

# *Amicus Curiae* in International Investment Arbitration: The Implications of an Increase in Third-Party Participation

By  
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## INTRODUCTION

The rapid rise to prominence of international investment arbitration in the international legal order has been accompanied by mounting public concern regarding the system's legitimacy and accountability. The controversy stems from the fact that while arbitration is traditionally a largely confidential and private dispute resolution mechanism, the involvement of a State in the investment context can lead to arbitral decisions that affect a significantly broader range of actors than the two parties to the dispute. As one author highlights, "investor-State arbitration involves challenges to governmental measures, sometimes measures of general application intended to promote or achieve important public policy goals."<sup>1</sup> Commentators and civil society groups have called for increased public involvement in investment arbitration proceedings, in order to incorporate broader policy considerations into the dispute resolution process and add a measure of transparency.<sup>2</sup> Many now view procedural and structural changes to the "secretive" private process in investor-

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1. Kenneth Kinyua, *Assessing the Benefits of Accepting Amicus Curiae Briefs in Investor-State Arbitrations: A Developing Country's Perspective* (Stellenbosch Univ. Faculty of Law, Working Paper Series No. 4, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1310753](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1310753).

2. Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT'L L. 775 (2008); see also Andrew Newcombe and Axelle Lemaire, *Should Amici Curiae Participate in Investment Treaty Arbitrations?*, 5 VINDOBONA J. INT'L L. & ARB. 22 (2001).

State arbitration as necessary to correct the system's perceived democratic deficit and lack of openness to public scrutiny.<sup>3</sup>

One avenue, which interested parties now increasingly rely on to include broader interests in investor-State arbitration is *amicus curiae*, or third party, intervention in arbitral proceedings. Arbitrators in investment disputes have over the last decade begun showing greater willingness to provide third parties with a very limited mandate to participate by way of written *amicus* briefs. In a number of high-profile arbitrations, nongovernmental organizations (NGOs) have intervened in order to provide expertise on thematic issues of public policy implicated in the dispute. More recently, the range of potential interveners has expanded beyond civil society groups. For example, in the pending case of *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary* (AES),<sup>4</sup> proceeding under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID), the European Commission (Commission) has gained *amicus curiae* status to represent the European Community's (EC or Community) interest in enforcing competition law.<sup>5</sup> The increase in and diversification of third parties seeking *amicus* standing raises complex questions regarding the nature of the interests that these third parties may represent, the positive and negative consequences of their involvement, and the different forms that their participation should take in the future.<sup>6</sup>

This paper seeks to analyze these issues, focusing on the potential for arbitration regimes to strike an appropriate balance between maintaining the key features of the arbitral institution and allowing relevant third-party input. Part I of this paper provides a broad overview of the international investment arbitration regime and the extent to which it embodies disputing parties' rights to privacy and confidentiality. Part II discusses in closer detail the rationale for third-party intervention in investment arbitration, focusing on the need for greater legitimacy and public participation in this area of dispute settlement, as distinct from commercial arbitration. Part III traces recent developments in *amicus* participation in international investment arbitration and the institutional changes that have allowed for greater third-party involvement. Part IV focuses

3. Choudhury, *supra* note 2, at 807-821.

4. AES Summit Generation Ltd. and AES-Tisza Erőmű Kft. v. Republic of Hungary, ICSID Case No. ARB/07/22 (2010).

5. Luke Eric Peterson, *European Commission Seeks to Intervene as Amicus Curiae in ICSID Arbitrations to Argue that Long-term Power Purchase Agreements Between Hungary and Foreign Investors are Contrary to European Community Law*, INV. ARB. REP., Sept. 17, 2008, at 14 [hereinafter *European Commission as Amicus Report*].

6. Meg Kinnear, *Transparency and Third Party Participation in Investor-State Dispute Settlement, Making the Most of International Investment Agreements: A Common Agenda*, Symposium Co-Organized by ICSID, OECD and UNCTAD (Sept 12, 2005); see also Epaminontas Triantafilou, *A More Expansive Role for Amici Curiae in Investment Arbitration?*, KLUWER ARB. BLOG (May 11, 2009), <http://klowerarbitrationblog.com/blog/2009/05/11/a-more-expansive-role-for-amicus-curiae-in-investment-arbitration/>.

on the implications of the rise in amicus participation and considers the need to develop more specific criteria to determine whether amicus curiae participation should be permitted in particular circumstances, and the form and extent of such involvement in particular contexts.

# I.

## INTERNATIONAL INVESTMENT ARBITRATION—AN OVERVIEW

In discussing the nature of third-party participation in investment arbitration, it is first necessary to highlight the rationale and key features of this system. Historically, international investment regimes have gained popularity in large part due to investor concerns about “being subject to arbitrary and discriminatory treatment by developing-country governments,”<sup>7</sup> such as expropriation, as well as national governments’ recognition of the need to attract investment opportunities by providing investors with greater protection.<sup>8</sup> As Kinyua notes, “[t]his is especially true of developing countries, which possess the necessary human and natural resources, but lack the capital and technological know-how possessed by most industrialized states . . . [their] search for foreign investment is an openly declared goal.”<sup>9</sup> Thus, numerous governments seeking to attract investors have entered into international investment agreements that incorporate “standards of behavior for host states,” which ordinarily include provisions that direct investor-State disputes to arbitration.<sup>10</sup> These provisions “essentially give an investor from a State party to the treaty the right to initiate binding arbitration against another State party when the investor has suffered an injury as a consequence of a measure of the other State party that is inconsistent with the treaty’s substantive obligations.”<sup>11</sup>

The international investment system is undergoing fast normative development through a number of different regional, sectoral, and bilateral regimes. There is an ever-increasing number of bilateral investment treaties (BIT) being enacted by governments to regulate the flow of foreign direct investment (FDI)—at present, there are an estimated 2,500 such agreements.<sup>12</sup> Apart from BITs, prominent foreign investment regimes include regional

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7. J. Anthony VanDuzer, *Enhancing the Procedural Legitimacy of Investor-State Arbitration through Transparency and Amicus Curiae Participation*, 52 MCGILL L. J. 681, 688 (2007).

8. *Id.* at 688. For a more in-depth discussion of this issue, see generally, Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITS Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT’L L. J. 67, 77-79 (2005).

9. Kinyua, *supra* note 1.

10. See Luke E. Peterson, *All Roads Lead out of Rome: Divergent Paths of Dispute Settlement in Bilateral Investment Treaties*, International Sustainable and Ethical Investment Rules Project, Nautilus Institute for Security and Sustainable Development 5 (2002), available at [www.iisd.org/pdf/2003/investment\\_nautilus.pdf](http://www.iisd.org/pdf/2003/investment_nautilus.pdf).

11. VanDuzer, *supra* note 7, at 688.

12. *Id.*

arrangements, such as the North American Free Trade Agreement (NAFTA),<sup>13</sup> as well as sector-specific arrangements, such as the Energy Charter Treaty (ECT).<sup>14</sup> Investor-State arbitral proceedings initiated pursuant to various treaty mechanisms are carried out under the auspices of different arbitral institutions and procedural rules.<sup>15</sup> For example, in investment disputes initiated under NAFTA Chapter 11, an investor may choose to proceed on the basis of three different sets of arbitral rules: ICSID Arbitration Rules (ICSID Rules),<sup>16</sup> the ICSID Additional Facility Rules,<sup>17</sup> with proceedings in both of these cases being conducted under the institutional auspices of ICSID, or under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Rules)<sup>18</sup> on an ad hoc basis.<sup>19</sup> Although arbitration under ICSID is now the predominant forum specified in BITs,<sup>20</sup> some agreements continue to refer to different procedural rules. The United Kingdom-Bolivia BIT, for example, currently makes reference to the Arbitration Rules of the International Chamber of Commerce.<sup>21</sup> Pursuant to the ECT, the investor can also initiate proceedings in several forums, including ICSID.<sup>22</sup> As such, there are a growing number of different regimes governing investment arbitration, each with its own idiosyncratic provisions.

