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CAN AMICUS CURIAE BECOME AMICUS ARBITRAE? REFLECTIONS ON THE ICSID SECRETARIAT
PROPOSITION TO ADMIT AMICUS CURIAE IN ARBITRATION PROCEEDINGS

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Introduction

International governmental organizations are increasingly subject to the principles they are preaching. Accountability\(^1\), transparency\(^2\) and good governance\(^3\) are claimed to be the principles which should underlie the functioning of these organizations, especially the United Nations, The World Trade Organization and the World Bank.\(^4\) Needs and pressure for more involvement of non-governmental parties at the international level is a well documented phenomenon.\(^5\) For example, in March 2005, The World Bank released a paper entitled “Issues and Options for Improving Engagement Between the World Bank and Civil Society Organizations”\(^6\) in which the Executives Directors recognize the importance of the civil society in the Bank activities and propose to engage with civil society organizations (“CSOs”) in three categories of activity: facilitation, dialogue and consultation, and partnership. To date, the involvement of Non-governmental Organizations (“NGOs”) was limited to human right issues, these organizations are today willing to intervene in the field of international economic relations.\(^8\) Moreover, after having being granted observer status in the most important

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1. The UNDP defines accountability as holding individuals and organizations responsible for performance, measured as objectively as possible, United Nations Development Program, Contact Program, Chapter 2, available at http://www.undp.org/governance/contactcdrom-contents/UNDP_manual/CONT01_Ch02.pdf, last visited April 27, 2005
2. According to the International Monetary Fund, transparency means “openness, honesty, and accountability in public and private transactions”, Fabric of Reform Glossary, available at http://www.imf.org/external/pubs/ft/fabric/gloss.htm, last visited on April 25, 2005. For Transparency International, “transparency can be defined as a principle that allows those affected by administrative decisions, business transactions or charitable work to know not only the basic facts and figures but also the mechanisms and processes. It is the duty of civil servants, managers and trustees to act visibly, predictably and understandably”, available at http://www.transparency.org/faqs/faq-corruption.html#faqcorr1, last visited April 27, 2005, for the WTO, transparency is defined as “the degree to which trade policies and practices, and the process by which they are established, are open and predictable”, available at http://www.wto.org/english/tewto_e/glossary_e/glossary_e.htm
3. Good governance can be defined as "administration (of government, or corporations or other private sector entities) that is efficient, fair, open, and impartial", International Monetary Fund Fabric of Reform Glossary, supra
4. See for example Ralf Nader, Introduction to L. WALLACH, M.SFORZA, THE WTO: FIVE YEARS OF REASONS TO RESIST CORPORATE GLOBALIZATION (1999), p. 6 (insisting that WTO and NAFTA represents an 'unaccountable system of transnational governance designed to increase corporate profit')
7. Defined as “organizations established by individuals or associations of individuals. NGOs are not endowed with government powers”, PARRY and GRANT ENCYCLOPEDIC DICTIONARY OF INTERNATIONAL LAW, New York, Oceana, 1986, pp. 258-259
international organizations\textsuperscript{9} and therefore taking part and being consulted at the level of the creation of international law, NGOs wish today to have an active role in the implementation of the rules they participated to enact.

Lately, this desire of the civil society\textsuperscript{10} to take part in investment arbitration proceedings have been materialized by several petitions of NGOs to ICSID tribunals requesting to be involved as \textit{amicus curiae} or even to be granted the status of a party. For example, on January 27, 2005, three consumers and environmental NGOs submitted a brief to an ICSID tribunal to be permitted to participate in the procedure in the case \textit{Aguas Argentina S.A. v. Argentina}\textsuperscript{11}, requesting transparency and participation in the arbitration proceedings initiated by a privatized public services company against Argentina. The tribunal has not yet rendered its decision on this issue but it clearly faces a difficult dilemma. The tribunal can either authorize the intervention of \textit{amicus curiae} without a clear consent of the ICSID Contracting States to do so or refuse such intervention before the discussions among ICSID Contracting States on this issue have been concluded, and feed the criticisms over ICSID's obscurantism.

The International Center for the Settlement of Investment Disputes (“ICSID”) is therefore one of the organization which is under increasing pressure to open its decision-making process. ICSID is presently suffering the same criticisms addressed to other international organizations such as the WTO and NAFTA in the past.

ICSID recently consulted the arbitrators, parties, counsels and governments involved in its activities and released a “Stakeholders’ Survey” (which is referred to as “clients’ survey” on the ICSID website).\textsuperscript{12} The result of this survey shows that many of the clients/stakeholders were satisfied with the ICSID's services.\textsuperscript{13} ICSID received “outstanding” rating for its fairness and for the speed and quality of the process. Consequently, the question is to know where the criticisms are coming from and to identify who are really ICSID stakeholders.

ICSID staff was probably conscious that the only parties in interest in ICSID arbitration were not only arbitrators, parties, counsels and government’s officials who have taken part in the survey, but also indirect parties in interest such as local population, environmental, labor an consumers NGOs and industrial lobbies.

In the present day, the debate is therefore to decide whether \textit{amicus curiae} should be accepted in ICSID arbitrations and, if they are, what should be the rules governing individuals and organizations

\textsuperscript{9} See for example http://www.un.org/french/aboutun/oi.htm for the United Nations, which granted, among others, observer status to International Federation of Red Cross and Red Crescent Societies, International Union for the Conservation of Nature and Natural Resources; See http://www.wto.org/english/thewto_e/igo_obs_e.htm for the WTO. The World Bank did not grant observer status to NGOs but created The Civil Society Team which coordinates civil society engagement staff across the institution, provides guidance and technical assistance to program staff on how to consult and involve civil society in Bank operations http://web.worldbank.org/WEBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK:20093779-pagePK:220503-piPK:220476-theSitePK:228717,00.html

\textsuperscript{10} Defined as “associations that exist outside of the state or market which maintain a certain degree of autonomy and independence and have the potential to provide alternative views, policies and actions to those promoted by the state and market” by the INTRAC (International NGO Training and Research Center), available at www.intrac.org/docs.php?id=28, last visited April 26, 2005

\textsuperscript{11} \textit{Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic}, Case No. ARB/03/19, Pending

\textsuperscript{12} www.worldbank.org/icsid, last visited on April 29, 2005

\textsuperscript{13} International Center for the Settlement of Investments Disputes, Stakeholders Survey, prepared for ICSID by Clark, Matire & Bartolomeo Inc., October 2004
participation in the arbitration proceedings.\footnote{Gail E. Evans, *Issues of Legitimacy and the Resolution of Intellectual Property Dispute in the Supercourt of the World Trade Organization*, INT’L T.L.R. 1998, 4(3), 81-98} In order to launch a debate among the Contracting States on this issue, the ICSID’s Secretariat presented in October 2004 a “Discussion Paper on the Possible Improvements of the ICSID Procedures.”\footnote{ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration*, October 22, 2004, available at http://www.worldbank.org/icsid/improve-arb.pdf} This proposal has been widely commentated and has given rise to engaged and unexpected commentaries.\footnote{See for example Howard Mann, Aaron Cosebey, Luke Peterson, Konrad von Moltke for the International Investment and Sustainable Development, *Comments on ICSID Discussion Paper, “Possible Improvements of the Framework for ICSID Arbitration*, December 2004, available at http://www.iisd.org/pdf/2004/investment_icsid_response.pdf; South Center, South Centre Analytical Note, February 2005, SC/TADP/AN/INV/1. available at http://www.southcentre.org/tadp_webpage/research_papers/investment_project/icsid_discpaper_feb05.doc} The very existence of the legal power of the ICSID’s Secretariat to make such a proposition has even been fiercely criticized.\footnote{South Center, *supra* note 16} One of the propositions of this paper was to give explicit power to arbitral tribunals to accept unsolicited submissions by non-parties in arbitration under the ICSID Arbitration Rules. It was expected that demand for “non-party participation in arbitration could be dealt with by the use of the amicus curiae device.”\footnote{John Bellhouse, Anthony Lavers, *The Modern Amicus Curiae: a Role in Arbitration*, C.J.Q. 2004, 23 (JUL), 187-200} The purpose of this paper is to discuss the opportunity to accept *amicus curiae* briefs in investment arbitration proceedings before the ICSID. More specifically, this paper will focus on the previous experience of the WTO and the NAFTA in this field and will point out the main different features of the ICSID system and the reasons why the admission of *amicus curiae* submissions may require adaptations in the ICSID context. Part I of this Paper will summarize the main features of investment arbitration and discusses the major criticisms to the system. Part II will briefly summarize the previous experience of international and arbitral tribunals in dealing with submissions by third parties. In Part III, the need for an efficient screening process in selecting participating parties in arbitration proceedings will be stressed. Finally, Part IV will propose criteria to be taken into account to render the management of *amicus curiae* viable and worthwhile in the daily practice of ICSID arbitration.

1. **Investment Arbitration and its Criticisms**

1.1. **What is ICSID?**

ICSID is an international organization which was established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States signed in Washington on March 18, 1965 and which came into force on October 14, 1966.\footnote{The ICISD Convention, available at http://www.worldbank.org/icsid/basicdoc/partA.htm} ICSID is an autonomous international organization which is a member of the World Bank Group. Pursuant to the Washington Convention, the ICSID provides facilities for the arbitration of disputes between Contracting States and investors who qualify as nationals of other states. In order to fulfill its objective, the ICSID Administrative Council\footnote{The ICSID Administrative Council is composed of one representative of each Contracting State. In the absence of a contrary designation, each governor and alternate governor of the Bank appointed by a Contracting State shall be ex} adopted Rules for the Institution of Conciliation
and Arbitration Proceedings ("Institution Rules"), Conciliation Rules and Arbitration Rules. Finally, in 1978, the ICSID Contracting States adopted the Additional Facility Rules in order to allow to use the ICSID rules in cases in which the underlying dispute arise of a situation which cannot receive the qualification of investment or if one of the parties to the dispute does not have its place of business in a Contracting State. According to the World Bank Executive Directors Report\(^{21}\), the broad objectives of the ICSID Convention was “to encourage a larger flow of private international investment” by creating a mechanism maintaining a careful balance between the interests of the investors and those of States.\(^{22}\) The number of cases submitted to the Center has increased significantly in recent years\(^{23}\), notably because the acceptance of the jurisdiction of the ICSID has become widespread in Bilateral Investment Treaties ("BITs").\(^{24}\)

