En&caseId=C19. Courts have traditionally accepted the intervention of amicus curiae in ostensibly private litigation because those cases have involved issues of public interest and because decisions in those cases have the potential, directly or indirectly, to affect persons beyond those immediately involved as parties in the case. See *id.* ¶ 19 ("This case will consider the legality under international law, not domestic private law, of various actions and measures taken by governments. . . . The factor that gives this case particular public interest is that the investment dispute centers around the water distribution and sewage systems of a large metropolitan area [This case] may raise a variety of complex public and international law questions, including human rights considerations.").

9. *Id.* ¶ 33.

future. Part II explains the reasons why amicus curiae generate such controversy, by presenting in detail various arguments advanced by NGOs and by investors and their law firms to universalize or eliminate the use of amicus briefs. This dichotomy arises because, in many cases, the interests of investors from developed countries conflict with those of developing countries. Part III of this Article reflects on how the interests of the developing countries can be best-protected by the legal regulation of amicus brief submissions in investment arbitration. Part III offers suggestions, ranging from the improvement of the current system to the elimination of the current scheme. The proposed new regime could mean that amicus briefs are requested *ex officio* by the arbitral tribunal or sent automatically to court by an institution that specializes in protecting the public interest in investment arbitrations.

I. *AMICUS BRIEFS IN INTERNATIONAL INVESTMENT ARBITRATION*

This Part begins by presenting the origins and main characteristics of the institution of amicus curiae. After describing the rules governing amicus submissions in the courts of various common law countries, this Part focuses on the international arena. It analyzes the rules governing amicus submissions to various international human rights courts and in the World Trade Organization's ("WTO") economic sphere. After briefly discussing the origin and individualizing features of this kind of arbitration, this Part analyzes various international provisions governing the submissions of amicus curiae. As indicated, the existence of these provisions has, in recent times, allowed some NGOs to submit amicus briefs in international arbitrations of great economic and social relevance. The admission of an amicus brief in investment arbitration is such an important subject that international institutions as respected as the United Nations Commission on International Trade Law ("UNCITRAL") and the International Chamber of Commerce ("ICC") have recently announced their willingness to develop research in this area.

A. Defining Amicus Curiae from a Historical Perspective

The Latin term “amicus curiae” means “friend of the court.”¹⁰ As scholars indicate, it is very difficult to provide a comprehensive definition of this notion, since its features and functions have varied according to the historical moment and the country in which these amicus curiae interventions have been accepted.¹¹ The origin of this notion is found in Roman law, where a court was provided with “legal information that was beyond its notice or expertise.”¹² As time passed, amici curiae were no longer passersby intervening in a process on their own initiative.¹³ Namely, in the United Kingdom the intervention of amicus curiae has, in most cases, required an invitation from the court.¹⁴

10. Throughout this Article, the term “amicus curiae” will be pluralized using the Latin term “amici curiae.” This expression is used more frequently in the international arena, although some texts use other terms such as “third-party intervention” or “nondisputing party participation.” See Convention for the Protection of Human Rights and Fundamental Freedoms art. 36.2, Nov. 4, 1950, 213 U.N.T.S. 222; NAFTA Free Trade Comm’n, *Statement on Non-Disputing Party Participation* (Oct. 7, 2003), available at http://www.ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file660_6893.pdf. The request for intervention, made by amicus curiae to the court, is called “amicus brief” for the purposes of this Article.

11. See John Bellhouse & Anthony Lavers, *The Modern Amicus Curiae: A Role in Arbitration?*, 23 CIV. JUST. Q. 187, 188 (2004); see also Michael K. Lowman, Comment, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?*, 41 AM. U. L. REV. 1243, 1244 (1992) (reflecting on the historical evolution on this notion).

12. See REAGAN WM. SIMPSON & MARY VASALY, *THE AMICUS BRIEF: HOW TO WRITE IT AND USE IT EFFECTIVELY* 1 (3d ed. 2010); see also Ernest Angell, *The Amicus Curiae: American Development of English Institutions*, 16 INT’L & COMP. L.Q. 1017 (1967) (explaining the characteristics of amicus curiae in Roman law).

13. See Angell, *supra* note 12, at 1017 (“The amicus appears to have been originally a bystander who, without any direct interest in the litigation, intervened on his own initiative to make a suggestion to the court on matters of fact and law within his own knowledge: the death of a party, manifest error, collusion . . .”); see also Lowman, *supra* note 11, at 1244.

14. See Bellhouse & Lavers, *supra* note 11, at 190 (“The traditional function of the *amicus curiae* in the English courts . . . [was] a practice, rather than an enshrined right, whereby arguments on points of law, or information, can be presented before the tribunal, with its permission and often by its active invitation, which would otherwise not be heard because they did not form part of the respective cases of the litigants represented. . . . [I]t has been used to ‘fill-in-the cracks’ which are sometimes left by a litigation system better suited to resolution of bi-partisan conflicts, as an alternative to allowing actual intervention by third parties or where such intervention is not an option.”); see also Johannes Chan, *Focus on Ma Case: Amicus Curiae and Non-Party Intervention*, 27 HONG KONG L.J., 1997, at 394.

In the United States, the first case referring to the intervention of a friend of the court occurred in 1823 when the US Supreme Court requested Henry Clay's intervention in *Green v. Biddle*¹⁵ to provide information about an alleged collusion between the parties.¹⁶ From that moment on, the submission of amicus briefs has become more widespread in the United States, both in the Supreme Court and on appeal.¹⁷ The expression "amicus curiae" is currently used in the United States for those who, without being part of the litigation proceeding, request that the court allow them to provide information relevant for the resolution of the dispute.¹⁸ These amicus submissions aim to assist the court by broadening its perspective on controversial issues.¹⁹ Although amici curiae cannot act directly as an advocate for a party, they very often have an interest in the litigation.²⁰

15. *Green v. Biddle*, 21 U.S. 1, 17 (1823).

16. See Karen O'Connor & Lee Epstein, *Court Rules and Workload: A Case Study of Rules Governing Amicus Curiae Participation*, 8 JUST. SYS. J. 35, 36 (1983) (noting that the Supreme Court's first use of amicus curiae in *Green v. Biddle* marked a turning point because the Court found it to be highly useful); see also Angell, *supra* note 12, at 1018 (examining the first interventions of amicus curiae in US courts).

17. See generally Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 L. & SOC'Y REV. 807, 828 (2004) ("It is possible that the recent and dramatic increases in amicus filings in the Supreme Court have resulted in a 'routinization' of how amicus briefs are considered by the Court."); see also SIMPSON & VASALY, *supra* note 12, at 8–10 ("In the last fifty years, while the United States Supreme Court has not increased its output of opinions, amicus filings have increased more than 800 percent. . . . The amicus brief [also] appears with regularity in federal courts of appeals and also in state supreme courts and state intermediate appellate courts.").

18. See SIMPSON & VASALY, *supra* note 12, at 3–6. See generally Susan L. Thomas, 3B C.J.S. *Amicus Curiae* § 14 (2011) (explaining the characteristics of amicus submissions in the US legal system).

19. See Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 830 (2000) ("Amicus briefs clearly do matter in many contexts, and this means that the Court is almost certainly influenced by additional information supplementing that provided by the parties to the case."). But see James F. Spriggs, II & Paul J. Wahlbeck, *Amicus Curiae and the Role of Information at the Supreme Court*, 50 POL. RES. Q. 365, 382 (1997) (questioning whether amici always submit supplemental information).

20. See Fowler V. Harper & Edwin D. Etherington, *Lobbyists before the Court*, 101 U. PA. L. REV. 1172, 1172 (1953) (stating that amicus briefs can be used as a lobbying device).

B. *The Role of Amicus Curiae in Other Areas of Law*

Along with its development in the judicial sphere of some countries, the institution of amicus curiae has gained increasing importance in the international arena.²¹ This Section presents the rules governing the submission of amicus briefs before the various national courts that admit them. It also discusses the rules governing the intervention of amici curiae internationally, particularly in the fields of human rights and interstate commerce. When analyzing the different provisions allowing the admission of amicus briefs in human rights and interstate commerce, this Section determines that the extent and characteristics of amicus participation depends on the governing rules and on the court's discretion to apply such rules.

1. National Courts

As noted, the US Supreme Court has a long tradition of accepting amicus briefs.²² Statistics show that the recourse to this institution has become commonplace. In recent years, amicus curiae briefs have been filed in eighty-five percent of cases pending before the US Supreme Court.²³ Amici include large numbers of individuals, institutions, and international organizations like the European Union.²⁴

Courts in the United States have rules governing amicus briefs. In the US Supreme Court, Rule 37 governs their submission.²⁵ Most importantly, it requires that a brief provide new and relevant information, indicate if the author has received monetary compensation from a party, and comply with

21. See *infra* Part I.B.2 (explaining the importance of amicus submissions in the international sphere).

22. See *supra* note 16 and accompanying text.

23. Kearney & Merrill, *supra* note 19, at 744; see also Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & POL. 33, 34 (2004) (discussing generally the impressive "magnitude of amicus briefs" filed in the Supreme Court).

24. See Cedric Ryngaert, *The European Commission's Amicus Curiae Brief in the Alvarez-Machain Case*, 6 INT'L L. F. DROIT INT'L 55, 57 (2004).

25. SUP. CT. R. 37 (specifying all the requisites to submit an amicus brief to the US Supreme Court).

procedural requirements.²⁶ Rule 29 of the US Federal Rules of Appellate Procedure regulates the amicus brief process in US Circuit Courts.²⁷ This rule establishes different consent requirements based on the nature of the party submitting the brief and introduces content requirements and time limits.²⁸

Other common law countries also allow the submission of amicus briefs to their highest legal authority. This is the case in the High Court of Australia, the Supreme Court of Canada, the Supreme Court of Appeal of South Africa, and the Supreme Court of the United Kingdom.²⁹ At this point, a distinction should be made between the rules recognizing the power of the court to appoint amicus curiae (Australia and Canada) and the rules that permit the intervention of amicus curiae if certain requirements are met (South Africa and the United Kingdom).³⁰ This differentiation, revisited in Part III of this Article, also appears when analyzing how various international tribunals regulate the institution of amicus curiae.

2. International Courts of Human Rights

In the current sphere of international human rights, there are various international courts that accept third-party interventions in the form of amicus briefs.³¹ The International Court of Justice allows the submission of amicus curiae briefs in both contentious and advisory proceedings.³² In a contentious proceeding, amicus briefs can only be submitted by public

26. *Id.* See generally Madeleine Schachter, *The Utility of Pro Bono Representation of U.S.-Based Amicus Curiae in Non-U.S. and Multi-National Courts as a Means of Advancing the Public Interest*, 28 *FORDHAM INT'L L.J.* 88, 92–110 (2004) (analyzing Rule 37 and its implications on submissions).

27. See *FED. R. APP. P.* 29.

28. See *id.* (listing the requisites to submit an amicus brief in the US appellate system).

29. *High Court Amendment Rules 2010 (No. 1)* (Cth), sch 1, Rule 44.04 (Austl.); Rules of the Supreme Court of Canada, Rule 92, SOR/2002-156 (Can.); Supreme Court of Appeal of South Africa, (GN) R979/1998, Rule 16 (S. Afr.); Supreme Court of United Kingdom: *The Supreme Court Rules, 2009*, S.I. 1603 (L. 17), Rule 35 (U.K.) (enumerating the requisites in order to submit an amicus brief to each of these Tribunals).

30. See *infra* Part III.

31. See *infra* Part I.B.2 (explaining which international courts admit amicus submissions).

32. See Statute of the International Court of Justice arts. 34(2), 66(2), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 [hereinafter ICJ Statute].

international organizations³³ on their own initiative or upon the request of the court.³⁴ In an advisory proceeding, a broader group of subjects—states or organizations—is allowed to present written or oral statements and to comment on the statements made by others.³⁵

On a regional level, the Rules of the European Court of Human Rights allow third-party interventions.³⁶ Rule 44 gives the president of the tribunal broad powers to specify the intervention of contracting parties, the Commissioner of Human Rights, and any person concerned with the case.³⁷ Additionally, Article 44 of the Rules of Procedure of the Inter-American Court of Human Rights also establishes requirements that amicus submissions should meet.³⁸ Analyzing recent

33. See Ruth Mackenzie, *The Amicus Curiae in International Courts: Toward Common Procedural Approaches?*, in CIVIL SOCIETY, INTERNATIONAL COURTS AND COMPLIANCE BODIES 295, 296 (Tullio Treves et al. eds., 2005) (stating that nongovernmental organizations (“NGOs”) have been prohibited from filing amicus briefs); see also Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT’L. L. 611, 620–23 (1994) (discussing the legislative history behind International Court of Justice (“ICJ”) Statute Articles 34 and 66 in defining public international organizations and international organizations and the role NGOs can play in ICJ proceedings).

34. ICJ Statute, *supra* note 32, art. 34.2 (“The Court . . . may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative.”).

35. ICJ Statute, *supra* note 32, art. 66.4 (“States and organizations having presented written or oral statements or both shall be permitted to comment on the statements made by other states or organizations . . .”); see THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 545–63, 1427–43 (Andreas Zimmerman et al. eds., 2006) (analyzing Articles 34 and 66); Shelton, *supra* note 33, at 621–23 (discussing the issue of nongovernment organizations as international organizations submitting amicus curiae briefs).

36. COUNCIL OF EUR., EUROPEAN COURT OF HUMAN RIGHTS: RULES OF COURT, Rule 44 (2011), available at http://www.echr.coe.int/NR/rdonlyres/6ACIA02E-9A3C-4E06-94EF-E0BD377731DA/0/REGLEMENT_EN_Avril2011.pdf.

