

HUMAN RIGHTS AND INVESTMENT ARBITRATION: THE ROLE OF *AMICI CURIAE*

JORGE E. VIÑUALES*

Institut d'études politiques de Paris**

El Centro Argentino de Estudios Internacionales***

ABSTRACT

The article analyzes the legal standing of *amici curiae* in international fora, focusing on the recent decisions rendered in the context of international trade and investment disputes. After a short review of the originally idea of *amicus curiae* as it developed in the common law tradition, the author discusses the legal treatment given to *amici curiae* by a number of international courts and tribunals, including the International Court of Justice, the European Court of Justice, the European Court of Human Rights, the Inter-American Court of Human

Fecha de recepción: 4 de septiembre de 2006
Fecha de aceptación: 20 de septiembre de 2006

* LL.M. Harvard Law School. D.E.A. en droit international, Institut universitaire de hautes études internationales, Geneva, lic. iur., University of Fribourg. I am indebted to FLORIAN GRISEL, SABINA SACCO, LAURIE ACHTOUK and ROTISLAV PEKAR for useful remarks and suggestions. This piece takes up and develops my previous remarks on the topic made in an article forthcoming in the *Dispute Resolution Journal* of the American Arbitration Association.

** 27 rue Saint-Guillaume - 75337 Paris Cedex 07

*** Cafayate 1031, Ciudad de Buenos Aires, República Argentina Código Postal: 14081.

Rights, the WTO Appellate Body, NAFTA (UNCITRAL) panels and ICSID arbitral tribunals. Drawing upon orders issued in two recent ICSID cases, in May 19 2005 and March 17 2006, respectively, the discussion emphasizes the fundamental tension underlying the intervention of *amici curiae* in investor-state arbitral proceedings, namely the conflict between the traditional consent-based legitimacy and the increasing need for public involvement.

Keywords: amicus curiae, ICSID, Methanex, Aguas Argentinas (Vivendi), investment arbitration

DERECHOS HUMANOS Y ARBITRAJE DE INVERSIÓN: LA FUNCIÓN DE LOS AMICI CURIAE

RESUMEN

El presente artículo analiza el marco jurídico que rige la participación de amici curiae ante foros internacionales, concentrándose en la jurisprudencia reciente en materia de comercio e inversiones internacionales. Luego de una breve reseña sobre el origen histórico de la institución de amicus curiae en la tradición del common law, el autor analiza el modo en que dicha institución ha sido acogida en instancias internacionales como la Corte Internacional de Justicia, la Corte Europea de Derechos Humanos, la Corte Interamericana de Derechos Humanos, el Órgano de Apelación de la OMC y los tribunales arbitrales establecidos en el marco de la ALENA (CNUDMI) y del CIADI. Haciendo referencia a las resoluciones dictadas en dos casos pendientes ante el CIADI, el 19 de mayo del 2005 y el 17 de marzo del 2006 respectivamente, el análisis enfatiza la dificultad fundamental que plantea la intervención de amici curiae en arbitrajes mixtos: la tensión entre la legitimidad tradicional, basada en el consentimiento de las partes, y la actual necesidad de una mayor participación de la sociedad civil.

Palabras clave: *amicus curiae*, *CIADI*, *Methanex*, *Aguas Argentinas (Vivendi)*, *arbitraje de inversión*.

INTRODUCTION

In a well-known paragraph of the 1970 *Barcelona Traction* decision, the International Court of Justice drawn a fundamental distinction between obligations owed by States to the international community as a whole and those arising *vis-à-vis* another State in the field of diplomatic protection.¹ This distinction reminds us that the two legal realms nowadays governed, respectively, by human rights law and the international investment regime, were early in history indistinct. The economic rights of investors were at the time subsumed under the broader category of aliens' rights, a category of vague contours. But the Court also suggested that the subsequent distinction embedded in international law between investors rights and human rights is not the mere result of hazardous historical events but is instead deeply rooted in humane values. The Court was, in other words, implicitly suggesting the existence of a hierarchy among the obligations of a State with respect to the treatment of foreign individuals.

The controversy over the existence of a hierarchy among different human rights, including economic rights, is far from settled. During the last decades, it has re-emerged in a variety of contexts, including

1 “When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*”, case concerning the *Barcelona Traction, Light and Power Company, Limited: Second Phase* 05.02.1970 (Belgium / Spain) *ICJ Reports* 1970, ¶ 33.

the international law of development, international criminal law, derogations from human rights' treaties and State responsibility.² The current debate on the role human rights considerations should play in state-investor arbitral disputes can be interpreted as a new manifestation of this unsettled question. What is at stake is indeed the extent to which the State can, in the exercise of its regulatory power, impose burdens on foreign investors based on environmental, human rights, or other considerations. In the last several years, a number non-governmental organizations (NGOs) have sought to intervene, sometimes successfully, in arbitral/panel proceedings to advance their stances in these areas. The attitude of arbitrators and panelists has been far from discouraging. In some cases, tribunals have recognized the possibility for NGOs to submit written briefs as *amici curiae*, namely as "friends of the court" offering their expertise and commitment.³ This participation raises, however, many difficult

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- 2 For a useful review of the controversy, citing some of the classical texts, see TERAYA, K., "Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights", in *European Journal of International Law*, 12/5, 2001, pp. 917-941.
 - 3 United States – Import Prohibition of Certain Shrimp and Shrimp Products (Report of the Appellate Body, WT/DS58/AB/R, October 12 1998); United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom (Report of the Appellate Body, WT/DS138/AB/R, May 10 2000); European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (Report of the Appellate Body, WT/DS135/AB/R, March 12 2001); Methanex Corporation v. United States of America, UNCITRAL (NAFTA), Decision of the Tribunal on Petitions from Third Persons to Intervene as *Amici Curiae* dated 15 January 2001; United Parcel Service of America Inc. v. Government of Canada (UNCITRAL/NAFTA), Decision on Petitions for Intervention and Participation of *Amici Curiae* dated 17 October 2001; Aguas Argentinas, S.A., 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 for Transparency and Participation as *Amicus Curiae*; Aguas Provinciales de Santa Fe S.A., Suez, 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). This latter decision was rendered on March 17 2006. The libel of these two latter cases has recently been modified, after Aguas Argentinas S.A. and Aguas Provinciales de Santa Fe S.A. withdrew from the proceedings by letter of 9 February 2006 and 11 January 2006, respectively (the procedural order effecting the withdrawal was issued in April 14 2006 in both cases). The Aguas Argentinas case is now libeled: Suez,

issues both from a technical and a more theoretical perspective. The way in which such issues will be addressed in practice may have strong repercussions on the overall legitimacy of investment arbitration as a dispute settlement mechanism. While the recent surge in investment arbitrations strongly suggests that both States and investors favor this mechanism of solving their disputes, one should not underestimate the influence that civil society may have in this context.

The purpose of this piece is to explore one avenue through which broader policy considerations, particularly regarding human rights, are being taken into account into investor-state arbitrations. The concept of human rights is taken here in its broadest meaning, including not only first generation rights but also rights of the so-called second and third generations, such as economic rights or the right to a safe environment. In this context, human rights considerations could enter investment disputes in at least four ways: (i) through a public policy clause in an investment treaty;⁴ (ii) through a clause reserving considerations of environment⁵, human rights, and labor rights⁶; (iii) on the basis of circumstances precluding wrongfulness in the sense given by the international law of State responsibility;⁷ (iv) through the filing of an *amicus curiae* brief.

Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic. The Aguas Provinciales is now libeled: Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic. For distinctiveness purposes, we will identify these two cases, respectively, as Vivendi v. Argentina and Interagua v. Argentina (or simply as Vivendi and Interagua). Another relevant case, that was brought to my attention by Florian Grisel, is Aguas del Tunari S.A. v. Republic of Bolivia (ICSID case No. ARB/02/3), where a similar request of intervention by a number of NGOs and individuals was refused by letter of the President of the tribunal, dated January 29 2003. The letter is nevertheless interesting, as we shall see, to confirm some points raised by the tribunal in the Vivendi and Interagua orders.

4 See article 10 of the Canadian 2004 Model BIT.

5 See article 12 of the US 2004 Model BIT; article 11 of the Canadian 2004 Model BIT.

6 See article 13 of the US 2004 Model BIT.

7 See in particular articles 23, 25 and 26 of the articles on Responsibility of States for Internationally Wrongful Acts (ILC 2001).

Our discussion focuses on the latter, paying particular attention to the orders recently issued in the *Vivendi*⁸ and *Interagua*⁹ cases, and the case law preceding them. After a brief discussion of the concept of *amicus curiae* and of the ways major international courts have dealt with it, we analyze the topic from the perspective of international trade and investment disputes.

1. THE CONCEPT OF *AMICUS CURIAE*

Aside from its ancient origins, the use of *amici curiae* can be traced back to the early history of common law.¹⁰ *Amici curiae* provided information at a time when considerable uncertainty existed as to the contents of the law.¹¹ Advances in civilization and technology rendered this function obsolete, even though legal proceedings have become increasingly complex.¹² However, there is another major

8 *Vivendi v. Argentine Republic*, *supra* footnote 3.

9 *Interagua v. Argentine Republic*, *supra* footnote 3.

10 For a brief overview of this early practice with reference to some of its main primary and secondary sources see the note on *Amici Curiae* in *Harvard Law Review*, 34/7, May 1921, pp. 773-776 (hereinafter cited as Harvard Note). For some references regarding the use of *amici curiae* by French courts see ANGELL, E., "The Amicus Curiae: American Development of English Institutions", in *International and Comparative Law Quarterly*, 16/4, 1967, p. 1017, footnote 3.