1.2. What is an Amicus Curiae?

There are few technical legal terms or definitions as unhelpful as *amicus curiae*. The lack of clarity of the notion of *amicus curiae* is a fair reflection of the disputed role and different understandings the notion receives in different legal systems.\(^{25}\)

The expression “*amicus curiae*” come from the Latin ‘friend of the court.’ *Amicus curiae* have been defined as “one who calls the attention of the Court to some point of law or fact, which would appear to have been overlooked.”\(^{26}\) Others have defined *amicus curiae* as persons who are not a party to a lawsuit but who petitions the court or are requested by the court to file a brief in the action because that person has a strong interest in the subject matter.\(^{27}\)

Over time, a more advocacy-oriented *amicus* function has evolved whereby an organization or group makes submissions to the court either in support of one of the parties to the dispute, or to further its own interest or to ensure a wide ventilation of views in what the *amicus* deems to be the public interest.\(^{28}\) As a rule, *amicus curiae* cannot control the course of action: they are neither served documents in the case nor can he introduce evidence or examine witnesses.\(^{29}\)

\(^{21}\) Supra note 32, at p. 218
\(^{23}\) See **NEWS FROM ICSID**, Vol. 21, No. 2, 2004
\(^{24}\) Joy Cherian, The Convention on the Settlement of Investment Disputes Between States and Nationals of other States: A Response to the question of choice of law in international investment arbitration, The Catholic University of America, Ph.D., 1974
\(^{25}\) Bellhouse and Lavers, supra note 18
\(^{27}\) BLACK’S LAW DICTIONARY (8TH ED. 2004)
\(^{29}\) Evans, supra note 14
1.3. Statement of the Problem

1.3.1. Features of Investment Arbitration

In the past, disputes between investors and the host State were highly politicized and led to frequent use of diplomatic protection and sometimes to the use of force. Investment arbitration is sometimes referred to as “mixed arbitration” because it involves a private investor on one side and a sovereign government on the other and is usually based on both private law and public international law. The rationale behind investment arbitration is that investors require neutral and predictable dispute settlement systems if they are to invest abroad, especially in a developing country where such an investment is a powerful engine of economic development. Indeed, Foreign Direct Investment (“FDI”) comes with capital, technology, employment and the use and development of local resources. Therefore, investment arbitration has played a central role in fostering international investment, especially in developing countries. In the recent ICSID survey, 61% of the person questioned said ICSID membership has contributed to a positive investment climate. Therefore, States are willing to offer efficient and objective dispute resolution mechanisms to attract foreign direct investment. Indeed, the direct right of access to a neutral and effective dispute resolution procedure to enforce the specific rights afforded to investments by the relevant treaty has the important advantage of depoliticizing the dispute, reducing investment risk and thereby increasing cross-border investment. The creation of ICSID took part in the development of “neutral” international tribunals. One of the motivating factors for the ICSID Convention was to remove investment disputes from the realm of diplomatic protection through direct access to an international remedy.

Investment arbitration has a number of long discussed specificities. In the classic investor-state arbitration scenario, the dispute arises out of a specific state measure taken in respect of a specific foreign investment, often involving claims of expropriation or discrimination. A novel and more radical scenario has however appeared in which the dispute arises because the state has passed general measures, which affect whole classes of foreign investor in alleged breaches of standard treaty

31 Shihata, supra note 28
32 Stern, supra note 8
33 Wallace, Jr., *Case study under NAFTA: Lessons for the wise*, in *Political, Economical and Cultural Obstacles to Effective Arbitration of Foreign Investment Disputes, Arbitrating Foreign Investment Disputes, Procedural and Substantive Legal Aspects*, STUDIES IN TRANSITIONAL ECONOMIC LAW, Vol. 19, edited by Norbert Horn, Kluwer Law International
36 Blackaby, supra note 35
38 Blackaby, supra note 35
These situations create a particular concern because they not only affect the investor but also affect the local population, consumers, workers or the environment.

Investment or Treaty-based arbitrations therefore raise fundamental issues of public law and policy, which are generally absent from international commercial arbitration. As a matter of fact, the arbitration under the aegis of ICSID often raises significant public interest issues and involve claims by an investor against a State that challenge sovereign acts under international law. For instance, the issuance of permits relating to the exploitation of natural resources constitutes exercise of a sovereign power. As a consequence, it is said that the issuance or non-issuance of permits should not be decided by investor-State arbitration, and if they are, the arbitrators should give great deference to the issuer.

These public interests usually reside in the expenditures of substantial amounts of public funds used and the ramifications the holding in one case may have beyond the case at hand. Indeed, arbitrators’ awards, even if they are unable to declare State measures invalid, may have a direct and significant impact on States’ future conduct and the national budget. For instance, a ruling in a particular case may have chilling effects on regulators. Some commentators have described the binding legal disciplines of investment arbitration as the “new constitutionalism” under which the democratic decision-making within the state is sacrificed to efficiency and market credibility. It is argued that the institutions of the State that citizens reasonably will look to for shelter from the hardships of the market are disabled, under the constitutional-like regime of investment rules, from taking measures for societal self-protection.

1.3.2. Criticisms

For Marcos Orellana, Senior Attorney with the Center for the International Environmental Law, an active association before international tribunals, “Investment treaty arbitrations resemble a mediaeval order, where obscurantism, obfuscation, and secrecy are suppressing democratic values.”

The conflict between the essentially private nature of arbitration and the often public nature of the issues at stake in investment arbitrations have caused this nascent institution to come under increasing criticism from the media, public interest groups and even the States themselves. Hence, the treatment of expropriation in NAFTA cases have provoked “a little of a storm of scholarly and activist reaction to these.”

Transparency is however a question of perspective and the civil society and business groups have

39. Blackaby supra note 35
40. Blackaby, supra note 35
43. Blackaby, supra note 35
44. Magraw, supra note 41
47. CIEL, Consumers and Human Rights Organizations request Transparency in International Arbitration Proceedings involving Argentine, at http://www.ciel.org/Tae/Suez_ICSID_SFeb05.html
48. Blackaby, supra note 35
49. Don Wallace Jr., supra note 31
completely different attitudes toward transparency and participation in particular dispute settlement mechanisms. In certain disputes, the interest of third parties may be no less immediate than the disputing parties and individual whose rights are directly affected by the outcome of arbitration should be equally entitled to access to the arbitration procedure. For NGOs, reasons of fundamental fairness and public acceptance of any decision rendered by arbitral tribunals require the intervention of third parties.

Opacity is by far the principal reproach made to the ICSID system and for most of the civil society conducting arbitrations implicating the public interest in conditions of secrecy is unacceptable. The fact that the procedure is seen as secret and non-transparent has led to open criticisms of investment arbitration by significant elements of the media as well as advocacy groups that focus on environmental and regulatory issues. These groups were contesting the prospect that key economic and political matters would be decided in confidential proceedings by a tribunal consisting in large part of foreigners. In the United States, environmental and consumer groups as well as the media and congress, began taking the position that NAFTA undermined legitimate government policy and opened decision-making to ill-informed tribunals. Such as the NAFTA's, The ICSID process was attacked for the lack of transparency of its proceedings, its uncertainty and the absence of accountability to domestic constituents.

The current opacity occurs at various levels. First, the very existence of the dispute is not always disclosed. Secondly, the rules do not provide for the access to the process itself and the to the resulting decision, although in many cases ICSID has been able to secure the consent of the parties to the publication of the award.

In order to put their criticisms in legal terms, non-parties have argued that the secrecy of investor-State arbitration violates the right to access information and the right to participate in matters related to public services. Others have argued that participation of civil society organizations was required by the principles of natural justice or Article 14 of the International Covenant on Civil and Political

50 Linda C. Reif, NAFTA, WTO and the FTAA: From choice of forum in interstate disputes to private actor access to dispute settlement, unpublished, at: http://www.bus.ualberta.ca/wcer/NAFTAReif.pdf
51 Nick Covelli, Rajeev Sharma, Proposals for Reform of the WTO Dispute Settlement Understanding in respect of Third Parties, INT. T.L.R. 2003, 9(1), 1-3
52 Petition of La Coordinadora para la Defensa del Agua y Vida, La Federación Departamental Cochabambina de Organizaciones Regantes, Sempa Sur, Friends of the Earth Netherlands, Oscar Olivera, Omar Fernandez, Father Luis Sanchez, and Congressman Jorge Alvdaroto the Arbitral Tribunal, in the case Aguas Del Tunari, S.A. v. the Republic of Bolivia, Case No. ARB/02/3, August 29, 2002 Aguas del Tunari
53 Petition in Aguas Del Tunari, supra note 51
54 Barton Legum, Is NAFTA the law of the land?, THE AMERICAN LAWYER, March 2002
55. Anthony de Palma, NAFTA = powerful little secrets, NY TIMES, March 11, 2001 at CI: about NAFTA arbitration: A their meetings are secret. Their members are generally unknown. […] Yet the way a small group of international tribunals handles disputes between investors and foreign governments has led to national laws to be revoked, justice systems questioned and environmental regulations challenged ; The Trade Secret Courts, NY TIMES, Sept. 27, 2004 (on the Chevron Texaco Arbitration): “[…] Arbitration greatly favors corporations” and “Unlike trials, arbitrations take place in secret. There is no room in the process to hear the people who might get hurt”, See also Fast Track Attack on America’s Values, THE WASHINGTON POST, 5 December 2001
57 Alvarez and Park, supra note 55, at p. 6
58 Alvarez and Park, supra note 55, at p. 7
59. Alvarez and Park, supra note 55, at p. 7
60 Blackaby, supra note 35
61 CIEL, at CIEL.org/Tae/Suez.ICSID_8Feb05.html
62 Petition in Aguas Del Tunari v. Bolivia, supra note 53, at p. 11
Therefore, secrecy has fed the desire for more intervention of the civil society. The civil society organizations request to have access to the proceedings in order to “provide new arguments from the perspective of the people affected, and to act as a watchdog in the process,” including in respect to the host State defense.

The second criticism address to investment arbitration is that it has a political bias and that those international tribunals are really accessible only to those with privileged social origin. In the word of Rosendahl: “So far, arbitration procedures have not been tailored to resolve investment disputes between powerful foreign investors and weaker developing countries. Adjustments for the latter are needed. It has failed to balance the rights and duties of each party, creating an unequal dispute resolution mechanism.”

The legitimacy of arbitral tribunals have been disputed by the environmental community which challenge the fact that ad hoc tribunal composed of trade experts is the proper forum to decide issues which involve fundamental choices about the exercise of sovereignty. Environmental organizations question the present situation under which the protection of the investor is allowed to supersede environmental and other regulations.