Despite their variations, investment arbitration regimes share common features that appeal to investors. First, arbitration is considered to provide

13. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA].

14. Energy Charter Treaty art. 26, Dec. 17, 1994, 2080 U.N.T.S. 102 [hereinafter ECT].

15. See, e.g., International Chamber of Commerce Rules of Arbitration, available at <http://www.iccwbo.org/court/english/arbitration/rules.asp>; London Court of International Arbitration Rules of Arbitration, available at [www.lcia.org/ARB\\_folder/ARB\\_DOWNLOADS/ENGLISH/rules.pdf](http://www.lcia.org/ARB_folder/ARB_DOWNLOADS/ENGLISH/rules.pdf); Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, available at [www.sccinstitute.com/\\_upload/shared\\_files/regler/web\\_A4\\_vanliga\\_2004\\_eng.pdf](http://www.sccinstitute.com/_upload/shared_files/regler/web_A4_vanliga_2004_eng.pdf).

16. ICSID Rules of Procedure for Arbitration Proceedings, available at <http://www.sice.oas.org/dispute/comarb/icsid/icsid2a.asp> [hereinafter ICSID Rules].

17. ICSID Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for the Settlement of Investment Disputes, available at <http://www.sice.oas.org/dispute/comarb/icsid/icsid3.asp> [hereinafter ICSID Rules].

18. UNCITRAL Arbitration Rules, available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1976Arbitration\\_rules.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html).

19. See North American Free Trade Agreement, *supra* note 13, ch. 11, art. 1120 (stipulating that a disputing investor may submit a claim against a host State to arbitration under either the Rules of the ICSID Convention, if both the host State and the home State of the claimant are parties to the Convention, or the Additional Facility Rules of ICSID, if either the host State or the investor's home State is a party to the ICSID Convention, but not both, or the UNCITRAL Rules).

20. William D. Rogers, Senior Partner, Arnold & Porter, Remarks at Inter-American Development Bank Conference on Commercial Alternative Dispute Resolution in the XXI Century: The Road Ahead for Latin America and the Caribbean (Oct. 26, 2000) (notes on file with author).

21. See, e.g., Agreement Between the United Kingdom of Great Britain and the Government of the Republic of Bolivia for the Promotion and Protection of Investments art. 9, May 24, 1988, Gr. Brit.-Bol., GR. BRIT. T.S. No. 34 (1990) (Cm. 1071).

22. ECT, *supra* note 14, art 26.

parties with a more efficient and, in the investor-State context, perhaps more impartial outcomes, by proceeding outside national judicial systems.<sup>23</sup> Because arbitral awards are normally not subject to any appeal except for those provided in the arbitration rules, the determination of these awards largely bypasses the judicial process.<sup>24</sup> The other key attraction is “[t]he implication . . . that what proceeds in the arbitration will not only be kept private between the parties but will remain absolutely confidential.”<sup>25</sup> This concept of privacy and confidentiality originates primarily from the foundational underpinnings of international commercial arbitration, but it has also to a considerable extent been translated into the investment context.<sup>26</sup>

Investment arbitral proceedings frequently rely on the same procedural rules that govern commercial arbitration, and contain certain privacy and confidentiality rights.<sup>27</sup> For instance, the UNCITRAL Rules, which are frequently used in investment arbitration disputes, ensure the parties’ rights to privacy by guaranteeing in-camera proceedings without access by third parties unless the disputing parties consent otherwise.<sup>28</sup> The rules also restrict the publication of any awards without the parties’ consent.<sup>29</sup> Although the existence of a general duty of confidentiality that would prohibit access to documents remains an unsettled question, arbitral panels proceeding under the UNCITRAL rules tend to accept parties’ rights to prohibit third-party access to relevant documents by express agreement.<sup>30</sup> There are also similar privacy and confidentiality rights in the investment-specific ICSID regime. For instance, the ICSID Convention disallows publication of the award without the consent of the parties<sup>31</sup> and the ICSID Rules prohibit attendance of third parties at arbitral

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23. VanDuzer, *supra* note 7, at 668-690.

24. See, e.g., Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 53, Mar. 18, 1965, 575 U.N.T.S. 159, 4 I.L.M. 532 [hereinafter ICSID Convention] (expressly stipulating that “[t]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.”).

25. Loukas Mistelis, *Confidentiality and Third-Party Participation: UPS v. Canada and Methanex Corp. v. USA* in *INTERNATIONAL INVESTMENT LAW AND ARBITRATION* 169, 169 (Todd Weiler ed., 2005).

26. See generally Cindy Buys, *The Tensions between Confidentiality and Transparency in International Arbitration*, 14 AM. REV. INT’L ARB. 121 (2003); Mistelis, *supra* note 25.

27. Mistelis, *supra* note 25.

28. UNCITRAL Arbitration Rules, *supra* note 18, art. 25(4).

29. *Id.* art. 32(5).

30. Mistelis, *supra* note 25; see also *Methanex Corp. v. United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae, Jan. 15, 2001, ¶¶ 43-46 [hereinafter *Methanex*, Amicus Curiae Decision].

31. ICSID Convention, art. 48 (5), available at <http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp>.

hearings without the parties' consent.<sup>32</sup> As such, the institutional rules and the consent-based nature of arbitration have traditionally provided disputing parties with the advantage of fashioning the investment arbitration proceedings to preserve privacy and confidentiality.

## II.

### THE RATIONALE FOR THIRD-PARTY PARTICIPATION IN INVESTMENT ARBITRATION

Unlike commercial arbitration, which ordinarily involves disputes affecting two private contracting parties, investor-State arbitration frequently concerns the public services sector, such as water, oil and gas, or waste management, and implicates "government regulation aimed at the protection of public welfare [such as] human rights, health and safety, labor laws, [or] environmental protection."<sup>33</sup> At the same time, there is growing awareness that in many respects, the investor-State dispute resolution system is "transfer[ring] decision-making from the national to the international level."<sup>34</sup> One scholar, for instance, expresses the following concern:

The growth in investment arbitration has also extended the powers of the international bodies governing [investor-State] disputes. In particular, the arbitrators governing these disputes are now regularly reviewing domestic public interest issues due to their expanded role. In fact, in some cases arbitrators are effectively striking down national regulations.<sup>35</sup>

Some academics have gone as far as describing international investment arbitration as a developing species of "global administrative law": they suggest that investment arbitration obligates host-states to arbitrate disputes that stem from sovereign acts, and thus function as a control mechanism over the exercise of governmental authority.<sup>36</sup> It has therefore been argued that "investment arbitration is best analogized to domestic administrative law rather than to international commercial arbitration."<sup>37</sup>

The perception that international investment arbitration has the potential to usurp national decision-making powers and even aspects of state sovereignty in areas of considerable public significance has led to growing questions about the system's legitimacy. Critics underscore the idea that the element of state participation and the potential significance of the decision for a host state and its

32. ICSID Rules, *supra* note 16, art. 32(2).

33. Kyla Tienhaara, *Third Party Participation in Investment-Environment Disputes: Recent Developments*, 16 REV. EUR. CMTY. & INT'L ENVTL. L. 230, 230 (2007).