11 The characterizations provided by two early legal dictionaries help illustrate this point. In Abbott's *Dictionary of Terms and Phrases* an *amicus* is defined as: "A friend of the court. A term applied to a bystander, who without having an interest in the cause, of his own knowledge makes suggestion on a point of law or of fact for the information of the presiding judge". Holthouse's *Law Dictionary* further underlines the importance for the judge to be reminded of cases relevant to the matter at hand: "When a judge is doubtful or mistaken in matter of law, a bystander may inform the court thereof as *amicus curiae*. Counsel in court frequently act in this capacity when they happen to be in possession of a case which the judge has not seen or does not at the moment remember". Both cited in KRISLOV, S., "The Amicus Curiae Brief: From Friendship to Advocacy", in *Yale Law Journal*, 72/4, March, 1963, pp. 694-695.

12 See Harvard note, p. 774. The ways in which *amici* may help courts deal with this increasing complexity vary. In some cases *amici* may comment on a point of law. But they may also assist courts on questions related to empirical research. In this latter

way in which *amici curiae* have played a substantial role in practice, namely as advocates for a broader cause.¹³ As such, *amici* may not always assist tribunals. As noted by Richard Posner in an order denying the right to file an *amicus* brief:

“After 16 years of reading amicus curiae briefs the vast majority of which have not assisted the judges, I have decided that it would be good to scrutinize these motions in a more careful, indeed a fish-eyed, fashion. The vast majority of amicus curiae briefs are filed by allies of the litigants and duplicate the arguments made in the litigants’ briefs, in effect merely extending the length of the litigants’ brief”.¹⁴

This being said, most lawyers and judges tend to support *amici curiae*, precisely because they sometimes add new content¹⁵ or defend positions not adequately represented in the proceedings.

Thus, *amicus* interventions can play an important advocacy role and give voice to unrepresented third-parties.¹⁶ The analogy with

respect see ROESCH, R., GOLDING, S.L., HANS, V. P., DICKON REPUCCI, N., “Social Science and the Courts: The Role of Amicus Curiae Briefs”, in *Law and Human Behavior*, 15/1, February, 1991, pp. 1-11.

13 On this interpretation, see the already cited study by SAMUEL KRISLOV as well as HARPER, F.V., ETHERINGTON, E.D., “Lobbyists before the Court”, in *University of Pennsylvania Law Review*, 101/8, June, 1953, pp. 1172-1177 and the more recent study by KEARNEY, J.D., MERRIL, T.W., The Influence of Amicus Curiae Briefs on the Supreme Court, in *University of Pennsylvania Law Review*, 148/3, January, 2000, pp. 743-855. This issue has not gone unnoticed in the literature discussing recent WTO and arbitral decisions admitting *amicus* briefs. See STERN, B., “L’entrée de la société civile dans l’arbitrage entre État et investisseur”, in *Revue de l’arbitrage*, n° 2, 2002, p. 334.

14 *Ryan v. Commodity Futures Trading Commission*, 125 F.3d 1062, 1063 (7th Cir. 1997), cited in KEARNEY, J.D., MERRIL, T.W., *The Influence of Amicus Curiae Briefs* ... , pp. 745-746. These authors also cite a passage from a dissenting opinion of US Supreme Court’s Justice Scalia in *Jaffee v. Redmond* (518 U.S. 1, 1996) pointing out: “In its consideration of this case, the Court was the beneficiary of no fewer than 14 amicus briefs supporting respondents ... Not a single amicus brief was filed in support of petitioner. That is no surprise. There is no self-interested organization out there devoted to pursuit of the truth in the federal courts”, p. 746.

15 *Id.*, p. 745.

16 See KRISLOV, S., *The Amicus Curiae Brief* ... , p. 698.

the presence of *amici* in international proceedings can hardly go unnoticed. Three main features of this analogy are worth-noting here. First of all, hostility to external intervention can also be found in arbitral proceedings, where the consensual basis for jurisdiction would *a priori* preclude admission of *amici* briefs without the consent of both parties to the arbitration¹⁷. Second, the underlying justification for admitting *amici* briefs in international proceedings has been indeed that in some way they represent other constituencies affected by the matter at hand. Third, although the rule of precedent is not applicable to any of the major international dispute settlement mechanisms, the use of similar cases to buttress the tribunal's conclusion is widespread and of great practical importance.

As we will see next, most of the legal and theoretical questions raised by the increasing admission of *amicus* briefs in international proceedings are directly or indirectly related to the implications identified. The particular conditions set for *amicus* intervention in a given court/tribunal also reflect the court/tribunal's perception of the role *amici* should play in these proceedings.

2. *AMICUS* INTERVENTION IN INTERNATIONAL COURTS

For purposes of the following discussion, international proceedings will be divided into two broad categories. The first category concerns permanent judicial bodies such as the International Court of Justice (ICJ), the European Court of Justice (ECJ), the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights (ICHR). The second category refers to tribunals dealing with issues of international trade and investment, particularly those established under the International Center for the Settlement of Investment Disputes (ICSID) or under NAFTA and subject to the rules issued by the United Nations Commission on International Trade Law (UNCITRAL) rules or, still, the special panels and

17 See STERN, B., *L'entrée de la société civile dans l'arbitrage ...*, pp. 339-340.

appellate proceedings under the aegis of the World Trade Organization (WTO).

Whereas the two categories could be seen, to some extent, as the expression of distinct bodies of jurisprudence, such a view should not be carried too far. There is indeed no legal impediment to invoke, for instance, a decision of the Inter-American Court of Human Rights endorsing a norm of international law before an investor-State arbitral tribunal or vice-versa. This is, of course, not to say that cross-reference is a regular practice, at least not for each and every one of the aforementioned courts and tribunals. Rather than cross-referencing, international tribunals tend to invoke their own decisions or decisions made by bodies of their own “kind”, a practice that, again, should not lead us to conclude that the norms of international law they are referring to are themselves of a different kind¹⁸. In all events, however, the distinction made here is only intended to ease the presentation.

The wide acceptance of *amicus* briefs in domestic courts¹⁹ has no immediate correspondence with the way international courts deal with this institution. And even at the international level, there appears to be a clear divergence of practice between the International Court of Justice and the other Courts. Traditionally, the ICJ has been extremely reluctant to allow *amicus* briefs filed by organizations other than States²⁰. The reasons for this are partly legal and partly political. The Statute and the Rules of the Court leave little room for *amicus* briefs by NGOs, particularly within the context of

18 This point remains controversial. There are two broad axes of controversy. First, there has been considerable debate over the existence of different legal orders or subsystems within the broader international legal system. Second, the lion's share of this literature pertains to the idea of a “third order” applicable to transnational relations among private actors, the so-called *lex mercatoria*.

19 See KEARNEY, J.D., MERRIL, T.W., *The Influence of Amicus Curiae Briefs on the Supreme Court*, cited *supra* footnote 8.

20 For a review of the ICJ practice regarding intervention by States see LAGRANGE, E., *Le tiers à l'instance devant les juridictions internationales à vocation universelle (CIJ et TIDM)*, in RUIZ FABRI, H., SOREL, J.M. (eds.), *Le tiers à l'instance devant les juridictions internationales*, Pedone, Paris, 2006, pp. 9-72.

contentious proceedings.²¹ But the challenges seem to be above all political. Indeed, allowing the participation of NGOs would, to some extent, force the Court to discuss topics that it may prefer not to address.²² It has been argued that it would be in the long-term institutional interest of the Court to show that its decisions and opinions take into account the public interest, in addition to the concerns of the litigating parties.²³ Interestingly enough, this is essentially the same argument currently been used to challenge the legitimacy of investor-state arbitrations, despite the fact that from

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- 21 The basic framework distinguishes between contentious cases and advisory opinions. In the contentious context, the most relevant provisions are article 34 paragraph 2 of the ICJ Statute and article 69 paragraphs 1 and 2 of the Rules of the Court. Only States and “public international organizations” may participate in the proceedings. However, the definition of “public international organizations” given in paragraph 4 of article 69 excludes NGOs (only international organizations of States are covered). In the advisory context, the situation is more arguable, although in practice almost no NGO has been granted the right to participate. Article 66 paragraphs 2 and 4 of the Statute, and article 105 paragraph 2 letter (a) of the Rules of the Court use the broader term of “organization”, which would leave more room for NGOs. The Court authorized NGO participation as *amicus curiae* in at least one advisory opinion, but its overall practice has gone clearly against such participation. For a review this practice see SHELTON, D., “The Participation of Nongovernmental Organizations in International Judicial Proceedings”, in *American Journal of International Law*, 88/4, October, 1994, pp. 619-628.
- 22 A case suggesting that this may be a relevant motive is the Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*. There were two requests for an advisory opinion. One of them came from the World Health Organization (WHO) and was denied. Along with it, the Court rejected an NGO request to submit information. See SHELTON, D., *The Participation of Nongovernmental Organizations ...*, p. 624. The Court thus avoided to enter into the health implications of the existence of nuclear weapons. In fact, the political motive for refusing *amicus* briefs or even requests for Advisory Opinions concerns not only NGOs but also Intergovernmental Organizations and even States. Here, SHELTON cites professor IAN BROWNLIE’S argument according to which the ICJ would be reluctant to permit third-state intervention in contentious cases because it fears States will prefer not to go to the ICJ if other States can intervene. In practice, this means that the Court will construe the overall matter in a way it sees fit to achieve a legally persuasive and still politically balanced decision.
- 23 See SHELTON, D., *The Participation of Nongovernmental Organizations ...*, p. 625.

an institutional perspective the ICJ has little in common with these arbitral tribunals.