Finally, some have even challenge the impartiality of the ICSID tribunal because of the links of the ICSID with World Bank, notwithstanding the fact that tribunal members are in no way connected with the Bank. The petitioners in Aguas de Tunari v. Bolivia argued that the organic connections between the ICSID and other institutions of the World Bank, such as the International Bank for Reconstruction and Development and the International Finance Corporation may create serious conflicts of interests. This is forgetting that the members of ICSID tribunal are chosen on a publicly available list and under no supervision or subordination with the World Bank.

It may be argued that these criticisms are unfounded and that, as a matter of fact, the ICSID arbitral tribunals have taken into account the legitimate interests of sovereign governments. However, it has to be recognized that there is some legitimacy behind the hyperbole and the legitimate complaints need to be identified so that they can be addressed. There is otherwise a risk to see “this new child in the world of international arbitration dying in infancy, delicate and overprotected by its parents from exposure to the

63 Petition Aguas del Tunari, supra note 53. Article 14 of ICCPR provides that all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

64 CIEL, supra note 60
65 pierre bourdieu, Foreword in yves dezalay, bryant g. garth, dealing in virtue, international commercial arbitration and the construction of a transnational legal order, The university of chicago press, Chicago and London, 1996
66 Rosendhal, supra note 37
67 Wallace, supra note 31
68 See Petition in Aguas del Tunari, supra 53, p. 9: “Adding to this concern is our understanding that a high level bank official approved the appointment of the President of this tribunal following the recommendation of the ICSID staff"
70 Blackaby, supra note 35
outside world.” However the nature of anti-NAFTA rhetoric often captures public skepticism more easily than the sound arguments against distortion of cross-border capital flows. “The lobby that invokes pure air and water and sovereignty has a message with more urgent ring than the theme of international economic cooperation.”

The advantages of arbitration have been widely misunderstood, although there are particularly important for investment. For investment arbitration to fulfill its promises, some mechanisms must be found to promote greater arbitral sensitivity to vital host State interest and to accommodate arbitration’s wisdom with political reality.

As a consequence, the model of private commercial arbitration used to adjudicate investment cases so far call for adaptations in order to balance the legitimate concerns of States, investors and the civil society.

2. Previous Practice of International Courts and Tribunal on Amicus Curiae

2.1. The Iran–United States Claims Tribunal

The Iran–US Claims Tribunal panels developed the practice of admitting amicus curiae. The arbitral panels acting under the aegis of the Iran–US claims Tribunal adapted the UNICITRAL Arbitration Rules in order to permit oral or written participation of third parties “when the Tribunal determined that the statement is likely to assist the tribunal in carrying out its task.” The arbitral tribunals considered that, although the UNICITRAL rules contain no similar provision, they do not prohibit a tribunal from accepting or considering amicus curiae briefs from non-parties. However, the principle of statutory interpretation expressio unius est exclusio alterius should have precluded this result. Indeed, according to this principle, when a text explicitly permits one or more forms of activity, it implicitly prohibits all similar forms not listed. The fact that the UNICITRAL Arbitration Rules explicitly permits tribunal to appoint expert but does not contain similar reference to submission by non-party should have excluded the possibility to accept amicus curiae briefs.

The power of arbitral tribunal to admit amicus curiae briefs under the UNICITRAL Arbitration Rules latter reappeared in the Methanex case discussed below.

72 Blackaby, supra note 35
73 Alvarez and Park, supra note 55, p.15
75 Alvarez and Park, supra note 55
76 Mackenzie, Remarks, Investments Disputes and NAFTA Chapter 11, 95 AMERICAN SOC–Y INT’L L. PROC. 196
77 See STEWART ABERCROMBIE BAKER & MARK DAVID DAVIS, UNICITRAL ARBITRATION RULES IN PRACTICE, p.76 (1992)
79 Stewart, Abercrombie, Baker & Mark David Davis, supra note 78, at p. 164
2.2. The WTO experience

2.2.1. The Shrimp case

In US Gasoline and US Hormones, the panels refused to accept amicus curiae, following the practice of the GATT. Under the GATT, the panels consistently rejected amicus briefs because they were of the opinion that the GATT mechanisms were strictly intergovernmental. The Shrimp case is therefore the first one in which amicus briefs have been admitted.

In 1997, India, Malaysia, Pakistan and Thailand brought a joint complaint against The US Endangered Species Act which imposed a ban on the importation shrimp harvested with technology that may adversely affect certain sea turtles. In this case, a number of environmental NGOs sought to have their views submitted to the panel. The Appellate Body found that Articles 12 and 13 of the Dispute Settlement Understanding (“DSU”) granted the panel authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts. As a consequence, the Appellate Body decided that panels may accept amicus curiae briefs from a private party if (1) one of the disputing State has attached the brief to its submissions or (2) on a discretionary basis. The Appellate Body found the admission of the amicus curiae briefs necessary in that case to make an objective assessment of the facts of the case. It was therefore decided that amicus curiae briefs were admissible at the panel level. It did not take long for the Appellate Body, which is supposed to control the application of the law and not the assessment of the facts, to decide that it was itself empowered to receive briefs from non-parties.

2.2.2. The Carbon Steel and Asbestos cases

In Carbon Steel, the European Communities (“EC”) requested WTO consultations on measures applied by the United States in countervailing duty cases. In this case, unsolicited briefs were submitted to the Appellate Body by two US industry lobbies. The EC contested the admission and argued that Article 13 of the DSU only permits the presentation of factual information by third parties and not legal arguments or interpretations. The Appellate Body concluded that nothing in the DSU or in the Working Rules for Appellate Review precluded the possibility to consider briefs

80 WTO, United States—Import prohibition of certain shrimp and shrimp products, DS58/R DS58/AB/R, ruling adopted on November 6, 1998
82 EC Measures Concerning Meat and Meat Products, WT/DS26 and WT/DS 48, ruling adopted on February 13, 1998
83 A summary of this case is available at http://www.wto.org/english/tratop_e/envir_e/edis08_e.htm
84 Article 11 of the DSU
86 WTO, European Communities—Measures affecting asbestos and asbestos-containing products, case No. 135, ruling adopted on 5 April 2001
87 IP/00/6, Brussels, 7 January 2000
submitted by third parties but emphasized that individuals or organizations which are not members of the organization have no legal right to make submissions or to be heard. This ruling provoked a huge controversy among the WTO members, “with the United States basically being alone to defend the Appellate Body actions.” After a special debate, the Chair of the WTO Council advised the Appellate Body to proceed with extreme caution on the issue of the amicus briefs. Indeed, a number of Member States complained that the amicus participants had been granted more rights than they themselves have to take part in the Appellate Body procedure. As a matter of fact, under Article 10.2 of the DSU, a Member needs to prove a “substantial interest” in the dispute to intervene as third party, a requirement that does not apply to NGOs. Moreover, a Member can only present observation on the interpretation of the Treaty, at the exclusion of factual findings.

In Asbestos, both the Panel and the Appellate Body rejected Canada’s challenge to France import ban on asbestos and asbestos-containing products. Applications to submit amicus curiae briefs were filled by seventeen environmental NGOs. The Appellate Body was therefore constrained to articulate a process to determine whether to accept the amicus curiae briefs. In a Communication to the Chairman of the Dispute Settlement Body, the Appellate Body provided for additional procedure adopted for the submission of amicus briefs pursuant to the Working Rules for Appellate Review. The Appellate Body specified that these rules were to be used in the Asbestos case only and did not have a general scope.

In its Communication, the Appellate Body stated that “any person, whether natural or legal, other than a party or a third party to this dispute, wishing to file a written brief with the Appellate Body, must apply for leave to file such a brief.” The application for leave to file such a brief should (a) be made in writing; (b) be in no case longer than three typed pages; (c) contain a description 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; (d) specify the nature of the interest the applicant has in this appeal; (e) identify the specific issues of law and legal interpretations developed by the Panel which the applicant intends to address in its written brief; (f) state why it would be desirable, in the interests of achieving a satisfactory settlement of the matter at issue, for the Appellate Body to grant the applicant leave to file a written brief, 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; and (g) contain a statement disclosing whether the applicant has any relationship 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.

The Appellate Body declared that it would render a decision whether to grant or deny such leave and that the grant of leave to file a brief would not imply that the Appellate Body will address, in its Report, the legal arguments made in such a brief. The written brief filed by an applicant granted leave to file was to be (a) in no case be longer than 20

89 Romano, supra note 26
90 Romano, supra note 26
91 Decision of the Appellate Body Concerning Amicus Briefs, Statement by Uruguay at the General Council, WTO Doc. WT/GC/38
93 Article 16(1)
typed pages, including any appendices; and (b) set out a precise statement, strictly limited to legal arguments, supporting the applicant's legal position on the issues of law or legal interpretations in the Panel Report with respect to which the applicant has been granted leave to file a written brief. Finally, the Appellate Body specify in its Communication that the parties to the dispute would be given a full and adequate opportunity to respond to written briefs filed with the Appellate Body by an applicant granted leave under this procedure.

Eventually, the Appellate Body decided in both cases to reject the request to submit amicus briefs on the basis that they failed to comply sufficiently with the requirements of the Additional Procedures. Nevertheless, the Appellate Body has now strongly affirmed the authority of WTO Panels and Appellate Bodies to accept amicus curiae submissions from the general public. In Banana III, the panel also permitted third parties to observe the entire proceedings and to make oral submissions during the second hearing.94 The State-to-State nature of the WTO dispute settlement system and the hybrid nature of WTO panels, borrowing features of both arbitral tribunal and international courts, raise the question of the value of the solutions in the Shrimp, Asbestos and Carbon Steel cases to investment arbitration. However, even if the WTO Dispute Resolution mechanism is intergovernmental in nature, private interests are often at stake, as it is the case in ICSID procedures.95

2.3. The NAFTA experience

NAFTA certainly has more common characteristics with the ICSID that the WTO has. It also offers to investor the possibility to arbitrate their dispute with the host State under certain arbitration rules such as the UNICITRAL Arbitration Rules and the ICSID Additional Facility Rules. The claims brought by the investor are based on provision of a public international law treaty, as it is the case in the ICSID context.