34. Choudhury, *supra* note 2, at 775.

35. *Id.*

36. See, e.g., Gus Van Harten and Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, 121 (2006).

37. *Id.*

population “render several issues of public nature and thus public interest.”<sup>38</sup> A further consideration in investment arbitration proceedings is that “adverse decisions leading to monetary awards will likely be paid by out of the public’s tax revenues.”<sup>39</sup> In light of these factors, commentators have argued that dispute settlement procedures in investment arbitrations lack public openness and scrutiny, and delegitimize outcomes arrived at in secrecy by private decision-makers.<sup>40</sup> Beyond ensuring legitimacy through transparency, some authors have also highlighted that the public nature of these arbitrations may create a situation where third parties have substantial legal interests in the dispute and should be granted broader rights of participation.<sup>41</sup>

In the seminal NAFTA case of *Methanex Corporation v. United States of America*, the U.S. government acknowledged that investment 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.”<sup>42</sup> At the same time, however, no one can ignore that arbitration is inherently based on a certain degree of party autonomy and privacy, and arbitration cannot be invested with all the features of a court process without reducing its attractiveness to investors and its key role in promoting the foreign investment regime.<sup>43</sup> As such, it is necessary to appropriately balance the attractive features of investment arbitration, such as privacy and efficiency, with acknowledgment of and accommodation for the impact of investor-State arbitration on broader public policy and third-party interests. Nevertheless, on the whole there appears to be a more compelling case for introducing a degree of third-party participation into investor-State arbitration proceedings than into international commercial arbitration.

### III.

#### RECENT DEVELOPMENTS IN THIRD-PARTY PARTICIPATION IN INVESTMENT ARBITRATION—THE RISE OF THE AMICUS CURIAE

##### A. *The Concept of an “Amicus Curiae”*

Third parties, or non-disputing parties, often participate in dispute resolution mechanisms as amicus curiae. The term is broadly translated as

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38. Mistelis, *supra* note 25, at 178.

39. Choudhury, *supra* note 2, at 809.

40. See, e.g., Newcombe & Lemaire, *supra* note 2.

41. See, e.g., Triantafilou, *supra* note 6.

42. *Methanex Amicus Curiae Decision*, *supra* note 30, ¶ 17.

43. Jorge E. Viñuales, *Amicus Intervention in Investor-State Arbitration*, 61 DISP. RESOL. J. 72 (2007).

“friend of the court.”<sup>44</sup> Amicus participation is ordinarily justified on the basis that this friend of the court is in a position to provide the court or tribunal its special perspective or expertise in relation to the dispute.<sup>45</sup>

The concept of amicus curiae is accepted in a number of domestic legal systems and has more recently gained some recognition in various international proceedings. Amicus curiae participation in domestic court cases is, for instance, well developed in U.S. jurisprudence, and is also present in other common law and some civil law jurisdictions.<sup>46</sup> On the domestic level, amicus intervention has not been limited to any one particular kind of group, and has frequently involved a range of participants, including individuals and foreign governments.<sup>47</sup> On the international plane, the practice relating to third-party participation varies among different forums, although several international tribunals specifically contemplate third-party involvement.<sup>48</sup> For instance, while the International Court of Justice has a rather restrictive practice in relation to third-party participation,<sup>49</sup> the European Court of Human Rights (ECHR) includes specific provisions for amicus curiae in its governing convention.<sup>50</sup> Further, the World Trade Organization (WTO), a body whose practices in adjudicating international trade disputes are perhaps most relevant for investor-State disputes, also allows for a limited form of third-party intervention by way of amicus briefs.<sup>51</sup>

Amicus participation in dispute resolution proceedings ordinarily takes the form of written submissions addressed to the decision-maker;<sup>52</sup> however, third-party involvement is not by definition limited to written submissions.<sup>53</sup> For instance, the ECHR has previously permitted third parties to participate in the oral hearings stage of the proceedings.<sup>54</sup> The court justified such broad rights of

44. Lance Bartholomeusz, *The Amicus Curiae Before International Courts and Tribunals*, 5 NON-STATE ACTORS & INT'L L. 209, 211 (2005).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. See European Convention on Human Rights art. 36(2), Nov. 4, 1950, 213 U.N.T.S. 222, stating: “The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.”

51. See, e.g., WTO, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, art.17(9), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/dsu\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm); see also Petros C. Mavroidis, *Amicus Curiae Briefs Before the WTO: Much Ado About Nothing*, Jean Monnet Working Paper 2/01, available at [www.worldtradelaw.net/articles/mavroidisamicus.pdf](http://www.worldtradelaw.net/articles/mavroidisamicus.pdf).

52. Bartholomeusz, *supra* note 44.

53. *Id.*

54. See, Timothy R. West and Matthew M.C. Roberts, *Amicus Curiae Participation in U.S. Supreme Court Oral Arguments*, ALL ACADEMIC RESEARCH (2003), available at [http://www.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/0/8/3/4/1/pages83411/p83411-](http://www.allacademic.com/meta/p_mla_apa_research_citation/0/8/3/4/1/pages83411/p83411-)

intervention on the basis that it highlighted “the general importance of the issue in the territories of all Contracting Parties.”<sup>55</sup> U.S. courts have also on occasion extended amicus rights to participation in the oral part of the proceedings.<sup>56</sup> As such, the concept of amicus curiae is not inherently restricted to any one form of participation and could, in appropriate cases, include attendance and participation at oral hearings, access to the disputing parties’ documents and even cross-examination of witnesses.<sup>57</sup>

*B. Amicus Curiae Participation in Investment Disputes: The Recent Trends*

Investment arbitration tribunals initially refused to allow third-party participation on account of the inherent difference between arbitration proceedings and those before domestic or international courts.<sup>58</sup> In *Aguas del Tunari SA v. The Republic of Bolivia*, known as the *Bechtel* case,<sup>59</sup> which took place pursuant to the provisions of the Netherlands-UK BIT, the tribunal denied citizens and environmental groups standing at the arbitration due to the parties’ unwillingness to consent to their participation.<sup>60</sup> The tribunal, which was operating under the auspices of ICSID, found that the “interplay of the ICSID Convention and the BIT, and the consensual nature of arbitration” left the decision as regards amicus participation in the hands of the parties to the arbitration. Since the parties did not consent, the tribunal lacked the power to allow any form of third-party intervention.<sup>61</sup> The decision in *Bechtel* has been subjected to considerable criticism and suggestions that the approach adopted by the tribunal would “deprive the public of reasonable expectations.”<sup>62</sup>

In recent years, there has been an undeniable shift in investor-State arbitration toward greater tolerance of limited third-party participation, perhaps in response to continuing public pressure and criticism.<sup>63</sup> The NAFTA parties have expressly supported this shift: the Free Trade Commission issued a *Statement on Non-Disputing Party Participation* (FTC Statement), that empowers NAFTA Chapter 11 tribunals to embrace nonbinding criteria for

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55. *Id.*

56. See, Timothy R. West and Matthew M.C. Roberts, *supra* note 54.

57. Choudhury, *supra* note 2; Viñuales, *supra* note 43.

58. See, e.g., *Secretive World Bank Tribunal Bans Public and Media Participation in Bechtel Lawsuit over Access to Water*, CIEL.ORG, [http://www.ciel.org/Ifi/Bechtel\\_Lawsuit\\_12Feb03.html](http://www.ciel.org/Ifi/Bechtel_Lawsuit_12Feb03.html) (last visited Oct. 8, 2010).