The other major international courts have been generally more receptive to *amicus* briefs. For instance, the European Court of Justice has admitted the participation of *amici curiae* in many cases,²⁴ although this possibility is only open for certain types of procedures.²⁵ The conditions set by the ECJ suggest that the underlying justification for *amici* participation is that they may be affected in their rights. Indeed, *amici* must establish that their interest is direct and specific or concrete²⁶, and their intervention is limited to supporting the submissions of one of the parties²⁷. Thus, the role

24 See case 6/64, *Costa v. ENEL*, 1964 ECR 1143 (Fr. ed.), 1964 C.M.L.R. 425 ; cases 16 & 17/62, *Confédération Nationale des Producteurs de Fruits et Légumes v. Council*, 1962 ECR 471, 488-89, 2 C.M.L.R. 160 (1963); cases 41, 43, 48, 50, 11, 113 & 114/73, *Générale Sucrière S.A. v. Commission*, 1973 ECR 1465, 1 C.M.L.R. 215 (1974); case 113/77, *NTN Toyt Bearing Co Ltd v. Council*, 1979 ECR 1185, 2 C.M.L.R. 257 (1979); case 155/79, *A M & S Eur. Ltd v. Commission*, 1982 ECR 1575, 2 C.M.L.R. 264 (1982); case 236/81, *Celanese Chem. Co Inc v. Council & Commission*, 1982 ECR 1183. All cited in SHELTON, D., *The Participation of Nongovernmental Organizations ...*, p. 629. These cases concern either professional or consumer associations, not NGOs working primarily on human rights' issues.

25 The legal framework for intervention can be found in article 40 (former article 37) of the Protocol on the Statute of the Court annexed to the Treaty of Nice (entered into force on February 1 2003, O.J. C 180 of 10.3.2001) as well as article 93 of the Rules of Procedure of the Court (which are paraphrased by articles 115 and 116 of the Rules of Procedure of the Court of First Instance). Broadly speaking, third party intervention is only allowed in procedures other than prejudicial questions or disputes between two States, two European Institutions or a State and a European Institution. A further distinction can be drawn between intervenors and *amici curiae*. This latter are not mentioned but have been allowed in practice. In any case, a third party must establish "an interest in the result of any case submitted to the Court" (article 40). For a study of this regime see DE SCHUTTER, O., "*Le tiers à l'instance devant la Cour de Justice de l'Union Européenne*", in RUIZ-FABRI, H., SOREL, J.-M. eds., *Le tiers à l'instance*, Pedone, Paris, 2005.

26 See cases 116, 124, and 143/77, *GR Amylum NV & Tunnel Refineries Ltd v. Council & Commission*, 1978 ECR 893, paragraph 9, 2 C.M.L.R. 590 (1982), cited in SHELTON, D., *The Participation of Nongovernmental Organizations ...*, p. 629.

27 See article 40 *in fine* of the Court's Statute.

of “assistant” seems to be favored over that of “advocate” for the public good.

Amici have played a major role in the context of courts specialized in human rights, such as the European Court of Human Rights (ECHR) or the Inter-American Court of Human Rights (IACHR). Concerning the ECHR, after a first unsuccessful attempt,²⁸ the Court eventually recognized the possibility for NGOs to participate in the proceedings in a 1981 case²⁹ authorizing a representative of the Trades Union Congress (TUC) to make an oral presentation on the basis of article 38(1) of the Rules of the Court.³⁰ This case underscored the need to define a legal basis allowing for third-party participation, which came in the form of an amendment to article 37(2) of the Rules of the Court explicitly permitting third-party submissions. This rule was later incorporated in article 36(2) of the Convention after Protocol 11 entered into force.³¹ Since these modifications took place, many cases before the ECHR have involved *amicus* submissions,³² which is not to say that none has been refused.

28 Tyrer case, 26 Eur. Ct. H.R. (ser. A) (1978), cited in SHELTON, D., *The Participation of Nongovernmental Organizations* ..., p. 630.

29 Young, James & Webster v. UK, 44 Eur. Ct. H.R. (ser. A) (1981), cited in SHELTON, D., *The Participation of Nongovernmental Organizations* ..., p. 631.

30 At this time, the content of this provision was as follows: “The Chamber may, at the request of a Party or of Delegates of the Commission or *proprio motu*, decide to hear ... in any other capacity any person whose evidence or statements seem likely to assist it in the carrying out of its task”, cited in *Id.*, p. 631. This provision corresponds to Rule A1 of the Annex inserted in July 7 2003: “The Chamber may, at the request of a party or of its own motion, adopt any investigate measure which it considers capable of clarifying the facts of the case. The Chamber may, *inter alia*, invite the parties to produce documentary evidence and decide to hear as a witness or expert or in any other capacity any person whose evidence or statements seem likely to assist it in carrying out its tasks”.

31 article 36 (2) of the European Convention states that: “The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or *any person concerned who is not the applicant to submit written comments or take part in hearings*” (italics added).

32 See, for instance, the Goddi case, 76 Eur. Ct. H.R. (ser. A) (1984); Malone case, 82 Eur. Ct. H.R. (ser. A) (1984); Lingens case, 103 Eur. Ct. H.R. (ser. A) (1986); Monnel & Morris, 115 Eur. Ct. H.R. (ser. A) (1987); Brogan case, 145B Eur. Ct. H.R. (ser. A)

The Court has indeed been reluctant to admit such submissions absent “a sufficiently proximate connection” between the issues raised in the application and the matter at hand,³³ or when clear precedents make third-party participation unnecessary,³⁴ or still when the Court considers that the issues have been adequately presented by the parties or other *amici*.³⁵ Conceptually, the ECHR’s perception of the role of *amici* is quite similar to the one of the ECJ, namely that of assistant rather than advocate for the public interest. This moderate practice contrasts with the extremely open approach used by the Inter-American Court of Human Rights regarding *amicus* participation,³⁶ particularly in the context of advisory proceedings.³⁷

(1988); Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989); X v. France, 234C Eur. Ct. H.R. (ser. A) (1992); Open Door & Well Woman v. Ireland, 246 Eur. Ct. H.R. (ser. A) (1992); Informationsverein Lentia v. Austria, 276 Eur. Ct. H.R. (ser. A) (1993); Brannigan & McBride v. United Kingdom, 258B Eur. Ct. H.R. (ser. A) (1993), all cited in SHELTON, D., *The Participation of Nongovernmental Organizations* ..., pp. 633-637.

33 See Kosiek case, 88 Eur. Ct. H.R. (ser. B) (1985); Leander v. Sweden, 116 Eur. Ct. H.R. (ser. A) (1987), both cited in *Id.*, pp. 632-633.

34 See Caleffi v. Italy and Vocaturo v. Italy, 206B-C Eur. Ct. H.R. (ser. A) (1991), both cited in *Id.*, p. 633.

35 See Capuano v. Italy, 119 Eur. Ct. H.R. (ser. A) (1987), cited in *Idem*.

36 There is no specific provision allowing for *amicus* submissions. Normally, *amicus* submissions are accepted but they are not formally incorporated into the file. See case of Benavides-Cevallos v. Ecuador, I/A Court H.R. (ser. C no. 38) (1998), paragraph 24 footnote 2. THOMAS BUERGENTHAL, then Vice President of the ICHR, argued that article 34(1) of the Court’s Rules of Procedure (which would now correspond to article 42(2)) provided enough grounding for the Court to admit *amicus* briefs. See BUERGENTHAL, Th., The advisory practice of the Inter-American Human Rights Court, in *American Journal of International Law*, 79/1, January 1985, pp. 15-17. BUERGENTHAL’s argument apply both in advisory and contentious cases.

37 See, for instance: “Other Treaties” Subject to the Advisory Jurisdiction of the Court, 1 I/A Court H.R. (ser. A no. 1) (1982); Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica, I/A Court H. R. (ser. A no. 4) (1984); Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, 5 I/A Court H.R. (ser. A no. 5) (1985); International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention, I/A Court H.R. (ser. A no. 14) (1994). For three recent contentious cases involving the participation of NGOs as *amici* see: case of Yatama v. Nicaragua, I/A Court H.R. (ser. C no. 127) (2005); case of Raxcacó-Reyes v. Guatemala, I/A

Among the reasons explaining this practice, it has been argued that *amicus* submissions present a way to compensate for the fact that individuals or NGOs lack standing before the ICHR.³⁸ Despite the absence of a clear reasoning of the Court, this wide practice suggests that the Court views *amici* as assistants and/or advocates for the public good.

One important element for assessing the overall attitude of these four Courts is the subject-matter they are most concerned with. The ECHR and the ICHR are, understandably, more welcoming than the ECJ and the ICJ. The two latter, whose involvement in human rights has been only incidental, have adopted a more restrictive stance given the broader scope of their jurisdiction. The legitimizing effect claimed by NGOs, particularly in the areas of human rights and environment, is therefore less relevant for these courts. In other words, *amici* seem to have a stronger “bargaining power” in those areas where the participation of civil society is increasingly regarded as important. In such areas, the legitimizing effect of NGOs and thereby their advocacy role as *amici curiae* are clearly strengthened. In this context, two main questions arise: first, are the areas of international trade and investment in need of more legitimacy? Second, if so, can NGOs provide this additional legitimacy? As discussed below, these two questions underlie several recent decisions rendered in trade and investment disputes admitting *amicus* submissions.

Court H.R. (ser. C no. 133) (2005); case of the Mapiripán Massacre v. Colombia, I/A Court H.R. (ser. C no. 134) (2005).

38 See BUERGENTHAL, Th., *The advisory practice of the Inter-American Human Rights Court* ..., p. 16. BUERGENTHAL's point is, more precisely, that NGOs use this avenue because it is the only one open. He does not discuss directly the motivations of the court.

