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Amicus Curiae in International Investment Arbitration: Can It Enhance the Transparency of Investment Dispute Resolution?

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Abstract

In investment arbitration there is a tension between the consensual commercial character of a dispute and an increasing need to offer transparent proceedings where a public interest is involved. It came to be quite clear from the beginning of the twenty-first century that investment arbitration would benefit from being more transparent and that the participation of amici curiae might be one method of addressing the problem. The Article concentrates on the role of non-disputing parties in investment arbitration and the changes that have occurred in the arbitration rules and BITs during the last decade. It is argued that the participation of non-disputing parties does increase the transparency of investment arbitration and allows for a greater democratic legitimacy of the whole process. In particular, the Article advocates a view that it is both possible and desirable to enhance the existing procedural framework by guaranteeing to amici curiae access to the arbitration documents and to oral hearings, subject to the necessary protection of genuine commercial secrets.

1. Introduction: Confidentiality and Transparency in International Investment Arbitration

In investment arbitration there is a fundamental tension between the consensual character of arbitration underlying a commercial dispute between two parties and an increasing need to offer transparent proceedings where a public interest is involved. (1) It is a truism to say that one of the valuable principles of arbitration is the confidentiality of the proceedings. The opportunity to decide commercial *page "205"* disputes behind closed doors away from the attention of the public often constitutes an important reason why parties resort to arbitration in the first place. However, investment arbitration differs from general commercial arbitration in that it involves claims against the State, which are often related to regulations of a public law nature. (2) Investment arbitration often includes questions of significant compensation for losses suffered as a result of the State introducing measures of public policy, relating to monetary, economic or social policies, the protection of

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specific industries or services, as well as the distribution of natural resources, important infrastructure projects, or environment protection. (3) Necessarily, investor-State arbitration entails scrutinizing the conduct of a sovereign State. (4) Clearly therefore, investment arbitration involves public issues not only because it relates to the liability of a State, but also because it often deals with various policies that are traditionally perceived as public. (5) As observed by Buckley and Blyschak:

> One of the major challenges facing ICSID is that recently, investor-State disputes have been raising public interest issues traditionally absent from international commercial arbitration. This calls into question the suitability of the in camera proceedings traditionally used to determine such disputes. Confidentiality and privacy are fundamental to arbitration as a dispute settlement method. However, the political legitimacy of the process is put at risk if genuine stakeholders cannot participate in decisions affecting their rights and interests. (6)

Obviously, the more the public interest is at stake, the greater the need for transparency in the decision-making process, and the more indispensable it seems to allow the interested public to participate in proceedings before the investment tribunals.

Further, the controversies that arise around investment arbitration in the recent decade not only concern the transparency or confidentiality of the proceedings and awards, but more fundamentally they relate to the very legitimacy of arbitration as a method of settling investment disputes. This is because the fact that the liability of sovereign States under public international law treaties is decided by privately page "206" nominated arbitrators in a commercial-like setting, not controlled or influenced by any democratically represented stakeholders, gives rise to intense debate in itself. (7)

As a result of the above-mentioned controversies, it came to be quite clear as from the beginning of the twenty-first century that investment arbitration should find support in more democratic legitimacy. A part of that was a growing demand for transparency in international investment arbitration. (8) As noted by the tribunal in *Methanex*: '*the . . . arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive*'. (9) Obviously, as is often the case, there were some who opposed the transparency of international investment arbitration. (10) They claimed, among other things, that investment disputes are commercial in their nature and thus should remain confidential between the parties. They stressed that the participation of third parties will increase costs and could lead to the politicization of the dispute, while depriving it of the advantages of arbitration, such as the flexibility and rapidity of the procedure, ultimately diminishing the chances for an amicable settlement between an investor and a State. (11) Nevertheless, page "207" the amendments that occurred in the arbitration rules and BITs in the 2000s, are headed towards allowing for greater transparency. (12)

This Article will concentrate on the role of non-disputing parties in

investment arbitration (known as amici curiae), and the changes that have occurred in that respect in the arbitration rules and BITs, although certain general considerations of transparency will also be touched upon. The amicus curiae is one of the inventions known to various legal systems (in particular in the common law world) that was embraced for the purposes of investment arbitration some ten years ago. (13) It clearly has the potential to increase transparency. (14) The pertinent question that arises, however, is to what extent can the participation of amici curiae enhance the transparency of international investment arbitration? This paper attempts to address this dilemma, taking a Polish perspective in particular.

2. The Concept of Amicus Curiae in Investment Arbitration and Its Origins in National and International Law

By 'amicus curiae' one should understand a non-disputing party, literally a '*friend of the court*', who is likely to assist the tribunal in arriving at its decision, but who is not a party to the proceedings. As explained by the tribunal in the *Suez* amicus order: '*the traditional role of an amicus in an adversary proceedings is to help the decision maker arrive at its decision by providing the decision-maker with arguments, perspectives, and expertise that the litigating parties may not provide.*'(15) However, it was also observed in *Methanex* that amici are not experts but rather advocates '*[…] and not independent in*  *page "208" that they advance a particular case to a tribunal.*'(16) In the last decade, a number of non-governmental organizations have managed to step in to investment arbitration proceedings as amici curiae, drawing upon the public character of a case. (17)

The career of the concept of amicus curiae in international investment arbitration started with a 2001 decision on amicus participation in the *Methanex* case. (18) The basic facts were as follows: Methanex was a Canadian company producing methanol; methanol is an important component of MTBE, which is used in the production of gasoline; Methanex made an investment in California, but later California banned MTBE in gasoline because it allegedly caused the contamination of drinking water supplies and therefore posed a significant risk to the environment, human health and safety; despite the environmental concerns at stake, Methanex complained to the investment tribunal under NAFTA that it had been expropriated, and requested significant compensation. A number of environmental protection NGOs attempted to seek amicus curiae status and to enter into proceedings, offering to present their position on some of the issues arising in the case. They succeeded, in that the tribunal agreed to consider their submissions. *Methanex* constituted a precedent because it was the first modern investment dispute to allow the participation of a non-disputing party in arbitration proceedings between an investor and a State. More examples were to come in the recent decade, (19) although petitions for participation as amicus curiae have also been occasionally denied. (20)