2.3.1. A turning point in investment arbitration: claims against the United States and Canada

For the United States, NAFTA began to create problems when Canadian investors started to bring claims for failure to grant “fair and equitable treatment” and for de facto expropriation.96 Americans and Canadians began to understand the host State perspective and praise for arbitration’s neutrality began to have competition in the form of complaints about infringement of national sovereignty and democracy.97

2.3.2. Methanex: a founding case

Methanex, a Canadian producer of methanol, introduced a claim against the United States on the basis that a Californian regulation on the removal of a methanol product from gasoline, although it was not discriminatory on its face, had discriminatory effects on its activities. The company claimed that the regulation constituted a creeping expropriation and that the United States violates Section 1105 of the NAFTA Treaty on fair and equitable treatment.

95 Stern, supra note 8
96 Park, supra note 76
97 Alvarez and Park, supra note 42
In the course of the procedure, the Tribunal received request from environmental organizations, which wanted a standing in the procedure. The tribunal received arguments and counter arguments on the opportunity to accept *amicus* briefs in the procedure. The parties agreed that all documents relating to the arbitration should be made available. Eventually, in a landmark interim award, the tribunal decided that nothing in the UNCITRAL rules or in the NAFTA Chapter 11 prohibited the tribunal to accept *amicus*. The tribunal concluded that article 15(1) of the UNCITRAL rules, which provides that “the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case”, was flexible enough to confer it discretion to accept or reject *amicus* briefs. The tribunal recognized that it does not have the authority to add a third party to the arbitration but held that receiving submissions was not equivalent to adding parties. The tribunal argued that the NAFTA arbitral procedures would benefit from more transparency and on the contrary that opacity would harm the institution. The tribunal referred to the practice of other international tribunals, such as the WTO and the Iran-US Claim Tribunal. The tribunal subjected the admission of *amicus* briefs to several conditions, such as the public interest of arbitration. The tribunal rejected Mexico’s argument that the concept of third party participation did not exist under its internal law.

The tribunal stated that it did not have the authority to permit access to the hearings or written pleadings without the consent of the parties to the arbitration. It also noted that if it were to accept *amicus* submissions, it would only do so on the condition that they were deemed necessary for the tribunal to make a better decision and would not otherwise violate the rules of the NAFTA or the equality of the parties to the arbitration. Accordingly, like the practice that has been developed within the WTO context, while arbitrators have asserted the power to accept *amicus* submissions, they have reserved using that right to the very limited circumstances in which they determine that *amicus* submissions would be appropriate and helpful to them in completing their task. Finally, the arbitrators decide that the parties did not have the right to attend hearing and intervene orally because of the requirement of article 25(4) of the UNCITRAL Rules to hold the hearing *in camera*. In *Methanex*, the intervention of environmental organizations was therefore recognized relevant under certain circumstances.

### 2.3.3. The UPS Case

The concept of admission of *amicus* briefs was extended to labor organizations in the UPS case. In January 2000, United Parcel Service of America ("UPS") filed a Notice of Intent with the Government of Canada under the NAFTA. UPS claimed that the Canadian government was breaching its national treatment obligation under the NAFTA Treaty and that Canada has failed to provide UPS with international law standards of treatment such as fairness and freedom from arbitrary and discriminatory conduct. It was argued that Canada did not grant to UPS the advantages it was granting to Canada Post.

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Notes on the Interpretation of certain provisions of Chapter II  

In order to clarify the power of arbitral tribunals to accept *amicus* briefs and to avoid inconsistency in their solutions, the three NAFTA parties released “Notes on the interpretation of certain provisions of Chapter II”. This statement affirms the authority of tribunals created pursuant to Chapter 11 of NAFTA to accept written submissions by non-parties and recommends certain procedures. For example, it is provided that the non-party should be a person of a NAFTA State or have a significant presence in a NAFTA State. Some observers estimated that the Notes on Interpretation constituted a modification of the original NAFTA Treaty and that they should therefore require approval in accordance with the applicable legal procedures of each party. The United States thereafter started to introduce similar provisions in their BITs. Hence, the BIT with Chile provides that a non-disputing party can make submissions regarding its interpretation of Chapter 10 of the Free Trade Agreement, both written and oral, during the course of an arbitration proceeding. Moreover, the tribunals in Chapter 10 arbitrations may accept and consider *amicus curiae* submissions from a person or entity that is not the disputing party.

3. The ICSID context: how to apply the WTO and NAFTA experiences in the ICSID context

3.1. The Discussion Paper of the ICSID Secretariat

The ICSID’s Secretariat released in October 2004 a Discussion Paper aimed at opening a debate on the possible improvement to the ICSID procedures. The purpose of the discussion paper was, among other things, to address the criticisms on the opacity of ICSID’s procedures. The Secretariat proposed different solutions to overcome the problem, such as opening the hearings to the public and ensure the prompt publication of awards. One of the propositions consists in giving an explicit power to arbitral tribunals constituted under the ICSID Arbitration Rules to admit *amicus curiae* briefs. The proposition is formulated as follow:

“There may well be cases where the process could be strengthened by submissions of third parties, not only civil society organizations but also for instance business groups or, in investment treaty arbitration, the other state party to the treaty concerned. It might therefore be useful to make clear that tribunals have the authority to accept and consider submissions by third parties. This could be done by amendment of ICSID Rule 34 and

100 NAFTA Free Trade Commission, July 31, 2001, printed in 13 World Trade & Arbitration Materials 139
102 Park, supra note 76
106 Rule 34: Evidence: General Principles

(1) The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.
(2) The Tribunal may, if it deems it necessary at any stage of the proceeding:
(a) call upon the parties to produce documents, witnesses and experts; and
(b) visit any place connected with the dispute or conduct inquiries there.
Article 41 of the Additional Facility Arbitration Rules, regarding evidence. The amendment could set out conditions for the submissions - for example, as to financial and other disclosures by aspiring friends of the court - or more flexibly leave such conditions for the determination by the tribunals in each case.

One of the questions arising out of this Discussion Paper was the power of the ICSID’s Secretariat to make such proposition. Indeed, Article II of the Washington Convention confers on the Secretariat the power to be the legal representative of the Organization. It also provides that the Secretariat shall be responsible for its administration, including the appointment of staff and shall perform the function of registrar and have the power to authenticate arbitral awards rendered pursuant to this Convention, and to certify copies thereof. It does not seem that this article is giving the Secretariat the power to submit amendment propositions to ICISD Contracting States. Indeed, The ICSID Convention apparently allocates the power to initiate proposals that amend the provisions of the Convention to Contracting States alone. Article 65 provides for a procedure to amend the Convention under which any Contracting State may propose amendment of the Convention. There is no mention of the role of the Secretariat in this regard. This initiative of the Secretariat does not find any precedent in other international organizations either. However, it is certainly a good thing that ICSID Secretariat has submitted the question to the Contracting States rather than to wait for a tribunal to decide this important issue on its own initiative. Indeed, in the past, arbitral tribunals have unilaterally admitted submissions by third parties, contributing to marginalize the consent of the parties in investment arbitration proceedings.

It was argued that ICSID Arbitration Rules give as much or more discretion to an arbitral panel constituted under it than to arbitral tribunal constituted under the UNICITRAL Model Law and that, as a consequence, the arbitral tribunal constituted under the ICSID rules should have the power to accept third parties briefs. Indeed, Rules 19 of the ICSID Arbitration Rules only provides that the tribunals shall make orders for the conduct of the proceedings. Nevertheless, the admissibility of amicus briefs is more a political than a procedural issue. Therefore, the power to accept amicus submissions should be conferred on tribunals by the ICSID parties themselves and tribunals should not consider that the admission of third parties briefs fall in the ambit of their procedural powers.

(3) The parties shall cooperate with the Tribunal in the production of the evidence and in the other measures provided for in paragraph (2). The Tribunal shall take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure.

(4) Expenses incurred in producing evidence and in taking other measures in accordance with paragraph (2) shall be deemed to constitute part of the expenses incurred by the parties within the meaning of Article 61(2) of the Convention.

107 Article 41: Evidence: General Principles
(1) The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.
(2) The Tribunal may, if it deems it necessary at any stage of the proceeding, call upon the parties to produce documents, witnesses and experts.
109 Thomas Walde and Mark Kantor, Do Proposals to Open ICSID Harm Developing Countries Interests? OGEIMID email list, March 10, 2005
109 South Center Analytical Note, supra note 16
110 Stern, supra note 6, at p. 339
111 Gross, supra note 95, at p. 5
113 Maximo Romero Jimenez, Considerations on NAFTA Chapter 11, 2 CHI. J. INT’L L. 243 (March Session 2001). However, some tribunal have decided that the admission of third parties submission constituted a procedural issue, see for example Hot Roll Lead case, Methanex
114 Josh Robins, False friends: Amicus Curiae and Procedural Discretion in WTO Appeals under the Hot-Rolled Lead / Asbestos doctrine, 44 HARV. INT’L L.J. 317
Some rules, while procedural in form, are so substantive that they must be explicitly authorized by the members of the organization.\textsuperscript{115} For instance, it was said, in the framework of the WTO, that the working procedures were intended to be merely procedural rules and were not intended to affect substantive rights. Moreover, the debate on the proposal will certainly preclude the situation which is now prevailing at the Appellate Body level of the WTO where NGOs have more right than the Members States.

Another question raise by the Discussion Paper is the power conferred on ICISD Contracting States to intervene in a dispute in which they are not party. The Discussion Paper explicitly refers to the other State party to the treaty concerned in investment treaty arbitration. However, this proposition does not open the possibility for other Contracting States to submit their observation on the application of the ICISD Convention or Arbitration Rules in cases in which they are not party. Therefore, it seems that the Discussion Paper confer more right to intervention in proceedings to non-State actors than to Contracting States, what is highly critical.

It thus appear that The ICSID system would be better served by a negotiated solution among Contracting States to this problem of access and institutional discretion, rather than by a judicially created right to third party to access.\textsuperscript{116} As a consequence, it would be appropriate to institutionalize the rules for admission of third party public interest groups, either as participants or observers.\textsuperscript{117} The participation of NGOs may affect the political interest of the State to create a predictable dispute resolution system in order to attract Foreign Direct Investment. In this context, the respective interests of NGOs and the host government may prove difficult to balance.\textsuperscript{118}

The question presented here is whether there are lessons of general utility to be learned from NAFTA's and WTO experience.\textsuperscript{119} It may be argued that, because NAFTA disputes often raise important policy considerations and because this concern also arises in arbitrations stemming from BITs\textsuperscript{120}, the rules of the developed in NAFTA cases should be applicable to ICSID cases. The characteristics and success of arbitration relate to specific geopolitical conjecture\textsuperscript{121}, and that is why the solutions prevailing in the WTO and the NAFTA context may not be adapted to the ICSID System. Historically, the business disputes were settled according to two sets of rules: the jurisdictional rules of states and those of the business world.\textsuperscript{122} However, investment disputes required a forum which may accommodate the needs of both sovereign state and private investor. The purpose of the creation of the ICSID Convention was to propose such a forum. As we have seen, the public interest was not given any place in the proceedings at that time and that is why a rule authorizing tribunal to receive \textit{amicus} briefs should be welcomed.