3. *AMICUS* INTERVENTION IN INTERNATIONAL TRADE AND INVESTMENT DISPUTES

3.1. GENERAL REMARKS

In the last several years, the legitimacy of the international trade and investment regimes has been fiercely challenged. The failure of the OECD's attempts to adopt a Multilateral Investment Agreement and the public protests against the WTO or the G8 are but obvious illustrations of this phenomenon³⁹. The battle is now moving toward more sophisticated "fronts". Investment arbitration may now be considered one such front, although not an easy one for NGOs.

The implications of *amicus* intervention in this new front are still ambiguous. Whereas, on the one hand, the overall legitimacy of mixed investment arbitrations may be enhanced if civil society is brought in, on the other hand, it is difficult to determine whether a particular NGO is really representative of some sector of civil society. Some *amici* may indeed be more a friend of the State than a friend of the Court. Two recent decisions, *Vivendi*⁴⁰ and *Interagua*⁴¹, deal with this issue. However, before analyzing these cases, it is useful to briefly discuss their precedents in the WTO and the NAFTA contexts.

3.2. THE WTO CONTEXT

Although *Vivendi* and *Interagua* make only a general reference to the WTO case law on *amicus* submissions, their immediate precedents, *Methanex v. United States*⁴² and *UPS v. Canada*⁴³, rely heavily on

39 For a statement of the main critiques see PEET, R. *et al.*, *Unholy Trinity: the IMF, World Bank and WTO*, Zed Books, London / New York, 2003.

40 *Vivendi v. Argentine Republic*, *supra* footnote 3.

41 *Interagua v. Argentine Republic*, *supra* footnote 3.

42 *Methanex Corporation v. United States of America*, *supra* footnote 3.

43 *United Parcel Service of America Inc. v. Government of Canada*, *supra* footnote 3.

the WTO decisions. There are three main decisions in which the position of the WTO Dispute Settlement Body (DSB) has been outlined⁴⁴.

The first is the report of the Appellate Body (AB) in the *US – Shrimp* case⁴⁵, in which it corrected the panel's interpretation of article 13 of Dispute Settlement Understanding (DSU),⁴⁶ stating that:

“authority to *seek* information is not properly equated with a *prohibition* on accepting information which has been submitted without having been requested by a panel. A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not*. The fact that a panel may *motu proprio* have initiated the request for information does not, by itself, bind the panel to accept and consider the information which is actually submitted. The amplitude of the authority vested in panels to shape the processes of fact-finding and legal interpretation makes clear that a panel will *not* be deluged,

44 See STERN, B., *L'entrée de la société civile dans l'arbitrage ...*, pp. 332-335; For a more detailed discussion of this case law see BOISSON de CHAZOURNES, L., MBERNGUE, M.M., “The amici curiae and the WTO dispute settlement system: the doors are open”, in *The law and practice of international courts and tribunals*, 2/2, 2003, pp. 205-248.

45 United States – Import Prohibition of Certain Shrimp and Shrimp Products, *supra* footnote 3. See 99-110.

46 Article 13 of the DSU deals with the panel's right to seek information. It reads as follows: “1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information; 2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.”

as it were, with non-requested material, *unless that panel allows itself to be so deluged.*⁴⁷

Thus, the AB recognized the possibility for an NGO to spontaneously submit a brief to a panel and, most importantly, the possibility for a panel to take this information into account.

However, the fact the AB proceeded to accept *amicus* briefs at the appellate level without explicitly identifying the legal grounding for this practice remained to be explained.⁴⁸ This point was clarified in another decision, namely *US – Lead Bars*.⁴⁹ In this case, the AB referred to a combination of article 17.9⁵⁰ of the DSU and article 16(1) of the *Working Procedures*⁵¹ to conclude that it had:

“... the legal authority under the DSU to accept and consider *amicus curiae* briefs in an appeal in which (it) found it pertinent and useful to do so”⁵².

The final decision in the triad was rendered in *European Communities – Asbestos*⁵³ and set the procedure to be followed, in that precise case, for the submission of *amicus* briefs.⁵⁴ This

47 See Decision (Shrimp), ¶108 (italics original).

48 See STERN, B., *L'entrée de la société civile dans l'arbitrage ...*, p. 334.

49 United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, *supra* footnote 3.

50 article 17(9) of the DSU reads as follows: “Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information”.

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

52 See Decision (Lead Bars), ¶42.

53 European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, *supra* footnote 3.

54 See Decision (Asbestos), ¶¶ 50-57.

procedure is particularly interesting in the light of the two questions identified at the end of section two, namely whether the international trade regime is in need of legitimacy and whether NGOs are able to provide it. Regarding the legitimacy issue, it has been reported that the very day the procedure was adopted, and despite express language limiting its scope to the matter at hand, the Secretariat put the procedures on the WTO website and sent an email notice to all the NGOs registered in the WTO circulation list.⁵⁵ This move can partly be construed as an attempt by the WTO to improve its public image and thereby its legitimacy. As to the second question, the AB seems to have paid great attention to the representative character of the NGOs concerned, as well as to the role they intended to play. Indeed, among the different conditions established for filing an *amicus curiae*, NGOs are required to clearly describe their activities and their sources of funding,⁵⁶ their relationship with the parties to the dispute,⁵⁷ their specific interest in the matter at hand,⁵⁸ and the contribution they could make to the proceeding.⁵⁹ Moreover the

55 See STERN, B., *L'entrée de la société civile dans l'arbitrage ...*, p. 335.

56 See Decision (Asbestos), ¶ 52, point 3 letter (c), requiring that an application to file written brief: “contain a description of the applicant, including a statement of the membership and legal status of the applicant, the general objectives pursued by the applicant, the nature of the activities of the applicant, and the sources of financing of the applicant.”

57 The application must: “contain a statement disclosing whether the applicant has any relationship, direct or indirect, with any party or any third party to this dispute, as well as whether it has, or will, receive any assistance, financial or otherwise, from a party or a third party to this dispute in the preparation of its application for leave or its written brief”, Decision (Asbestos), 52, point 3, letter (g).

58 The application must also: “specify the nature of the interest the applicant has in this appeal”, Decision (Asbestos), ¶ 52, point 3, letter (d).

59 The application must: “state why it would be desirable, in the interests of achieving a satisfactory settlement of the matter at issue, in accordance with the rights and obligations of WTO Members under the DSU and the other covered agreements, for the Appellate Body to grant the applicant leave to file a written brief in this appeal; and indicate, in particular, in what way the applicant will make a contribution to the resolution of this dispute that is not likely to be repetitive of what has been already submitted by a party or third party to this dispute”, Decision (Asbestos), ¶ 52, point 3, letter (f).

AB reserved its right not to discuss or even mention the points raised in the *amicus* brief.⁶⁰

Overall, this procedure conveys an understanding of *amici curiae* as little more than tools for improving the legitimacy of an unpopular organization. It is difficult to assess how this system will evolve. For the time being, however, one cannot exclude the possibility of a purely rhetorical use of NGOs, that is one in which NGO intervention would only serve to create an appearance of openness to social concerns, without actually affecting the substance of the disputes.

3.3. THE NAFTA (UNCITRAL) CONTEXT

The main step towards the admission of *amicus* briefs in mixed investment arbitrations was taken in the *Methanex* case,⁶¹ a NAFTA chapter 11 arbitration conducted according to the UNCITRAL rules. For the first time in this type of disputes, the tribunal asserted authority, under article 15(1) of the UNCITRAL rules,⁶² to accept *amicus* written submissions.

Methanex Corporation, a Canadian company, claimed compensation for damage suffered by reason of an environmental regulation adopted by the Californian authorities prohibiting the use of a fuel additive, methyl tertiary-butyl ether (MTBE), produced by Methanex. Three environmental NGOs requested permission to

60 “The grant of leave to file a brief by the Appellate Body does not imply that the Appellate Body will address, in its Report, the legal arguments made in such a brief”, Decision (Asbestos), ¶52, point 5.

61 *Methanex Corporation v. United States of America*, *supra* footnote 3. For a discussion of the relevant parts of this case see: DUMBERRY, P., “The admissibility of *amicus curiae* briefs by NGOs in investors-States arbitration: The precedent set by the *Methanex* case in the context of NAFTA Chapter 11 proceedings”, in *Non-State Actors and International Law*, 1/3, 2001, pp. 201-214.

62 UNCITRAL Arbitration Rules, adopted by the U.N. General Assembly on December 15, 1976. Article 15(1) states: “Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided 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”.

review the parties' pleadings and documentation, to attend the hearings and to make written as well as oral presentations.⁶³ The request was based on both legal and policy arguments.⁶⁴ Concerning the first category, it was argued that general procedural powers vested in the tribunal by article 15 of the UNCITRAL rules could serve as a basis for granting the petition. This was further supported by the absence of any contrary rules in Chapter 11 of NAFTA as well as by the practice of both the WTO Appellate Body and the US and Canadian domestic courts. As to the policy arguments, it was advanced in particular that the case had "immense public importance" and that *amici* participation would "allay public disquiet as to the closed nature of the arbitration proceeding under Chapter 11 of NAFTA". The tribunal handled the request with caution. It first asked the parties to the dispute and the remaining NAFTA States to comment on the *amicus* petitions. As one could expect, the Claimant opposed the request,⁶⁵ as did Mexico.⁶⁶ The Respondent,

63 See Methanex (decision on petitions), ¶ 5 and 7.

64 These arguments are summarized in Methanex (decision on petitions), ¶ 5-8. For a full development, see International Institute for Sustainable Development: Application for Amicus Standing (25 August 2000); Supplemental Application for Amicus Standing (6 September 2000); Final Submission in Support of Application for Amicus Standing (16 October 2000). Earth Justice: Application for Amicus Standing (13 October 2000).