An amicus curiae is not a phenomenon particular to investment arbitration. Amici, or similar concepts, are known under both international law and various national laws. The concept is particularly well established in the common law legal systems. (21) It is said to have been known already in Roman Law. (22)

At the international level, the amicus curiae is also known to WTO dispute resolution bodies. The first WTO dispute to accept a non-party submission was the page "209" *Shrimp/Turtle* case of 2001. (23) The main question in that case was whether US legislation prohibiting the import of shrimp caught by trawlers not using 'turtle excluder devices' amounted to an unreasonable restraint on trading activities. The Appellate Body ruled that submissions from non-governmental organizations could be considered so long as they were pertinent to the dispute at hand. (24)

The amici submissions have also been accepted by the Iran-US Claims Tribunal. (25)

It is worth observing that a concept fulfilling similar functions as the amicus curiae is also present under Polish law. The possibility to present to the court a particular perspective important for a dispute is envisaged in the provisions of the Code of Civil Procedure (Articles 63 and 4796a). (26) The Polish Constitutional Court had also accepted submissions offered by amici (e.g., in case No SK 43/05, where Helsi ń ska Fundacja Praw Człowieka, a well-known organization active in the field of human rights protection, was allowed to present its position on the issues arising therein). (27)

3. Authority of an Investment Tribunal to Accept Submissions from Non-disputing Parties

The very first question that arises is whether the investment tribunal is competent to allow the participation of an entity or individual who is not a party to the arbitration, but who seeks to provide information or arguments with respect to certain issues arising in the dispute.

Under the ICSID Arbitration Rules, (28) after the 2006 amendment it is quite clear that the tribunal has such a power. The authority of a tribunal to allow written submissions from amici (called 'non-disputing parties' in ICSID) is clearly recognized under Article 37(2) of ICSID Arbitration Rules. This provision states: page "210"

> After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the 'non-disputing party') to file a written submission with the Tribunal regarding a matter within the scope of the dispute. (29)

Moreover, it is submitted that Article 44 of the ICSID Convention, (30) which confers on the arbitration tribunal extensive procedural powers, (31) constitutes sufficient authority for the tribunal to decide about other forms of amici participation, such as, in particular, attendance at oral hearings and access to the arbitration documents. The above is confirmed by the case law, since the arbitration tribunals have in the past already used Article 44 of the ICSID Convention as a basis for its authority to decide on these questions. (32)

The UNCITRAL Arbitration Rules (also in the new 2010 version) are, silent on the question of participation of non-disputing parties. However, the famous Article 15(1) of the UNCITRAL Arbitration

Rules (now Article 17(1)) grants the arbitration tribunal broad discretion as to the manner in which arbitration proceedings are conducted and is '*intended to provide the broadest procedural flexibility within fundamental safeguards'.*[33] It was decided already in *Methanex*[34] (which was held under the UNCITRAL Arbitration Rules), and was repeated by tribunals in later decisions, that the power to decide on the amici participation is vested in these general procedural competences of the tribunal. According to Article 15(1) (the first sentence of the new Article 17(1) has the same wording):

> Subject 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.

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The above is confirmed also by practice of the Iran-US Claims Tribunal, which uses the UNCITRAL Arbitration Rules as the basis for the proceedings held before it. Both the Tribunal Notes to Article 15(1), [35] and the case law of the Tribunal, [36] confirm that it is possible to allow a non-disputing party to make observations in a dispute.

4. The Criteria to Be Applied When Considering the Participation of Amici

The very authority of the investment arbitration tribunals to consider the participation of amici raises little if any controversy nowadays. An important issue, however, is the criteria that are to be applied in considering whether to allow for the participation of amicus curiae. For this purpose, three issues should be distinguished, since they are all treated differently by the existing arbitration rules and the arbitration tribunals deciding in that matter:

– written submissions by amicus curiae;
– participation in oral hearings;
– access to the file of the case.

4.1. Written submissions

The first question relates to the criteria to be applied if an amicus is to be allowed to present a written submission, so it could explain anything that a non-disputing party considers important and relevant in the given case.

These criteria were first formulated in the Argentinean cases – Suez and Interagua disputes – where the tribunal (it was the same tribunal for both cases) identified three conditions for amicus intervention:

(a) *the appropriateness of the subject matter of the case*: by the first criterion, the tribunal required that there is an important public interest in the case that the amicus will address which merits protection; only the existence of page "212" such a

public interest allows the non-disputing parties to intervene in arbitration between an investor and a State; (37)

(b) *the suitability of a given non-party to act as amicus curiae in the case*: the second criterion concentrates on the entity or an individual seeking permission to submit its observations to the tribunal; the candidate for an amicus has to show that it has 'expertise, experience and independence' in order to be able to assist the tribunal in its mission; (38)

(c) *the procedure by which the amicus submission is made and considered*: the last condition is less a criterion to be taken into account when taking a decision to allow an amicus to make a submission, but rather refers to a set of requirements designed to safeguard the effective proceedings and ensures that the parties are not overburdened, if the amicus will be allowed to step in. (39)

By the amendment of 2006, similar criteria were introduced in the Article 37(2) of the ISCID Arbitration Rules. This provision states:

> 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 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 criteria formulated in the ICSID Arbitration Rules are worded differently than the criteria set in the Argentinean cases, but a closer look proves that they are substantially similar. The first criterion concentrates on the non-disputing petitioner – whether it is in a position to provide assistance to the tribunal (and thus reflects the same condition as the second criterion defined in the Argentinean cases). To that effect, the tribunal will examine whether an applying amicus has the 'expertise, experience and independence', which is necessary to provide valuable and relevant input to the case. The amicus has to be both sufficiently knowledgeable on the issues at stake and should possess the resources necessary to be able to present its experience to the tribunal. Additionally, the arbitrators may consider the '*identity and background of the petitioner, the nature of its membership if it is*  *page "213" an organization, and the nature of its relationships, if any, to the parties in the dispute'.* (40) An important element is also that an amicus has to be independent of the parties (see below, section 5).