37. See *id.*, Rule 44(3), 44(5); see also THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 205 (Pieter Van Dijk et al. eds., 4th ed. 2006) (referring to the old Rule 36.1 and noting that the president is left a certain margin of discretion with respect to inviting parties to submit written comments or take part in hearings); Anthony Lester, *Amici Curiae: Third-Party Interventions Before the European Court of Human Rights*, in PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION 341, 341–50 (Franz Matscher & Herbert Petzold eds., 1988) (explaining how the rule referred to third-party intervention).

38. See INTER-AMERICAN COMM’N ON HUMAN RIGHTS, RULES OF PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS art. 44 (2009), available at <http://www.cidh.oas.org/Basicos/English/Basic20.Rules%20of%20Procedure%20of%20the%20Court.htm>.

decisions of the Inter-American Court of Human Rights, it seems that amicus briefs are often submitted and that judgments make abundant reference to these submissions.³⁹

Some international criminal tribunals also accept or request amicus briefs. This is the case of the International Criminal Court, and of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), the International Criminal Tribunal for Rwanda (“ICTR”), and the Special Court for Sierra Leone (“SCSL”).⁴⁰ While in the cases of the ICTY, ICTR, and SCSL, the admission of amicus briefs is based on the generic powers of the court to regulate the process, the International Criminal Court has more specific rules.⁴¹ Rule 103 of the International Criminal Court Rules of Procedure and Evidence allows the Chamber to invite or give leave for a state, organization, or person to submit written or oral observations on any issue that the Chamber deems appropriate and at any stage of the proceedings.⁴² Additionally, the International Criminal Court gives a very prominent role to the prosecutor, who is empowered to “seek additional information from States, organs of the United Nations, intergovernmental or

39. See Monica Pinto, *NGOs and the Inter-American Court of Human Rights*, in CIVIL SOCIETY, INTERNATIONAL COURTS AND COMPLIANCE BODIES 47, 55–56 (Tullio Treves et al. eds., 2005) (stating that amicus briefs are popular).

40. See Int’l Crim. Ct., Rules of Procedure and Evidence, Rule 103, ICC-ASP/1/3 (2002), available at http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf [hereinafter Int’l Crim. Ct. Rules of Procedure]; Int’l Crim. Trib. for the Former Yugoslavia, Rules of Procedure and Evidence, Rule 74, U.N. Doc. IT/32/Rev.45 (Dec. 10, 2009), available at http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_rev44_en.pdf; Int’l Crim. Trib. for Rwanda, Rules of Procedure and Evidence, Rule 74, U.N. Doc. ITR/3/REV.2074 (Oct. 1, 2009), available at <http://unictr.org/Portals/0/English/Legal/ROP/100209.pdf>; Special Court for Sierra Leone, Rules of Procedure and Evidence, Rule 74 (Mar. 7, 2003), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=yNjqn5TIYKs%3d&tabid=176>.

41. See generally Sarah Williams & Hannah Woolaver, *The Role of the Amicus Curiae Before International Criminal Tribunals*, 6 INT’L CRIM. L. REV. 151, 153–56 (2006) (examining the role of amicus curiae before international criminal tribunals, including how and when amici are granted permission to appear, the criteria used by the courts in determining whether to accept amicus submissions, and how the information provided is used by the courts in their deliberations). For a reflection of the amicus rules of the international tribunals, see Nina H.B. Jørgensen, *The Problem of Self-Representation at International Criminal Tribunals: Striking a Balance between Fairness and Effectiveness*, 4 J. INT’L CRIM. JUST. 64, 75–77 (2006).

42. Int’l Crim. Ct. Rules of Procedure, *supra* note 40, Rule 103.1.

nongovernmental organizations, or other reliable sources that he or she deems appropriate,” when considering whether to initiate an investigation.⁴³

3. World Trade Organization

In international trade, Article 13 of the Understanding on Rules and Procedures Governing the Settlement of Disputes in the WTO (“DSU”) regulates the arbitration panel’s right to seek information.⁴⁴ The treatment to be accorded to unsolicited amicus letters is a controversial issue.⁴⁵ In the WTO appellate procedure, the appellate body has considered that its right to accept amicus submissions arises from the broad provisions of Article 17(9) of the DSU.⁴⁶ The 2010 Working Procedures for Appellate Review contain additional rules regarding third-party participants.⁴⁷ In practice, many of these submissions are rejected, which has generated controversy.⁴⁸ Likewise, whether panels are required to give reasoned explanation of their decisions is still being debated.⁴⁹

43. Rome Statute of the International Criminal Court art. 15(2), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; *id.* art. 54(3) (further elaborating on the prosecutor’s powers and duties).

44. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 13, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]; *see* Josh Robbins, *False Friends: Amicus Curiae and Procedural Discretion in WTO Appeals under the Hot-Rolled Lead / Asbestos Doctrine*, 44 HARV. INT’L L.J. 317, 319 (2003) (discussing Understanding on Rules and Procedures Governing the Settlement of Disputes in the WTO (“DSU”) provisions, including Article 13 that relate to amicus submissions in panel-level proceedings).

45. One of the most recent examples in this regard is the unsolicited letter from an Australian private entity (Apple and Pear Australia Ltd.) received by the panel in the case *Australia-Apples*. *See* Simon Lester, *Unsolicited Letter from an Australian Private Entity*, INT’L ECON. L. & POL’Y BLOG (Aug. 9, 2010, 10:51 AM), http://worldtradelaw.typepad.com/ielpblog/wto_disputes/.

46. *See* DSU, *supra* note 44, art. 17(9).

47. *See* World Trade Organization, *Working Procedures for Appellate Review*, Rule 24, WT/AB/WP/6 (Aug. 16, 2010).

48. *See* WORLD TRADE ORGANIZATION, A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM 98–100 (2004).

49. The Appellate Body has stated that “[t]he grant of leave to file a brief . . . does not imply that the Appellate Body will address, in its Report, the legal arguments made in such a brief.” Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 52(5), WT/DS135/AB/R (Mar. 12, 2001). In another case, the Appellate Body referred to amicus letters, but concluded that they were not going to be taken into account, stating:

C. *The Acceptance of Amicus Curiae in Provisions Regulating International Investment Arbitration*

In recent decades, investments in developing countries have grown into a widespread phenomenon. Along with the benefits that investments can generate for the development of the host state, the proliferation of investment also increased the number of cases in which the investor wants to initiate legal claims against the developing state.⁵⁰ In most cases, investors have preferred a mechanism other than going to national courts. Investors often question the expertise of local judges as well as the efficiency and transparency of the host state's legal system.⁵¹

As international investment arbitrations have become more widespread, the citizens of developing countries and numerous NGOs have demanded that their voices be heard. Since the controversy is often connected with national policies, and the ultimate resolution will have direct effects on the population, transparency has been deemed necessary to the entire

We are of the opinion that we have the legal authority under the DSU to accept and consider *amicus curiae* briefs in an appeal in which we find it pertinent and useful to do so. In this appeal, we have not found it necessary to take the two *amicus curiae* briefs filed into account in rendering our decision.

Appellate Body Report, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, ¶ 42, WT/DS138/AB/R (May 10, 2000). This approach of the World Trade Organization (“WTO”) panels has led developing countries to raise several issues with the European Community. See World Trade Organization, Dispute Settlement Body Special Session, *India’s Questions to the European Communities and its Member States on Their Proposal Relating to Improvements of the DSU*, TN/DS/W/5 (May 7, 2002). See generally Federico Ortino, *The Impact of Amicus Curiae Briefs in the Settlement of Trade and Investment Disputes*, in *ECONOMIC LAW AS AN ECONOMIC GOOD* 301, 316 (Karl M. Meessen ed., 2009).

50. See *supra* note 3 and accompanying text (referring to new ways of investment disputes that do not follow the classic pattern of developed-developing countries).

51. See Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 PENN ST. L. REV. 1269, 1287–88 (2009); see also Francesco Francioni, *Access to Justice, Denial of Justice and International Investment Law*, 20 EUR. J. INT’L L. 729, 738–43 (2009) (reflecting on the advantages of investment arbitration). In this Article, the term “transparency” refers to the way of managing the arbitration procedure. Therefore, this allusion is not linked to the protection of the investor’s legitimate expectations—as a manifestation of the fair and equitable treatment.

arbitration process.⁵² Responding to these requests, in recent years several provisions contained in both bilateral and multilateral treaties and in arbitration rules have incorporated, to a greater or lesser degree, the principle of transparency.⁵³ One manifestation of this broad principle is the admission of amicus briefs.⁵⁴

1. The Origin of International Investment Arbitration

Many companies want to invest in countries where production costs are lower than in their own country.⁵⁵ However, international investment also creates fear in developed countries, because developing countries that offer economic incentives generally do not have stable political and legal systems.⁵⁶ In order to protect foreign investment, Bilateral Investment Treaties (“BITs”) began to appear in the late 1950’s.⁵⁷ The first BIT, between Germany and Pakistan, dates back to 1959.⁵⁸ BITs’ main objective is to protect investments made by investors of a state party in the territory of another state party, and thus increase foreign direct investment between the signatory states.⁵⁹ The use of BITs has since spread to the point that they are widely used throughout the investment world today.⁶⁰ There are also various free-trade agreements that include an investment chapter similar to the BITs.⁶¹ All these texts have a common core. They guarantee the investor a series

52. See RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 133 (2008); see also CAMPBELL MCLACHLAN ET AL., *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* 233–34 (2007).

53. See *infra* Part I.C.3 (explaining the relevance of the principle of transparency).

54. See *infra* Part I.C.3.

55. See Amanda Perry, *An Ideal Legal System for Attracting Foreign Direct Investment? Some Theory and Reality*, 15 AM. U. INT’L L. REV. 1627, 1644–45 (2000) (analyzing the effect of US free trade on US and international labor).

56. See DOLZER & SCHREUER, *supra* note 52, at 3–7; see also MCLACHLAN ET AL., *supra* note 52, at 3–5 (explaining the origin and evolution of international investments).

57. THE EVOLVING INTERNATIONAL INVESTMENT REGIME: EXPECTATIONS, REALITIES, OPINIONS xxxii–xxxiii (José E. Alvarez et al. eds., 2011) (reflecting on the origin of BITs) [hereinafter EVOLVING INTERNATIONAL INVESTMENT REGIME].

58. See *id.*

59. See DOLZER & SCHREUER, *supra* note 52, at 18–27; see also MCLACHLAN ET AL., *supra* note 52, at 26–34 (analyzing the content of bilateral investment treaties).

60. EVOLVING INTERNATIONAL INVESTMENT REGIME, *supra* note 57, at xxxiii.

61. *Id.*

of substantive rights, such as national treatment, fair and equitable treatment, most-favored-nation treatment, and fair expropriation,⁶² as well as access to dispute resolution mechanisms, such as international arbitration, for resolving disputes that may arise from the investment.⁶³

In 1965, the World Bank formulated the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“Washington Convention”) to address the resolution of investment conflicts through arbitration.⁶⁴ The Washington Convention established the International Centre for Settlement of Investment Disputes (“ICSID”).⁶⁵ ICSID provides a specialized mechanism for conciliation and arbitration of international investment disputes.⁶⁶

Many BITs, multilateral treaties, national laws, and investment contracts refer to ICSID as the mechanism to resolve investment conflicts.⁶⁷ As a result, this organization currently has 144 member states.⁶⁸ Indeed, on June 30, 2010, the number of cases registered by ICSID since its inception reached 319.⁶⁹ In the fiscal year 2010, ICSID registered twenty-seven new proceedings, representing a twelve percent increase from the previous fiscal year.⁷⁰ These statistics encourage ICSID to present itself as “the leading international arbitration institution devoted to investor-state dispute settlement.”⁷¹

62. See DOLZER & SCHREUER, *supra* note 52, at 119–94 (explaining the meaning and extension of these standards of protection); see also MCLACHLAN ET AL., *supra* note 52, at 200–349 (analyzing the content of bilateral investment treaties).

63. See DOLZER & SCHREUER, *supra* note 52, at 211–90; see also MCLACHLAN ET AL., *supra* note 52, at 45–55.

64. See Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter Washington Convention].

65. See *id.* art. 1 (“The purpose of the [ICSID] shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention.”).

66. See *About ICSID*, INT’L CENTRE FOR SETTLEMENT OF INVESTMENT DISP., <http://icsid.worldbank.org/ICSID/Index.jsp> (last visited Jan. 10, 2012).

67. See *id.*

68. Int’l Ctr. for the Settlement of Inv. Disputes, *supra* note 2, at 9.

69. *Id.* at 21.

70. *Id.*

71. *About ICSID*, *supra* note 66.

Aside from addressing cases conducted under the Washington Convention and the ICSID Rules of Procedure for Arbitration (“ICSID Rules”), the ICSID secretariat also provides administrative support to investor-state arbitrations conducted under the UNCITRAL Arbitration Rules (“UNCITRAL Rules”). The UNCITRAL Rules have also been applied by other arbitral tribunals, such as the Permanent Court of Arbitration in The Hague, Netherlands, the Stockholm Chamber of Commerce, and the ICC.⁷²

2. Special Characteristics of International Investment Arbitration Justifying the Implementation of the Principle of Transparency

Confidentiality and privacy are main characteristics of international commercial arbitration.⁷³ These have traditionally been two factors that persuaded parties to go to arbitration instead of going to court.⁷⁴ The public nature of court proceedings and judgments have, in many cases, made companies involved in a trade dispute opt for arbitration.⁷⁵ Arbitration, an extrajudicial mechanism, allows companies to shield their dealings from public scrutiny through a variety of rules and procedures, including Article 20(7) of the ICC Rules, Article 10 of the International Dispute Resolution Procedures of the American Arbitration Association, Article 30 of the

72. United Nations Conference on Trade and Development, Geneva, Switz., *Latest Developments in Investor-State Dispute Settlement*, at 2, UNCTAD/WEB/DIAE/IA/2010/3 (2010).