65 See Methanex Corporation: Investor's Response to the Application for Amicus Standing (31 August 2000); Investor's First Submission on Amicus Application (27 October 2000); Investor's Second Submission on *Amicus* Application (22 November 2000). For a summary of these arguments, see Methanex (decision on petitions), ¶ 12-15.

66 See Mexico: Submission in Response to Application for Amicus Standing (10 November 2000). For a summary of the arguments, see Methanex (decision on petition), 9. The *amicus curiae* institution is unknown to the Mexican legal system. Moreover, developing countries are generally opposed to NGO participation in these matters.

the United States,⁶⁷ and Canada⁶⁸ supported the application. The arguments presented in these submissions were taken into account by the tribunal to decide four main questions.⁶⁹

First, the tribunal considered whether the acceptance of *amicus* briefs was covered by article 15(1) of the UNCITRAL rules. The analysis was conducted in three stages.⁷⁰ In the first stage, the tribunal asked whether admitting *amici curia* was a procedural matter in the sense of article 15(1). It was specified that, were *amici* to be treated as Disputing Parties or Non-Disputing Parties,⁷¹ the matter could not be considered procedural. The tribunal then drew, as a second step, a distinction between adding a person as a party to the arbitration and accepting *amicus* submissions. As *amici* were not entitled to the rights of parties, acceptance of their submissions was a matter that the tribunal could decide under article 15(1). Third, the tribunal sought authority for its interpretation in the practice of the Iran-US claim tribunal⁷² and the WTO Appellate Body,⁷³ while

67 See U.S.: First Submission on Amicus Application (27 October 2000); Second Submission on Amicus Application (22 November 2000). For a summary of the arguments, see *Methanex* (decision on petition), ¶ 16-23. The US has an extensive domestic practice of *amici curiae*.

68 See Canada: Submission in Response to Application for Amicus Standing (10 November 2000). For a summary of the arguments, see *Methanex* (decision on petition), 10. Canada has a substantial domestic practice of *amici curiae*.

69 See *Methanex* (decision on petition), ¶ 28.

70 *Id.*, ¶¶ 29-34.

71 In the sense of article 1128 of NAFTA: “On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement”.

72 The tribunal cited here Note 5 of the Iran-US Claims Tribunal Notes to article 15(1) of the UNCITRAL rules, which reads: “5. 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 arbitral tribunal in carrying out its task, permit such Government or person to assist the arbitral tribunal by presenting written and [or] oral statements”, *Methanex* (decision on petition) ¶ 32.

73 Comparing the powers of the AB under article 17(9) of the DSU to accept *amicus* submissions to the broader powers vested in the arbitral tribunal by article 15(1) of the UNCITRAL rules. See *Methanex* (decision on petition), ¶ 33.

rejecting, on arguable grounds,⁷⁴ the restrictive practice of the ICJ. The second question concerned the Claimant's argument that acceptance of *amicus* submissions would affect the equal treatment of the Disputing Parties and thus run afoul article 15(1).⁷⁵ The tribunal solved this objection adducing that this was a potential risk of any adversarial procedure, a risk that could be adequately redressed by suitable rules limiting the extent of *amici* participation.⁷⁶ Third, the tribunal considered whether other provisions in Chapter 11 of NAFTA modified its powers under article 15(1) of UNCITRAL rules, finding that no relevant provision expressly prohibited the acceptance of *amicus* submissions⁷⁷. Finally, the tribunal interpreted article 25(4) of UNCITRAL rules⁷⁸ as relevant only to petitioners' requests to attend the hearings, make oral presentations and access the parties' submissions and documentation. It found that the critical element in this respect was the consent of

74 The exclusion of the ICJ's practice seems inconsistent with the extent to which the tribunal relied on the WTO case law. The restrictive practice of the International Court of Justice was indeed found of "little assistance" given that the ICJ's "... jurisdiction in contentious cases is limited solely to disputes between States; its Statute provides for intervention by States; and it would be difficult in these circumstances to infer from its procedural powers a power to allow a non-state third person to intervene", see paragraph 34. In the light of this reasoning, one could have expected not only a fuller elaboration on how the inter-state character of the WTO dispute settlement body affects the authority of its jurisprudence with respect to a mixed arbitration, but also some reference to the practice of other international courts in which private parties can sue States, such as the ECHR's practice.

75 See *Methanex* (decision on petition), ¶¶ 35-37.

76 This point was stressed in the Tribunal's conclusion: "... as 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 weighted heavily with the Tribunal; and it is concerned that the Claimant should receive whatever procedural protection might be necessary", *Id.*, 50.

77 *Id.*, ¶¶ 38-39.

78 Article 25(4) reads: "Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are examined."

both parties, absent which the hearings were to remain private and the documentation confidential.⁷⁹

After the adoption of the statement on non-disputing party participation by the NAFTA Free Trade Commission (FTC),⁸⁰ on 7 October 2003, the parties agreed that the guidelines set forth in the FTC's statement provided "useful guidance for *amicus* participation", suggesting "... that the Tribunal adopt those recommended procedures in this case", and emphasizing that any links with the parties should be disclosed.⁸¹ The NGOs concerned submitted two separate *amicus* briefs on 9 March 2004,⁸² which were accepted by both parties.⁸³

The lessons of the *Methanex* case are particularly interesting in light of the *Vivendi* and *Interagua* cases. Three issues appear important for determining the contours of the emerging legal standing of *amici curiae*: amici's involvement in jurisdictional matters; the "marginalization" of the parties' consent; the ramifications of the legitimacy question. As discussed below, these issues are inter-related.

Concerning the first issue, *amici* seem to be precluded from commenting on the overall jurisdiction of the tribunal to hear the case. In other words, *amici*'s input must relate to matters of substance, and more precisely to the broader public interests affected by the dispute. This view, which is not spelled out in *Methanex*, received

79 See *Methanex* (decision on petition), ¶¶ 40-46.

80 See Statement of the Free Trade Commission on non-disputing party participation (7 October 2003).

81 See letter of Christopher Dugan (31 October 2003). The parties did not make any distinction in their statement between article 1128 Submissions and *amicus* submissions. The FTC statement concerned "Non-disputing parties", a term the tribunal had, as we saw before, distinguished from the legal standing of *amici curiae*.

82 See Amicus Submission by Bluewater Network, Communities for a Better Environment and the Center for International Environmental Law; Amicus Submission by the International Institute for Sustainable Development.

83 See US Letter on Amicus Submissions (26 March 2004); *Methanex* Letter on Amicus Submissions (26 March 2004).

more attention in *UPS v. Canada*.⁸⁴ UPS, a U.S. company, requested compensation for damage suffered as a result of the monopoly granted by Canada to the Canadian Postal Service. Two Canadian associations sought to intervene in the arbitration. The parties to the proceeding opposed most of what the two associations requested. In particular, Canada made it clear that such submissions should never be admitted with respect to procedural issues, including the jurisdiction of the tribunal and the place of arbitration.⁸⁵ The underlying reason is that *amici* are expected to contribute a fresh perspective on the broader implications of the dispute, not to “take away the case from the disputing parties”.⁸⁶ Their role is to be advocates more than experts, and, as such, to provide insights that will help the tribunal decide a case taking into account its public repercussions. This raises, however, an important issue. Whereas *amicus* intervention may help legitimize the overall arbitration system, such intervention may also undermine the very foundations of arbitral proceedings, namely their reliance upon the consent of the parties. Broader acceptance of *amicus* participation may come to the cost of pushing investors to look for other dispute settlement mechanisms. This is the basic dilemma underlying the admission of *amici curiae* in international arbitration.

The acceptance of *amicus* briefs suggests a new “marginalization” of the parties’ consent.⁸⁷ In *Methanex*, the tribunal asserted jurisdiction to authorize *amicus* submissions even if a party opposed it. The powers implicit in article 15(1) of the UNCITRAL rules were therefore to be determined by the tribunal, irrespective of the parties

84 *United Parcel Service of America Inc. v. Government of Canada*, *supra* footnote 3.

85 *See* Canada: Submission on the Amicus Petitions (28 May 2001), ¶¶ 43-55. The tribunal followed this point. *See* UPS (decision on petition), ¶ 71.

86 *Id.*, ¶ 44.

87 The expression was coined by Brigitte STERN. *See* STERN, B., *L’entrée de la société civile dans l’arbitrage ...*, pp. 339-340. *See also* STERN, B., “Un coup d’arrêt à la marginalisation du consentement dans l’arbitrage international (A propos de l’arrêt de la Cour d’appel de Paris du 1er Juin 1999)”, in *Revue de l’arbitrage*, no. 3, 2000, pp. 403-427.

consent. The implications of this issue can be better evaluated in the light of the *UPS* case. In this case, the aforementioned Canadian organizations first sought to participate as parties to the procedure, using the *amicus curiae* path as a subsidiary way to attain a similar result. Both parties firmly challenged the tribunal's power to add a party to the dispute without their prior consent, finding support in the *Methanex* decision.⁸⁸ Interestingly enough, the two unions argued that the UNCITRAL rules, based on assumptions of private law, were ill-suited to govern disputes with such important public repercussions,⁸⁹ an argument the tribunal summarized as follows:

“... investor-state claims can be seen more analogous to the judicial review applications than to private contract disputes.”⁹⁰

The tribunal rejected this claim on the basis of strict legal considerations. However, the argument well illustrates the basic tension between public and private considerations. Intuitively, it would be difficult to deny the deeply public nature of investor-state relations, at least when they set restrictions on the regulatory powers of the State. The problem is not so much in this intuitive characterization as in the conclusions one should draw from it. Allowing any non-profit organization to fully take part in the proceedings may mean the end of the useful life of such proceedings. Bluntly stated, legitimacy is a double-edged sword.