The third criterion, although the wording might prima facie suggest otherwise, should really be taken as referring to the requirement of a significant public interest in the case. More precisely, there are two elements involved. First, whether there exists a public interest that plays an important role in a given dispute, and second, whether the NGO in question seeks to vindicate that interest by its

participation in the dispute. Obviously, virtually every investment arbitration contains some public issues, since it relates to the responsibility of a sovereign State and often involves claims for significant compensation, which ultimately will have to be paid by the tax payers. However, it follows from the case law that such a public interest would normally not be sufficient to allow an interested amicus to step in. There should be something more that could be defined as the public policy issue and could be taken as the basis for an amicus intervention. Such public interest exists in particular where the decision of the arbitration tribunal would have an impact on a large group of people, or even society as a whole (but other than a need to attain financial responsibility borne by the State) or raises important concerns of public international law and human rights. (41) The considerations that were already classified in the case law as raising sufficient public interest in order to justify the participation of an amicus curiae include for example: the functioning of the water distribution and sewage systems of urban areas (Argentinean cases), the functioning of the water supply system (Biwater Gauff), environmental protection (Methanex) and the organization of the postal system (UPS).

The second criterion defined in Article 37(2) of the ICSID Arbitration Rules should rather be seen as a requirement for amici submissions, and not a condition for admitting the non-disputing parties' applications. Thus, in *Biwater Gauff*, the tribunal was satisfied with a declaration by the applying non-disputing party that it will address a matter within the scope of the dispute. (42)

Lastly, according to the ICSID Arbitration Rules there is yet another important factor that an investment tribunal has to take into account when considering whether to allow an amicus submission. In short, the tribunal should bear in mind the interests of the disputing parties and the procedural efficacy of the arbitration proceedings itself. The last part of Article 37(2) states:

> 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.

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Unlike the ICSID Rules, the UNCITRAL Arbitration Rules (also in their new 2010 version) are silent on the criteria to be applied when considering whether to accept written submissions from amici. This will rarely be a problem, however, because it does not often happen that the investment tribunals have only the UNCITRAL Arbitration Rules at their disposal. The UNCITRAL Arbitration Rules are used by the NAFTA tribunals, but their procedural framework consists also of the NAFTA Agreement itself, as well as of other sets of rules that could aid the tribunal. In particular, the NAFTA Free Trade Commission has issued a Statement on Non-disputing Party Participation in 2003, which sets the criteria to be applied in determining whether to allow a non-disputing party to file a submission. (43)

A more difficult situation arises if the only set of rules that governs the proceedings is the UNCITRAL Arbitration Rules, and the BIT in question is also silent on the question of the participation of the

non-disputing parties. This is the case in the investment disputes to which Poland is a party, since Poland has not accepted the Washington Convention. The Polish investment disputes are therefore often held under the UNCITRAL Arbitration Rules alone. It is submitted that in such cases the tribunals should be guided by the conditions set in the ICSID Arbitration Rules and draw on the experience of other cases decided by the investment tribunals, whether under ICSID or NAFTA. The two most important criteria that the UNCITRAL tribunals should examine are the existence of a significant public interest and the suitability of a given entity or individual to act as amicus curiae in the particular case. Additionally, the tribunals should ensure that the arbitration proceedings are not disrupted, and the participation of the amici would not unduly burden the parties.

4.2. Oral hearings

Much more difficult for the non-disputing parties is to obtain access to oral hearings held within the investment arbitration proceedings. This is because the participation of an amicus at the hearings strictly depends on the consent of the parties.

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ICSID Arbitration Rules put this requirement quite clearly in Article 32(2):

> Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties […] to attend or observe all or part of the hearings, subject to appropriate logistical arrangements.

The 2006 revision of the ICSID Arbitration Rules does not change the situation.

A similar rule is incorporated in the UNCITRAL Arbitration Rules. They address participation in oral hearings in Article 28(3) (old Article 25(4) of the Rules). According to this provision:

> *Hearings shall be held in camera unless the parties agree otherwise*.

These provisions establish a principle of the confidentiality of the oral hearings. It has been held in the case law that Article 25(4) of the UNCITRAL Arbitration Rules was intended to exclude from the hearings the members of the public, including the non-party third parties seeking participation in the arbitral proceedings. (44) Similarly, one should view Article 32(2) of the ICSID Arbitration Rules. (45) Both these provisions can only be overridden if there is consent from both parties. (46) Such a provision renders the amici participation in the hearings rather a theoretical possibility, since rarely will both parties have an interest in opening the hearings to third parties. Nevertheless, it has already occurred in the past that the amici were allowed to participate in the oral phase of the procedure, because both parties to the dispute have consented to it. (47)

More extensive transparency of the hearings is provided for in the new US Model BIT and Canadian Model BIT of 2004. (48) The rule

under these model regulations is that the hearings are open not only to the non-disputing parties, but also to the general public. Specific arrangements may, however, be undertaken at the page "216" request of any of the parties in order to protect certain confidential information of commercial or other character. (49)

4.3. Access to documents

The issue of non-disputing parties or other third parties having access to the record of arbitration is not covered by the ICSID Arbitration Rules, nor by the UNCITRAL Arbitration Rules. Neither did the 2006 revision of ICSID, nor the 2010 revision of the UNCITRAL Arbitration Rules, provide any guidelines to that effect. The only issue that have been dealt with is the publication of the award. Article 48(5) of the Washington Convention and Article 35(5) of the UNCTIRAL Rules both require that the parties give their consent before an award can be made public. (50) This is a limited question, however, and should not prejudice an answer with respect to the non-disputing parties' access to the documents of the arbitration.

The investment arbitration tribunals have had occasion to consider the question in several cases in the past. In particular, in Suez the tribunal observed that:

> *As a general proposition, an amicus curiae must have sufficient information on the subject matter of the dispute to provide perspectives, expertise and arguments which are pertinent and thus likely to be of assistance to the tribunal.* (51)

After all, the main purpose of the amicus submission is to effectively assist the tribunal in explaining the issues that are important from the point of view of the amicus and are relevant to the case at hand. Clearly, the amicus can more adequately and precisely assist the tribunal, being able to avoid unnecessary repetitions with the arguments raised by the parties, if it is granted access to the most important arbitration documents. The readiness shown by the tribunal in Suez shows that the arbitrators felt competent to decide on the question of access by non-disputing parties to the case file, without the need to obtain the consent of page "217" the parties to the dispute. Similarly, the wording of the decision on amicus petition in Biwater Gauff seems to indicate that the tribunal considered it has the authority to allow access to the record. (52) This is not changed by the fact that ultimately the tribunals in Suez and Biwater Gauff did not allow access of the amici to the documents of arbitration because they considered it unnecessary on the facts of the case. The arbitrators have underlined in both cases that the amicis' submission is to address broad policy issues in which the amici are specialized, and to that effect they do not need to obtain access to the record of arbitration. (53)

Often, the tribunal would issue a confidentiality order at an early stage of arbitration. If, later in the proceedings, there are petitions for amici participation, tribunal is bound by its own confidentiality order. (54) Thus, if the tribunal has decided to accept the parties' agreement that the documents of the arbitration can only be disclosed to third parties with the consent of the parties, it would

be hard to accept that the tribunal would reverse its previous order in that regard. If no such order exists, however, the tribunal retains discretion to allow access to the record of arbitration to third parties, including amici curiae.