73. See Michael Pyles, *Confidentiality*, in *THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION* 501, 536–39 (Lawrence W. Newman & Richard D. Hill eds., 2d ed. 2008) (linking the notion of privacy with the private character of the hearing and the concept of confidentiality with the non-disclosure of documents and information obtained during an arbitration or even with the existence of the process itself); see also Anibal Sabater, *Towards Transparency in Arbitration (A Cautious Approach)*, 5 *BERKELEY J. INT'L L.* 47 (2010) (arguing that the push for transparency in arbitration is the result of a political effort to reconsider the role of investment arbitral tribunals). Note that privacy entails the prohibition of third parties from attending and confidentiality imposes obligations on the arbitration parties. See Pyles, *supra*, at 538.

74. See Gu Weixia, Note, *Confidentiality Revisited: Blessing or Curse in International Commercial Arbitration?*, 15 *AM. REV. INT'L ARB.* 607, 607 (2004) (discussing the confidentiality and privacy in arbitration); see also Cindy G. Buys, *The Tensions between Confidentiality and Transparency in International Arbitration*, 14 *AM. REV. INT'L ARB.* 121, 121 (2003) (analyzing the value of confidentiality in international arbitration).

75. See Weixia, *supra* note 74, at 607; see also Buys, *supra* note 74, at 121.

Arbitration Rules of the London Court of International Arbitration, and Articles 73–76 of the World Intellectual Property Organization Arbitration Rules.⁷⁶ Yet, despite the traditionally secretive nature of arbitration, this means of dispute resolution has grown more transparent. Recently, mechanisms have been implemented by which to publicize arbitration awards.⁷⁷ Notwithstanding some recent growth in transparency, the submission of amicus briefs is still not allowed in arbitration between private parties.

Many commentators argue that the specific characteristics of international investment arbitration justify the introduction of exceptions to the confidentiality and privacy principles governing international commercial arbitration.⁷⁸ The same approach has been suggested by some arbitral tribunals. For example, in *United Parcel Service v. Canada*, the tribunal stated: “It recalls as well the emphasis placed on the value of greater transparency for proceedings such as these. Such proceedings are not now, if they ever were, to be equated to the standard run of international commercial arbitration between private parties.”⁷⁹

76. INT’L CHAMBER OF COMMERCE, RULES OF ARBITRATION art. 20.7 (1998), available at <http://www.iccwbo.org/court/arbitration/id4093/index.html>; AM. ARB. ASS’N, INTERNATIONAL DISPUTE RESOLUTION PROCEDURES art. 10 (2009), available at <http://www.adr.org/sp.asp?id=33994#Conduct%20of%20the%20Arbitration>; LONDON CT. OF INT’L ARBITRATION, LCIA ARBITRATION RULES art. 30 (1998), available at <http://www.lcia.org> (select the “LCIA Arbitration Rules” hyperlink); WORLD INTELLECTUAL PROP. ORG., WIPO ARBITRATION RULES arts. 73–76, available at <http://www.wipo.int/amc/en/arbitration/rules/> (regulating confidentiality in their arbitration procedures).

77. Compare UNCITRAL Arbitration Rules, G.A. Res. 31/98, art. 32(5), U.N. Doc. A/RES/31/98 (Dec. 15, 1976), available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html (select “Text” hyperlink) (“The award may be made public only with the consent of both parties.”), with UNCITRAL Arbitration Rules, G.A. Res. 65/22, art. 34(5), U.N. Doc. A/RES/65/22 (Dec. 6, 2010), available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html (select “Text” hyperlink) [hereinafter UNCITRAL Rules] (“An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.”).

78. See Bjorklund, *supra* note 51, at 1288; see also Jack J. Coe, Jr., *Transparency in the Resolution of Investor-State Disputes—Adoption, Adaptation, and NAFTA Leadership*, 54 KAN. L. REV. 1339, 1348–53 (2006) (outlining the arguments for transparency promotion in investment arbitration).

79. *United Parcel Serv. v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, ¶ 70 (NAFTA Arb. 2001),

Investment arbitration is specific by nature.⁸⁰ First, note that one of the parties to the investment arbitration is a state, which gives this arbitration a hybrid public-private nature.⁸¹ Moreover, the conflict under discussion in international investment arbitration usually transcends the individual interests of the state and the company involved.⁸² The investment arbitration processes have a substantial influence on the population's ability to enjoy basic human rights, such as a healthy environment or access to water.⁸³ As a result, these societies are demanding that their opinions be taken into account during relevant international investment arbitrations.⁸⁴ Furthermore, condemnatory awards have a tremendous impact on the state's public purse and, therefore, on the taxpayer's interests.⁸⁵

These social demands are reflected in the implementation of transparency in international investment arbitration.⁸⁶ The notion of transparency in investment arbitral proceedings is broad, covering various issues such as making information about the arbitration and the award itself publicly available, giving permission to third parties to attend and participate in public hearings, offering access to key arbitration documents and the ability to file written submissions.

<http://naftaclaims.com/Disputes/Canada/UPS/UPSDecisionReParticipationAmiciCuriae.pdf> [hereinafter *United Parcel Service*, Decision on Amicus Curiae]

80. See MCLACHLAN ET AL., *supra* note 52, at 9; see also Catherine A. Rogers, *The Arrival of the "Have-Nots" in International Arbitration*, 8 NEV. L.J. 101, 117 (2007); Alessandra Asteriti & Christian J. Tams, *Transparency and Representation of the Public Interest in Investment Treaty Arbitration*, INT'L INV. L. & COMP. PUB. L. (forthcoming) at 5, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1618843.

81. Washington Convention, *supra* note 64, art. 25(1). In cases where the Washington Convention is applicable, the public party can also be "any constituent subdivision or agency of a Contracting State designated to the Centre by that State." *Id.* art. 25(3).

82. See MCLACHLAN ET AL., *supra* note 52, at 57 (highlighting the public nature of the issues posed in investment arbitration); see also 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, 809 (2008).

83. See discussion *infra* Part II.A.1 (explaining public interest protection).

84. See Ibironke T. Odumosu, *The Law and Politics of Engaging Resistance in Investment Dispute Settlement*, 26 PENN ST. INT'L L. REV. 251, 252 (2007) (reflecting on the role of the society); see also Barnali Choudhury, *Democratic Implications Arising from the Intersection of Investment Arbitration and Human Rights*, 46 ALBERTA L. REV. 983 (2009) (analyzing possible solutions for instilling democracy into investment arbitration).

85. See Alvarez, *supra* note 3.

86. See Odumosu, *supra* note 84; see also Choudhury, *supra* note 84, at 983.

3. The Principle of Transparency in Recent BITs

Following the aforementioned trend towards transparency, some recent BITs have included various manifestations of the principle of transparency.⁸⁷ The US 2004 Model BIT provides for documents to be made available to the public,⁸⁸ for open hearings,⁸⁹ and for the possibility of submitting amicus briefs.⁹⁰ The most recent US BITs also reflect these principles, as illustrated in Articles 28 and 29 of the US-Uruguay BIT and the US-Rwanda BITs.⁹¹

Canada's current 2004 Model Foreign Investment Promotion and Protection Agreement ("FIPA"), apart from ensuring that all documents will be promptly made available to the public and that all hearings will be open to the public, confirms in Article 39 the possibility of submitting amicus briefs

87. For contrary examples of recent BITs that do not address this issue see TREATY BETWEEN THE FED. REPUBLIC OF GERMANY AND ____ CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROT. OF INVS. (2008), *available at* <http://italaw.com/investmenttreaties.htm> (follow "German 2008 Model BIT" hyperlink); BILATERAL AGREEMENT FOR THE PROMOTION AND PROT. OF INVS. BETWEEN THE REPUBLIC OF COLOMBIA AND ____; COLOMBIAN MODEL (August 2007), *available at* http://italaw.com/documents/inv_model_bit_colombia.pdf (publishing Colombia's Model BIT); DRAFT AGREEMENT BETWEEN THE GOV'T OF THE REPUBLIC OF FRANCE AND THE GOV'T OF THE REPUBLIC OF (. . .) ON THE RECIPROCAL PROMOTION AND PROT. OF INVS. (2006), *available at* <http://italaw.com/documents/ModelTreatyFrance2006.pdf>; AGREEMENT BETWEEN THE GOV'T OF THE REPUBLIC OF INDIA AND THE GOV'T OF THE REPUBLIC OF ____ FOR THE PROMOTION AND PROT. OF INVS. (2003), *available at* <http://italaw.com/Indiamodelbit.htm>.

88. *See* TREATY BETWEEN THE GOV'T OF THE UNITED STATES OF AM. AND THE GOV'T OF [COUNTRY] COVERING THE ENCOURAGEMENT OF RECIPROCAL PROT. OF INV. art. 29(1) (2004), *available at* <http://italaw.com/investmenttreaties.htm> (follow "US 2004 Model BIT" hyperlink).

89. *See id.* art. 29(2) ("The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.").

90. *See id.* art. 28(3) ("The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party.").

91. *See* Treaty between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Rwanda, arts. 28-29, Feb. 19, 2008, S. TREATY DOC. NO. 110-23; Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Uruguay, arts. 28-29, Nov. 4, 2005, S. TREATY DOC. NO. 109-09.

to the tribunal and develops guidelines for their acceptance.⁹² In line with this, the last FIPAs signed by Canada also address the issue of transparency. For example, the Canada-Slovak Republic FIPA, signed on July 20, 2010, contains Annex B.II, which extensively regulates participation by the nondisputing contracting party.⁹³ Further, the 2007 Norway Draft Model BIT devotes Article 18 to the participation in the proceedings and includes a reference to amicus briefs.⁹⁴ For multilateral investment treaties, Article 10.21 of the Dominican Republic-Central America-United States Free Trade Agreement Rules on transparency in the arbitration proceeding⁹⁵ and Article 10.20 allows nondisputing parties to make oral and written submissions.⁹⁶

In some cases,⁹⁷ North American Free Trade Agreements (“NAFTA”) tribunals applied the broadly drafted Articles 15 and 25 of the UNCITRAL Rules to authorize nondisputing party interventions.⁹⁸ In October 2003, the Free Trade Commission released a statement on nondisputing party participation (“FTC Statement”),⁹⁹ describing the procedures for this participation.¹⁰⁰

92. See AGREEMENT BETWEEN CANADA AND ____ FOR THE PROMOTION AND PROT. OF INVS. arts. 38(1), 38(3), 39 (2004), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/2004-FIPA-model-en.pdf>.

93. See Agreement between Canada and the Slovak Republic for the Promotion and Protection of Foreign Investments, Can.-Slovak Republic, Annex B.II, Jul. 20, 2010, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/EN_Canada_Slovakia_FIPA.pdf [hereinafter Canada-Slovak BIT].

94. See AGREEMENT BETWEEN THE KINGDOM OF NORWAY AND ____ FOR THE PROMOTION AND PROT. OF INVS. art. 18(3) (2007), available at <http://italaw.com/investmenttreaties.htm> (select “Norway 2007 Draft Model BIT” hyperlink).

95. See Dominican Republic-Central America Free Trade Agreement art. 10.21, Aug. 5, 2004, 43 I.L.M. 514, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text> [hereinafter CAFTA-DR].

96. See *id.* art. 10.20(2) (“A non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement.”); *id.* art. 10.20(3) (“The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party.”).

97. See *infra* Part I.C.4.

98. See UNCITRAL Rules, *supra* note 77, arts. 15, 25.

99. The Free Trade Commission is “[m]ade up of ministerial representatives from the NAFTA partners.” *North American Free Trade Agreement: About NAFTA*, NAFTANOW.ORG, http://www.naftanow.org/about/default_en.asp (last visited Jan. 10, 2012). It “[s]upervises the implementation and further elaboration of the Agreement

In other geographical areas, multilateral investment treaties such as the Investment Agreement for the Common Market for Eastern and Southern Africa¹⁰¹ COMESA Common Investment Area¹⁰² also regulate the amicus submissions.¹⁰³

4. Transparency in NAFTA and ICSID Arbitrations

In June 2005, the Organization for Economic Cooperation and Development Investment Committee released a document asking for greater transparency and third party participation in investor-state dispute settlement procedures.¹⁰⁴ This document

and helps resolve disputes arising from its interpretation.” *Id.* It also “[o]rversee the work of the NAFTA committees, working groups, and other subsidiary bodies.” *Id.*

100. See generally J. Anthony VanDuzer, *Enhancing the Procedural Legitimacy of Investor-State Arbitration through Transparency and Amicus Curiae Participation*, 52 MCGILL L.J. 681, 709 (2007) (discussing the Free Trade Commission’s statement).

101. See *Overview of COMESA: COMESA’s Priorities and Objectives*, COMESA, http://www.comesa.int/about/index.php?option=com_content&view=article&id=75&Itemid=106 (last visited Jan. 10, 2012) (describing the Common Market for Eastern and Southern Africa as “an organization of free independent sovereign states which have agreed to co-operate in developing their natural and human resources for the good of all their people and as such it has a wide-ranging series of objectives which necessarily include in its priorities the promotion of peace and security in the region”).