59. *Aguas dal Tunari SA v. The Republic of Bolivia*, ICSID Case No. ARB/03/02 (Oct. 21, 2005).

60. Choudhury, *supra* note 2, at 814.

61. *Id.*

62. See, e.g., Mistelis, *supra* note 25, at 185.

63. VanDuzer, *supra* note 7, at 681.

accepting written submissions from third parties.<sup>64</sup> Further, US and Canadian model BITs have included provisions that allow tribunals to consider granting third parties the rights to submit briefs in investment arbitration.<sup>65</sup> Finally, the ICSID Rules have been amended to provide ICSID tribunals with the discretion to allow interested third parties to make written submissions in arbitral proceedings.

In terms of application, in several recent high-profile cases, tribunals have permitted non-disputing parties to submit amicus curiae briefs in investment arbitration proceedings. These briefs have been governed by either UNCITRAL or ICSID rules. While third-party involvement originally centered on NGOs, in recent cases more varied amicus curiae have sought intervention rights.

### 1. *NGOs as Amicus Curiae*

The early cases to grant third-party intervention rights in investment disputes overwhelmingly involved NGOs and civil society groups. These groups sought amicus standing to represent public interests in the subject matters of the disputes, including health and sustainable development.

*Methanex* was the first case to recognize the “privilege” of third parties to participate as amicus curiae in investment arbitration proceedings.<sup>66</sup> The case involved a NAFTA dispute and proceeded under the UNCITRAL Rules.<sup>67</sup> The dispute concerned the legality of a governmental public regulation; the right of the Government of California to ban substances produced by a Canadian investor on the basis of potential health risks to local populations.<sup>68</sup> Several Canadian NGOs, including the International Institute for Sustainable Development, petitioned the arbitral tribunal to submit an amicus brief on critical legal issues of public concern, and to request access to documents in the dispute as well as access to hearings as an observer.<sup>69</sup> The *Methanex* tribunal considered the relevant provisions of NAFTA and the UNCITRAL Rules, and ultimately held that it had the implied procedural authority to permit or prohibit amicus access.<sup>70</sup> Specifically, the tribunal relied on Article 15(1) of the UNCITRAL Rules, which states:

Subject to these Rules, *the arbitral tribunal may conduct the arbitration in such*

64. NAFTA Free Trade Commission, *Statement of the Free Trade Commission on Non-Disputing Party Participation*, Oct. 7, 2003, 16 W.T.A.M. 167 (2004) [hereinafter *FTC Statement*].

65. See Canada Model Foreign Investment Protection Agreement, art. 39 [hereinafter Canadian Model BIT], available at <http://ita.law.uvic.ca/documents/Canadian2004-FIPA-model-en.pdf>; United States Model Bilateral Investment Treaty, art. 28(3) [hereinafter US Model BIT], available at [http://www.ustr.gov/Trade\\_Sectors/Investment/Model\\_BIT/Section\\_Index.html](http://www.ustr.gov/Trade_Sectors/Investment/Model_BIT/Section_Index.html).

66. Choudhury, *supra* note 2; see also *Methanex Amicus Curiae Decision*, *supra* note 30.

67. *Methanex Amicus Curiae Decision*, *supra* note 30.

68. *Id.*

69. *Id.*

70. *Id.*

manner as it considers appropriate, provided the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.<sup>71</sup>

The tribunal emphasized that this case concerned a matter of public interest “not merely because one of the Disputing Parties is a State,” but because it concerned provision of public services and matters of human health, and the amicus could bring a new perspective on the issues.<sup>72</sup> At the same time, the tribunal considered itself bound by Article 25(4) of the UNCITRAL Rules—the in camera provision—not to allow third-party access to hearings, and disallowed access to documents on the basis of privacy.<sup>73</sup> The tribunal generally underscored that it was not granting any substantive right of participation to the NGOs, as this was beyond its power, and so there were not additional burdens placed on the disputing parties.<sup>74</sup>

The following case to consider the amicus issue under the UNCITRAL Rules, *United Parcel Services*, largely followed the approach of the *Methanex* tribunal.<sup>75</sup> The proceedings in *UPS* concerned a claim by United Parcels of America that Canada Post was inappropriately using its monopoly in letter mail to compete unfairly against private-sector courier and parcel services in breach of several NAFTA provisions.<sup>76</sup> The Canadian Union of Postal Workers and the Council of Canadians sought to represent Canadian postal workers’ labor interests as *amicus curiae*.<sup>77</sup> The tribunal in *UPS* accepted the request, but limited the NGOs to submission of written briefs, although the parties ultimately agreed to render the hearings and relevant documents public.<sup>78</sup> Notably, the *UPS* tribunal explicitly stated that the amicus would not be able to raise any new issues not raised by the parties.<sup>79</sup> In granting the amicus rights, the *UPS* tribunal again placed considerable emphasis on the need to legitimize arbitral proceedings by allowing for greater public intervention.<sup>80</sup>

In the ICSID context, the cases of *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*<sup>81</sup> and *Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v. The Argentina* also extended amicus curiae

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71. *Id.* (emphasis added).

72. *Id.* ¶ 49.

73. *Id.* ¶ 42.

74. *Id.* ¶ 27.

75. See *United States Parcel Service of America v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae* (Oct. 17, 2001) [hereinafter *UPS Amicus Curiae Decision*].

76. *Id.*; Choudhury, *supra* note 2; VanDuzer, *supra* note 7.

77. *UPS Amicus Curiae Decision*, *supra* note 75; Mistelis, *supra* note 25, at 192.

78. *UPS Amicus Curiae Decision*, *supra* note 75, ¶ 50.

79. Mistelis, *supra* note 25.

80. *UPS Amicus Curiae Decision*, *supra* note 75, ¶ 70.

81. *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5 (Feb. 2, 2007) [hereinafter *Biwater Amicus Curiae Decision*].

rights to third-party NGOs.<sup>82</sup> The *Biwater* arbitration concerned Tanzania's privatization of its water supply and sewage services in the country's capital, Dar es Salaam, and the subsequent termination by the Tanzanian government of a supply services contract with a UK company.<sup>83</sup> Five NGOs, representing human rights and sustainable development concerns, filed a joint "Petition for *Amicus Curiae* Status," requesting access to key documents submitted by the parties and permission to attend any hearing and to reply to any of the tribunal's written questions. In support of their submissions, the NGOs claimed that the *Biwater* arbitration proceedings involved issues of great concern to the local community in Tanzania, and a variety of potential issues of concern to developing countries that have privatized water or other infrastructure, from the perspective of sustainable development.<sup>84</sup> The *Biwater* tribunal decided the issue of amicus participation under the newly introduced Rule 37(2) of the ICSID Rules, which grants the arbitral tribunal discretion to allow third-party submission of written briefs.<sup>85</sup> Rule 37(2) requires the arbitral tribunal to consider whether, among other things:

(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (b) the non-disputing party submission would address a matter within the scope of the dispute; and (c) the non-disputing party has a significant interest in the proceeding.<sup>86</sup>

The Tribunal held that the Rule 37(2) criteria were satisfied such as to allow the NGOs to submit amicus briefs.<sup>87</sup> The tribunal also did not allow the NGO petitioners any active participation, partly on the basis that Rule 32(2) requires party consent to attend hearings and partly due to the tribunal's view that the third parties did not require access to the record in order to submit meaningful and informed briefs.<sup>88</sup> As in the previous cases decided under the UNCITRAL Arbitration Rules, the tribunal emphasized that *amicus curiae* are

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82. *Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v. The Argentina*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae* in *Suez* (July 30, 2010) [hereinafter *Suez*].