In this regard, two main questions arise. First, who should be entitled to participate? Second, to what extent should this participation be allowed? Concerning the first question, NGO

88 See Canada: Submission on the Amicus Petitions (28 May 2001), ¶¶14-25; and UPS Corporation: Submission on the Amicus Submission (28 May 2001), ¶ 12.

89 See Amicus Petitions by the Canadian Union of Postal Workers and the Council of Canadians (8 November 2000), ¶¶46-48; Amended Amicus Petitions by the Canadian Union of Postal Workers and the Council of Canadians (10 May 2001), ¶¶ 19-20.

90 *UPS* (decision on petition), ¶ 24. See the comment of STERN, B., *L'entrée de la société civile dans l'arbitrage* ..., p. 342.

participation represents a procedural enhancement in terms of legitimacy only if the relevant NGOs are themselves legitimate advocates of a public cause. Indeed, NGOs are easily constituted and can sometimes be manipulated either by the State or by private corporations providing funds. Moreover, in order to participate NGOs need to be representative and competent. Good faith cannot compensate for the lack of expertise. As to the second question, the general practice in mixed arbitrations is to limit *amicus* participation to the filing of written briefs. In this connection, the UPS case represented a clear innovation in that the parties agreed to make the proceedings open to the public.⁹¹ This is still another manifestation of the trend towards increased transparency in investment arbitrations. However, as discussed next, public hearings remain for now limited to the NAFTA (UNCITRAL) context.

3.4. THE ICSID CONTEXT

After *Methanex* and *UPS* the question arose of whether the practice of *amicus* intervention would reach other contexts as well, in particular arbitrations under ICSID rules. The orders issued by the arbitral tribunals in *Vivendi* and *Interagua* have answered this question affirmatively.⁹² In doing so, these orders strike a careful

91 See ICSID News Release, July 25 2002.

92 Before these two orders, however, a petition requesting “all rights of participation accorded to other parties” and subsidiarily the status of *amici curiae* (with essentially the same rights claimed in the *Vivendi* and *Interagua* cases) had been filed, on August 28 2002, by several NGOs and individuals in *Aguas del Tunari S.A. v. Republic of Bolivia*, *supra* footnote 3. The tribunal rejected the petition unanimously, as expressed in a letter of the President of the tribunal, Professor David Caron, dated 29 January 2003. Although the letter does not expressly distinguish this primary petition from the subsidiary one of intervening as *amici curiae*, it seems to do so implicitly when it states: “In particular, it is manifestly clear to the Tribunal that it does not, absent the agreement of the Parties, have the power to join a *non-party* to the proceedings; to provide access to hearings to *non-parties* and, *a fortiori*, to the public generally; or to make the documents of the proceedings public” (Italics added). However, the tribunal seems to leave the ICSID door open when it adds: “... the Tribunal is of the view that

balance between the need for public legitimacy and the respect of party consent, setting a framework for the analysis of the many conflicting issues that arise in the context of *amicus* intervention. Here, we will discuss this framework in light of the elements presented so far.

Both the *Vivendi* and *Interagua* are governed by ICSID rules and, except for the orders on the petitions for participation as *amicus curiae*, the proceedings remain confidential. The two orders were made public by consent of the parties to the disputes. In both cases the composition of the tribunal is the same⁹³. The two cases involve concessions granted to foreign investors to run public water and sewage systems serving millions of people in Argentina. As such, the cases raise not only environmental considerations but also important questions of human rights.⁹⁴ A number of NGOs⁹⁵ filed petitions for participation as *amicus curiae* in the two cases.

there is not at present a need to call witnesses or seek supplementary non-party submissions at the jurisdictional phase of its work. *We hold this view without in anyway prejudging the question of the extent of the Tribunal's authority to call witnesses or receive information from non-parties on its own initiative*" (italics added). This latter seems a direct (though implicit) reference to the preceding decisions in the WTO and NAFTA (UNCITRAL) contexts.

93 President: Prof. JESWALD W. Salacuse; Arbitrators: Prof. GABRIELLE KAUFMANN-KOHLER and Prof. PEDRO NIKKEN.

94 In particular the right to water. An explicit reference to water is made in a number of international treaties. See article 14(2)(h) of the Convention on the Elimination of All Forms of Discrimination against Women; article 24.1(2)(c) of the Convention on the Rights of the Child; article 14(2)(c) of the African Charter on the Rights and Welfare of the Child; articles 20, 26, 29 and 46 of the Geneva Convention on the Treatment of Prisoners of War; articles 85, 89 and 127 of the Geneva Convention on the Protection of Civilian Persons in Times of War; articles 54 and 55 of the Additional Protocol to the Geneva Conventions on the Protection of Victims of International Armed Conflict; articles 5 and 14 of the Additional Protocol to the Geneva Conventions on the Protection of Victims of Non-international Armed Conflict. There is also a General Comment (No. 15) adopted by the UN Committee on Economic, Social and Cultural Rights at its twenty-ninth session in November 2002 (UN Doc. E/C.12/2002/11), interpreting articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights. For further details see: Center on Housing Rights and Evictions, Legal Resources for the Right to Water. National and International Standards,

The orders deciding the petitions in each case displays a similar structure. After identifying three different components of each petition, namely the requests for authorization to attend the hearings and make oral presentations, to submit written briefs, and to access the parties' submissions, the tribunal addressed each component separately. We will discuss them in the same order.

Access to hearings – The first issue addressed was whether petitioners could be authorized to attend the hearings and make oral presentations.⁹⁶ Petitioners cited the *Methanex* and *UPS* precedents in which the parties had agreed to open the procedures to the public. In both *Vivendi* and *Interagua*, the tribunal rejected the request on the basis of the express wording of article 32(2) of the ICSID Arbitration Rules.⁹⁷ The tribunal found that, under article 32(2), it could only authorize *amicus* participation with the consent of both parties and, given the claimants' refusal, it had no authority to grant the request:

January 2004. For a discussion of the right to water in the context of investment disputes, see PETERSON, L.E., GRAY, K.R., *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration*, April 2003, *Research paper prepared by the International Institute for Sustainable Development*, pp. 24-32.

95 In *Vivendi*, the relevant NGOs were: Asociación Civil por la Igualdad y la Justicia (ACIJ), Centro de Estudios Legales y Sociales (CELS), Center for International Environmental Law (CIEL), Consumidores Libres Cooperativa Ltda. de Provisión de Servicios de Acción Comunitaria, and Unión de Usuarios y Consumidores. In *Interagua*, the relevant NGOs were: Fundación para el Desarrollo Sustentable, as well as Professor RICARDO IGNACIO BELTRAMINO, DR. ANA MARÍA HERREN, and Dr. OMAR DARÍO HEFFEN.

96 See *Vivendi* (order), ¶¶ 4-7 and *Interagua* (order), ¶¶ 5-8.

97 This provision states: "The tribunal shall decide, with the consent of the parties, which other persons besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal may attend the hearings".

“(the tribunal) has no authority to exercise such power in opposition to a clear directive in the Arbitration Rules, which both Claimants and Respondent have agreed will govern the procedure ...”⁹⁸

This may also mean that, absent such specific wording, the consent of both parties would not be required by any other source of legal authority, such as customary law or general principles of law.

The May 2005 project to amend ICSID Arbitration rules involved a proposal to change this wording.⁹⁹ Had the envisioned proposal been adopted, arbitral tribunals would have received the authority to grant *amici* access to the hearings, even upon the express refusal from one or even all parties.¹⁰⁰ The tribunal would have been vested with the power to promote the legal status of *amicus curiae*, as recognized in previous WTO and NAFTA (UNCITRAL) decisions, to that of non-disputing parties or even parties to the proceedings. In other words, an explicit marginalization of the parties’ consent would have been operated, with the possible result of making ICSID proceedings less attractive, at least for disputes with a strong political or public dimension.

98 See Vivendi (order), ¶ 6 and Interagua (order), ¶ 7, both using identical language. Commenting on the conclusion of the Methanex tribunal, according to which a difficulty would remain, under UNCITRAL, if a point was advanced by a petitioner to which both parties were opposed, Brigitte STERN noted: “*Pour ma part, je ne vois pas qu’il puisse y avoir un raisonnement juridique différent, selon qu’une seule ou les deux Parties s’opposent à la production de mémoires d’amicus curiae*”, *L’entrée de la société civile dans l’arbitrage ...*, p. 340.

99 The full text of the amended article 32(2) would have read: “After consultation with the Secretary-General and with the parties as far as possible, the Tribunal may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings. The Tribunal shall for such cases establish procedures for the protection of proprietary information and the making of appropriate logistical arrangements”. See Suggested Changes to the ICSID Rules and Regulations, *Working Paper of the ICSID Secretariat*, 12 May 2005, p. 10.

100 The explicative note tried to minimize this transfer of power pointing out that: “... consultation with the parties would ensure that any objection of concern they may have will be taken into account by the tribunal in considering whether to allow any third parties to attend or observe the hearings”, *Idem*.

In the language that eventually prevailed, article 32(2) states:

“Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons ... to attend or observe all or part of the hearings ...”.¹⁰¹

Thus, each party to the proceeding reserves a veto¹⁰² against the participation of an *amicus curiae* to the oral proceedings. While this solution will probably come under criticism from activist NGOs, it does not appear disproportionate in the light of NAFTA (UNCITRAL) practice.¹⁰³ From the perspective of the conflict between public legitimacy and consent, apart from a stronger emphasis on procedural arrangements, it is hard to see what the new wording adds to the former situation. As a matter of fact, one could even argue that in its present state article 32(2) is more restrictive than before, for it explicitly reserves “the protection of proprietary or privileged information”, an issue that under the former rule would have been subject to interpretation by the tribunal. In any case, it is not in this respect that *Vivendi* and *Interagua* break new ground, but rather with respect to the admissibility of written submissions.