\textsuperscript{116} Robins, supra note 116, at p. 6
\textsuperscript{117} Blackaby, supra note 35
\textsuperscript{118} Rosendhal, supra note 37
\textsuperscript{119} Wallace, supra note 31
\textsuperscript{120} Charles Brower II, \textit{NAFTA=\textasciitilde s Investment Chapter: Dynamic Labatory, Failed Experiences and Lessons for the FTAA}, \textit{97 AM, SOC=\textasciitilde Y INTL L. PROC.} 251 (April 05, 2003)
\textsuperscript{121} Dezalay, Garth, \textit{supra} note 67, at p. 319
\textsuperscript{122} Dezalay, Garth, \textit{supra} note 67, at p. 321
3.2. The Multilateral Nature of ICSID

The ICSID almost has a universal membership and gather sovereign countries which culture and experience are very different. Moreover, the protection of foreign investment has long been an issue of controversy between the countries of the North and South. ICISD is therefore a field of confrontation of different legal culture and the place of amicus briefs is not obvious in this system.

3.2.1. Civil law v. common law approach

The amicus third-party intervention is not a civil law tradition - and that is most developing countries - but rather a in the main US legal phenomenon. In civil-law countries there is no well-established practice of allowing third parties without a legal interest in the merits of the dispute to intervene or participate in a proceeding, though some civil law countries, like France, have developed similar institutions in their case-law. The concept of intervention of non-parties is thus not totally unknown in civil law systems (for instance, The Avocat General can be considered as a form of institutionalized friend of the court). Nonetheless, most civil law countries do not have a practice of allowing the submission of amicus curiae briefs.

This fact was emphasized in the Submission of Mexico to the arbitral tribunal in the Methanex case. In its submission, Mexico stressed the fact that while the power of courts to receive amicus curiae briefs is well recognized in Canada and the United States, it is not recognized in Mexico. The Mexican government therefore concluded that it was concerned by the fact that concepts and procedures which are alien to its tradition and which were no agree by the NAFTA parties may be imported into NAFTA dispute settlement proceedings. However, the tribunal left the question unanswered in its interim award.

The tensions between civil and common law tradition is even more perceptible in the ICSID framework, given that most of the Contracting States are of civil law tradition and do not have concept such as amicus curiae in their domestic legal system.

3.2.2. The Americanization of the international litigation

As two commentators pointed out, “the U.S. legal practice has emerged increasingly as the lingua franca of international commerce.”

One may say that the introduction of amicus curiae in investment arbitration would participate in the Americanization of international litigation.

The international legal order is construed largely from the competition among national approach.

123 154 States are signatories of the Convention, the list of these States is available at http://www.worldbank.org/icsid/constate/c-states-en.htm
125 Thomas Walde, OGERIM email list, March 10, 2005
126 Romano, supra note 26
128. Romano., supra note 26
129 Dezalay Garth, supra note 67, p. 313
130 Bourdieu, supra note 67
Therefore, it is not surprising that the United States, which have a long tradition of using *amicus curiae* briefs in domestic procedures, are the principal supporter of their introduction in the international order. This process of unification of the law at the international level can take two forms: the consensual way, which is apparently the one the ICSID Secretariat wish to follow, and the conflictual way, which may result of the unilateral actions of arbitral tribunals.

3.2.3. Democratic Countries v. Non-democratic Countries Need for Transparency

Transparency encourages good governance and democratically-elected governments are accountable to their electorate and should come under scrutiny in the political process if they are engaged in conduct contrary to their international obligations. Third world countries have never been eager to make investment arbitration public. Democratic countries and accountable governments felt a greater need for more transparency in investment arbitration.

For developing countries, opening the doors of arbitral tribunals to civil society would be tantamount to letting in a wide number of environmental and human rights NGOs, all based in the North. Each has its own agenda, which, despite claims to the contrary, rarely reflects the interests of developing countries and has human and financial resources in many cases far superior to those that any given developing country could field in litigation. Like in the WTO context, many developing countries fear a flood of advocacy from well-funded NGOs and multinational corporations. On the other side, developing countries may have little experience in arbitration; in this case, the support of *amicus* may be useful.

3.2.4. The Role of Arbitral Tribunals in Investment Disputes

Most commentators suggest that the role of an arbitrator is private and contractual: the arbitrator is charged with the mission of resolving a particular dispute between specific parties. Therefore, “it is not for the arbitral tribunal to question the motives or judgments of the parties, but to assess their rights and obligations in light of their legally significant acts or omissions. That is all, that is enough.” Therefore, arbitrators cannot usurp the role of government officials or business leaders. The arbitral tribunals have no political authority and no right to presume to impose their personal view of what might be an appropriate negotiated solution. The fact that arbitrators often cannot give legal significance to public interest is therefore more a consequence of their limited mandate, i.e. an abstentionist behavior, rather than an interventionist behavior. It is said that arbitrators are not guardians of the public interest and should simply resolve the dispute *inter partes* without looking at the wider political and economic impact of the issues in debate. Such an approach may be appropriate in a private dispute but show its shortcomings in investment arbitration. Experienced commercial arbitrators generally see their mandate as giving effect to the parties shared *ex ante* expectations, finding the facts, and applying the law in the most dispassionate and correct

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131 Blackaby, *supra* note 35

132 South Center Analytical Note, *supra* note 16, at p. 12

133 Uruguay Statement, *supra* note 15; Negotiations on the Dispute Settlement Understandings: Proposals on DSU by Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe, WTO Doc. TN/DS/W/18 (Oct. 7, 2002); India’s Questions to the European Communities and its Member States on their Proposal Relating to Improvements in the DSU, WTO Doc. TN/DS/W/5 (May 7, 2002)


135 Blackaby, *supra* note 35
fashion possible. Consequently, arbitrators do not normally see themselves as guardians of the public interest.\textsuperscript{136} Moreover, one of the advantages of arbitration is that an arbitrator may see things less passionately than a host State judge.\textsuperscript{137} It is however noteworthy that, despite warnings about an anticipated pro-investor slant in NAFTA tribunals, the NAFTA parties are not without their success.\textsuperscript{138} Some commentators argued that government’s counsels represent a multitude of clients’ interests.\textsuperscript{139} However individual entitlement would be best realized if direct private party access to dispute resolution complements but does not exclude the traditional form of citizens representation by the government.\textsuperscript{140} 

\textit{Amicus curiae} may be considered as lobbyist. “\textit{It can be argued that Appellate Body members, like U.S. domestic judges, may regard the lobbying done through amicus submission with skepticism.}\textsuperscript{141} The risk is that the admission of \textit{amicus} briefs may passionate the debate and exacerbate the dispute. ‘\textit{The dispute settlement process is depoliticized and subjected to objective legal criteria.}\textsuperscript{142} Although the arbitrators cannot substitute their judgment to the policy of State and must resolve legal conflicts, there is probably still a place for their sense of equity and the possibility to apply the legal rules in taking into account the specific context of a dispute.

3.2.5. The Role of Counsels in Investment Arbitration Involving Third Parties

The admission of \textit{amicus} briefs will require adaptation on the part of counsels. The counsels, especially the ones from civil law jurisdictions, will have to learn how to use the \textit{amicus curiae} device to support their case, for example by encouraging the intervention or even formation of client sympathetic \textit{amicus}, deploying public relation specialists. Another possibility is for counsels to divide arguments between main counsel and NGOs, which can bring up arguments which would be seen as improper for the counsel. Finally, counsels may use third parties for the collection of evidence. Therefore, there are tactical challenges of how to deal with the opposing party \textit{amici}\textsuperscript{143}

3.3. Tensions Created by the Admission of \textit{Amicus Curiae}

So far, arbitral tribunals have unilaterally accepted the submissions of \textit{amicus} briefs. However, the potential impact of this admission is unclear.\textsuperscript{144} The admission of \textit{amicus} briefs may well enter in conflict with fundamental characteristics of arbitration, such as efficiency of the arbitral proceedings, the equality of the parties and confidentiality.

\begin{itemize}
\item \textsuperscript{136} Alvarez and Park, \textit{supra} note 42, p. 14
\item \textsuperscript{137} Alvarez and Park, \textit{supra} note 42, p. 14
\item \textsuperscript{138} Brower, \textit{supra} note 124
\item \textsuperscript{139} MacKenzie, \textit{supra} note 74
\item \textsuperscript{140} Evans, \textit{supra} note 14
\item \textsuperscript{141} Ala-I Padideh, \textit{Essay, Judicial Lobbying at the WTO: The Debate over the Use of Amicus Curiae Briefs and the LLS Experience, 24 FORDHAM INT’L LJ.} 62, 71-72 (2000)
\item \textsuperscript{142} \textit{CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY}, Cambridge University Press, July 2001, p. 398
\item \textsuperscript{143} Thomas Walde, \textit{Litigation Strategy and Tactics in Investment Arbitration with Third Parties, E-mail on the OGEMID list, March 8, 2005
\item \textsuperscript{144} Stern, \textit{supra} note 8}
\end{itemize}
3.3.1. Transparency v. Efficiency

Some fear that allowing amicus participation may overwhelmed the role or resources of the litigating parties, or distort the process due to overwhelming (but one-sided) third party submissions. Other fear that the admission of amicus briefs will broaden the scope of the dispute. The prerequisite for the intervention of organizations as non-parties in ICSID arbitration resides in the possibility for these organizations to have access to the documents relating to a specific case, such as the request for arbitration, the claim and counterclaim. Indeed, the disclosure of documents drives the demand for active participation. However, the access to information and the opening of the hearing, if it does constitutes a prerequisite to the intervention of non-parties, remain passive. Moreover, so far, public hearings have not been very successful, gathering only a handful of public. The decision to televised the hearings in a different room seems to constitute a good solution, which allow non-parties to witness the procedure without disrupting it. Indeed, it is important that the process is not re-politicized or turned into a media circus subj ecting the tribunal to public pressure.