102. See COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA, INVESTMENT AGREEMENT FOR THE COMESA COMMON INVESTMENT ARENA 20, 31–32 (2007), available at <http://vi.unctad.org/files/wksp/iiawksp08/docs/wednesday/Exercise%20Materials/invagreecomesa.pdf>. Article 8: Amicus Curiae states:

- (1) The tribunal shall have the authority to accept and consider amicus curiae submissions from a person or entity that is not a disputing party (the ‘submitter’). . . .
- (3) The [COMESA Common Investment Area] Committee may establish and make available to the public a standard form for applying for status as amicus curiae. . . .
- (4) Amicus curiae submissions may relate to any matter covered by this Agreement that is relevant to the claim before the tribunal.

Id. Annex A, art. 8. Article 8 is included in Annex A, devoted to state-state arbitration. Nevertheless, it also applies to investor-state disputes. *Id.* art. 28(8) (“An arbitral tribunal shall be open to the receipt of amicus curiae submissions in accordance with the process set out in Annex A with necessary adaption for application to investor-state disputes under this Article.”).

103. See, e.g., Agreement Establishing the Association of Southeast Asian Nations—Australia-New Zealand Free Trade Area ch. 11 (Feb. 27, 2009), available at <http://www.aseansec.org/22260.pdf> (regulating only the issues of disclosure of information, awards and notices of arbitration, and using the concept “non disputing party” to designate “the Party of the disputing investor” instead of a third party).

104. See THE OECD INVESTMENT COMMITTEE, TRANSPARENCY AND THIRD PARTY PARTICIPATION IN INVESTOR-STATE DISPUTE SETTLEMENT PROCEDURES (2005), available at www.oecd.org/dataoecd/25/3/34786913.pdf (“[A]dditional transparency, in particular in relation to the publication of arbitral awards, subject to necessary

substantially refers to NAFTA's 2003 Free Trade Commission Statement on Non-Disputing Party Participation.¹⁰⁵ This 2003 Statement establishes detailed procedures regarding written submissions by nondisputing parties.¹⁰⁶ Moreover, it is an important development with respect to Article 15(1) of the 1976 UNCITRAL Rules.¹⁰⁷ Article 15(1) was the primary rule previously used by NAFTA tribunals to accept such submissions "[s]ubject to these Rules, the arbitral tribunal may 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 party is given a full opportunity of presenting his case."¹⁰⁸ As explained below,¹⁰⁹ NAFTA arbitrations show an early recognition of the institution of the *amicus curiae* and a new concern for shaping the characteristics of their intervention.

In analyzing the rules of the ICSID, it appears that the Centre has made a recent effort to submit their arbitration proceedings to public scrutiny.¹¹⁰ In this sense, Rule 48(4) of the ICSID Rules states that: "The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal."¹¹¹ Additionally, Rule 32(2) affirms that:

Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the

safeguards for the protection of confidential business and governmental information, is desirable to enhance effectiveness and public acceptance of international investment arbitration, as well as contributing to the further development of a public body of jurisprudence. . . . [I]t may also be desirable to allow third party participation, subject however to clear and specific guidelines.").

105. See NAFTA Free Trade Comm'n, *supra* note 10.

106. *Id.* ¶ B.1.

107. See UNCITRAL Rules, *supra* note 77.

108. CTR. FOR INT'L ENVTL. LAW, REVISING THE UNCITRAL ARBITRATION RULES TO ADDRESS INVESTOR-STATE ARBITRATIONS 12 (2007), available at http://www.iisd.org/pdf/2008/investment_revising_uncitral_arbitration_dec.pdf.

109. See *infra* Part I.D.1 (illustrating the role of *amicus curiae* in NAFTA).

110. Washington Convention, *supra* note 64, pmb1.

111. ICSID, *Rules of Procedure for Arbitration Proceedings (Arbitration Rules)*, Rule 48(4), at 122, available at <http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp> [hereinafter ICSID Rules].

Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.¹¹²

Consequently, this provision requires that both parties agree to allow nondisputing parties to attend the hearings.¹¹³ This implies that there have been very few public hearings throughout ICSID's practice. However, the possibility of public hearings has been accepted in 2010 cases such as *Commerce Group Corp. v. El Salvador*,¹¹⁴ and *Grand River Enterprises Six Nations, Ltd. v. United States*.¹¹⁵

Article 37(2) of the ICSID Rules states that:

[T]he Tribunal may allow a person or entity that is not a party to the dispute . . . to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which: (a) the non-disputing party submission would assist the Tribunal . . . (b) the non-disputing party submission would address a matter within the scope of the dispute; (c) the non-disputing party has a significant interest in the proceeding.¹¹⁶

The possible interpretation of Article 37(2) raises doubt among scholars, specifically in regards to the notion of

112. *Id.* Rule 32(2), at 115.

113. See, e.g., Andrew de Lotbinière McDougall & Ank Santens, *ICSID Tribunals Apply New Rules on Amicus Curiae*, WHITE & CASE LLP, at 4 (Mar. 2007), available at http://www.whitecase.com/files/Publication/1c8e8d96-9588-4e86-8c13-523252138974/Presentation/PublicationAttachment/37e1af34-0172-4412-a094-5639d34243e6/article_ICSID_Tribunals.pdf (originally published in 22 MEALEY'S INT'L ARB. REP. 18 (Feb. 2007)) (referring to the veto right that each party has); see also VanDuzer, *supra* note 100, at 704.

114. Press Release, Int'l Ctr. for Settlement of Inv. Disputes, *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador* (ICSID Case No. ARB/09/17) Public Hearing (Nov. 10, 2010), available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement68>.

115. Press Release, Int'l Ctr. For Settlement of Inv. Disputes, *Grand River Enters. Six Nations, Ltd., et al. v. United States of America NAFTA/UNCITRAL Arbitration Rules Proceeding* (Jan. 22, 2010), available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement40>.

116. ICSID Rules, *supra* note 111, Rule 37, at 117.

significant interest. As such, varying positions may be supported with regards to what meets this requirement. For example, an NGO may have to show a real “pecuniary interest,” which means it must experience a “special damage” on their interest or an “intellectual or emotional interest.”¹¹⁷ Accordingly, the Article sets out a system in which the arbitral tribunal has to consult the parties, but allows the court to authorize written submissions from nondisputing parties even if it does not have both parties’ approval.¹¹⁸ When making a decision regarding the amicus submissions, Article 37(2) gives the court a nonexhaustive set of criteria to be taken into account and offers some procedural considerations.¹¹⁹

D. *The Role Given to Amicus Curiae in Recent International Investment Arbitrations*

This Section provides an empirical study on the application of these rules in various investment arbitrations in which nonparties were asked to intervene.¹²⁰ The analysis of these cases will focus on: (1) the various requirements that the different arbitral panels have imposed regarding when to accept interventions, (2) the allegations made by NGOs in each petition for participation and in amicus briefs, and (3) the importance granted to these allegations in the final awards.

1. Amicus Curiae and NAFTA

NAFTA arbitrations are the first to have addressed the issue of amicus intervention in international investment arbitration. In the case *Methanex Corp. v. United States*, a Canadian company

117. See Ross P. Buckley & Paul Blyschak, *Guarding the Open Door: Non-party Participation before the International Centre for Settlement of Investment Disputes* 14 (Univ. of South Wales Law Sch. Research Paper No. 2007-33), *BANKING & FIN. L. REV.* (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=989264.

118. See de Lotbinière McDougall & Santens, *supra* note 113, at 9 (stating that with the new Rule 37.2, neither party has a veto right regarding amicus submissions); see also VanDuzer, *supra* note 100, at 717.

119. See MCLACHLAN ET AL., *supra* note 52, at 58–60; see also de Lotbinière McDougall & Santens, *supra* note 113, at 6 (reflecting on Rule 37(2)).

120. Although the requests of NGOs often address several issues, for examples, standing as parties, disclosure of materials, and attendance at hearings, this Article focuses only on amicus briefs.

that manufactured methanol submitted a claim to arbitration for injuries resulting from a California order that banned the use of MTBE.¹²¹ Methanol is an ingredient used to produce the gasoline additive MTBE.¹²² During the arbitral proceedings, the US civil society criticized NAFTA because it “provided special rights to foreign corporations that allowed special tribunals effectively to overrule local environmental regulations through a sort of legal ‘backdoor.’”¹²³ Consistent with the *Methanex* approach, some NGOs have requested transparency in this process. In January 2001, the NAFTA arbitral tribunal issued a Decision on Authority to Accept Amicus Submissions.¹²⁴ The decision proclaimed the tribunal’s authority to accept written amicus briefs in investment arbitration for the first time. As the arbitration was governed by the UNCITRAL Rules, the tribunal considered that its powers to accept amicus submissions “must be inferred . . . from its more general procedural powers,” meaning, it must be inferred from Article 15(1) of the UNCITRAL Rules.¹²⁵ In its reasoning, the arbitral tribunal on the one hand recognized that: “There is undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties The public interest in this arbitration arises from its subject-matter”¹²⁶ On the other hand, the arbitral tribunal restrictively declared that:

[A] receipt of written submissions from a person other than the Disputing Parties is not equivalent to adding that person

121. *Methanex Corp. v. United States*, 44 I.L.M. 1345, ¶ 1 (NAFTA Arb. 2005).

122. *Id.*

123. Barton Legum, *Introductory Note to Methanex Corporation v. United States of America*, 44 I.L.M. 1343 (2005) (explaining the *Methanex* case).

124. *See Methanex Corp. v. United States*, Petitioner’s Final Submissions Regarding the Petition of the International Institute for Sustainable Development to the Arbitral Tribunal for Amicus Curiae Status, ¶ 10 (NAFTA Arb. 2000), <http://www.naftaclaims.com/Disputes/USA/Methanex/MethanexAmicusStandingIISDFinal.pdf> [hereinafter *Methanex*, Petitioner’s Submissions].

125. *Methanex Corp. v. United States*, Decision on Petitions from Third Persons to Intervene as “Amici Curiae,” ¶ 25 (NAFTA Arb. 2001), <http://www.naftaclaims.com/Disputes/USA/Methanex/MethanexDecisionReAuthorityAmicus.pdf> [hereinafter *Methanex*, Amici Curiae Decision].

126. *Id.* ¶ 49. Regarding the parties’ suggestions on the public interest in this arbitration arising from its subject matter, the petitioners stressed “the critical impact that the tribunal’s decision will have on environmental and other public welfare law-making in the NAFTA region.” *Id.* ¶ 5.

as a party to the arbitration. The rights of the Disputing Parties . . . both procedural and substantive, remain juridically exactly the same before and after receipt of such submissions; and the third person acquires no rights at all.¹²⁷

Other NAFTA arbitrations, such as *United Parcel Service of America, Inc. v. Canada*, have also decided that Article 15(1) of the 1976 UNCITRAL Rules allows amicus curiae submissions.¹²⁸ The Statement of the Free Trade Commission on Non-Disputing Party Participation has enabled other subsequent arbitral tribunals to have rules that are more direct in their support in the intervention of amici curiae.¹²⁹ In *Glamis Gold Ltd. v. United States*, several organizations asked to intervene in a case where the Canadian investor considered California's pro-environmental regulatory measures to be a NAFTA violation.¹³⁰ The arbitral tribunal "decided to accept each submission and consider it, as appropriate, in accordance with the principles stated in the FTC Statement"¹³¹ Reflecting on the consideration given to these allegations by the tribunal, the award states: "[T]he tribunal appreciates the thoughtful submissions made by a varied group of interested non-parties who, in all circumstances, acted with the utmost respect for the proceedings and Parties."¹³² Nevertheless, the arbitral tribunal noted that the FTC Statement did not require it to consider the submissions.¹³³ In fact, the tribunal did not even "reach the particular issues addressed by these submissions."¹³⁴

Subsequent NAFTA cases have also referenced the importance of complying with the requirements of the FTC

127. *Id.* ¶ 30.

128. *See* *United Parcel Serv. of Am., Inc. v. Canada*, Decision on Petitions for Intervention and Participation as Amici Curiae, ¶ 63 (NAFTA Arb. 2001), <http://www.naftaclaims.com/Disputes/Canada/UPS/UPSDecisionReParticipationAmiciCuriae.pdf>.

129. *See* NAFTA Free Trade Comm'n, *supra* note 10, at ¶ B(3).

130. *See* *Glamis Gold Ltd. v. United States*, Award, ¶ 11 (NAFTA Arb. 2009), <http://www.naftalaw.org/Disputes/USA/Glamis/Glamis-USA-Award.pdf>.

131. *See id.* ¶ 286.

132. *Id.* ¶ 8.

133. *Id.* ¶ 286 ("Section (B)(9) of the FTC Statement, which states that acceptance of a non-disputing submission does not require the Tribunal to consider that submission at any point in the arbitration . . .").

134. *Id.* ¶ 8.

Statement. Specifically, in *Merrill & Ring Forestry L.P. v. Canada*, the tribunal declared: “[D]irect your attention to the standards for granting leave to file such a submission, which are contained in Section B, para. 6 of the Statement, as well as to the procedures for submitting and considering the submission, contained in Section B, paras. 3–10 of the Statement.”¹³⁵

2. Amicus Curiae and ICSID

The first ICSID case raising the question of the admissibility of amicus submissions was *Aguas del Tunari, S.A. v. Republic of Bolivia*.¹³⁶ The claimant began an arbitration proceeding alleging that Bolivia had violated some provisions of the Netherlands-Bolivia BIT.¹³⁷ The water company could not develop its project, as the citizens of the city of Cochabamba protested massively against the privatization of the water and sewage services and the concession was rescinded.¹³⁸ When the arbitration began, some individuals and environmental NGOs filed a petition in order to participate in the proceedings as amicus curiae, due to the public interest involved in the dispute.¹³⁹ The court appreciated the initiative¹⁴⁰ and claimed to have seriously considered it.¹⁴¹ Nevertheless, the tribunal concluded that it lacked “the power to join a non-party to the proceedings.”¹⁴²

Despite this first defeat, NGOs continued to submit amicus briefs in ICSID arbitrations. In *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*

135. Email from Eloïse M. Obadia, Senior Counsel, ICSID, to Steven Shrybman, Attorney for Canada, 2 (July 31, 2008), available at http://www.naftalaw.org/Disputes/Canada/Merrill/Merrill_Ring-Canada-AmicusDecision.pdf [hereinafter Obadia Email].