83. *Biwater Amicus Curiae* Decision, *supra* note 81; Andrew de Lotbinière McDougall and Ank Santens, *ICSID Tribunals Apply New Rules on Amicus Curiae*, 22 MEALEY'S INT'L ARB. REP. 69 (2007).

84. *Biwater Amicus Curiae* Decision, *supra* note 81, at 7.

85. *Id.* at 2.

86. Note that the first two criteria in Rule 37(2) of the ICSID Rules of Arbitration are somewhat similar to the considerations discussed by the *Methanex* and *UPS* tribunals in determining whether to grant amicus participation under the UNCITRAL Rules. Notably, under the ICSID Rules, *amicus curiae* are not limited to participating solely in disputes concerning a question of "public interest." In contrast, tribunals adjudicating under the UNCITRAL Rules emphasize this criterion in deciding whether to allow amicus participation.

87. *Biwater Amicus Curiae* Decision, *supra* note 81, at 14-15.

88. *Id.* ¶¶ 62-68.

not entitled to any kind of substantive rights.<sup>89</sup> Notably, the tribunal stated that “allowing for the making of such submission by these entities in these proceedings is an important element in the overall discharge of the Arbitral Tribunal’s mandate, and in securing wider confidence in the arbitral process itself.”<sup>90</sup> In its order, the tribunal highlighted the presence of public interest in the arbitration.<sup>91</sup>

Finally, the ICSID tribunal in the *Suez* case also made reference to the new procedural standards on *amicus* participation, even though the proceedings were not officially governed by these standards, as they were initiated prior to the amendments.<sup>92</sup> The proceeding, which concerned a dispute regarding water privatization and water supply services in Argentina, considered a petition for *amicus curiae* participation by five NGOs, representing issues of human rights and public services access.<sup>93</sup> As in the cases already discussed, the third parties sought access to documents and hearings as well as the right to submit legal briefs. The tribunal, perhaps not surprisingly, did not extend participation rights beyond submission of briefs.<sup>94</sup> Although the decision-makers in this case emphasized that the *amicus curiae* could bring new perspectives to the proceeding, they also highlighted the importance of not unduly burdening the disputing parties with broad third-party intervention.<sup>95</sup>

A review of the manner in which tribunals have allowed NGOs to participate in investment arbitrations to date reveals that the rationale driving their intervention has been more procedural than substantive. Given the public interest in the proceedings, the need to promote a level of public involvement and transparency appears to have influenced arbitral tribunals. At the same time, the arbitral tribunals, perhaps because they perceived that these third parties were not able to materially impact the merits of the disputes, granted them very limited rights.

## 2. Moving beyond NGOs in *Amicus Curiae* Participation

In analyzing the role of *amicus curiae* in investment arbitration, it is necessary to recognize that this domain is not always limited to public interest advocacy groups. In fact, the field has been progressively expanding to include a broader range of potential third-party actors. In 2005, the NAFTA Chapter 11 case of *Glamis Gold Ltd. v. United States of America*, a dispute governed by the UNCITRAL Rules and concerning reclamation requirements for open-pit mines

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89. *Id.*; McDougall & Santens, *supra* note 83, at 73.

90. *Biwater Amicus Curiae Decision*, *supra* note 83, ¶ 50.

91. *Id.* ¶¶ 51-52.

92. McDougall & Santens, *supra* note 83, at 69.

93. *Id.* at 74.

94. *Id.* at 80.

95. *Suez*, *supra* note 82, ¶ 21.

in California, expanded the concept of potential third-party interveners beyond civil society groups.<sup>96</sup> The tribunal accepted amicus briefs from the Quechan Indian Nation, which made submissions regarding the government's alleged duty under international law to preserve sacred lands on which the mines were located. In addition, as the tribunal accepted a brief from the National Mining Association, a business association representing the American mining sector, which submitted materials regarding the need to ensure that the State's regulation did not undermine the interests of miners.<sup>97</sup> The tribunal did not allow any of the third parties to actively participate in the case.<sup>98</sup> While the dispute is presently unresolved on the merits, the amicus curiae in this case, at least the Quechan Indian Nation, appear to have represented a more concrete interest in the outcome of the proceedings than the NGOs that had intervened in previous disputes. For instance, the substantive outcome of the case appears to affect the amicus curiae in this case because they have rights directly connected to the land on which the mines are located.

The pending case of *AES*, discussed above, is another illustration of the diversification of third-party interveners in investment arbitration. It is also perhaps an even more striking example of amicus curiae representing a direct legal interest in the outcome of the dispute as opposed to a broad public interest mandate. The ECT dispute concerns "alleged breaches by Hungary of commitments contained in long term power purchase agreements (PPAs) between [AES and Electrabel] and a Hungarian entity, Magyar Villamos Muek (MVM)."<sup>99</sup> Although case details are not publicly available, it has been reported that the Commission "wishes to intervene in the ICSID arbitrations out of a desire to see that EC law is enforced."<sup>100</sup> The Commission believes that PPAs negotiated prior to a State's accession to the European Union (EU) are "illegal as a matter of European Community Law" because they constitute illegitimate aids to that country.<sup>101</sup> One source explains that "[w]hile the EC acknowledges the need to compensate power generators for their investments in Hungary prior to that country's EU accession, it says that the PPAs are not an appropriate means insofar as they shelter incumbent operators from competition, rather than assist them in adapting to open competition."<sup>102</sup> Thus, the Commission may seek to fulfil its mandate as the enforcer of EU competition law by making amicus submissions regarding illegal aspects of Hungary's PPAs, in order to influence the decision on the merits, particularly the extent to which AES should

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96. Kinnear, *supra* note 6, at 6.

97. Tienhaara, *supra* note 33, at 238-239.

98. See, e.g., *Glamis Gold Ltd. v. U.S.*, Decision on Application and Submission by Quechan Indian Nation (Sept. 16, 2005).

99. *European Commission as Amicus Report*, *supra* note 5, at 14.

100. *Id.* at 14.

101. *Id.* at 14-15.

102. *Id.* at 15.

be compensated for any breaches following Hungary's accession to the EU. In light of this background, in September 2008, the Commission filed an application to participate as an amicus in the proceedings pursuant to ICSID Rule 37(2),<sup>103</sup> and in November 2008, the tribunal issued its procedural order ruling in favour of the Commission.<sup>104</sup> Although it is unknown whether the Commission sought broader participation rights, such as access to documents or hearings, the tribunal only extended amicus involvement to submission of a written brief. This was similar to the approach taken by tribunals in the previous cases.<sup>105</sup>

A review of amicus participation to date certainly highlights the increase in both the interest in participation as well as the institutional tolerance towards this phenomenon. At the same time, it is evident that the participation rights of third parties remain extremely limited. Overall, the current institutional and practical approach to amicus intervention in investment arbitration can be categorized as discretionary and largely not formalized.

#### IV.

##### THE IMPLICATIONS OF RECENT TRENDS IN *AMICUS CURIAE* PARTICIPATION

The recent trends in amicus curiae involvement in investment arbitration raise complex questions regarding the manner in which tribunals should approach third-party intervention in the future. First, the recent application for amicus standing by the Commission implicates the issue of whether institutional rules and tribunals need to expressly take into account the nature, significance, and directness of a third party's claimed interest in a dispute when deciding upon rights of intervention. In determining the nature of amicus rights in investment arbitration, it is of course also necessary to consider the potential benefits and drawbacks of expanding the process beyond the disputing parties. The overarching question centers on the various forms that amicus curiae participation should take in different circumstances, and the criteria that should be developed to achieve a more predictable and systematic approach to granting third-party participation rights.