In conclusion, it is submitted that, since no provision of the ICSID or UNCITRAL Arbitration Rules preclude or in any other way regulate the question of access to the documents of arbitration, and because there is no general rule of confidentiality incorporated in the ICSID nor in the UNCITRAL Arbitration Rules, (55) a decision to grant non-disputing parties access to the documents of arbitration remains at the discretion of the arbitral tribunal in each and every case, in accordance with tribunal's general procedural powers under Article 44 of the ICSID Convention and Article 17(1) of the UNCITRAL Arbitration Rules. The decision of a tribunal is not subject to the consent of the parties, unless there already exists a confidentiality order made earlier in the proceedings, which would provide for such a requirement.

Full public access to the record of arbitration is warranted by the rules of the US Model BIT of 2004. The US Model BIT provides that there is not only the possibility, but even an obligation to transmit the most important documents to the non-disputing parties and to make them available to the public. This page "218" obligation rests on the respondents. (56) Similarly, the Canadian Model BIT of 2004 provides for public access to all of the documents submitted to the tribunal (though subject to the deletion of confidential information). (57)

5. Who Can Apply for Amicus Curiae Status

Another important issue that should be dealt with is what types of entities or individuals could take part in investment arbitrations as non-disputing parties. The essential question is whether any natural or legal person, irrespective of legal form and type of activity, may become an amicus, or is this status rather reserved for organizations serving public interests, such as NGOs?

Clearly, in the recent case law, petitioners applying for amicus status were predominetely NGOs or individuals concerned with certain considerations of public interest. This is not surprising, since the very role of a '*friend of the court*' in investment arbitration is to represent a point of view of civil society concerned with certain issues of public interest, which to a large extent are represented by NGOs. (58) In the past, however, other types of entities were also allowed in the status of amicus curiae. A good example is provided by the case law of the Iran-US Claims Tribunal. More precisely, in *Iran v. United States*, case No A15, a memorial from certain US banks was accepted, (59) while in case No A25, a memorial from Philips Petroleum Company Iran was invited. (60) In the NAFTA cases, entities of various nature were allowed to file amicus submissions, which included bodies such as the Canadian Union of Postal Workers, the Council of Canadians and the US Chamber of Commerce in *UPS v. Canada*(61) or the Quechan Indian Nation and the National Mining Association in *Glamis Gold Ltd. v. USA.*(62) Moreover, in a recent ICSID case of *AES v. Hungary*(63) , the European Commission sought to obtain amicus curiae status and succeeded in that regard (Commission

intervened in order to secure the page "219" enforcement of EU competition law). It therefore follows from the experience of existing case law that various types of entities may be admitted as amicus curiae.

The relevant provision in the ICSID Arbitration Rules, namely Article 37(2), does not require that an amicus is a certain type of entity. It uses the broad term 'non-disputing party', which is not further defined or restricted in the said Rules. It would seem reasonable, therefore, to assume that the ICSID Arbitration Rules do not create any requirements or limitations as to the nature of the entity or individual that can apply for amicus status.

The requirements as to who can take part in the investment arbitration as a 'non-disputing party' refer rather to what a given entity or individual is able to add to the proceedings. As mentioned before, amici have to possess necessary expertise and resources allowing them to make a valuable contribution in the case at hand. Equally important is the requirement of neutrality of non-disputing parties, i.e. that amici are independent from the parties. The independence of the petitioning NGO (or other entity) will be assessed in light of its identity and background. (64) It is particularly important that amicus does not receive any financial or other material support from any of the parties, and that it lacks a financial interest in the decision of the tribunal (although the non-disputing parties are clearly interested in the outcome of the case since they '*advance a particular case to a tribunal*'(65)). Therefore, an NGO sponsored by the claimant investor could clearly not be accepted as an amicus in investment arbitration. Similarly, it would seem hard to allow to the proceedings a non-governmental or inter-governmental organization financed by the respondent State. However, if the organization in question is substantially independent, this possibility should not entirely be excluded. (66) After all, the tribunal always has the option to consider amicus submissions but then to reject its contentions on merits. This issue should be decided on a case-by-case basis. (67)

To sum up, it seems clear from the case law and the wording of ICSID Arbitration Rules (and the UNCITRAL Arbitration Rules do not contain any contrary language) that any natural or legal person, irrespective of the legal form or nature of its activities, may become a non-disputing party in the investment arbitration proceedings. This also includes private business entities if they might have anything to add to the proceedings, and if they truly represent a public interest (which would rather be exceptional). In considering whether to allow a given petitioner the status of amicus curie, the arbitrators will assess whether the petitioner can add any valuable content to the dispute, and whether it is sufficiently independent from the parties to the dispute.

page "220" ***6. Concluding Remarks - How Well Does an Amicus Curiae Serve the Purpose of Increasing the Transparency and Legitimacy of Investment Arbitration Proceedings, and What Should Be Done in order to Enhance the Currently Existing Legal Framework***

The developments of the recent years clearly show that a growing need for transparency in international investment arbitration has been recognized within ICSID and other institutionary decision-

making bodies, as well as in the arbitration community in general. Amici curiae have come to be firmly accepted as an important element allowing public interests to be secured within the framework of investment arbitration proceedings, (68) although the degree of its rights to participate remain uncertain.

Nevertheless, the changes already introduced in the relevant regulations (in ICSID Rules in 2006, and in UNCITRAL Arbitration Rules in 2010) seem rather modest, (69) since although submissions of amici may be considered, they will not be allowed to participate in the hearings without the parties' consent, and their access to the arbitration documents is rather difficult, without mentioning that the publication of the very awards is subject to the agreement of the parties. The new US and Canadian Model BITs went much further, but they will only apply to disputes based under the BIT's incorporating these Model regulations (they could, however, constitute a source of inspiration for other decision-makers amending their BITs or arbitration rules).