136. See *Aguas del Tunari, S.A. v. Republic of Bol.*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction (Oct. 21, 2005), 20 ICSID REV.–FOREIGN INV. L.J. 450 (2005) [hereinafter *Aguas del Tunari*]; see also *id.* at 574 app.

137. *Id.* ¶ 3.

138. See, e.g., *id.* ¶ 66.

139. See *id.* at 574–75 app.

140. See *id.* at 575 app. (telling the environmental NGO, Earthjustice, that “[t]he Tribunal appreciates that you, and the organizations and individuals with whom you work, are concerned with the resolution of this dispute”)

141. *Id.* (“The Tribunal wishes to emphasize that it has given serious consideration to your request. The briefness of our reply should not be taken as an indication that your request was viewed in other than a serious manner.”)

142. *Id.*

(“*Suez*”), some European shareholders in a water and sewer concession considered that certain Argentine acts and omissions constituted a breach of various BIT provisions.¹⁴³ Basing their decision on Article 44 of the Washington Convention, the arbitral tribunal declared that it had the power to accept nonparty submissions for the first time.¹⁴⁴ The tribunal, in order to clarify the conditions required to accept amicus briefs, set forth the following criteria: “a) the appropriateness of the subject matter of the case; b) the suitability of a given nonparty to act as *amicus curiae* in that case, and c) the procedure by which the amicus submission is made and considered.”¹⁴⁵

An important question is how to apply these three requirements to specific investment cases.¹⁴⁶ For instance, in the later case, *Suez*, the same arbitral tribunal considered that:

It is not enough for a nongovernmental organization to justify an *amicus* submission on general grounds that it represents civil society or that it is devoted to humanitarian concerns. It must show . . . how its background, experience, expertise, or special perspectives will assist the Tribunal in the particular case The Tribunal has decided that the four Petitioners have not provided it with

143. *Suez, Sociedad General de Aguas de Barcelona, S.A. & Vivendi Universal, S.A. v. Arg. Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, ¶ 1 (Aug. 3, 2006), available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC518_En&caseId=C19 [hereinafter *Suez*, Decision on Jurisdiction].

144. *Suez, Amicus Decision*, *supra* note 6, ¶ 2; see Washington Convention, *supra* note 64, art. 44 (“If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.”).

145. *Suez, Amicus Decision*, *supra* note 6, ¶ 2.

146. See *Aguas del Tunari SA v. Republic of Bolivia (ICSID Case No. ARB/03/2): Introductory Note*, 20 ICSID REV.-FOREIGN INV. L.J. 450, 455 (2005) (summarizing the *Aguas del Tunari* decision on amicus intervention:

[T]he Tribunal focused on the fact that the dispute centered around water services provided to millions of people, and thus may raise a variety of complex public and international law questions, including human rights considerations. With this in mind, the Tribunal concluded that *amicus curiae* brief would be suitable in this case, as any decision by the Tribunal would potentially affect the manner in which water concessions operate and thus the vast public they serve. As to the suitability of the Petitioners, the Tribunal identified *expertise*, *experience*, and *independence* as the three factors to be considered. Finally, with respect to the appropriate procedure, the Tribunal declared its goal to enable the *amicus* to present their views, while safeguarding the substantive and procedural rights of the disputing parties).

sufficient specific information and reasons to conclude that they qualify as *amici curiae* in this case.¹⁴⁷

In subsequent ICSID arbitrations in which amicus briefs were accepted, their admission derived directly from the current Rule 37 of the ICSID Rules.¹⁴⁸ This rule was successfully invoked in *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*.¹⁴⁹ This case refers to a water and sewerage infrastructure project undertaken by a British-German joint venture in Tanzania.¹⁵⁰ Problems arose between the parties and the investor submitted a request for arbitration to ICSID alleging BIT breaches.¹⁵¹ In this case, the tribunal “reserved the right (if needed) to ask the Petitioners specific questions in relation to their written submission, and to request the filing of further written submissions and/or documents or other evidence, which might assist in better understanding the Petitioners’ position, whether before or after the hearing.”¹⁵²

Furthermore, in *Pac Rim Cayman LLC v. Republic of El Salvador*¹⁵³ and *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*,¹⁵⁴ both arbitral tribunals based the admission of amicus submissions on ICSID Rule 37.2

147. Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A. & InterAguas Servicios Integrales del Agua S.A. v. Arg. Republic, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as *Amicus Curiae*, ¶¶ 33–34 (Mar. 17, 2006), 45 I.L.M. 1023 (2006).

148. See *supra* Part I.C.4.

149. See *Biwater Gauff (Tanz.) Ltd. v. United Republic of Tanz.*, ICSID Case No. ARB/05/22, Procedural Order No. 5, ¶ 55 (Feb. 2, 2007), 22 ICSID REV.-FOREIGN INV. L.J. 217 (2007) [hereinafter *Biwater Gauff*, Procedural Order No. 5] (“The Arbitral Tribunal grants the Petitioners the opportunity to file a written submission in these arbitral proceedings, pursuant to Rule 37(2).”).

150. *Biwater Gauff (Tanz.) Ltd. v. United Republic of Tanz.*, ICSID Case No. ARB/05/22, Award, ¶¶ 1–3 (July 24, 2008), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1589_En&caseId=C67 [hereinafter *Biwater*, Award].

151. See *id.* ¶ 15.

152. *Id.* ¶ 65.

153. ICSID Case No. ARB/09/12, Decision on Respondent’s Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, ¶ 50 (Aug. 2, 2010), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1652_En&caseId=C661 [hereinafter *Pac Rim*, Decision on Respondent’s Preliminary Objections].

154. ICSID Case No. ARB/09/17, Award, ¶ 39 (Mar. 14, 2011), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1971_En&caseId=C741.

and Article 10.20.3 of the Dominican Republic-Central America-United States Free Trade Agreement.¹⁵⁵ In these cases referring to mining exploitation, the arbitral tribunals released a procedural order providing details on the characteristics that written applications should fulfill.¹⁵⁶ Finally, in *Piero Foresti v. Republic of South Africa*, a group of European investors considered a South African mining act to have negatively affected their mineral rights.¹⁵⁷ In this case, following the ICSID Arbitration (Additional Facility) Rules, the petitions for participation were accepted¹⁵⁸ through the application of Article 41.3 of these Rules.¹⁵⁹ The wording of Article 41(3) is identical to that of Rule 37(2) of the ICSID Rules.¹⁶⁰

155. Article 10.20.3 on the Conduct of the Arbitration provides that “[t]he tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party.” CAFTA-DR, *supra* note 95, art. 10.20.3.

156. *Pac Rim*, Decision on Respondent’s Preliminary Objections, *supra* note 153, ¶ 50 (“(1) be emailed to ICSID . . . (2) in no case exceed 20 pages . . . (3) be made in one of the languages of these proceedings . . . (5) describe the identity and background of the applicant, the nature of any membership if it is an organization and the nature of any relationships to the Disputing Parties and any Contracting Party; (6) disclose whether the applicant has received, directly or indirectly, any financial or other material support from any Disputing Party, Contracting Party or from any person connected with the subject-matter of these arbitration proceedings; (7) specify the nature of the applicant’s interest in these arbitration proceedings prompting its application; . . . [(9) explain] why the Tribunal should grant permission to the applicant to file its written submissions in these arbitration proceedings as an *amicus curiae*.”). These requirements, referred to in *Pac Rim Cayman LLC*, were also reproduced, with changed dates, in *Commerce Group Corp. See News Release, ICSID, Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador* (ICSID Case No. ARB/09/17), Procedural Order Regarding *Amici Curiae* (Oct. 20, 2003), available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement67>.

157. *Piero Foresti v. Republic of S. Afr.*, ICSID Case No. ARB(AF)/07/1, Award, ¶ 55 (Aug. 4, 2010), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1651_En&caseId=C90 [hereinafter *Foresti*].

158. *Id.* ¶ 9 (“[T]he Parties agreed that Article 41(3) of the Arbitration Rules would apply to the filing of written submissions by non-disputing parties (“NDPs”). The Parties also agreed to a procedure to be followed by the Parties and the Tribunal with respect to any NDP seeking to file written submissions and approaching either Party or the Tribunal.”).

159. ICSID, *Additional Facility Rules*, art. 41.3, at 62, available at <http://icsid.worldbank.org/ICSID/ICSID/AdditionalFacilityRules.jsp> (“After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Article called the “non-disputing party”) to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the

While analyzing some of the decisions of arbitral tribunals, it appears that amicus submissions were not especially relevant when making a decision.¹⁶¹ Nevertheless, in *Piero Foresti* the arbitral tribunal committed to something positive from the perspective of defending the practice of the amici curiae:

[A]fter all submissions, written and oral, have been made the tribunal would invite the parties and the [non-disputing parties (“NDP”)] to offer brief comments on the fairness and effectiveness of the procedures adopted for NDP participation in this case. The tribunal would then include a section in the award, recording views (both concordant and divergent) on the fairness and efficacy of NDP participation in this case and on any lessons learned from it.¹⁶²

E. *The Future of Amicus Briefs in International Arbitration*

Far from being a resolved issue, the admission of amicus curiae is generating broad debate among practitioners, scholars, and the parties involved in investment arbitrations. Anticipating that the filing of amicus briefs is going to be a universal practice in the future, two relevant international organizations have recently expressed their desire to create optimal rules for the submission of amicus briefs.

1. United Nations Commission on International Trade Law

UNCITRAL’s mandate is to further the progressive harmonization and unification of the law of international

extent to which: (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (b) the non-disputing party submission would address a matter within the scope of the dispute; (c) the non-disputing party has a significant interest in the proceeding. The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.”).

160. ICSID Rules, *supra* note 111, Rule 37(2), at 117.

161. *See* this Part I.D.2 (discussing the importance that different arbitral tribunals placed on amicus submissions).

162. *Foresti*, *supra* note 157, ¶ 29; *see also* Elizabeth Whitsitt, *An ICSID Tribunal Introduces Innovative Steps into Non-Disputing Party Procedure*, INVESTMENT TREATY NEWS, Oct. 10, 2009, <http://www.iisd.org/itn/2009/10/10/an-icsid-tribunal-introduces-innovative-steps-into-non-disputing-party-procedure>.

trade.¹⁶³ The UNCITRAL Working Group II (“Working Group”), tasked with arbitration and conciliation, met in Vienna in October 2010. The Working Group announced that it consider preparing a set of rules of uniform law on transparency in treaty-based investor-State dispute settlement.¹⁶⁴ One of the issues designated by UNCITRAL as a question for possible consideration by the Working Group is submissions by third parties.¹⁶⁵ A reform of the UNCITRAL rules, deemed necessary by scholars,¹⁶⁶ would require a detailed regulation of the institution of *amicus curiae*.¹⁶⁷

2. International Chamber of Commerce

The ICC is a business organization that has an arbitration mechanism widely used in international practice.¹⁶⁸ In March 2009, the ICC created the Task Force on Arbitration involving

163. *Origin, Mandate and Composition of UNCITRAL*, U.N. COMMISSION ON INT’L TRADE L., <http://www.uncitral.org/uncitral/en/about/origin.html> (last visited Jan. 10, 2012).

164. U.N. Secretariat, U.N. Comm’n on Int’l Trade Law, Working Grp. II (Arbitration & Conciliation), *Settlement of Commercial Disputes: Preparation of Rules of Uniform Law on Transparency in Treaty-Based Investor-State Dispute Settlement*, 53rd Sess., Oct. 4–8, 2010, ¶ 25, U.N. Doc. A/CN.9/WG.II/WP.160/Add.1 (Aug. 5, 2010) [hereinafter Working Group II].

165. See Ignacio Tortorola, *The Transparency Requirement in the New UNCITRAL Arbitration Rules: A Premonitory View*, INV. TREATY NEWS Q., Sept. 2010, at 8, 10 (noting that this set of rules will be finally be created).

166. See Juanita Olaya, *Good Governance and International Investment Law: The Challenges of Lack of Transparency and Corruption* 43 (Soc’y of Int’l Econ. L., Second Biennial Global Conference, Working Paper No. 2010/43), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1635437&rec=1&srcabs=1633989; see also Eugenia Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 29 BERKLEY J. INT’L L. 200, 221 (2011) (referring generally to the “need to further formalize the status of *amicus* in investment proceedings”).

167. See Working Group II, *supra* note 164, ¶ 21 (stating that the Working Group should consider creating specific rules governing third-party submissions that address: [P]ossible criteria for acceptance of third parties’ submissions, such as assessing the legitimate interest of the third parties, ensuring that they are accountable, independent and not backed by any of the disputing parties . . . whether the arbitral tribunal should be requested to provide grounds for refusal of third parties’ submissions and arguments contained in the submissions. . . . [and]the conditions for allowing publicity of the *amicus curiae* briefs).