##### A. *Considering the Nature of the Legal Interests Represented by Amicus Curiae*

The contrast between NGO participation and that of third parties such as

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103. *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Procedural Details, available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=ListCases&caseId=C114&actionVal=viewCase> (last viewed Nov. 2, 2010).

104. *Id.*

105. Triantafilou, *supra* note 6.

the Commission raises a crucial issue regarding the need for investment tribunals to recognize that certain third parties may have more significant legal interests in the outcome of the dispute, and as such, may merit broader participation rights.

In this regard it is significant that the NGO *amicus curiae* participants discussed earlier did not have direct legal interests in the outcomes of the dispute. Rather, they represented broad concerns with key thematic issues. For instance, a review of the *amicus* submissions in the *Methanex* case indicates that the NGOs focused primarily on human rights, such as the right to potable water and general health concerns.<sup>106</sup> The briefs submitted by these NGOs were somewhat “opinion-driven” in nature, and not directly connected with the primary and substantive legal issues implicated in the proceedings.<sup>107</sup>

On the other hand, the Commission appears to have “a significant, direct, and legally protectable interest” in the outcome of disputes involving EU law.<sup>108</sup> Within the EC system and throughout EU territory, the Commission has the specific mandate of a “public prosecutor,” particularly in competition law matters.<sup>109</sup> Moreover, the Commission has frequently intervened as *amicus curiae* in a range of proceedings: it routinely participates as a third party in arbitral EC competition law proceedings,<sup>110</sup> and has previously appeared before U.S. courts in matters that had implications for the Commission’s enforcement of European competition law and policy.<sup>111</sup> Commentators have highlighted that there is a strong Community interest in the correct and uniform application of Community law.<sup>112</sup>

Thus, there is an argument that the Community has a particular mandate to ensure that Community law is interpreted consistently in all forums, which justifies giving greater weight to its submissions in the *AES* proceedings than those of NGO third parties in previous investment arbitrations. One scholar argues that the nature of the EC’s interest in this case was more significant than informing the tribunal of narrow environmental or cultural implications of a

106. See *Methanex*, Submission of Non-Disputing Parties Bluewater Network, Communities for A Better Environment and Centre for International Environmental Law (Mar. 9, 2004), available at <http://www.state.gov/s/l/c5818.htm>.

107. For a discussion of the “opinion-driven” nature of many *amicus curiae* submissions, see Andrea K. Bjorklund, *The Participation of Amicus Curiae in NAFTA Chapter Eleven Cases*, Essay Papers on Investment Protection (2002), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/participe.aspx?lang=en>.

108. Triantafilou, *supra* note 6.

109. Gordon Blanke, *The Role of the European Commission as Amicus Curiae in EC Merger-Remedy-Related Arbitrations*, in *THE USE & UTILITY OF INTERNATIONAL ARBITRATION IN EC COMMISSION MERGER REMEDIES: A NOVEL SUPRANATIONAL PARADIGM IN THE MAKING?* 155 (Gordon Blanke ed., 2006).

110. *Id.*

111. See, e.g., Calvin S. Goldman et al., *International Antitrust: Developments After Empagran and Intel – Comity Considerations*, Am. Bar Ass’n Antitrust Mtg. (Mar. 31, 2005).

112. Blanke, *supra* note 109, at 161.

decision. "The EC sought to assert the relevance of its legally prescribed mandate, which is replete with policy implications for the entire European Union, and to address the consequences of a conflict between that mandate and the tribunal's jurisdiction."<sup>113</sup>

There is, of course, the counter-argument that the proper forum for the Commission to redress any violations of Community law would be through Community law mechanisms, such as prosecuting Hungary before the European Court of Justice (ECJ).<sup>114</sup> However, such an approach remains problematic from the viewpoint of securing the integrity and consistency of Community law. The ECJ process is lengthy, meaning that the arbitral tribunal could issue an award inconsistent with Community law while the judicial process at the EC level is pending.<sup>115</sup> States party to the ICSID Convention must enforce a final award on their territory.<sup>116</sup> Under the ICSID Convention, State parties must recognize an ICSID award in the same manner as a final judgment of a court of that State.<sup>117</sup> Notably, the ICSID Convention does not include public policy exceptions to enforcing an award.<sup>118</sup> As such, an EU Member State may be required to actively enforce on its territory an award that may not be entirely consistent with EU law. Such an outcome could certainly undermine the integrity of the Community system. Notably, Judge Richard Posner has argued, admittedly in a domestic law context, that *amicus curiae* participation is particularly warranted where the outcome of the proceedings could affect the party's interest in another case.<sup>119</sup> By analogy, an award against Hungary might affect EU Member State and Commission interests in enforcing, and thereby legitimizing, awards based on agreements that may be illegal under Community law.

In light of these significant interests, some argue the Commission, and *amicus curiae* applicants in similar circumstances, should be permitted "a more effective legal recourse" than submission of an *amicus* brief, and that the arbitration rules governing the issue of third-party participation should contemplate broader involvement.<sup>120</sup>

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113. Triantafilou, *supra* note 6.

114. See The Treaty Establishing the European Community, 2006 O.J. (C321) E37, 179, art. 226 (allowing the Commission to initiate enforcement actions against Member States for alleged violations of Community law).

115. See, e.g., Ian S. Forrester, *The Judicial Function in European Law and Pleading in the European Courts*, 81 TUL. L. REV. 647 (2007).

116. See, e.g., ICSID Convention, *supra* note 24, arts. 53-54.

117. *Id.*

118. *Id.* arts. 50-52 (stipulating the narrow grounds for annulling the award and which do not include a public policy exception).

119. *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997); Bjorklund, *supra* note 107.

120. Triantafilou, *supra* note 6.

*B. The Potential Benefits Stemming from Amicus Curiae Participation in Investment Disputes*

Another issue to consider in evaluating amicus participation in investment disputes concerns the kinds of benefits that third parties could bring to awards, and to the system as a whole.<sup>121</sup> In this regard, an analysis of amicus involvement to date suggests that different amicus curiae might contribute to the procedural legitimacy of the arbitral process, as well as to the substantive quality of the awards.

First, as highlighted earlier, amicus curiae participation can promote a general interest in procedural openness and ensure that the broader public does not perceive the arbitration process as “secretive.” As already highlighted, there is a public interest in the enhancement of procedural legitimacy of investment arbitration by means of greater participation. At the same time, the NGO amicus curiae have not, to date, made submissions that were “determinative to the awards rendered.”<sup>122</sup> For instance, the *Methanex* final award referred to the “well-reasoned” nature of the amicus submissions but did not indicate whether the perspectives offered by the public interest groups in any way impacted on the outcome.<sup>123</sup> As such, some amicus curiae may be limited to contributing a level of public legitimacy to arbitral proceedings.

Nevertheless, there may in fact be instances where third-party involvement actually serves both to improve the legal quality of the award and to assist in the systemic development of international investment law as a whole. As to the first point, in some cases parties to a proceeding may have a specific vested interest in not disclosing all the facts pertinent to the issues in dispute.<sup>124</sup> For instance, in *AES* it is possible that neither Hungary nor the investor would have an interest in emphasizing the fact that the contracts between them may violate the EC’s restrictions on State aid.<sup>125</sup> The claimant would certainly not wish to emphasize that a contract may be based on an illegality, as this may impact their ability to claim damages. As for Hungary, the State may consider it detrimental to emphasize this issue as its primary defence, since its acknowledgement of engaging in State aid may give rise to further actions by the Commission within the EU sphere. In this regard, the Commission’s involvement could potentially highlight relevant legal issues that may not otherwise have prominence.