It seems that there still exists a need for a greater transparency in investment arbitration, and for the amici participation in particular. As observed in the NAFTA context by J.A. VanDuzer (in 2007): '*to be considered legitimate, investor-state dispute settlement [...] needs to satisfy high standards of transparency and openness to non-disputing party participants. Such transparency and openness are fundamental values of the international economic order'.* These words are true also in the context of ICSID and even more so under the UNCITRAL ad hoc arbitrations. They are especially relevant for Poland, since the investment arbitrations in which Poland was a respondent were held under UNCITRAL Arbitration Rules alone.

The fundamental notion that should be accepted as a starting point is that the investor-State arbitration is not simply a dispute between two commercial partners involving their private law relationship. In the settlement of investment disputes, a *page "221"* public interest is present in almost every case, since a common element of all the arbitrations is the liability of the State for breaches of a public international law agreement. Even more, other various important public considerations often arise, as shown by the cases decided over the last decade. As a result, the nature of investment disputes and issues arising thereunder calls for a larger participation of the public than in regular commercial arbitration. Amici curiae most often represent civil society groups, which are emanations of the broader public, and for this reason are suitable candidates to enhance the transparency and legitimacy of the investment dispute settlement. (70)

Even more fundamentally, as noted by Buckley and Blyschak, '*international investment law is at a crossroads. it is passing through a crucial juncture that will determine who will control its future direction. At the heart of this battle is the increasing power of multinational corporations to shape international legal norms to their ends'*. This in itself may not be a bad thing. However, given that the multinational corporations (banks in particular) are recently subject to increasing criticism because of the role played by some of them in the global financial crisis, any future development of the investment dispute settlement should take place with the consent of the wider public. It seems that, particularly in Central Eastern Europe, there is a concern that too many of the extremely

important economic issues that influence large groups of people, or even societies as a whole, might be decided behind closed doors in ‘secretive’ proceedings.

Nigel Blackaby and Caroline Richard have convincingly argued that amicus' written submissions alone cannot cure the democratic deficit, and lack of transparency in investment treaty arbitration, as long as the arbitration proceedings itself are confidential (there are no oral hearings and no access to the record of arbitration). (71) Not being able to evaluate the real claims of the parties, nor to express a position at the hearing, amici submissions may be reduced to general observations deprived of any actual comment regarding the concrete context of the given case. (72) For that reason, amici may not be able to effectively assist the tribunal and the whole page "222" exercise serves no purpose. (73) To grant amici solely rights to submit written observations is to stop in the middle of the road. (74)

It is submitted that the participation of non-disputing parties in the settlement of investment disputes does increase the transparency of the arbitration proceedings and allows for a greater democratic legitimacy of the whole process. Nevertheless, the convincing scepticism as to what amici could bring into the proceedings while only being permitted to present written observations, should, in my view, stimulate further action towards greater transparency. Taking the above into consideration, I wish to advocate a view that it is both possible and desirable (75) to enhance the existing procedural framework by guaranteeing the non-disputing parties access to the arbitration documents and to oral hearings, subject to the necessary protection of genuine commercial secrets. As pointed out by Nigel Blackaby and Caroline Richard: ‘they [amicus briefs – M.Z.] must be part of a package of transparency measures. The true response to the transparency criticism lies in opening the parties' pleadings and the proceedings to the public for comment.’(76)

Considering the possible amendments to the existing sets of rules, it is important to remember that the institutional rules that typically govern investment arbitration proceedings have their roots in the consent-based nature of arbitration as a confidential process between private commercial parties. (77) This is particularly true with respect to the UNCITRAL Arbitration Rules, since they are designed to serve ad hoc commercial arbitrations and not necessarily investor-State disputes. The UNCITRAL Arbitration Rules are thus generally inapt for changes towards greater transparency and the involvement of non-disputing parties representing a public interest, because such amendments would then apply to any type of arbitration governed by the UNCTIRAL Arbitration Rules. ICSID Rules, however, have their origins in traditional commercial arbitration and were designed in light of the principles developed in this field of law. They are, however, specifically adopted to apply to the investment dispute settlement. It is feasible then, that they could be modified in order to provide for more transparency and amici participation. It is page "223" submitted, in particular, that a rule governing admittance to the record should be established, allowing at least the non-disputing parties to access the documents, subject to the protection of the commercial secrets of the parties. Furthermore, Article 32(2) should be modified to provide for the openness of the

hearings in general (however, again subject to the protection of strictly confidential information). The provisions of the new US and Canadian Model BITs of 2004 may serve as an example in that regard.

In Poland, the situation calls for particular attention. Poland is not a party to the ICSID Convention, thus its procedural framework does not apply to the disputes in which Poland is a respondent. Neither are there any helpful rules on confidentiality established in any multilateral treaty – as is the case with NAFTA, for example. The arbitrators are left with the UNCITRAL Arbitration Rules, which do not contain any provisions governing the participation of non-disputing parties, even though it is generally accepted that tribunals can allow submissions from amici under their wide procedural powers stemming from Article 17(1) (previously Article 15(1)) of the Rules. As a result, 'Polish' investment arbitrations are among the most secretive investor-State dispute settlements that exist. Since the lack of transparency casts doubts as to how the tax payers' money is spent, the Polish government should recognize that there is an important public interest in opening the investment arbitration to more public scrutiny. The amendment of UNCITRAL Arbitration Rules is rather unlikely, and accession to ICSID Convention is at present not seriously considered in Poland. Thus, the only plausible manner in which the framework for the participation of non-disputing parties (and generally the confidentiality in the investment proceedings) could be enhanced is by introducing the relevant rules in the new BITs concluded by the Polish government. Again, it is worth looking to US and Canadian Model BITs as a source of inspiration. A chance for such an endeavour may not come easily, because Poland has a large map of states with which it has already concluded BITs during the last two decades. If such an opportunity arises however, one should make sure that it is not squandered.