168. See *What Is ICC?*, INT’L CHAMBER OF COM. WORLD BUS. ORG., <http://www.iccwbo.org/> (last visited Jan. 10, 2012).

states or state entities.¹⁶⁹ The 150-member task force was commissioned to determine whether the ICC arbitration proceedings should be modified to some extent, given the peculiarities of these mixed-nature controversies.¹⁷⁰

Amicus submissions are common in various jurisdictions. Similarly, amicus briefs may be filed before various international tribunals. In the field of international investment arbitration, amicus submissions are controversial. Several reasons exist both for and against the institution of amicus submissions.

II. *THE DEBATE ON ACCEPTING AMICUS BRIEFS IN INTERNATIONAL INVESTMENT ARBITRATION*

The admission of amicus briefs in investment arbitration is a controversial issue.¹⁷¹ Most papers on this subject reflect the position of interest groups and, therefore, wish to strengthen the recourse to this institution. However, the amicus submissions raise greater concerns for the investors initiating international arbitration proceedings and their practitioners. This Part details the arguments for and against the institution of amicus curiae in international investment arbitration.¹⁷²

A. Benefits of Accepting Amicus Briefs

Nonprofit legal advocacy organizations highlight several positive aspects of amicus curiae. This Section details these aspects.

1. Public Interest Protection

Amicus submissions aim to protect important public interests such as environmental and health protection, human rights, workers' rights, sustainable development, cultural

169. See *Task Force on Arbitration Involving States or State Entities*, INT'L CHAMBER OF COM. WORLD BUS. ORG., <http://www.iccwbo.org/policy/arbitration/id32956/index.html> (last visited Jan. 10, 2012).

170. See *id.* (recounting the International Chamber of Commerce Task Force on Arbitration's mandate).

171. See, e.g., Asteriti & Tams, *supra* note 80, at 3 (alluding to a potential "pitched battle between proponents of greater transparency and inclusiveness and defenders of privacy and confidentiality").

172. Some of these arguments are also taken into account when assessing the amicus submissions in the judicial sphere. See Schachter, *supra* note 26, at 119–36.

heritage, the fight against corruption, and governmental policies.¹⁷³ The significance of these public interests emphasizes the benefits of bringing them to the attention of arbitrators through the amicus submissions.¹⁷⁴ Although the various rules governing investment arbitration require qualified arbitrators, this does not mean that arbitrators have to be able to know all the aspects of a case *per se*.¹⁷⁵ Along with the ruling of the arbitral tribunal in the *Suez* case, recent statements of the nondisputing parties in the *Piero Foresti* case are also relevant to show the protective goal of these amicus submissions:

[T]his arbitration raises issues of obvious public importance, including substantive equality and other human rights, environmental protection, sustainable development, and the respective roles of governments and investors in pursuing these goals. The consistency of South Africa's domestic constitutional obligations and its obligations arising out of international human rights law, on the one hand, and international investment treaties, on the other, has direct relevance to each of the Petitioners' mandates and activities at the local, national and international levels. The interest of the Petitioners in all of these public concerns is longstanding, genuine and supported by their well- recognised expertise in these areas.¹⁷⁶

173. See CAMILLA GRAHAM, ADVOCATES FOR INT'L DEV., A "HOW TO" GUIDE TO AMICUS CURIAE & INTERNATIONAL INVESTMENT ARBITRATION 6–7, available at <http://a4id.co.uk/content/amicus-curiae+international-investment-arbitrations.pdf> (citing several issues that can be affected by investment arbitration).

174. See Choudhury, *supra* note 82, at 827 (highlighting the importance of this "public interest"); see also Mary E. Footer, *BITs and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment*, 18 MICH. ST. J. INT'L L. 33, 46–47 (2009).

175. See, e.g., Washington Convention, *supra* note 64, art. 14 ("Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.").

176. Brief for Centre for Applied Legal Studies et al., Petition for Limited Participation as Non-Disputing Parties in Terms of Articles 41(3), 27, 39, and 35 of the Additional Facilities Rules, ¶ 4.18, *Piero Foresti v. Republic of S. Afr.*, ICSID Case No. ARB(AF)/07/1, available at <http://www.lrc.org.za/case-related/1012-2009-07-17-piero-foresti-a-others-v-rsa-petition-for-limited-participation-as-non-disputing-parties-icsid> (follow "Click to download" hyperlink).

2. Improvement of the Quality of the Award

Sometimes the state is not able to bring all relevant aspects of the controversy to the arbitrators' attention.¹⁷⁷ This situation might be due to several factors. For example, the state might have no knowledge or evidence on some issues, or the state might lack resources or expertise to properly develop a global defense.¹⁷⁸ Under these circumstances, amicus submissions offer useful additional perspectives, factual, legal, and technical, to the arbitral tribunal. Thus, the contributions made by the amicus curiae enhance the quality of the award. This benefits the parties involved in the case, as well as the general interests that may be affected by the arbitral decision.¹⁷⁹ In the *Suez* case, the tribunal affirmed that, “[g]iven the public interest in the subject matter of this case, it is possible that appropriate nonparties may be able to afford the Tribunal perspectives, arguments, and expertise that will help it arrive at a correct decision.”¹⁸⁰

In *Biwater*, the arbitral tribunal recognized that the petitioners “approach[ed] the issues in this case with interests, expertise and perspectives that have been demonstrated to materially differ from those of the two contending parties, and as such have provided a useful contribution to these proceedings.”¹⁸¹

3. Increase in Transparency

The intervention of amicus curiae also benefits the institutional sphere. The increased transparency achieved by the submissions gives greater credibility to the mechanism of international investment arbitration itself and makes a

177. See *Methanex*, Amici Curiae Decision, *supra* note 125, ¶ 10 (noting that Canada has “stated its support for greater openness in arbitration proceedings”).

178. See MCLACHLAN ET AL., *supra* note 52, at 59–60; see also Levine, *supra* note 166, at 217–18 (highlighting the problems that the host state has to face).

179. See Daniel Barstow Magraw Jr. & Niranjali Manel Amerasinghe, *Transparency and Public Participation in Investor-State Arbitration*, 15 ILSA J. INT’L & COMP. L. 337, 345 (2009) (analyzing these benefits); see also Levine, *supra* note 166, at 217–19 (discussing the benefits of amicus participation in investment disputes).

180. *Suez*, Amicus Decision, *supra* note 6, ¶ 21.

181. *Biwater*, Award, *supra* note 150, ¶ 359.

contribution toward its future consolidation and prevalence.¹⁸² Therefore, amicus briefs are a resource to combat the legitimacy crisis that threatens investment arbitration.¹⁸³ In *Methanex*, the petitioner:

[D]rew the Tribunal's attention to the advantage that would accrue from granting the Petitioner *amicus* status in helping to remedy the public perception of NAFTA's Chapter 11 process as closed, secretive, non-transparent and one-sided, as well as being not disposed to take account of the environmental issues at stake in the cases brought under it. The Petitioner argued that the need to remedy that perception has been rendered more acute by the *Metalclad* decision, and that a properly established process for the amicus status will enhance the public acceptability of any ultimate decision of this Tribunal¹⁸⁴

In *Biwater*, the arbitral tribunal stated that: “[T]he Petitioners emphasise the importance of public access to the arbitration from the perspective of the credibility of the arbitration process itself in the eyes of the public, which often considers investor-state arbitration as a system unfolding in a secret environment that is anathema in a democratic context.”¹⁸⁵

4. Amicus Briefs as a Starting Point for Implementing the Public Interest in Investment Arbitration

Arbitral tribunals should also support the additional requests that petitions for participation as non-disputing parties usually include:¹⁸⁶ permission to attend and present the amicus's

182. See Amokura Kawharu, *Public Participation & Transparency in Investment Arbitration: Recent Developments and Future Challenges*, ANU COLLEGE OF LAW, 2–3, http://law.anu.edu.au/cipl/Conferences&SawerLecture/2007/ANZSIL%202007/Publications/Amicus%20Notes%2006.07_Amokura.pdf (last visited Jan. 10, 2012); see also Levine, *supra* note 166, at 21 (highlighting the benefits of amicus submissions).

183. See generally Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521 (2005) (reflecting on the contemporary problems facing arbitration); see also Levine, *supra* note 166, at 21.

184. *Methanex*, Petitioner's Submissions, *supra* note 124, ¶ 10.

185. *Biwater Gauff*, Procedural Order No. 5, *supra* note 149, ¶ 34.

186. Analyzing the investment arbitration cases in which third parties have sought to intervene, it appears that such third parties normally submit two documents: a petition for participation as non-disputing party—a request that lists all the orders sought—and the submission of the amicus brief itself. For further discussion see Eugenia Levine, *supra* note 166, at 222 (“The tribunal should also be empowered with

key submissions at the oral hearings when they take place, or as an alternative, attend the oral hearings as observers or to reply to any specific questions of the tribunal on the written submissions; and access to the key arbitration documents that are relevant to the concerns of the amicus.¹⁸⁷ To protect the public interest, it is necessary to maximally implement the principle of transparency in the field of international investment arbitration. In *United Parcel Service v. Canada*, both amicus petitioners, in arguing for access to arbitration documents, stated that: “[T]hey are prejudiced in being able to describe the full nature of their interests and potential contribution by not knowing the Investor’s particular claims and the arguments it has brought forward.”¹⁸⁸ In the field of ICSID, there has been recent progress applauded by amicus petitioners.¹⁸⁹ The tribunal in *Piero Foresti* has allowed “access to those papers submitted to the Tribunal by the Parties that are necessary to enable the [nondisputing parties] to focus their submissions upon the issues arising in the case and to see what positions the Parties have taken on those issues.”¹⁹⁰

5. Positive Effects of Public Scrutiny on the Future of the Investment System

The entire process of writing and submitting amicus briefs is an incentive to attract media interest and influence public debate on these public-interest topics.¹⁹¹ In *Biwater*, the arbitral tribunal itself recognized that “the dispute was a very public and

a *structured* discretion to allow for different forms of amicus participation: (a) submission of written briefs; (b) attendance at hearings, and potentially the making of oral arguments; and (c) access to some or all of the documents on the record.”).

187. See, for example, the still-unpublished letter of *Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador*, PCA Case No. 2009-23, Petition for Participation as Non-Disputing Parties, ¶ 1 (Perm. Ct. Arb. Oct. 22, 2010), http://www.iisd.org/pdf/2011/petition_amicus_chevron_ecuador.pdf (requesting that the Permanent Court of Arbitration tribunal allow the petitioners, two NGOs, to submit a written brief, present their submission at oral argument, and access “key arbitration documents”).

188. *United Parcel Service*, Decision on Amicus Curiae, *supra* note 79, ¶ 47.

189. See, e.g., Whitsitt, *supra* note 162 (stating that ICSID “imposed unprecedented procedural steps regarding document disclosure and participant feedback”).

190. Obadia Email, *supra* note 135, at 1.

191. See, e.g., GRAHAM, *supra* note 173, at 6, 10.

widely reported one.”¹⁹² An amicus brief can therefore have a long-term educational impact or even be an influence for significant changes in the future, such as a national legislative modification or the establishment of an international instrument to regulate a particularly sensitive issue.¹⁹³ In this sense, it should be noted that the public is demanding a much more active role throughout the whole process of international investment. The Public Statement on the International Investment Regime issued on August 31, 2010, claims that:

Private citizens, local communities and civil society organizations should be afforded a right to participate in decision-making that affects their rights and interests, including in the context of investor-state dispute settlement or contract renegotiation. The international investment regime, by not allowing for full and equal participation of such parties alongside the investor where their interests are affected, fails to satisfy this basic requirement of procedural fairness.¹⁹⁴

B. *Concerns on the Admission of Amicus Briefs*

This Section presents some of the negative aspects of the amicus curiae submissions, especially those highlighted by investors, law firms supporting investors in international investment arbitration, and host states. The confluence of these arguments could reduce the willingness of the parties involved in international investment to go to arbitration.

192. *Biwater, Award*, *supra* note 150, ¶ 67.

193. *See* Levine, *supra* note 166, at 217–19; *see also* Magraw Jr. & Amerasinghe, *supra* note 179, at 351–52 (stating that transparency can be a tool to achieve systemic improvements in different areas of law).

194. PUBLIC STATEMENT ON THE INTERNATIONAL INVESTMENT REGIME ¶ 9 (2010), *available* at <http://www.osgoode.yorku.ca/public-statement/documents/Public%20Statement%20%28June%202011%29.pdf>. This statement of concern about the international investment regime is supported by a series of academics with expertise in investment law. *See id.*

1. Amicus Curiae is not a Universally Recognized Institution

Importantly, some national legal systems do not recognize the institution of amicus curiae.¹⁹⁵ In the NAFTA case *United Parcel Service*, Mexico claimed to be

concerned that concepts or procedures that are alien to its legal tradition and which are not agreed to as part of [the FTC Statement] may be imported into NAFTA dispute settlement proceedings involving other NAFTA parties and then set a precedent for future cases where Mexico is the disputing Party.¹⁹⁶

This could lead one to argue that it is wrong to generally impose on states this institution in the field of investment arbitration, as it “may be seen as representing a victory of the common law over the civil law.”¹⁹⁷

2. Disregard for the Consensual Nature of Arbitration

An essential feature of arbitration, which is highly valued by the parties, is its consensual nature. Therefore, if parties, or at least one of them, do not accept amicus briefs, one can argue that arbitrators should not be able to authorize the intervention of these nonparties.¹⁹⁸ Consequently, in the absence of a rule that stating otherwise, the ICSID arbitral tribunal in *Aguas del Tunari* communicated to the amicus petitioners that:

Your core requests are beyond the power or the authority of the Tribunal to grant. The interplay of the two treaties involved . . . and the consensual nature of arbitration places the control of the issues you raise with the parties, not the Tribunal. In particular, it is manifestly clear to the

195. See Coe, Jr., *supra* note 78, at 1362. See generally Asteriti & Tams, *supra* note 80 (offering an interesting study on comparative law among common law and civil law countries).