The Supreme Court of the United States, which has a long experience in dealing with amicus curiae briefs, makes it clear in its Rules that the admission of briefs may constitute an important burden on the Court: “An amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An amicus curiae brief that does not serve this purpose burdens the Court, and its filing is not favored.” The number of amicus briefs presented to the Supreme Court has nevertheless substantially increased in recent years and they are now filed in most of the cases argued before the Supreme Court. There are now only a few cases in which amicus curiae briefs are not submitted.

The admission of amicus curiae briefs also creates procedural complications. For example, in Asbestos, the Tribunal has to set up rules for the submissions, to lay down guidelines as to which organizations may submit briefs and the time limit to respond to them. It is indeed paramount that the party whose position is adversely affected by the amicus briefs may be given a short but reasonable period of time to present its observation on the briefs.

Finally, the admission of amicus briefs could deprive the parties of the leverage necessary to reach a negotiated solution and preclude any possibility of settlement. On the other side, the fact that the procedure would be publicized may bring the host state to the negotiating table in order to avoid publicity.

3.3.2. Transparency v. Equality of the Parties

Amicus curiae are the friends of the court but are not always the friends of the parties. Amicus curiae are not independent opinions. The amicus curiae are not expert either because they are not independent and impartial. Therefore, the right for a tribunal to seek information is not the same as the right to accept information. It is understood that most of the time amicus briefs will support the host

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145 Comment IISD, supra note 16
146 Blackaby, supra note 35
148 Stern, Shapiro, Geller, supra note 89, at p. 665
149 Robins, supra note 116
150 Jimenez, supra note 115
151 Robins, supra note 116
The acceptance of *amicus curiae* could then be unfair to the investor, which would have to spend time and money and legal resources in order to respond to such additional arguments. Moreover, the *amicus* may develop arguments that may embarrass the “supported party”. The defense of developing countries during arbitral proceedings may also affect the promotion of investment. Finally, undermining developing country governance quality by reducing the power and impact of international disciplines (such as investment treaties) will ultimately reduce investment in countries that need it, or in other words: “Undermining investment treaty disciplines is poverty mongering - a message that does not fit easily with the Northern-civil society broad criticism of global institutions and their instruments.”

3.3.3. Transparency v. Confidentiality

Confidentiality has traditionally been of the essence of arbitration mechanisms. Although confidentiality has been recognized as one of the main advantages of arbitration for long, its scope is today subject to debates. Some commentators have opined that “… a general duty of confidentiality cannot be said to exist *de lege lata* in international arbitration. At best, it is a duty *in statu nascendi*. Most national jurisdiction has not addressed the issue, and those that have seemed to produce more questions than answers.” Other says that “What is evident today is that, with respect to confidentiality in international arbitrations, nothing should be taken for granted.” Moreover, there is no firm agreement in the international community on the proper categorization of confidentiality as procedural or substantive, i.e. under the power of the arbitral tribunal or of the parties. In their second submissions in Methanex, the United States argued that “whether or not the arbitration is deemed confidential is irrelevant to the issue of participation of amici…” The intervention of governments in investment arbitration creates a special situation in which there should be limits to the confidentiality. A public actor by definition “concerns the people” and it may be a duty to publicly disclose information about its activities.

3.3.3.1. The Esso case precedent

In the *Esso* case, the energy authorities of the State of Victoria (Australia) introduced a claim against Esso over price increases. The Minister applied to the court for declaration that the public authorities were not barred from disclosing to third parties information revealed by Esso in the

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153 Jimenez, supra note 115
154 South Center Analytical Note, supra note 16
155 Thomas Walde OGEMID, South Center Analytical Note, supra note 16
156 Francisco Orrego Vicuna, Dispute Resolution Mechanisms in the International Arena: The Roles of Arbitration and Mediation, 57 JUL DISP. RESOL. J. 64; Patricia Isela Hansen, Judicialization and Globalization in the NAFTA, 38 TEX., INT’L REV. 489
159 Monique Pongracic-Speier, *Confidentiality and the Public Interest Exception: Considerations for Mixed International Arbitration*, THE JOURNAL OF WORLD INVESTMENT, Vol. 3, April 2002, Number 2
160 Pongracic-Speier, supra note 166
161 Esso Australia Ltd. Et al. v. the Honorable Sidney James Plowman et al. (1995), 128 A.L.R. 391 (HC)
arbitral proceedings. The Court was requested to ask itself: “Why should the consumers and the public [...] be denied knowledge of what happens in these arbitrations, the outcome of which will affect, in all probability, the prices chargeable to consumers by the public utilities?”

The High Court denied that there exists an implied duty of confidentiality in commercial arbitration in Australia and found that, if such duty of confidentiality should exist, it would be subject to a public interest exception. The Court argued that, if the parties wanted to keep the information used in the proceedings confidential, they would have introduced a provision to that effect in the arbitration agreement and that such a provision would have bind both the parties and the arbitrator. The essence of the case resides in the public exception to confidentiality found by the Court. The Court stated that: “There may be circumstances in which third parties and the public have a legitimate interest in knowing what has transpired in the arbitration...this would give rise to a ‘public interest’ exception [to confidentiality].”

According to the opinion of the Court, the standard to be used to decide whether or not the public interest is affected by the arbitration is that of “governmental information”. The Court stated that “governmental information” should be available to the public as a matter of principle unless one of the parties to the arbitration can prove that the public interest lies in the non-disclosure. However, one of the justices, in a concurring opinion, added that public interest should be “more than mere curiosity.”

3.3.3.2. The Situation Prevailing under NAFTA and ICSID

It appears that in NAFTA arbitrations involving the ICSID Additional Facility Rules, either the parties have consented to disclosure of documents or the tribunals have ordered such disclosure. The rules on confidentiality in the Additional Facility Rules are less restrictive than arbitration in the UNICITRAL rules. The first NAFTA Chapter 11 tribunal to consider the issue of confidentiality was in Metalcad v. United Mexican States. The Mexican government sought a declaratory judgment from the tribunal that the proceedings were confidential. The tribunal held that NAFTA, ICSID Additional Facility Rules and the UNICITRAL Arbitration Rules contain no express restriction on the freedom of the disputing parties to make publicly available information concerning the arbitration. The issue of confidentiality was later addressed in the Loewen case and in the Methanex case, the tribunals decided that the parties are permitted to release their own written arguments at their discretion.

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162 The Esso case, supra at section 22
163 The Esso case, supra at section 41
165 Supra note 12, quoting NAFTA art. 1120 (under NAFTA Article 1120, the investor makes the choice of arbitral rules under which the arbitration will proceed.)
167 Fulvio Fracassi, Confidentiality and NAFTA Chapter 11 Arbitrations, 2 CHI. INT'L L. 213 (2001)
Loewen\textsuperscript{169}, the non-parties organizations requested access to the documents pertaining to the arbitration on the basis of the Freedom of Information Act under which the United States is bound to comply with requests properly submitted by the public for the disclosure of certain documents submitted during the course of the arbitration, unless these documents fall within statutory exemptions.\textsuperscript{170} The tribunal decided that in the case of an arbitration under the NAFTA where a government is a party and where this government is bound by national legislation to make certain information public, it should not be supposed that, in the absence of express provision, the Convention or the Rules impose a general duty on the parties to preclude a government from discussing the case publicly, thereby depriving the public of the knowledge and information concerning public affairs.\textsuperscript{171} The tribunals in Loewen and Methanex appears to have gone so far as to agree on the release of all written submissions and even the minutes of the hearings, upon completion of the their arbitration.

Under Article 44(2) of the ICSID Additional Facility Rules, the minutes of the hearings are to remain confidential unless the parties to the arbitration agree otherwise. The official comments to the original version of the ICSID Rules also provides that the parties are not prohibited from publishing their pleadings but that “they may, however, come to an understanding to refrain to do so, particularly if they feel that the publication may exacerbate the dispute.”\textsuperscript{172} The application by non-parties for standing to participate in NAFTA arbitration brought the issue of confidentiality into a different focus. The limitation on the confidentiality is still based on the consent and agreement of the parties. There is therefore an inconsistency between the admission of amicus curiae and privacy and confidentiality, which have been axiomatic characteristics of arbitration.\textsuperscript{173}

4. How to Set up Workable Criteria and Procedure for the Admission of Amicus Curiae: The Need for an Efficient Screening

The arbitrators in the Methanex case decided that their tribunal had the power to accept submissions from amicus curiae as a matter of jurisdiction in an arbitration governed by the UNCITRAL Rules but, considering the matter to be premature, declined to articulate detailed criteria on the admission of non-parties briefs.\textsuperscript{174} Therefore, there are as yet no clear rules with respect to this delicate question.

The rules used in domestic legal system or developed by other international tribunals may constitute guidelines for what could be the rules at the ICISD. The NAFTA Statement on Amicus Briefs\textsuperscript{175}, which is replicated in its essence in the subsequent U.S. Free Trade Agreements with Singapore, Chile, Morocco and now CAFTA\textsuperscript{176}, also offers useful guidelines with regard to the amicus submissions. It is

\textsuperscript{169} In the Loewen Case, the tribunal was chaired by Lord Mason, who was also the chief justice in the Esso case discussed above, in which it was decided that there was a public interest exception to confidentiality.

\textsuperscript{170} Eloise Obadia, Investment Treaties and Arbitration: Current and Emerging Issues, ICSID NEWS, Vol. 18, No. 2

\textsuperscript{171} Loewen, supra note 175, at para. 8

\textsuperscript{172} Fracassi, supra note 174, referring to ICISD Regulations and Rules 30 (ICISD 1975). The annotations were prepared by the ICISD Secretariat but do not constitute part of the Rules and have no legal force.

\textsuperscript{173} Bellhouse and Lavers, supra note 18

\textsuperscript{174} Blackaby, supra note 35

\textsuperscript{175} Anonymous, NAFTA Commission Statement on Amicus Curiae Participation in Arbitrations, Am. J. INT'L L. 841, October 2004

\textsuperscript{176} Mann H., Cosebey A., Peterson L., von Moltke K., Comments on ICSID Discussion Paper, “Possible Improvements of the Framework for ICSID Arbitration, International Investment and Sustainable Development, December 2004,
suggested that arbitral tribunals should weight both substantive criteria relating to the character of the amici, the nature of the submission and the characteristics of the case as well as procedural criteria relating for example to issues such as timing and format to determine whether, and if so, how to use amicus briefs. Such guidance and safeguards are necessary to ensure predictability and due process in arbitration under the ICSID Arbitration Rules.