In a similar context, Kinyua suggests that amicus curiae may have a role to play in bringing forward “[i]ssues of bribery or corruption.”<sup>126</sup> The problem of bribery arose in the prominent investor-State arbitration case *World Duty Free v.*

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121. Kinyua, *supra* note 1.

122. Kinnear, *supra* note 6, at 7.

123. *Methanex*, Final Award (Aug. 3 2005), ¶ 11.

124. Triantafilou, *supra* note 6.

125. *Id.*

126. Kinyua, *supra* note 1.

*Republic of Kenya*.<sup>127</sup> In that case, the State and the claimant both acknowledged the claimant's payment of a cash bribe to the previous government.<sup>128</sup> However, there are likely to be circumstances where neither party would consider it advantageous to disclose that their agreement was founded on official State corruption.<sup>129</sup> In this situation, informed amicus curiae can play an important role in bringing relevant allegations of corruption to the arbitral tribunal.<sup>130</sup> Notably, the issue of agreements based on an illegality is significant since "[t]here is a strongly held view within the arbitration community that an arbitral tribunal has the power and jurisdiction to consider issues of illegality and can do so of its own motion, if the issue has not been put before it by the parties."<sup>131</sup>

Further, participation by representatives of supranational regimes, such as the Commission, could specifically assist in preventing the "fragmentation" of international law, whereby conduct that is illegal under one international regime is nevertheless sanctioned under another international law regime.<sup>132</sup> Several commentators have expressed the concern that "investment law must evolve and be interpreted consistently with international law, including human rights law, multilateral environmental treaties and WTO law."<sup>133</sup> It is notable that the Professor Ernst-Ulrich Petersmann specifically identified "fragmentation and conflicts between different special international treaty regimes."<sup>134</sup> A lack of coordination at the international level may lead to national authorities increasingly becoming subject to conflicting commands from different supranational systems. As already suggested in the discussion of the *AES* case, the Commission's interest, and potentially its capacity, to prevent fragmentation of Community law and enforcement on EU territory of awards contrary to EC public policy is a case on point. As a mechanism to minimize fragmentation of international law, it may be necessary as a matter of best practice to allow representatives of interested supranational regimes to participate in arbitral proceedings in order to inform the tribunal of the extent to which the laws of a

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127. *World Duty Free Company Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7 (Oct. 4, 2006) (award not publicly available).

128. Kinyua, *supra* note 1.

129. *Id.*

130. *Id.*

131. *Id.*

132. For a general discussion of the concept of "fragmentation" in international law, see Ernst-Ulrich Petersmann, *Justice as Conflict Resolution: Proliferation, Fragmentation, and Decentralization of Dispute Settlement in International Trade*, 27 U. PA. J. INT'L ECON. L. 273 (2006).

133. See, e.g., Anna van Aaken, *Fragmentation of International Law: The Case of International Investment Protection 1* (University of St. Gallen Law School, Law and Economics Research Paper Series, Working Paper No. 2008-1, 2008).

134. Ernst-Ulrich Petersmann, *Justice as Conflict Resolution: Proliferation, Fragmentation, and Decentralization of Dispute Settlement in International Trade*, 27 U. PA. J. INT'L ECON. L. 273, 280 (2006).

different international regime are implicated. For instance, legal representatives from the ECHR or the WTO could assist investment arbitration tribunals in rendering awards that do not create conflicting obligations for national governments and thereby fragment international law. This approach would be highly relevant in ensuring that the international system of laws develops “not as a rigid and fractured discipline where the right hand does not know what the left is doing, but [as] a broad whole in which the workings of its branches inform each other.”<sup>135</sup>

In light of these considerations, there are compelling reasons to allow third parties to participate in State-investor arbitrations. Perhaps decision-makers should consider introducing potentially broader participation rights than merely making written submissions, on the basis that amicus contributions could create substantial benefits for the arbitral proceedings and for the investment arbitration regime in the wider context of international law.

### *C. Considering the Stakes: The Negative Aspects of Allowing Expanded Third-Party Participation*

In considering the role that amicus curiae can play in investment arbitration proceedings, and in contemplating whether broader intervention rights may be warranted in certain circumstances, it is of course necessary to also reflect on the potential negative consequences of third-party involvement in State-investor arbitral proceedings. There are in fact a number of possible, and somewhat compelling, arguments against a sweeping or radical expansion of the State-investor arbitration mechanism to encompass broader third-party participation.

First, third-party intervention can increase the practical burdens on the disputing parties. In fact, the *Methanex* tribunal emphasized the need to ensure that third-party participation does not impose any additional burdens on the parties or the arbitral process more generally.<sup>136</sup> Several commentators have in fact highlighted that allowing greater third-party intervention in State-investor disputes could potentially lead to rising costs and delays.<sup>137</sup> Arbitration specialist Noah Rubins suggests, for example, that there are even considerable “costs and time involved in the *parties*’ review and [potential] response to nonparty submissions.”<sup>138</sup> This consideration is central given that “[i]nvestor-State disputes already run, on average, several years and entail large costs for both claimants and respondent States.”<sup>139</sup> Obviously, if the level of third-party participation moves beyond submission of written briefs, and third parties seek

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135. Kinyua, *supra* note 1.

136. *Methanex*, Amicus Curiae Decision, *supra* note 30, ¶50.

137. Tienhaara, *supra* note 33; Noah Rubins, *Opening the Investment Arbitration Process: At What Cost, for What Benefit?* TRANSNAT’L DISP. MGMT., June 2006.

138. Rubins, *supra* note 137.

139. Tienhaara, *supra* note 33.

discovery of documents, evidence-taking, and participation in oral arguments, there could be extra burdens placed on the efficiency of the process. In effect, there is a risk that opening up the process in this manner would result in the arbitration procedure becoming "court-like" and losing the attributes of more cost-efficient and speedy adjudication that parties perceive as a significant advantage.

Furthermore, the loss of confidentiality and privacy, which is associated with increased third-party participation, can also have considerable negative side effects. First, some commentators have suggested that investors may feel threatened by the fact that increased openness could jeopardize the need to keep certain information, such as trade secrets, confidential, although it appears that this issue is most easily resolved through "redaction" or other techniques commonly used by the courts.<sup>140</sup> A more serious issue is that opening the doors to third-party interveners could potentially "re-politicize" disputes.<sup>141</sup> The concern here is that third-party involvement could lead to the arbitration becoming a "court of public opinion."<sup>142</sup> Rubins suggests that the resolution "of disputes in conditions of complete publicity does not lend itself to such principled outcomes" and points out the possibility of parties making exaggerated claims in order to "obtain 'nuisance value' compensation."<sup>143</sup> Increased publicity could also lead to a lessening of settlement opportunities: as claims gain exposure to the public domain, the parties could face increased pressure to continue to the substantive outcome of the case. The State, especially, could face additional pressure, given its perceived obligation to protect the right to regulate and the public good generally.<sup>144</sup> This is especially a risk where a strong public interest lobby supports one side of the dispute.<sup>145</sup> As Rubins concludes, such "increased publicity (particularly one-sided and argumentative) can . . . form a significant barrier to amicable settlement in investor-State disputes."<sup>146</sup>

On a more systemic level, there is certainly some concern that infusing the arbitral process with the perceived disadvantages of costs, delays, loss of confidentiality, and the corollary of potential politicization could lead to less investor confidence in the mechanism. As a consequence, there could be a chilling of FDI flows to less stable nations, which are often the developing

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140. Tienhaara, *supra* note 33.