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[1] Jorge E. Viñuales, *Amicus Intervention In Investor-State Arbitration*, 61 Disp. Resol. J. 72, 73 (Jan. 2007); Jorge E. Viñuales, *Human Rights And Investment Arbitration: The Role of Amici Curiae*, Int. Law: Rev. Colomb. Derecho Int. Bogotá, 231, 232 (2006); Eugenia Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 29 Berkeley J. Intl. L. 200, 200 (2011); Nigel Blackaby & Caroline Richard, *Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration?, in* The Backlash Against Investment Arbitration: Perceptions and Reality 253 (Michael Waibel, Asha Kaushal, Kyo-Haw Liz Chung & Claire Balchin eds., 2009); Amokura Kawharu, *Participation of Non-governmental Organizations in Investment Arbitration as Amici Curiae, in* The Blacklash Against Investment Arbitration: Perceptions and Reality

275 (Michael Waibel, Asha Kaushal, Kyo-Haw Liz Chung & Claire Balchin eds., 2009).

[2] *See e.g.* David d. Caron, Matti Pellonpää & Lee M. Caplan, *The UNCITRAL Arbitration Rules* 38 (Oxford University Press 2006); Christopher Dugan, Noah D. Rubins, Don Wallace & Borzu Sabahi, *Investor-State Arbitration* 167 (Oxford University Press 2008); Levine, *supra* n. 1, at 205; Viñuales, *Amicus*, *supra* n. 1, at 73; Blackaby & Richard, *supra* n. 1, at 254.

[3] Levine, *supra* n. 1, at 205; Blackaby & Richard, *supra* n. 1, at 255.

[4] Blackaby & Richard, *supra* n. 1, at 255.

[5] And as noted by Jorge E. Viñuales, in investment arbitration, '*virtually all cases raise issues of public concern*'. Viñuales, *Amicus*, *supra* n. 1, at 73.

[6] Ross P. Buckley & Paul Blyschak, *Guarding the Open Door: Non-party Participation Before The International Centre for Settlement of Investment Disputes*, 22 B.F.L.R. 353, 354 (2007).

[7] Consider an already famous quote from New York Times article: 'Their meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small group of international tribunals handles disputes between investors and foreign governments has led to national law being revoked, justice systems questioned, and environmental regulations challenged.' Anthony DePalma, *Nafta's Powerful Little Secret: Obscure Tribunals Settle Disputes, But Go Too Far, Critics Say*, N.Y. Times (Mar. 11, 2001). Cf. Levine, *supra* n. 1, at 200; Kawharu, *supra* n. 1, at 281; Blackaby & Richard, *supra* n. 1, at 253. Another have expressed the following criticism, additionally pointing out at the lack of consistency between the awards delivered by various tribunals: 'decisions about public issues with economic and political consequences are resolved in private before different sets of individuals who can and do come to conflicting decisions on the same points of law and no single body has the capacity to resolve these inconsistencies'.*See* Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 Fordham L. Rev. 1521, 1521 (2005).

[8] *See e.g.*, J. Anthony VanDuzer, *Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation*, 52 McGill L. J. 681, 684 (2007) and the literature cited therein; Franck, *supra* n. 7, at 1521; Meg Kinnear, *Transparency and Third Party Participation in Investor-State Dispute Settlement, Symposium on Making the Most of International Investment Agreement: A Common Agenda*, 2005 (*available at* http://www.oecd.org/dataoecd/6/25/36979626.pdf); Andrew Newcombe & Axelle Lemaire, *Should Amici Curiae Participate in Investment Treaty Arbitrations?*, 5 VJ 22, 23 (2001); Levine, *supra* n. 1, at 208.

[9] *Methanex v. United States of America*, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae of Jan. 15, 2001, para. 49 (*available at* http://www.state.gov/documents/organization/ 6039.pdf); *Biwater Gauff (Tanzania) v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No 5 of Feb. 2, 2007, para. 51 (*available at* http://icsid.worldbank.org).

[10] It seems striking that most of the representatives of the Polish government – at least that is what I have learned on few occasions – seem to be critical or least sceptical of the idea to enhance the

transparency of investment arbitration. This is surprising since the transparency is normally advocated by the states and serves to their benefit because it helps to provide for greater legitimacy and credibility to the investment arbitration. The transparency is, however, usually opposed by those who speak in the name of the investors, since they are usually interested to keep their commercial dealings confidential.

[11] Noah Rubins, *Opening the Investment Arbitration Process: At What Cost, for What Benefit?*, 3 Transnat'l Disp. Mgmt. (Jun. 2006). Cf. Kyla Tienhaara, *Third Party Participation in Investment-Environment Disputes: Recent Developments*, 16 Rev. Eur. Cmty. & Intl. Envtl. L. 230, 241 (2007) who makes a useful table of the pros and cons of third-party participation in the investment arbitration proceedings.*See also* the sceptical view expressed in Dugan et al., *supra* n. 2, at 707.

[12] This is shown *inter alia* by the 2006 amendment to the ICSID Arbitration Rules, which introduced a provision on the amici submissions (art. 37(2)). The provisions dealing with non-disputing parties, as well as other rules committed to the transparency of the proceedings are also contained in the Canadian and US new model BITs (*see infra* n. 49). The propositions to increase the transparency under the UNCITRAL Rules were also made (*see e.g.*, James E. Castello, *Report on the UNCITRAL Arbitration Working Group*, 63 Disp. Resol. J. 7 (May–Jul. 2008) although in the end they have not heavily influenced the 2010 amendments to the Rules. Cf. VanDuzer, *supra* n. 8, at 686; Viñuales, *Amicus*, *supra* n. 1, at 73.

[13] It is interesting to note, however, that, unlike in the present context where the amicus curiae will be seen as an element enhancing the public legitimacy of the investment arbitration, in the public international law, in particular under the WTO dispute settlement, the amici are rather viewed as the private actors exercising their influence on relationships that are chiefly controlled and shaped by the sovereign states.*See* Duncan B. Hollis, *Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty*, 25 B.C. Intl & Comp. L. Rev. 235, 235 (2002).

[14] Cf. Levine, *supra* n. 1, at 201. As sceptically noted by Nigel Blackaby and Caroline Richard however: 'it is questionable whether the admission of amicus curiae briefs alone without access to the arbitration record or oral proceedings will address concerns over the transparency and legitimacy of investment treaty arbitration.' Blackaby & Richard, *supra* n. 1, at 273.

[15] *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae of May 19, 2005, para. 13 (*available at* http://icsid.worldbank.org).