196. *United Parcel Serv. of Am., Inc. v. Canada*, Mexico’s 1128 Submission on the Amicus Petitions, ¶ 5 (NAFTA Arb. 2001), <http://www.naftaclaims.com/Disputes/Canada/UPS/UPSMexico1128ReAmicusSub.pdf>. Note that this allegation was made when NAFTA courts applied Article 15 of the 1976 UNCITRAL Arbitration Rules. This argument lost strength once the referred 2003 NAFTA Statement was approved.

197. See Bjorklund, *supra* note 51, at 1293 (reflecting on this conflict among different legal systems).

198. See, e.g., Sabater, *supra* note 73, at 50–51 (proclaiming that “imposing limits on the opportunities for third parties to intervene in any given arbitration is nothing but enforcing the parties’ original dispute resolution agreement”).

Tribunal that it does not, absent the agreement of the Parties, have the power to join a non-party to the proceedings.¹⁹⁹

3. No Need for Amicus Briefs

The rules governing investment arbitrations already offer enough options to both parties and the judge to gather information needed to resolve the case. Taking the example of the ICSID Rules, Rule 33 regulates the organization of evidence,²⁰⁰ and Rule 34 gives a very active role to the tribunal regarding the evidence.²⁰¹ Referring to NAFTA arbitrations, the investor in *United Parcel Service* argued that “*amicus* briefs should only be submitted in the event that the Tribunal determines the disputing parties are unable to provide the necessary assistance and materials needed to decide the dispute.”²⁰² Therefore, *amicus* interventions are not always considered necessary to provide a new perspective on the case.

4. Interference with Parties’ Strategy

Amicus curiae interventions may affect the parties’ strategy. Parties are sometimes unwilling²⁰³ to reveal all the information related to the case because they may be suffering from political pressure, or they might believe that the disclosure will be counterproductive to their interests.²⁰⁴ *Amicus* briefs, therefore,

199. *Aguas del Tunari*, *supra* note 136, ¶ 17.

200. *See* ICSID Rules, *supra* note 111, Rule 33 (“Without prejudice to the rules concerning the production of documents, each party shall, within time limits fixed by the Tribunal, communicate to the Secretary-General, for transmission to the Tribunal and the other party, precise information regarding the evidence which it intends to produce and that which it intends to request the Tribunal to call for, together with an indication of the points to which such evidence will be directed.”).

201. *Id.* Rule 34 (allowing the tribunal to admit any evidence and weigh its probative value; call upon parties to produce documents, witnesses, or experts; visit any place connected with the dispute; and note any failure by the parties to comply with the tribunal’s evidentiary requests).

202. *United Parcel Service of Am., Inc. v. Canada*, Investor’s Response to the Petition of the Canadian Union of Postal Workers and the Council of Canadians, ¶ 17 (NAFTA Arb. 2001), <http://www.naftaclaims.com/Disputes/Canada/UPS/UPSInvestorSubReAmicus.pdf>.

203. *See supra* Part II.A.2.

204. *See* Tomoko Ishikawa, *Third Party Participation in Investment Treaty Arbitration*, 59 INT’L. & COMP. L.Q. 373, 393 (2010); *see also* Levine, *supra* note 166, at 21 (explaining potential interferences with parties’ strategies).

can negatively affect the parties' degree of autonomy and control over their arbitration.

5. Unilateral Positioning

Investors complain that, as amicus briefs mostly support the state's approach,²⁰⁵ the court may be pressured to accept these arguments and thus prioritize the state's position.²⁰⁶ This risk has been expressly indicated by the arbitral tribunal in *Methanex*:

[A]s appears from the Petitions, any *amicus* submissions from these Petitioners are more likely to run counter to the Claimant's position and eventually to support the Respondent's case. This factor has weighed heavily with the Tribunal; and it is concerned that the Claimant should receive whatever procedural protection might be necessary.²⁰⁷

6. Harmful Positioning

Some scholars allege that amicus briefs, especially if they are unsolicited, do not provide added value.²⁰⁸ Amicus curiae have been criticized for merely repeating the state's arguments, which has occasionally led to complaints that the intervening NGOs are biased.²⁰⁹ Sometimes even developing countries, which theoretically benefit from these submissions, are wary of NGOs submitting amicus briefs.²¹⁰ Because NGOs from developed countries have the economic resources, required specialists, and requisite experience, they often drive the drafting of these briefs.²¹¹ Therefore, the respondent state and its citizens may consider the amicus curiae as not adequately reflecting all the nuances of the social problems that often exist

205. See GRAHAM, *supra* note 173, at 11 (stating that amicus submissions often reflect perspective); see also Magraw Jr. & Amerasinghe, *supra* note 179, at 355.

206. See, e.g., Magraw Jr. & Amerasinghe, *supra* note 179, at 355; see also Mackenzie, *supra* note 33, at 299 (highlighting potential risk of prejudice due to the volume of briefs in support of the opposing party's position).

207. *Methanex*, Amici Curiae Decision, *supra* note 125, ¶ 50.

208. See, e.g., Mackenzie, *supra* note 33, at 299 (reflecting on the value of amicus submissions).

209. See Bjorklund, *supra* note 51, at 1292–93 (reflecting on the impartiality of amicus briefs).

210. See *id.*

211. See *id.*

behind these international investment arbitrations,²¹² and that amicus briefs constitute an “uninvited interference with affairs in the developing world.”²¹³

7. Costs and Delays to the Parties

Amicus involvement increases arbitration costs and generates delays, both of which are ultimately borne by the parties. Therefore, amicus briefs have damaging effects on the parties to a dispute in terms of time, resources, and increased submissions that leave investment arbitration with some of the same criticisms that can be directed towards the judicial system.²¹⁴ These submissions can also create a paradoxical situation where they are detrimental to the citizens of the respondent state whose interests the amicus briefs try to defend.²¹⁵ Moreover, these problems of time and expense increase if the applicable arbitration rules allow parties to make submissions on the petitions filed by the amici. The following statements of the investor in *Merrill & Ring Forestry L.P. v. Canada* are very clear in this regard:

Care must also be taken to ensure that *amicus* submissions are not received without sound reason to believe that they will usefully assist the Tribunal. If a tribunal were to permit *amicus* briefs liberally, then the proceedings would quickly become unmanageable That would be unfair and costly to the disputing parties, who would be called upon to

212. This argument has been raised by several developing countries within the WTO. It has been stated that amicus submissions may put “the developing countries at an even greater disadvantage in view of the relative unpreparedness of their NGOs who had much less resources and wherewithal either to send briefs without being solicited or to respond to invitations for sending such briefs.” World Trade Organization General Council, *Minutes of Meeting of 22 November 2000*, ¶ 38, WT/GC/M/60 (Jan. 23, 2001).

213. Bjorklund, *supra* note 51, at 1292.

214. See Levine, *supra* note 166, at 24 (pointing out that “there is a risk that opening up the process in this manner would result in the arbitration procedure becoming ‘court-like’ and losing the attributes of more cost-efficient and speedy adjudication that is perceived as a significant advantage”); see also Sabater, *supra* note 73, at 51 (noting that delays, complexities, and publicity is exactly what parties tried to avoid by submitting themselves to arbitration).

215. See Asteriti & Tams, *supra* note 80, at 5–6 (explaining the potentially detrimental effects on the State of investment arbitration proceedings).

respond to potentially voluminous material, none of which would be received on the basis of their consent.²¹⁶

Additionally, the submission of amicus briefs also affects the workload of the arbitral tribunal and it is a new expense that is borne by the parties.²¹⁷ It should be noted that speed and economy are two of arbitration's main characteristics, which lead the parties to prefer this mechanism rather than going through the courts.²¹⁸ The negative effects of the amicus briefs might influence investors and make them rethink their choice.

8. Risks to Confidentiality

Amicus briefs ask for greater transparency in the whole arbitration process, and they usually request additional rights, such as access to documents and hearings.²¹⁹ The acceptance of these requirements, which generally has not happened so far, would be detrimental to investors who would have to suffer the negative consequences of the diffusion of confidential information, such as adverse publicity or the loss of future business.²²⁰ In *Methanex*, the investor stated the following regarding this sensitive information:

Under Article 25.4 of the UNCITRAL Rules, hearings shall be held "in camera" unless the parties agree otherwise At common-law, the requirement that arbitration be held in camera carries with it the implied term that the documents created for the purpose of that hearing are also private and confidential. The disclosure to a third party of such documents would be almost equivalent to opening the door of the arbitration room to that third party. . . . The parties negotiated at some length and ultimately came to an agreement respecting the terms of a Confidentiality Order in the form delivered to the Tribunal by joint submission

216. *Merrill & Ring Forestry L.P. v. Canada*, Investor's Response to the Petition of the Communication, Energy and Paperworkers Union of Canada, The United Steel Workers and the British Columbia Federation of Labour, ¶ 25 (NAFTA Arb. 2008), http://www.naftalaw.org/Disputes/Canada/Merrill/Merrill_Ring-Canada-Amicus-Investor.pdf.

217. See Bjorklund, *supra* note 51, at 1293; see also Coe, Jr., *supra* note 78, at 1363.

218. See, e.g., Levine, *supra* note 166, at 24.

219. See Bjorklund, *supra* note 51, at 1293–95.

220. See GRAHAM, *supra* note 173, at 11; see also Levine, *supra* note 166, at 24 (reflecting on the risks for the investor).

dated August 23, 2000 Nowhere in the order do the parties permit disclosure to non-governmental organizations or public interest groups. Further, the parties did not agree in the Confidentiality Order to waive or amend the provisions of Article 25.4 of the UNCITRAL Rules, requiring the hearings to be held in camera.²²¹

The various reasons set out above for and against the acceptance of amicus briefs in the field of investment arbitration lead to reflection on which should be the future treatment to be given to amicus curiae.

III. *DRAWING A LINE BETWEEN "FRIENDS OF THE COURT" AND "FALSE FRIENDS"*

As discussed in the preceding Parts, the current NAFTA and ICSID regulations have allowed the submission of amicus briefs in some major investment arbitration cases.²²² The abundant references found in treaties, laws, and investment contracts to ICSID seems to indicate that many future requests for amicus curiae will continue to be made through the mechanism established by this international organization.

However, ICSID has been widely questioned in recent times and some countries, such as Bolivia and Ecuador, have even denounced the Washington Convention and left the organization.²²³ This recent situation foretells that other alternative channels will be used to submit future requests for amicus briefs. In this regard, two recent initiatives cited in this Article are relevant: the UNCITRAL Working Group II aiming to create a set of rules of uniform law on transparency in treaty-based, investor-state dispute settlement, and the ICC Task Force on Arbitration involving states or state entities, which will probably address the issue of transparency.²²⁴ It seems that both

221. *Methanex Corp. v. United States*, Investor's Response to the Application for Amicus Standing, ¶¶ 3–6 (NAFTA Arb. 2000), <http://www.naftaclaims.com/Disputes/USA/Methanex/MethanexInvestorResponseReAmicus.pdf>.

222. *See supra* Parts I–II.

223. *See* Katia Fach Gómez, *Latin America and ICSID: David versus Goliath?*, 17 L. & BUS. REV. AM. 195, 227 (2011) (analyzing the characteristics of investment disputes with Latin American countries); *see also* Ignacio A. Vincentelli, *The Uncertain Future of ICSID in Latin America*, 16 L. & BUS. REV. AM. 409, 410 (2011) (discussing the future of the ICSID in Latin America).

224. *See supra* Part I.E.

institutions are aware that in the near future, they will gain relevance in the field of international investment arbitration, and that the intervention of nonparties in this sector often raises issues requiring individual regulation.

This Part presents a series of proposals in order to predetermine what should be the most adequate future praxis for the admission of amicus briefs. These proposals are useful not only in determining how the general and imprecise parameters contained in ICSID Rule 37.2 should be better applied—or even amended—in future ICSID cases, but they also provide guidelines regarding the UNCITRAL and ICC preliminary works. These suggested criteria should allow arbitrators to distinguish among different types of amicus briefs, and encourage acceptance of these nonparty interventions only if their effects are beneficial to all the interests involved in the international dispute. Additionally, in certain cases, the creation of an institution that permanently takes into account the interests otherwise protected through amicus briefs should be encouraged.

A. Improving the Current Standards of Amicus Brief Submission

The first way to draw a line between the various types of amicus briefs that can be submitted in investment arbitration is to create a detailed set of additional guidelines to properly filter these requests. To create these new guidelines, the various rules set out in Sections I.B and I.C.3 of this Article were discussed. Based on an analysis of all those provisions and on the discussion in Part II, some of the remarkable factors that might be weighed to create these additional guidelines are indicated below. Additionally, this Part reflects on an appropriate answer for all these issues. The goal of this Part is to propose the contents of the provision that an arbitral tribunal should apply when determining whether to accept an amicus submission. The application of this provision should not depend on the tribunal's discretion, as is the case with NAFTA, but rather should be mandatory, provided that the constituent guidelines reflect minimum flexibility. The mandatory application of this provision is, of course, not synonymous with the mandatory acceptance of the submission.