Power to authorize amicus curiae briefs – Concerning the second issue, the tribunal distinguished two questions: whether it had the power to authorize *amicus* submissions and, if so, under which

101 Article 32(2) of the *ICSID Rules of Procedure for Arbitration Proceedings* (as amended and effective April 10 2006). The full text of article as amended reads: “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 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.”

102 This interpretation is confirmed by the French and Spanish wordings: “*Sauf si l’une des parties s’y oppose*” or “*Salvo objeción de alguna de las partes*”.

103 Which requires the consent of both parties to open the hearings to the public.

conditions.¹⁰⁴ The first question has both procedural and theoretical implications. The tribunal first noted that no previous ICSID tribunals had adjudicated a similar petition.¹⁰⁵ It then defined *amicus curiae* as:

“... a nonparty to the dispute ... ‘a friend’ (offering) to provide the court or tribunal its special perspectives, arguments or expertise on the dispute, usually in the form of a written *amicus curiae* brief or submission”¹⁰⁶.

It thus acknowledged that *amici* may play the role of advocates for a particular cause, a point that had already been asserted in the *UPS* case, in which the Canadian associations had first sought to act as parties before turning to the *amicus* status as a subsidiary alternative.¹⁰⁷

This characterization has implications on whether admitting *amicus* briefs is a “question of procedure” in the sense of article 44 of the ICSID Convention. article 44, in relevant part, provides:

“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”.

Whether admitting *amicus* briefs constitutes a question of procedure or not depends, admittedly, upon the scope of intervention granted to *amici curiae*, rather than merely on the terminology used. The decision addressed this point at three levels. First, as discussed

104 See *Vivendi* (order), ¶ 9 and *Interagua* (order), ¶ 10.

105 See *Vivendi* (order), ¶ 9.

106 See *Vivendi* (order), ¶ 8 and *Interagua* (order), ¶ 9, both using identical language.

107 See *Amicus Petition*, ¶ 1, stating: “1. The purpose of this petition is to request: (i) standing as parties to any procedures that may be convened to determine the claim made by United Parcel Service of America, Inc (UPS) in this matter; 2. in the alternative, should the status as party be denied to one or both Petitioners, the right to intervene in such proceedings in accordance with the principles of fundamental justice ...”.

before, both decisions refused to grant NGOs the request to attend oral proceedings and make oral presentations, thus introducing a clear limitation on their scope of intervention. Second, the tribunal also noted that *amici* have traditionally been considered nonparties,¹⁰⁸ citing *Methanex* to support its view.¹⁰⁹ Third, the tribunal set a number of conditions for an *amicus* brief to be admissible. Despite the relevance of these elements, the tribunal's conclusion as to the procedural nature of the question seems somewhat hasty. It is entirely based on the premise that:

“At a basic level of interpretation, a procedural question is one which relates to the manner of proceeding or which deals with the way to accomplish a stated end”,

adding that

“The admission of an *amicus curiae* submission would fall within this definition of procedural question since it can be viewed as a step in assisting the Tribunal to achieve its fundamental task of arriving at a correct decision in this case”¹¹⁰.

However, other acts would fit within this broad definition of a procedural question as well.¹¹¹

108 See *Vivendi* (order), ¶13 and *Interagua* (order), ¶ 13.

109 The tribunal further refers to: “... practices of NAFTA, the Iran-United States Claims Tribunal, and the World Trade Organization” on the admission of *amicus curiae*. See *Vivendi* (order), ¶ 15 and *Interagua* (order), ¶ 15. This general assertion implicitly refers to the cases discussed before. No reference whatsoever is made to either the restrictive practice of the International Court of Justice, or to that of the European Court of Justice, or, still, to any of the International Courts specialized in human rights.

110 See *Vivendi* (order), ¶ 11 and *Interagua* (order), ¶ 12, both using identical language.

111 Such as allowing other persons to attend or observe all or part of the hearings when the objections of one or more parties appear “unreasonable” in light of the tribunal's fundamental task of arriving at a correct decision.

In addition, the reference to a “correct decision in this case” raises the broader theoretical issue of what should we understand by the term “correct”. Should the decision be correct: for the parties? for the public? for the overall arbitration regime? At issue is the underlying dilemma between public legitimacy and party consent. The best decision for the parties in a particular case may not be the best for the arbitration regime as a whole. A party may indeed prefer to keep public concerns out of the arbitral proceeding, which in turn would affect the public perception and thus the legitimacy of such proceedings. At the risk of opening Pandora’s box, one may ask what should be the overall role of arbitrators. Should they behave as policy-makers, worried about the overall evolution of the investment regime, when deciding a case? We do not intend to address this theoretical issue here. Suffice it to recall that one of the reasons why investors find arbitration proceedings particularly attractive is that such proceedings are tailored to the specific needs of the parties. This is not to say that arbitrators should never take into account broader policy considerations, which they already do. However, excessively enlarging this dimension of adjudicatory proceedings may lead arbitrators to very deep waters that even national judiciaries find hard to navigate.¹¹²

This latter point leads us to the main contribution of the two orders, namely the attempt by the tribunal to strike a detailed balance between public legitimacy and party consent by setting conditions for *amicus* participation.¹¹³ The legal grounding of these conditions is, however, unclear. The tribunal simply notes that its approach is based

112 The literature focusing on the implications for judicial legitimacy of taking policy stances is extremely vast, with some major differences whether this issue is addressed in a common law context or in a civil law one. For a useful discussion of the different points of tension featuring eminent magistrates see: BADINTER, R., BREYER, S. eds., *Judges in Contemporary Democracy: An International Conversation*, New York University Press, New York, 2004.

113 See *Vivendi* (order), ¶¶ 17-29 and *Interagua* (order), ¶¶ 17-34.

“... on a review of *amicus* practices in other jurisdictions and fora”.¹¹⁴

This vagueness can perhaps be explained by the tribunal’s reluctance to clearly state the formal legal source of these conditions, and this for different plausible reasons. One such reason would be that, as discussed before, not all international *fora* favor *amicus* intervention. Another reason would be that, as a rule, *amicus* intervention is unknown to legal orders based on the civil law tradition. It would therefore not be an easy exercise to ground these conditions on the existence of either international customary law or general principles of law.¹¹⁵ One is thus left to assume that these conditions are mainly derived from the WTO Appellate Body’s report in the *European Communities – Asbestos* and the decision in *Methanex*.¹¹⁶

The tribunal identified three conditions for *amicus* intervention:

“a) the appropriateness of the subject matter of the case; b) the suitability of a given non-party to act as *amicus curiae* in that case; and c) the procedure by which the *amicus* submission is made and considered”¹¹⁷.

Concerning the first condition, the tribunal notes that:

“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,

114 See *Vivendi* (order), ¶ 17 and *Interagua* (order), ¶ 17, both using identical language.

115 Both sources require some degree of generality, which is excluded when a important part of the States (or legal orders) concerned do not accept the rule or principle in question. On the conceptual aspects of these two sources see: BARBERIS, J.A., *Fuentes del derecho internacional*, Platense, Buenos Aires, 1973; BARBERIS, J.A., *La formación del derecho internacional*, Ábaco, Buenos Aires, 1994.

116 As well as *Methanex*’s suites, such as the already cited NAFTA FTC’s Statement on non-disputing party participation.

117 *Vivendi* (order), ¶ 17.

directly or indirectly, to affect persons beyond those immediately involved as parties in the case”¹¹⁸.

This reminds us of the very origins of the *amicus curiae* institution in a legal context such as the common law, where the rule of precedent made individual rulings applicable to other cases as well. In the two decisions at hand, it was the water supply of millions of people that was at stake¹¹⁹. One may wonder however whether there is any investment dispute concerning the exercise of the State’s regulatory powers where such a public dimension would be absent. A set of criteria thus appear necessary to determine when the public component of the dispute would invite *amicus* intervention or, conversely, when such intervention would be excluded by the predominantly private character of the dispute.¹²⁰ The tribunal further added that *amicus* participation would have:

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- 118 See Vivendi (order), ¶ 19 and Interagua (order), ¶ 18. Compare to the wording used in the relevant parts of the FTC’s *Statement*, paragraph B point 6: “(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”. Compare also to the less clear mention made by the WTO AB’s decision in the *Asbestos case*, paragraph 52 point 3. An application for leave to file such a written brief shall: “(d) specify the nature of the interest the applicant has in this appeal ... (e) identify the specific issues of law covered in the Panel Report and legal interpretations developed by the Panel that are the subject of this appeal, as set forth in the Notice of Appeal (WT/DS135/8) dated 23 October 2000, which the applicant intends to address in its written brief.”
- 119 The tribunal considered that: “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, the city of Buenos Aires and surrounding municipalities. Those systems provide basic public services to millions of people and as a result may raise a variety of complex public and international law questions, including human rights considerations. Any decision rendered in this case, whether in favor of the Claimants or the Respondent, has the potential to affect the operation of those systems and thereby the public they serve”, Vivendi (order), ¶ 19 and Interagua (order), ¶ 18, using similar language.
- 120 Possible approaches could be derived from some countries’ methodology to distinguish private claims from public claims, such as it is made in Switzerland, to name but one jurisdiction.

“... the additional desirable consequence of increasing the transparency of investor-state arbitration”.¹²¹

The more the dispute involves a public dimension, the more the intervention of NGOs appears beneficial, at least insofar as these organizations are capable of “legitimising” the proceeding. This leads to the second condition.