[16] Methanex, *supra* n. 9, para. 38.

[17] Viñuales, *Amicus, supra* n. 1, at 73.

[18] *See Methanex Corporation v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits of Aug. 3, 2005 (*available at* http://www.state.gov/documents/organization/51052.pdf). Cf. Dugan et al., *supra* n. 2, at 268 et seq.; Blackaby & Richard, *supra* n. 1, at 259; Kawharu, *supra* n. 1, at 276.

[19] *United Parcel Services of America v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amici

Curiae of Oct. 17, 2001 (*available at* http://www.state.gov/documents/ organization/6033.pdf); *Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae of March 17, 2006 (*available at* http://icsid.worldbank.org); Suez, *supra* n. 15; Biwater Gauff, *supra* n. 9.

[20] *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Order of Jan. 29, 2003.

[21] Viñuales, *Human*, *supra* n. 1, at 231; Hollis, *supra* n. 13, at 239; Newcombe & Lemaire, *supra* n. 8, at 26; Blackaby & Richard, *supra* n. 1, at 258.

[22] Hollis, *supra* n. 13, at 239; Newcombe & Lemaire, *supra* n. 8, at 25; Blackaby & Richard, *supra* n. 1, at 258 and the literature cited therein.

[23] United States – Import Prohibition of Certain Shrimp and Shrimp Products, Nov. 26, 2001 WT/DS58/AB/R.

[24] *Id.* paras. 79–91. *See also* Buckley & Blyschak, *supra* n. 6, at 5; Nicola Notaro, *Judicial Approaches to Trade and Environment: The EC and the WTO* 228 (Cameron May 2003); Hollis, *supra* n. 13, at 239.

[25] *Islamic Republic of Iran v. United States*, Case A15, Award No. 63-A15-FT, 2 Iran-US C.T.R. 40; *Islamic Republic of Iran v. United States*, Case No. A25, Order of Oct. 11, 1989, 21 Iran-US C.T.R. 283.

[26] According to Art. 63: 'The organisations defined in the preceding articles [i.e. the non-governmental organisations – M.Z.], which do not participate in a dispute as parties, may present to the court a relevant to the case point of view.' Art. 4796a of the Code however clarifies that in the commercial proceedings, the non-governmental organizations may present a submission, if the specific rules of law so allow. This includes also a right to present an argument at oral hearings if the court permits. The non-disputing NGO can access the parts of the record to the extent it is necessary to present its submission.

[27] Judgment of May 12, 2008, SK 43/05. Cf. judgment of the Constitutional Court of Jul. 17, 2007, P 16/06; judgment of Oct. 30, 2006, P 10/06.

[28] Rules of Procedure for Arbitration Proceedings of the International Centre for Settlement of Investment Disputes, 2006 version (*available at* http://icsid.worldbank.org).

[29] In its version after the amendment in 2006. However, a power of an ICSID Tribunal to accept the written submissions from a non-disputing party was recognized already before the amendment, under art. 44 of the ICSID Convention, which grants to it a residual power to decide on all the procedural questions not settled in the Convention or Rules.*See* Suez, *supra* n. 15, para. 16. In that case the Tribunal also pointed out that art. 15(1) of the UNCITRAL Rules is substantially similar to art. 44 of the ICSID Convention. *See* Suez, *supra* n. 15, para. 14.

[30] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (known also as the 'Washington Convention', entered into force on Oct. 14, 1966; by 2005 as many as 155 States were parties to the Convention). It might be added that Poland, as one of just a few countries in the world, is not a party to the Convention.

[31]

Article 44 reads: 'Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. 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.' In the Argentinean cases, it has been observed that art. 44 of the Convention is substantially similar to art. 15 of the UNCITRAL Arbitration Rules and therefore – as in *Methanex*– could be used in order to back up tribunal's authority to decide on various forms of participation of amici.*See* Suez, *supra* n. 15, para. 14; Interagua, *supra* n. 19, para. 14.

[32] Suez, *supra* n. 15, para. 14; Interagua, *supra* n. 19, para. 14.

[33] Methanex, *supra* n. 9, para. 27.

[34] Methanex, *supra* n. 9, paras. 24 et seq.

[35] Note 5 states: 'The arbitral tribunal may, having satisfied itself that the statement of one of the two Governments – or, under special circumstances, any other person – who is not an arbitrating party in a particular case is likely to assist the tribunal in carrying out its task, permit such Government or person to assist the tribunal by presenting oral or written statements.' UNCITRAL Arbitration Rules together with the Notes prepared by the Iran-US Claims Tribunal constitute the Rules of the Procedure of the Tribunal (*available at* http://www. iusct.org/tribunal-rules.pdf).

[36] *See* the decisions cited *supra* n. 25.

[37] As put by the tribunal: '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* Suez, *supra* n. 15, para. 19; Interagua, *supra* n. 19, para. 18.

[38] Suez, *supra* n. 15, para. 24 et seq; Interagua, *supra* n. 19, paras. 25 et seq.

[39] Suez, *supra* n. 15, para. 29; Interagua, *supra* n. 19, para. 30.

[40] Suez, *supra* n. 15, para. 25; Interagua, *supra* n. 19, para. 24.

[41] Suez, *supra* n. 15, para. 19; Interagua, *supra* n. 19, para. 18; Methanex, *supra* n. 9, para. 49. Cf. Levine, *supra* n. 1, at 210.

[42] Biwater Gauff, *supra* n. 9, para. 50.

[43] Paragraph B.6 of the FTC Statement provides: 'In determining whether to grant leave to file a non-disputing party submission, the Tribunal will consider, among other things, the 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 arbitration 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 matters within the scope of the dispute;

(c) the non-disputing party has a significant interest in the arbitration; and

(d) there is a public interest in the subject-matter of the arbitration.'

Further, according to para 7: 'The Tribunal will ensure that:

(a) any non-disputing party submission avoids disrupting the proceedings; and

(b) neither disputing party is unduly burdened or unfairly prejudiced by such submissions.'

[44] *See* Methanex, *supra* n. 9, para. 41. However, the tribunal has observed that Art. 25(4) relates only to the privacy of the oral hearings of the arbitration and does not provide for wider confidentiality of the arbitration as such.*See* Methanex, *supra* n. 9, para. 41.