141. *Id.*

142. Rubins, *supra* note 137.

143. *Id.*

144. *Id.*

145. Tienhaara, *supra* note 33.

146. Rubins, *supra* note 137.

countries most in need of the investments. Professor Viñuales poignantly summarizes the dilemma:

[P]ublic legitimacy is a double-edged sword in that, if badly used, *amicus* intervention could undermine the very arbitration regime it is supposed to strengthen. Whereas *amicus* intervention may help legitimize the overall arbitration system, such intervention may also erode the traditional basis of arbitral proceedings, namely the consent of the parties.<sup>147</sup>

As the preceding discussion highlights, there are a number of competing considerations that need to be taken into account in determining whether, and to what extent, third parties should be permitted to participate in arbitral proceedings. The broader implication of this discussion is that the current approach to granting *amicus* standing, which is largely ad hoc and discretionary, is not satisfactory to capture the range of issues that are involved.

#### *D. Striking a Balance: Developing Formalized Criteria for Third-Party Participation in Investment Disputes*

At present, there is no formalized or systematic approach to dealing with the issue of *amicus* participation in State-investor arbitration. The only attempts to create any kind of criteria for third-party participation are evidenced in amendments to the ICSID Rules, the FTC Statement, and the Canadian Model BIT. However, these are limited to the submission of briefs, and the FTC Statement is also not legally binding.<sup>148</sup> In terms of the criteria involved, all three documents focus on the potential of the *amicus* brief to assist the tribunal, the extent to which it would address a matter within the scope of the dispute and whether the third party has a “significant” interest in the proceedings.<sup>149</sup> The FTC Statement and the Canadian Model BIT also direct the tribunal to consider whether a “public interest” exists in the dispute.<sup>150</sup> While the UNCITRAL Rules are currently under review to include explicit third-party participation provisions, it appears that the proposals under consideration are also limited to submission of written briefs, and comprehensive criteria for *amicus* participation will not be included.<sup>151</sup> As such, a number of commentators have described the current approach as piecemeal and have emphasized the need to further formalize the status of *amicus* in investment proceedings.<sup>152</sup>

147. Viñuales, *supra* note 43, at 75.

148. Choudhury, *supra* note 2, at 809.

149. See FTC Statement, *supra* note 64; ICSID Rules, *supra* note 17, art. 37(2); Canadian Model BIT, *supra* note 65, art. 39; US Model BIT, *supra* note 65, art. 28(3).

150. FTC Statement, *supra* note 64; Canadian Model BIT, *supra* note 65, art. 39.

151. Tienhaara, *supra* note 33.

152. Choudhury, *supra* note 2; VanDuzer, *supra* note 7.

Given the range of different arbitral rules and investment regimes currently in place, it will undoubtedly be difficult to create a harmonized approach to third-party participation. However, certain steps can be taken to increase consistency. First, a set of clear guidelines should be included in the major regimes and rules that are utilized in investment arbitration: the NAFTA, the ICSID Convention and/or arbitration rules, the UNCITRAL Rules and the key model BITs. Notably, in order to distinguish between the rights of *amicus curiae* in commercial and in investment arbitration, arbitration rules which are applicable to both kinds of process, such as the UNCITRAL Rules, should stipulate that any new provisions on third-party participation apply only where a State is a party to the arbitration.<sup>153</sup> While the processes of amendment for different instruments involved in the investment arbitration regime are independent, they tend to be influenced by one another. For instance, the FTC Statement appears to have had an impact on the amendments to the *amicus* provisions in the ICSID Rules.<sup>154</sup> Thus, once some of the central regimes begin adopting more comprehensive guidelines on *amicus* participation, there is a strong chance that a degree of “cross-fertilization” and harmonization will follow.

In terms of the criteria that should be adopted for third-party intervention, it is first of all necessary to develop standards that will allow for guaranteed or mandatory, rather than purely discretionary, right of participation as *amicus curiae*. These applicants must be able to satisfy criteria similar to those already addressed in the ICSID Rules, such as the presence of a significant interest in the merits of the dispute. Such an approach would certainly require significant revision to the provisions of many prominent rules, such as the ICSID Rules. At the same time, it will genuinely address the fact that in circumstances where a third party has a sufficient interest in the proceedings, it may be necessary from the perspective of legitimacy to formalize their status rather than leaving the possibility of participation subject to an *ad hoc* process.

The tribunal should also be empowered with a *structured* discretion to allow for different forms of *amicus* participation: (a) submission of written briefs; (b) attendance at hearings, and potentially the making of oral arguments; and (c) access to some or all of the documents on the record. In determining whether or not to exercise the discretion to extend participation rights beyond submission of written briefs, the tribunal should be directed to assess whether an *amicus curiae* applicant can demonstrate a direct legal interest in the dispute.

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153. See Fiona Marshall & Howard Mann, Revision of the UNCITRAL Arbitration Rules: Good Governance and the Rule of Law: Express Rules for Investor-State Arbitrations Required, INT'L INST. FOR SUSTAINABLE DEV. INT'L (2006), available at [http://www.iisd.org/pdf/2006/investment\\_uncitral\\_rules\\_revision.pdf](http://www.iisd.org/pdf/2006/investment_uncitral_rules_revision.pdf).

154. Choudhury, *supra* note 2.

Other relevant considerations would include the extent to which a third party can contribute substantively to the quality of a final award and the extent to which such contribution is dependent on more extensive intervener rights. Finally, the criteria should stipulate that the interests and benefits of amicus participation should not outweigh factors such as unjustifiable burdens of cost and delay.<sup>155</sup> Any amendments to the rules should also specifically empower the tribunal to redact inherently confidential materials, such as trade secrets, as well as to limit the length of written submissions and access to the record, the time allowed for any oral arguments or for cross-examination of witnesses. Ultimately, beyond guaranteeing a minimal level of participation where an amicus curiae can satisfy the tribunal that they have a particular interest, even if only a broad public interest, in the dispute, arbitrators should be considered competent to weigh up competing considerations and to determine in particular cases whether “the added burdens of [broader] *amicus* involvement are justified.”<sup>156</sup>

Although this approach of expanding third-party participation rights should be adopted with caution, it appears to represent an appropriate balance between preserving the traditional features of arbitration and enhancing the systemic legitimacy of State-investor dispute resolution.

## V. CONCLUSION

In considering the role to be played by third-party interveners in investor-State arbitral disputes, it is necessary to remain conscious of the fact that the investment arbitration regime fundamentally differs in character from traditional commercial arbitration. In many instances, it is imperative for State-investor arbitration to “satisfy high standards of transparency and openness to non-disputing party participants.”<sup>157</sup> In addition, as the *AES* case pending before ICSID highlights, there may be instances where amicus curiae may represent substantial legal interests that they are mandated to represent, and where their participation could have broader benefits for both the specific arbitration and the system as a whole. It is also necessary to be mindful of the ever-present concern that “should the acceptance of *amicus* briefs in investor-State arbitration become widespread, it could render arbitration less attractive to investors.”<sup>158</sup> A review of current trends in third-party participation reveals that there is, at present, no formalized or predictable process to address the interplay of these issues. A

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155. Marshall & Mann, *supra* note 154.

156. Choudhury, *supra* note 2, at 817.

157. VanDuzer, *supra* note 7, at 721.

158. Viñuales, *supra* note 43, at 75.

reassessment of the current frameworks for third-party participation is necessary in order to formalize amicus curiae status in investment arbitration, and thereby promote the procedural and substantive legitimacy of State-investor dispute resolution mechanisms.