4.1. Criteria for the Selection of Third Parties

One of the sensible issues relating to the intervention of third parties in arbitration is the selection of these parties. The risk is that the tribunal would be overwhelmed by submissions of third parties, all pretending to have an interest in the dispute. There is therefore a need for rules to ensure that only those organizations that have adequate professional standing and reliability be allowed to participate.

4.1.1. The Determination of the Public Interest

The public interest is used as a mean to justify and legitimate the petitions of NGOs before ICISD tribunals. The problem is that “the public interest will often appear as an empty vessel.” It will therefore be for tribunals to decide when the public interest may be affected by an arbitration procedure under the ICSID Rules and which organizations shall be entitled to represent the public interests. Most of the time, tribunals have retain a large discretion with regard to the selection of the organizations which may present observations before them and to the weight to be prescribed to the amicus submissions. For example, in the English courts, the presentation of amicus curiae has been the practice, rather than a vested right, whereby arguments on point of law, or information, can be presented before the tribunal, with its permission or often by its active invitation. This has enabled the representation of the parties potentially affected by the litigation or its outcome while not involved in any dispute at all. However, it has allowed the public interest to be argued in comparatively rare situations.

The International Institute for the Unification of Private Law (UNIDROIT) recently published Draft Unidroit Principles of Transnational Civil Procedures. Its their comments to Principle 13, the drafters recognized that amicus curiae brief is a useful mean by which a non-party may supply the court with information and legal analysis that may be helpful to achieve a just and informed disposition of a case. Such a brief might be from a disinterested source or a partisan one. Written submissions may be supported by oral presentations at the discretion of the court. Under Principle 13, written submissions may be received from third persons if they concern either important legal

178 Marceau & Stilwell, supra note 184
179 Vicuna, supra note 163
181 Feintuck, supra note 187
182 Bellhouse and Lavers, supra note 18
issues in the proceeding or matters of background information. These submissions may be submitted whenever appropriate with the consent of the court and upon consultation with the parties. The court may invite such a submission. The parties should have the opportunity to submit written comments addressed to the matters contained in such a submission before it is considered by the court. It appears that the drafters of the Draft Principles wanted to limit the intervention of third parties to cases in which their participation is material to the outcome of the case. Such assistance could for instance consist of access to important factual information. However, the drafters decided that any person may be allowed to file such a brief, notwithstanding a lack of legal interest sufficient for intervention. It is in the court discretion whether such a brief may be taken into account. A court has authority to refuse an amicus curiae brief when such a brief would not be of material assistance in determining the dispute.

The criterion of material assistance appears to be appropriate and is high enough to avoid frivolous interventions. The rules should differentiate between the associations merely interested and the ones effectively affected. As a consequence, each petitioner should have a direct interest in the subject matter of the claim. Moreover, the petitioner should have the burden to prove that the resulting the award could potentially adversely affect its interest. Lastly, the organization should show that it is uniquely qualified to present observation.\textsuperscript{184} The effect of the award on the intervening party should be direct rather than indirect or remote.

The Statute of the European Court of Justice provides that third parties may intervene in a case if they show a direct, specific and economic interest.\textsuperscript{185} The Court specified that a mere moral interest in the proceeding is not sufficient to permit intervention.\textsuperscript{186} This rule should also been found in the ICISD Arbitration Rules in order to avoid mere moral observation. For example, in Aguas del Tunari, one of the petitioner, Friends of the Earth Netherlands, argued that an award in favor of the investor “would undermine the organization work”, i.e. to support sustainable development and to prevent the use of Dutch corporate structure in ways that are unsustainable.\textsuperscript{187} This should not constitute a relevant interest for the purpose of submitting amicus curiae because it is remote.

Examples of direct interests are monetary or pecuniary interests, i.e. who will pay an adverse award. Nevertheless, the fact that the state would have to pay an award directly but that this may affect the tax payers of this country should not be sufficient to claim an interest, whatever the size of the economy or the claim (which is not direct in this case and which constitute the price to offer a secure a safe legal environment to foreign investors). The fact that the award “is likely to carry persuasive weight with other arbitral tribunals resolving similar claim”\textsuperscript{188} shall not constitute an interest for third parties either.

The third party organization shall also have the burden to prove that the interests of the NGOs are not represented in the arbitration, particularly that the state is not able to present these interests. The tribunals should also make sure that the organizations have no other legal or administrative ways to advance their position. Finally, the application should \textit{set forth facts or questions of law that have not been or reasons for believing that they will not be, presented by the parties and their relevancy to the disposition of...}
The mere fact that the award may affect the right of the host state to implement measures to maintain environmental protection should not be enough in itself. It is suggested that the associations which are recognized as public interest organizations in their own State, for example for tax purpose, shall be presumed to be representative of the public interest. Therefore, there should be a rebuttable presumption that those associations have the right to present application for the submission of amicus briefs if they are directly affected by the case.

In its Comment of the Discussion Paper, the International Institute for Sustainable Development ("IISD") argued that associations tend to act responsibly in the face of a responsible and responsive process, and will seek among themselves agreement in order to avoid undue duplication of submissions. The IISD also argues that the tribunal ultimately controls its procedure and can act as a block against potential distortions to which the process may theoretically lead." The Institute therefore concludes that the rules on the selection of amicus should be left to the responsibility of the NGOs and the control of tribunals. However, the statement by civil society organizations that they will act responsibly does not constitute a sufficient guarantee against duplication of submissions. Therefore, the arbitral tribunal shall be granted the power to order the consolidation of all amicus briefs that have the same purpose.

Another way to avoid submissions of useless or frivolous briefs is to provide that the tribunal may require a statement of interest of the proposed amicus. The same requirement has been adopted by the NAFTA parties in the Notes on the Interpretation of Certain Chapter II Provisions which provides that the non-party should file a written application of no more than five pages.

The Rules of the United States Supreme Court also provides for a two steps procedures. First, the amicus must present a motion of no more than five pages. Under Rule 37 of the United States Supreme Court, the amicus shall ask both parties to give their consent to the filing of the brief. Most attorneys receiving a request will consent to the filing, even in support of the opposing party. On the contrary, in the Iran-US Claims Tribunal, it was decided that the tribunal has the authority to regulate proceedings and that this does not depend on the consent of the parties. The rule requiring the consent of the parties to the submission does not seem to be applicable in the ICSID context because would prohibit the filing of amicus briefs in most of the cases.

The NAFTA Statement provides for a nationality criteria. The non-party should be a person of a NAFTA country or that has a significant presence in a NAFTA state. Such criteria may be useful in the ICSID context in order to avoid submission by third parties which are national of non-Contracting States, i.e. states which are not subject to the same obligation.

In 2001, The English Attorney General (Lord Williams) set up a working group to re-appraise and regularize the amicus curiae function. The Working Group decided that a court might properly seek the assistance of an Advocate to the Court" when there is a danger of an important point of law being decided without the court hearing the relevant argument. The Working Group specified that an Advocate to the court is not appropriate where (i) the court believes that a government department should be

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190 Rule of the Supreme Court of the United States, Rule 37.1 pre-2003 drafting.
191 Comment IISD, supra note 16, at p. 14
194 Dadras Int'l v. Iran, Iran-U.S. Cl. Trib., 1995 Iran Award 567-213, 1995 WL 1132818, Paras. 59-61
represented because its interests are affected, (ii) the Attorney General sees the need to intervene as guardian of the public interest or (iii) a litigant needs pro bono assistance. This double list of cases in which the assistance of amicus should be welcomed and cases in which it should presumably be useless is proper method to select organizations which will effectively assist the tribunal. The list of cases in which the submission should not be welcomed should include cases in which the government state that it will defend the position of the public interest or cases in which the submission of amicus may be redundant with submissions of expert statements. The International Court of Justice adopted a more restricted approach toward the admission of third party submissions. Under Article 50 of its Statute\textsuperscript{196}, the International Court of Justice \textit{Anay, at any time, entrust any individual, body, bureau, commission, or other organizations that it may select, with the task of carrying out an enquiry or giving an expert opinion"}. The Rules of the Court also allow public international organizations to furnish, on their own initiative, information relevant to a case before the Court, by filling a Memorial before the closure of the written proceedings. In this case, The Court shall retain the right to require such information to be supplemented, either orally or in writing, in the form of answers to any questions, which it may see fit to formulate and also to authorize the parties to comment, either orally or in writing, on the information thus furnished. The Rules of the Court restrict the access to the Court to \textit{a public international organizations\textsuperscript{197} defined as a\textit{international organization of States}.}

\textbf{4.1.2. Disclosure requirements}

Caution should be exercised that the mechanism of the amicus curiae submission not interferes with the court=s independence.\textsuperscript{198} Consequently, it is important to establish disclosure requirements in relation to the submission of amicus briefs. Under the NAFTA rules, the third parties shall disclose in their application their links with other entities that have provided financial support and the nature of their interests in the arbitration. In the same vein, the Rules of the United States Supreme Court specified that a brief filed shall indicate whether counsel for a party authored the brief in whole or in part and shall identify every person or entity, other than the amicus curiae, its members, or its counsel, who made a monetary contribution to the preparation or submission of the brief. Under the Rules of the United States Supreme Court, the brief shall also clearly identify the party supported. The Rules do not prohibit consultation or communication between counsel for the supported party and the amicus counsel. In many events, such discussion is appropriate and avoids duplication of arguments.\textsuperscript{199}

This disclosure requirement are an efficient way to ensure that the amicus briefs are not supporting unknown interests and should therefore be part of the ICISD rules on amicus briefs.

\textsuperscript{196} Statute of the International Court of Justice, June 26, 1945, 59 stat. 1055, 33 U.N.T.S 993
\textsuperscript{197} International Court of Justice, Rules of the Court (as amended on Dec. 5, 2000), http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicrulesofcourt_20001205.html, last visited April 25, 2005
\textsuperscript{198} Draft Unidroit Principles, \textit{supra} note 190, Comment to Principle 13
\textsuperscript{199} Stern, Gressman, Shapiro, Geller, \textit{supra} note 89, at p. 667
4.1.3. Practical Matters

The submission of the third parties should be filed simultaneously but separately. It is indeed important to make sure that the time frame for the submission of the brief on the merit does not allow pressure and lobbying by outside parties on the organizations presenting the briefs. If the application to submit a brief is granted, the final submission must be no longer than twenty pages and may discuss only matters within the scope of the dispute. The Tribunal will decide whether to grant the application after having heard the parties.

The application should be granted if:

- The amicus curiae would assist the Tribunal by bringing a perspective, insight that is different from that of the disputing parties;
- The amicus curiae is significantly affected by the dispute;
- There is a public interest in the subject matter of the dispute.