[45] Cf. Suez, *supra* n. 15, paras. 5–7; Interagua, *supra* n. 19, paras. 6–8.

[46] As observed by Viñuales 'each party to the proceeding reserves a veto against the participation of an amicus curiae to the oral proceedings'. Viñuales, *supra* n. 1, at 260.

[47] Such precedential events took place in Methanex and UPS cases, although the parties have agreed to the public hearings at the later stage of the proceedings (but not at the moment when the amicus petitions were considered). *See Methanex v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits of August 3, 2005, para. 8; *United Parcel Services of America v. Canada*, Award on the Merits of May 24, 2007, para. 4 (although parts of the hearings were closed to the public for the reasons of commercial confidentiality).

[48] A Model Treaty between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment of 2004 (*available at* www.state.gov/documents/organization/117601.pdf); Model 2004 Agreement between Canada and _____ for the Promotion and Protection of Investments of 2004 (published in International Investment Instruments: A Compendium, XIV UNCTAD/DITE/4 261 (*available at* http://www.naftaclaims.com/files/canada_model-BIT.pdf).

[49] Art. 29(2) of the US Model BIT 2004 states: '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.' Cf. art. 38(1) of the Canadian Model BIT 2004.

[50] According to art. 48(5) of the Washington Convention and art. 48(4) of the ICSID Arbitration Rules (both rules have the same wording): 'The Centre shall not publish the award without the consent of the parties', while art. 34(5) of the 2010 version of UNCTIRAL Arbitration Rules (previously art. 32(5)) state that: '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.'

[51] *Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition by Five Non-governmental Organisations for Permission to Make an Amicus Curiae Submission of Feb. 12, 2007, para. 24.

[52] Biwater Gauff, *supra* n. 9, paras. 62 et seq.

[53] Suez, *supra* n. 51, para. 25; Biwater Gauff, *supra* n. 9, paras.

64–65.

[54] *See* Biwater Gauff, *supra* n. 9, paras. 62, 66; Methanex, *supra* n. 9, para. 46.

[55] With respect to UNCITRAL Rules *see* Caron et al., *supra* n. 2, at 34. Compare however Levine, *supra* n. 1, at 204. Moreover, under NAFTA the Free Trade Commission in its Interpretive Note on Transparency said: 'Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and, subject to the application of Article 1137(4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal.'

[56] According to art. 29(1) of the US Model BIT (2004): 'Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Party and make them available to the public: (a) the notice of intent; (b) the notice of arbitration; (c) pleadings, memorials, and briefs; (d) minutes or transcripts of hearings of the tribunal, where available; and (e) orders, awards, and decisions of the tribunal.'

[57] Canadian Model BIT 2004, art. 38(3).

[58] Cf. Kawharu, *supra* n. 1, at 277.

[59] *See Iran v. US*, Case No A15, *supra* n. 25, at 43. The memorial was submitted by US banks and accepted for filling in accordance with art. 15 of the UNCITRAL Rules and Note 5 of the Tribunal Rules. The relevant part of the award was also cited in the *Methanex*, *supra* n. 9, para. 32.

[60] *Iran v. United States*, Case No A25, *supra* n. 25, at 284. The tribunal has invited Philips Petroleum Company Iran to submit, pursuant to art. 15, n. 5 of the Tribunal Rules, a memorial, if it so wishes.

[61] *UPS v. Canada*, *supra* n. 47, para. 3.

[62] *Glamis Gold Ltd. v. United States of America*, Decision on Application and Submission by Quechan Indian Nation of Sept. 16, 2005.

[63] *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award of Oct. 23, 2010. Cf. Levine, *supra* n. 1, at 201.

[64] Suez, *supra* n. 15, para. 25; Interagua, *supra* n. 19, para. 24.

[65] Methanex, *supra* n. 9, para. 38.

[66] Viñuales, *Human*, *supra* n. 1, at 269.

[67] *Id.*

[68] VanDuzer, *supra* n. 8, at 723.

[69] As put by VanDuzer, 'the 2006 amendments to the ICSID Arbitration Rules and the Additional Facility Rules make only marginal improvements in this regard'[in relation to the transparency of the proceedings – M.Z.]. VanDuzer, *supra* n. 8, at 722. Another author observes that: 'it is evident that the participation rights o third parties remain extremely limited'. Levine, *supra* n. 1, at 214.

[70] For various considerations and doubts relating to the suitability of NGOs to fulfil the tasks of amici, *see* Kawharu, *supra* n. 1, at 275.

[71] Blackaby & Richard, *supra* n. 1, at 266.

[72] Blackaby & Richard, *supra* n. 1, at 267. The authors also argue that amici briefs alone are not capable of enhancing the democratic legitimacy of investment arbitration, since a written submission, for

example, by a Washington based NGO hardly represents the society of a developing respondent country, such as Tanzania in an example given by the authors. Blackaby & Richard, *supra* n. 1, at 269. This argument is only partially true however, since it is based on a particular setting of the case that may not be true elsewhere. Still, it is precisely the right of various NGOs to present their position in the investor-State arbitration which creates an institutional framework within the investment dispute settlement that allows the members of different communities to represent views of their societies and thus increases democratic legitimacy. Whether this opportunity is seized by members of a given society might be a question of the extent of the development of the civil society in a respondent state. The practical insufficiencies should not however outweigh the value of the procedural opportunity.

[73] Nigel Blackaby & Caroline Richard present a view that the expert reports of the NGOs called by the respondent-states to aid their case are more effective than the amicus briefs, because the former, unlike the latter, might be tested at the hearings. Blackaby & Richard, *supra* n. 1, at 270. However, it is important to remember that whether NGOs are called as experts is left to the discretion of a state. For various reasons the state may not always be adequately representing all of the views of the democratic society.

[74] Blackaby & Richard, *supra* n. 1, at 271.

[75] Cf. E. Levine who points out that: 'decision-makers should consider introducing potentially broader participation rights than merely making written submissions, on the basis that amicus contributions could create substantial benefits for the arbitral proceedings and for the investment arbitration regime in the wider context of international law', since 'amicus curiae participation can promote a general interest in procedural openness and ensure that the broader public does not perceive the arbitration process as secretive'. Levine, *supra* n. 1, at 219 and 217, respectively.

[76] Blackaby & Richard, *supra* n. 1, at 274.

[77] Levine, *ssupra* n. 1, at 205.