1. Amicus' Identity

Taking into account the practice of both national and international courts and international arbitral tribunals referred to throughout this Article, the identity of the amici curiae may be extremely varied. Amicus briefs submitted by states, NGOs, professional associations, trade unions, private companies, scholars, law school clinics, law firms, and individuals have been accepted. Sometimes, amici curiae represent a large group of people with a common interest, and, on other occasions, the amicus briefs are presented individually.²²⁵ The singularity or plurality of the petitioner is not the only essential factor to give greater or lesser relevance to the submission. Additional important facts to consider are, for example, the connection between the activities of the amicus and the circumstances of the case and, moreover, the amicus' real representativeness—the one that goes beyond the quantitative data. Consequently, it does not seem appropriate, as the Statute and Rules of the International Court of Justice establishes,²²⁶ to set an *ex ante* provision limiting the typology of subjects allowed to submit amicus briefs. International investments and the perspectives advocated by the amici curiae may be so diverse that there should be ample personal legitimation in this field of nonparty intervention. Scholars have also suggested the establishment of different levels of participation among the amici, taking into account their respective level of interest in the case.²²⁷ This proposal, although suggestive, would pose difficulties in implementation.

2. No Requirement for a Specific Drafter's Expertise

National courts accepting amicus briefs sometimes require them to be submitted by an attorney admitted to practice before that court.²²⁸ Taking into account the characteristics of international investment arbitration—that is, conducted before ad hoc tribunals or international organizations that do not

225. See *supra* Parts I.D, III.

226. See *supra* Part I.B.2.

227. See, e.g., Levine, *supra* note 166, 214–15, 222 (discussing pertinent criteria for third-party submissions).

228. E.g., SUP. CT. R. 37.

require the admission to a specific bar—this strict exigency cannot be reproduced in this sphere. It is not necessary that the drafter be a practitioner. Given the wide range of interests that can be defended through amicus submissions, these briefs will not always develop legal principles. It is advisable that, taking into account the characteristics of the arguments to be developed, a suitable person should be elected to draft this brief. It should be noted that the degree of credibility and relevance granted by the court to the amicus brief would possibly depend on its quality.

3. Proof of Economic Independence from the Parties

As amici curiae sometimes have been accused of partiality, the test of economic independence is important to dispel such doubts. Frequently, NGOs domiciled in the state where the investment was made submit amicus briefs to the arbitral tribunal. In these cases, it is especially important to demonstrate that the NGO does not receive subsidies or other financial support that could affect their impartiality. Another question to be determined is to what extent the submission of amicus briefs should be prevented from those who are connected in some way to lawyers, witnesses, judges, or staff working on the arbitration.²²⁹ It should be noted that the field of international investment arbitration is very specialized. There are a limited number of arbitrators and law firms working in this area and, therefore, the connections between people involved in these conflicts are more common than what otherwise might be thought.

229. This question has been raised in international criminal matters. Regarding the existence of a personal interest or the existence of an association or working relationship between one judge and the three authors of one of the amicus curiae briefs filed subsequently in the case, see *Prosecutor v. Furundzija*, Case No. IT-95-17/1-A, Judgement (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000), http://www.icty.org/x/file/Legal%20Library/jud_supplement/supp18-e/furundzija.htm.

4. Conclusive Evidence of Legitimate and Significant Interest in the Petitioners

The notion of interest is extremely difficult to define.²³⁰ Similarly, it is very complicated to establish the appropriate standard of interest for these cases of amicus submissions in investment arbitration. An interest that is legitimate, significant, and able to be conclusively demonstrated should be represented at the arbitration. This does not mean that the investment has to be financially harmful to the NGO. It is enough to prove that the purpose for which the NGO was created is negatively affected by cases such as the one that gave rise to the controversial arbitration.

Another issue to consider is that amicus submissions are intended to pursue the protection of collective interests that belong to the basic core of every society. Therefore, organizations must avoid the temptation to resort to this institution to make other kinds of claims, such as political ones, or to gain popularity.

5. Public Interest in the Subject Matter of the Arbitration

The requirement of public interest to be a subject matter of the arbitration is neither expressly included in Article 37.2 of the ICSID Rules,²³¹ nor has it been added in the procedural orders that ICSID have issued in its last investment arbitration cases, which provide detailed guidelines on the written applications.²³² Nevertheless, BITs, such as the Canadian-Slovak BIT,²³³ do indicate that one of the issues the court must consider is if there is a public interest in the subject matter of the arbitration. This second option is preferable because, as stated above,²³⁴ the intervention of the civil society in the area of investment arbitration has to be justified by the peculiarities of a case that exceed the interests of specific parties. In addition, the application of this filter could banish baseless submissions that would only constitute a burden to the arbitral process.

230. *See supra* Part I.C.4.

231. *See supra* Part I.C.4.

232. *See supra* Part I.D.2.

233. *See* Canada-Slovak BIT, *supra* note 93; *supra* Part I.C.3.

234. *See supra* Part II.A.1.

6. Novel Contribution

The amicus brief must identify its added value. If the amicus brief is only offering overlapping arguments, it should not be admitted. As the one the basic rule to follow, it seems nevertheless very difficult for the entire text of the amicus brief to offer novel contributions. Therefore, a parameter to determine the required degree of novelty in the submissions should be established. This degree may be established by including an adverb before the adjective, such as “sufficiently” or “mostly novel” contribution, in the procedural rule governing the amicus submissions and by allowing the arbitral tribunal to apply this rule while taking into account the characteristics of each case. Depending on the nature of the NGO submitting the amicus brief, it is estimated that the novelty test could be successfully overcome by providing either novel legal or factual arguments in the amicus briefs. As will be exposed, the option of submitting joint briefs facilitates the possibility of the amicus brief meeting this standard. Finally, it can be argued that an NGO does not know whether it will overcome this test of novelty if it does not have access to the documents submitted by the parties. However, it seems that this argument is losing relevance now. It is increasingly common for at least one of the parties to make its arbitration documents accessible online.

7. Other Procedural Limits Regarding the Submission of Amicus Briefs

In order to resolve potential overlaps among concurrent amici curiae, procedural rules should encourage potential amici to coordinate efforts and to submit consensus documents that comply in the best possible way with these requirements. As will be presented below, a joint brief with a maximum predetermined length is a good tool to keep this nonparty intervention manageable for the arbitral tribunal. A temporal limit on the submission is also necessary to avoid slowing down the whole arbitration process.

8. Cost Assumption

In general, there is no information on how high the costs arising from the preparation and submission of amicus briefs are. While sometimes the drafting of amicus briefs is part of the work of the NGO's staff, other briefs are wholly or partially drafted by outside counsel who do not work pro bono. Differing from the requirement to prove that the NGO is not economically dependent on the parties, it would also be beneficial to impose upon NGOs the duty of revealing the cost of the amicus submission and the funding source of the expense. On the other hand, investors and states are currently bearing the costs derived from the time that arbitrators and lawyers devote to analyze or respond to the amicus briefs. The optimal solution to avoid this outcome is to avoid passing these costs to the NGOs that have submitted the briefs, as this option could stop the presentation of valuable contributions. A better possibility would be to create some kind of fund that covers the internal and external expenses arising from the intervention of amici curiae in investment arbitrations.²³⁵

9. No Veto Right of the Parties

The issues addressed by amicus briefs are so essential that their allegations should not be made dependent on the parties' acceptance. In this sense, the approach contended in Rule 37 of the ICSID Rules is appropriate. Nevertheless, the inability of the parties to prevent arbitral tribunals from accepting amicus briefs does not imply that the parties do not have to be protected from certain effects that these submissions may generate.

10. Party Protection to Minimize the Adverse Aspects of Amicus Submissions

If amicus briefs are accepted, parties should be given the opportunity to respond to these submissions. Party response should not depend on the discretion of the arbitral tribunal. The rules have to set out a reasonable deadline by which states and investors may submit their responses on the amicus briefs to

235. The creation of this mechanism, however, would require an international agreement, which might be difficult to achieve.

the tribunal. On the other hand, a balance should also be struck, so that these deadlines should not lengthen the arbitration.

11. Duties of the Arbitral Tribunal Regarding Amicus Briefs

The arbitral tribunal should grant to parties and nonparties a number of procedural guarantees. For instance, once the tribunal has decided the phase in the proceedings when such submissions may be made and has imposed deadlines and length limits for the submission of the amicus briefs, the arbitral tribunal should respond to the amicus submission within a reasonable time and offer the amici curiae sufficient reasoning for the acceptance or rejection of their requests. In addition, if the amicus brief is accepted, the arbitral tribunal must commit itself to consider in detail these submissions and include approving or disapproving references to the amicus briefs' content in the final award. This option is the best way for the whole process of third-party intervention to enjoy the highest possible degree of predictability, transparency, and consensus.

12. Powers of the Arbitral Tribunal Regarding Amicus Briefs

The general rules governing the procedure of the investment arbitration or the specific provisions relating to amicus briefs should provide the arbitral tribunal with sufficient margin to act. It is beneficial if the tribunal, as happened in the *Biwater* case,²³⁶ reserves the right to question the amicus or to demand further information regarding the amicus brief's content. As will be seen in the following Section,²³⁷ if this proposition is carried out to its final consequences, it can generate substantial changes in the current scheme of investment arbitration. Additionally, if parties are authorized to access key documents provided by the parties to the arbitration, the court should have the power to impose some limits on amicus briefs in this regard. For example, the tribunal may order the NGO not to publish the amicus brief alluding to these key documents until at least the end of the arbitration.

236. See *supra* Part I.D.2; *supra* notes 149–52 and accompanying text.

237. See *infra* Part III.B.

B. *Developing More Stable Ways to Protect the Public Interest in International Investment Arbitration*

This Article considers the establishment of additional requirements as an appropriate solution to prevent the indiscriminate filing of amicus briefs in investment arbitration. This option is particularly ideal in relation to rules such as the UNCITRAL Rules, which are sometimes applied by ad hoc tribunals that do not have a permanent institutional support. On the other hand, if the arbitration is hosted by an international organization such as ICSID or the ICC, which does have a permanent administrative structure, the option of refining filters is also adequate. Nevertheless, this Article questions whether, in these cases, it would be preferable to create a structure that protects the public interests in a more predictable and stable fashion.

Two alternative and more radical systemic changes regarding amicus submissions may also be envisioned in investment arbitrations. On one hand, amicus interventions could be based on the WTO model, which implies that the arbitrators would request the amicus curiae submissions. Thus, the arbitral tribunal would decide which submissions might be of interest for the case and therefore not admit unrequested amicus briefs.²³⁸ This system has some advantages. For example, in recent ICSID cases there have been no amicus submissions, although the court has offered such a possibility through a procedural order.²³⁹ Applying this alternative system, the lack of participation of NGOs can be supplemented by a proactive positioning of the court. Besides that, the arbitrators would make much more targeted requests, avoiding requests which are redundant or too generic. Analyzing this system from the opposite perspective, its implementation could generate a dangerous situation of helplessness. The public interest would not be taken into account if, due to a lack of information or awareness, the court did not make any or enough amicus requests.

On the other hand, arbitral institutions such as ICSID or the ICC could establish within its structure a permanent

238. *See supra* Part I.B.3.

239. *See supra* Part I.D.2.

institution devoted to the protection of the general interest. Part I.B.2 of this Article refers to such institutions, such as the Commissioner of Human Rights or the prosecutor in international criminal matters. These institutions—and others such as the Ombudsman and the UN special rapporteur—come from different areas of law that are removed from investment arbitration, and thus their contributions to the investment area should be accepted very cautiously. Given this caveat, the newly defined functions of these persons should include the responsibility of investigating the general interests affected by each investment arbitration and presenting, if any, this novel protective perspective to the arbitral tribunal. This system would benefit from the stability and professionalism acquired by the new institution over time.

Nevertheless, the implementation of this institution requires that many obstacles be overcome, such as the financing side or the reluctance of the traditional participants in investment arbitration. The operation of this new institution would also require intensive work of clarification in matters such as the specific powers of this new institution and its interaction with the arbitral tribunal, parties, and NGOs. This would be a fundamental reform, undoubtedly requiring political will and due time to become reality. Such reforms, if enacted, would be beneficial to the public interest.

CONCLUSION

The intervention of *amicus curiae* in investment arbitration is a matter of great interest that will continue to generate legal debate. In the wake of multiple courts' and some tribunals' decision to admit *amicus curiae* submissions, several rules on investment arbitration have increasingly recognized the possibility that the general interest is protected through *amicus* submissions. The fact that a party to the investment arbitration is a state and problems transcend the interests of the named parties justifies the progressive implementation of the principle of transparency in investment arbitration, which has been traditionally rejected in commercial arbitration. The acceptance of the institution of *amicus curiae* in BITs and in arbitration rules has resulted recently in various NGOs submitting *amicus* briefs in relevant international arbitrations. Additionally,

UNCITRAL and the ICC are currently developing two projects in the field of investment arbitration that are going to address the issue of amicus briefs. Taking all of this data as reference, this Article reflects on the most appropriate regulation of the institution of amicus curiae. It considers a multiplicity of factors, both internal—concerning the content and the submission process—and external—referring to the relationship of these nonparties with other participants in investment arbitration. Given the controversial nature of amicus curiae, any regulation must be multi-faceted. Against the multiple benefits preached mainly by NGOs, investors believe that the acceptance of amicus curiae brings various injustices. The proposal advocated by this Article is twofold. On the one hand, the acceptance of unsolicited amicus briefs should be governed by a set of criteria able to block any submissions that do not benefit the outcome of the arbitration and are excessively detrimental to the parties and arbitrators of the investment dispute. On the other hand, institutions managing investment arbitrations could establish a new institution exclusively and permanently dedicated to defending the collective interest. Although appealing, this proposal would require a major change to the system, so that success would only materialize in the medium to long term.