The tribunal summarized the requirements of the second condition saying that *amicus* briefs would only be admitted from:

“persons who establish to the Tribunal’s satisfaction that they have the expertise, experience, and independence to be of assistance in this case”¹²².

It was not clear whether this wording involved a cumulative requirement or was rather indicative. Two main elements appear important in this respect. First, as its predecessors, the tribunal paid particular attention to the independence of the NGO concerned, focusing in particular on:

“a. The identity and background of the petitioner, the nature of its membership if it is an organization, and the nature of its relationships, if any, to the parties in the dispute”.

Among these relationships, NGOs must prove that they have not:

“c. ... received financial or other material support from any of the parties or from any person connected with the parties in this case”¹²³.

121 See *Vivendi* (order), ¶ 22 and *Interagua* (order), ¶ 21.

122 See *Vivendi* (order), ¶ 24 and *Interagua* (order), ¶ 23.

123 See *Vivendi* (order), ¶ 25. Compare to WTOAB’s Decision (*Asbestos*), ¶ 52 point 3. An application for leave to file such a written brief shall: “(c) contain a description of the applicant, including a statement of the membership and legal status of the applicant, the general objectives pursued by the applicant, the nature of the activities of the applicant, and the sources of financing of the applicant ... (g) contain a statement disclosing whether the applicant has any relationship, direct or indirect, with any party or any third party to this dispute, as well as whether it has, or will, receive any

Second, the tribunal made it clear that *amicus* intervention was only justified if the *amicus* could contribute something specific. The terms *experience* and *expertise* used in the aforementioned quotation leave however considerable room to accommodate different types of organizations and/or individuals. In all events, applications for *amicus* status must state:

“b. The nature of the petitioner’s interest in the case ... (and) ... d. The reasons why the Tribunal should accept petitioner’s *amicus curiae* brief”.¹²⁴

In line with the preceding NAFTA case law, this would tend to exclude *amicus* submissions on jurisdictional questions, for which the tribunal and the parties can provide the expertise required and no special perspective appears *prima facie* relevant.¹²⁵ This also

assistance, financial or otherwise, from a party or a third party to this dispute in the preparation of its application for leave or its written brief”. See also the conditions set in the relevant parts of the FTC’s *Statement*, ¶ B point 2: “(c) describe the applicant, including, where relevant, its membership and legal status (e.g. company, trade association or other non-governmental organization), its general objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the applicant); (d) disclose whether or not the applicant has any affiliation, direct or indirect, with any disputing party; (e) identify any government, person or organization that has provided any financial or other assistance in preparing the submission”.

124 See *Vivendi* (order), ¶ 25. Compare to WTO AB’s Decision (Asbestos), ¶ 52 point 3. An application for leave to file an *amicus* brief must: “(f) state why it would be desirable, in the interests of achieving a satisfactory settlement of the matter at issue, in accordance with the rights and obligations of WTO Members under the DSU and the other covered agreements, for the Appellate Body to grant the applicant leave to file a written brief in this appeal; and indicate, in particular, in what way the applicant will make a contribution to the resolution of this dispute that is not likely to be repetitive of what has been already submitted by a party or third party to this dispute”. Compare also to the condition set in the relevant part of the FTC’s *Statement*, ¶ B point 6, stating that the Tribunal will consider 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.”

125 See *Vivendi* (order), ¶ 28 and *Interagua* (order), ¶ 27.

seems consistent with the view of the tribunal in *Aguas del Tunari v. Bolivia*.¹²⁶

As to the third and final condition, namely the procedural modalities for the *amicus* intervention, they were not laid out in the orders, on the ground that it was too early in the procedure to make determinations on this point.¹²⁷

The *Interagua* order includes a useful additional section¹²⁸ in which the tribunal analyses whether the conditions of relevant expertise, experience and independence are met by the four petitioners of the case. The tribunal concludes that it has not been offered enough information to consider the four petitioners suitable *amici curiae*. It is stated, among others, that for such determinations to be made, the tribunal needs specific information on the nature and size of the organizations' membership, the qualifications of their leadership, their staff's expertise and the activities in which they have engaged. In the case of individuals, detailed *curricula vitae* may serve to determine whether they possess the relevant expertise and experience¹²⁹. Moreover, detailed information on the professional and financial relations of both organizations and individuals must also be provided.¹³⁰

One important question that may arise in this context is how to deal with the diverse reality of potential *amici*. Indeed, if only prestigious and well-established NGOs were to be recognized as having enough experience and expertise to intervene, then a number

126 The tribunal's President emphasizes, in his letter of January 19 2003, that: "the Tribunal is of the view that there is not at present a need to call witnesses or seek supplementary non-party submissions *at the jurisdictional phase of its work*" (italics added). But, the precise scope of this assertion is not totally clear.

127 See *Vivendi* (order), ¶¶ 30-32 and *Interagua* (order), ¶ 28.

128 Section IV, under the heading "Whether Petitioners Qualify as Appropriate *Amici Curiae* in This case", *Interagua* (order), ¶¶ 29-34.

129 See *Interagua* (order), ¶ 30.

130 *Id.*, ¶ 32.

of particular questions to which such NGOs do not grant priority would be overlooked. One may also wonder what treatment should be granted to NGOs or even Intergovernmental Organizations that, despite being entirely funded by States, are nevertheless substantially independent. At the margin, almost no intergovernmental organization would be able to endorse the position, for instance, of the United States, for the US is the largest fund provider of most of these organizations, and that would create a conflict of interest. A case-by-case methodology may thus be necessary to tackle the diversity of the practice. Such a methodology may in turn introduce more uncertainty and variation from one arbitration to another.¹³¹ And even if such a methodology could be applied in a fairly consistent manner, it would require a substantial investment from the tribunal to understand the specificities of each case and from the parties to fund such effort.

Access to documentation – The third request made by the petitioners was to have access to the submissions made by the parties. Such access, it was argued, is a necessary requirement for meaningful and effective *amicus* intervention. So far, the tribunal has avoided making any determination on this issue.¹³² While *prima facie* the NGOs may seem to have a point, from a legal perspective there are at least two powerful arguments that would go against granting such access. First, as *amici curiae* have been carefully distinguished from parties, they are not entitled to the array of rights that may be derived from the fundamental right of defense. Thus, legally speaking, the *amicus* position is not harmed if the documentation of the case remains confidential. Second, even if the tribunal were eventually led to grant *amici curiae* a broader scope of intervention, such as attending public hearings and making oral presentations, the newly amended article 32(2) of the ICSID

131 Inconsistency is a widely recognized problem in field of international arbitration. Among the possible solutions that have been consider, one may recall the proposals for the creation of an appellate level within the ICSID context.

132 See Vivendi (order), ¶¶ 30-32 and Interagua (order), ¶¶ 35-37.

Arbitration rules suggests that the tribunal must in all events grant “protection of proprietary or privileged information”. This runs afoul the argument supporting increasing access to documents.

CONCLUDING REMARKS

In a recent conference organized at Harvard Law School¹³³ focusing on current issues in investment arbitration, a practitioner suggested that the *amicus curiae* phenomenon has been and will remain “on the fringe” rather than “in the mainstream” of international arbitration. He gave many reasons for this, including the lack of public interest in disputes, the insufficient determination and resources of NGOs to lead the trend and the limited power and/or will of arbitral tribunals to accept submissions (in non-NAFTA, ICSID or US BIT cases).

Of course, one cannot easily assess whether this prediction will accurately describe *amicus* intervention in the years to come. There are, however, a number of signs that point in the opposite direction. At the outset, one should not underestimate the determination of NGOs to drive this change. In the world of NGOs, there are many incentives other than purely altruistic motives that may lead NGOs to seek more participation. NGOs need visibility to survive and grow. This is especially true of small and emerging NGOs, for whom visibility is equated with credibility, which in turn means increasing access to resources. For these organizations, acting as *amici curiae* in investment disputes may be a relatively simple way of improving their credibility while, at the same time, receiving a quality seal, given the demanding conditions set by the tribunals for the admissibility of *amici curiae*. If this were to be the case, then NGO participation would elicit not only greater public attention but also greater resources, and thus increased determination.

133 *International Investment Law at a Crossroads*, Conference organized by Harvard’s International Law Society, March 3 2006. See ACHTOUK, L., PEKAR, R., SACCO, S., VIÑUALES, J., *International Investment Law at a Crossroads: Conference Report*, in *Stockholm International Arbitration Review*, vol. 1/2006.

Concerning, second, what the aforementioned practitioner describes as the limited power and/or will of arbitral tribunals to admit *amicus* participation, this can very swiftly change. One clear illustration of how quickly the fire may propagate is given by the ease with which tribunals operating under UNCITRAL and ICSID have connected the scopes of article 17.9 of the WTO DSU, article 15(1) of the UNCITRAL rules, and article 44 of the ICSID Convention, in order to assert the power to authorize *amicus* submissions.

Third, and perhaps most importantly, there seems to be substantial awareness on the part of not only arbitrators but also public officials and investors that more legitimacy is required in investment arbitration. The frank encouragements given to this stance in the WTO, NAFTA and ICSID contexts are clear signs of this attitude. Moreover, investors may come to acknowledge, as they did in the context of corporate social responsibility, that they are now operating in an environment increasingly affected by social activism. In such an environment, some form of NGO participation may help preserve investment arbitration as a viable method to solve their disputes with host States.

In the next years, arbitral tribunals may be called to strike delicate balances between the consent of the parties and considerations of public legitimacy. The decisions in the *Vivendi* and *Interagua* cases offer, in this context, two remarkable attempts at maneuvering between the Scylla of public legitimacy and the Charybdis of secrecy. As such, they are part of a broader body of experimental “research” on how to reconcile private interests with the public good.

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