The Rules of the United States Supreme Court also limit the length of the brief to 20 pages, which seems to be an adequate length because it limits the time spent by the tribunal in addressing the arguments of the amici.

The time for filing the brief is also another important practical problem because late submissions may disrupt the procedure. Under the Supreme Court Rules, the brief shall be submitted within the time allowed for filing the brief for the party supported, or if in support of neither party, within the time allowed for filing the petitioners or appellants briefs. This allows the opposing party to have sufficient time to respond to the amicus brief.

4.1.4. The Equality between the Parties

The parties should have the opportunity to submit written comments addressed to the matters in the submission before it is considered by the court. The NAFTA Statement also provides that the tribunal must ensure that the submission does not disrupt the proceedings and that neither party is unduly burdened or unfairly prejudiced by such submission.

Such criteria should also be introduced in the ICISD Arbitration Rules.

4.2. The Scope of the Amicus Curiae

4.2.1. Intervention as third parties / Intervention as amicus curiae

If arbitrators wish to permit intervention by third/non-parties, they could only do so in one of two ways. The arbitrators would either allow an amicus curiae to act as an advocate representing the third party (a role very different from that in the English courts), or they would have actually to admit the petitioner as a party in the arbitration. In Methanex, the tribunal observed that “receipt of written submissions from a third person other than the Disputing Parties is not equivalent to adding that person as a party to the arbitration.” There is indeed an important difference between being an amicus or a third party.

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200 NAFTA Notes on the interpretation of certain Chapter II provisions, supra note 199
201 Rule 37.3(a)
203 Bellhouse an Lavers, supra note 18, Petition to intervene in Aguas de Tunari v. Bolivia, supra note 53
204 Methanex, supra note 42, p. 14
The third party has an active role in the procedure and its arguments shall be answer by the tribunal while the amicus submission is simply an help for the tribunal and the amicus does not present claims or defense of its own. For instance, factual assertions in an amicus brief are not evidence in the case. Amicus curiae does therefore not become a party to the case but is merely an active commentator. If the amicus is to represent an interest rather than to assist the tribunal, objectivity, if not expertise, would be seriously in doubt. A more serious objection to the amicus curiae as representative of third party interests in arbitration is the inconsistency of that concept with consensual, private dispute resolution.

Commentators said that amicus briefs should analyze and balance the arguments of both sides and should be moderate in tone and in general more objective than the usual advocate brief. To say the least, this has not been the case so far in the investment arbitration context.

In Aguas del Tunari, the third parties requested the tribunal to have the permission:

1. To make submissions concerning the procedures by which the arbitration will be conducted
2. To make submission concerning the jurisdiction of the Tribunal and on the arbitraribility of the matters raised
3. To make submission on the merits of one of the party claim
4. To attend hearings
5. To make oral presentation during the hearing
6. To have immediate access to all submission made to the tribunal.
7. Moreover, the NGOs required that the Tribunal to make an on-site visit in order to provide affected communities a direct opportunity to present their concerns to the Tribunal.

The tribunals should be extremely cautious when allowing an organization to be granted standing as third parties because the impact on the procedure is much more important than to grant the organization the right to intervene as amicus. In most of the cases, the intervention of the third party should therefore be limited to submission of amicus briefs.

4.2.2. Legal and/or factual submissions?

Under the NAFTA Statement, amicus can make *submissions only on matters within the scope of the dispute*. Under English law, the contribution of the amicus curiae to the court need not consist solely in arguing point of law. Principle 13 of the Unidroit Principles does not authorize third persons to present written submissions concerning the facts in dispute. It permits only presentation of data, background information, remarks, legal analysis, and other considerations that may be useful for a fair and just decision of the case.

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205 Bellhouse and Lavers, *supra* note 18
206 Bellhouse an Lavers, *supra* note 18; Petition to intervene in *Aguas de Tunari v. Bolivia*, *supra* note 53
207 *Supra* note 11, at p. 18
208 NAFTA Notes on Certain Chapter II Provisions, *supra* note 199
209 *Supra* note 2, quoting Sherdley v. Sherdley, 1986 STC 266
In the United States, the amicus is not entitled to present new questions to the Court.\footnote{United Parcel Service v. Mitchell, 451 U.S. 56, 60 n. 2 (1981)} Therefore, it seems that the submission of amicus should be limited to point of law within the scope of the dispute and to background factual information when the non-party has unique access to them or expertise in the area.

4.2.3. Written and/or oral submissions?

The Rules of the Supreme Court of the United States provides that the amici are permitted to file only one brief on the merits and are generally not permitted to file responsive or supplemental briefs. The amicus other than the Solicitor General are rarely permitted to participate in oral argument, and then only by special leave of the court and after the consent of the supported party to share some of the party argument time.\footnote{Wheeler v. Barrera, 414 U.S. 1140 (1974); Zicherman v. Korean Air Lines Co., 515 U.S. 1156 (1995)}

Many of the same issues regarding democratic legitimacy, which informed the decisions of arbitral tribunals to accept written submissions, apply to oral submissions. In Addition, certain aspects of the ICSID Arbitrations Rules differing from the UNICITRAL or the WTO DSU suggest the discretionary authority of a tribunal organized under them to allow such oral evidence, for example Rule 15(1) of the Arbitration Rules requiring the Adeliberations\footnote{Gross, supra note 95, at p. 7} to remain secret, with no similar requirement regarding proceedings.\footnote{South Center Analytical Note, supra note 16}

The English Working Group provides that an “Advocate to the Court” will not normally be instructed to lead evidence, cross examine witnesses, or investigate the fact. Oral intervention of amicus would be particularly disruptive and would certainly be redundant with the written submission of the amicus. The amicus should therefore been denied the right to intervene orally before the tribunal.

4.2.4. The problem of cost

The admission of amicus curiae entails important cost. These costs consist of the time spend by the arbitrators and the counsels for the parties to read and respond to the submissions of amici.

The south Centre is therefore right when it says that the amicus third-party intervention increases costs - with a bearing in particular on the least financially capable parties - that are poor respondent developing countries and small, entrepreneurial investor claimants. The admission of third parties briefs may create discrimination between the rich NGOs against the poor NGOs or the poor investor. The right to submit observation will also largely benefit the better equipped interest groups of developed countries that are better funded than interest groups of developing countries.\footnote{Thomas Walde, supra}

In addition, the South Centre makes the point that NGO participation would mean in practice mainly ‘Northern’ NGOs which are best resourced, media-savvy and dominate (much like a multinational company) its ‘Southern’ subsidiaries. This criticism is quite well established by developing countries (like India) as well in the WTO context where they have made a similar criticism of the WTO Appeals Body to allow limited entry of NGO/amicus briefs in several cases.\footnote{Thomas Walde, supra}

The problem of cost also raises the problem of the authority of the arbitral tribunal over third parties.
The arbitral tribunal are traditionally not empowered to issue injunctions directed to third parties. The tribunal should therefore be given the power to order the payment of an upfront sum before the application for submission, and after that, at the time of the submission.

Conclusion

Now that the Pandora’s Box has been opened by the ICISD Secretariat, it seems very unlikely the debate on the intervention of non-party in ICSID arbitration could lead to a rule prohibiting the intervention of the civil society in investment arbitration. In any case, such intervention would be appreciable in order to render the ICISD mechanisms more transparent and legitimate and to ensure better decision-making by arbitral tribunals. It is important for tribunals and parties to understand that amicus participation is not in opposition to good practice or to the arbitration process. This right of intervention should however be subject to rules on the selection of interveners and the scope of their submissions.

The arbitral tribunals will have an important role and responsibility in ensuring that the participation of non-state actors in ICSID arbitration is workable and worthwhile. It will be the role of tribunals to make sure that arbitration allow both parties to benefit from its advantages without being unlawfully burdened by its cost. However, the tribunal should receive guidance from the ICSID Arbitration Rules. The procedure to select amicus should be a two-step procedure. The first step should consist in an application for submission of amicus briefs. The second step should consist in the actual submission of the briefs. Admission of amicus curiae briefs should be limited to organizations (i) directly affected by the dispute, (ii) with unique expertise and access to information on the subject matter of the dispute, (iii) which can offer material assistance to the tribunal.

These submissions address be both legal and factual issues, but amicus submissions should be exclusively written and amicus should not be granted access to the hearing. The ICISD arbitration Rules should also provide guidelines on the length of this submission and the time for their filling. Finally, the arbitral tribunal should be empowered to order the amicus to post security for cost in connection with their intervention.

Another question is now to know whether the admission of amicus curiae in commercial (private) arbitration constitute a necessary next step. It was said that “there are many areas in which what might have been regarded as a purely private, commercial matter between two parties will generate sufficient public interest that the tribunal would have to deal with unsolicited briefs and applications to appear before the tribunal as amicus curiae.”

Other argue that “[i]nvestor-state disputes are] to be distinguished from a typical commercial arbitration on the basis that a State [is] the Respondent, the issues [have] to be decided in accordance with a treaty and the principles of public international law and a decision on the dispute could have a significant effect extending beyond the two Disputing Parties.” The question is therefore to know whether the public interest rule allowing the intervention of third parties in investment arbitration should be applied to commercial arbitration.

215 PHILIPPE FOUCHARD, EMANUEL GAILLARD, BERTHOLD GOLDMAN, INTERNATIONAL COMMERCIAL ARBITRATION, Edited by Emmanuel Gaillard and John Savage, Kluwer Law International (1999), at p. 727
216 Comment IISD, supra note 16, at p. 9
217 Rosendahl, supra note 37
218 Casey, Non-party Participation in Arbitration: The Role of the Court, unpublished
219 USA Memorandum to the arbitral tribunal on the submission of amicus curiae briefs, Methanex, supra note 42, at p. 18
International commercial disputes normally do not involve such issues and this normally does not implicate the environmental community’s concern.\textsuperscript{220}

Finally, the admission of \textit{amicus curiae} takes place in what has been called the judicialization\textsuperscript{221} of the arbitral process. This phenomenon is characterized by the importation of judicial element to the arbitral process. The admission of \textit{amicus curiae}, together with, the opening of hearings to the public and the extension of the scope of the judicial review tend to render arbitration less alternative than it originally was. It is noteworthy that the new Model BIT sets forth extensive transparency commitments.\textsuperscript{222}

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\textsuperscript{220} Magraw, \textit{supra} note 42
\textsuperscript{221} Vicuna, \textit{supra} note 163
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