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Civil Society's Voice in the Settlement of International Economic Disputes[*]

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IT IS WELL KNOWN THAT THE VOICE OF CIVIL SOCIETY is increasingly being heard in international circles. The latest trend is for the "activism" of civil society no longer to be limited to the traditional area of human rights, but also embrace the area of international economic relations. Civil society is not content with just demonstrating in the street, but is also bent upon making its way into the courtroom. The problems dealt with under the World Trade Organization (WTO), the North American Free Trade Agreement (NAFTA) and the International Centre for Settlement of Investment Disputes (ICSID) are often social challenges, and it is hardly surprising that civil society should want to have its say whenever public-interest issues arise.[1]

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[1] For a general approach to the question of the role of NGOs and *amicus curiae*, *see* D. Shelton, "The Participation of Nongovernmental Organizations in International Proceedings," 88 Am. J. Int'l L. 611 (1994); R. Ranjeva, "Les organisations non-gouvernementales et la mise en œuvre du droit international," 270 Collected Courses of the Hague Academy of International Law 10 (1997); H. Ascensio, "L'*amicus curiae* devant les juridictions internationales," 4 Rev. gén. de dr. int'l pub. 897 (2001); Ph. Sands, "Le droit international, le praticien et les acteurs non étatiques," in H. Ghérari and S. Szurek (eds.), L'émergence de la société civile internationale—Vers la privatisation du droit international, 85–103, Paris, Pedone (2003),

In this context, the WTO dispute settlement mechanism, in which non-governmental organizations (NGOs) play a key role—nobody has forgotten Seattle!—started the trend and left the door wide open for private persons to file *amicus curiae* briefs in inter-State trade disputes.[2] This was the point of departure for an astounding development, which will be described below. Also to be analyzed is the continuing extension of the case law started by the WTO from as far back as 1998,[3] in a form much like concentric circles.[4] Developments within the WTO, NAFTA and ICSID will be sequentially analyzed before comments are made on the creation and evolution of international economic law.

No attempt shall be made here to define who may be included in the category of "friends of the court." It is better this way because, by definition, it is not possible to predict who could one day become your friend. Catherine Kessedjian noted that it was clear that tribunals could not identify beforehand who would better be able to submit information that would help to resolve the dispute.[5] Therefore, it will not be ascertained here if enterprises as well as NGOs can

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Cahiers internationaux 18. *See also* on the question of third-party involvement in legal proceedings generally, E. Jouannet, "Quelques perspectives théoriques : incertitudes sur le tiers et désordres de la justice internationale," in H. Ruiz Fabri and J.-M. Sorel (eds.), Le tiers à l'instance devant les juridictions internationales, 255–263, Paris, Pedone (2006).

[2] *Amici curiae* have been accepted at the level of panels and in the Appellate Body, first for private natural persons and legal entities, and then for non-party States or third-party States.

[3] For my written work on this subject, in French and in English, with numerous bibliographical references, *see* "L'intervention des tiers dans le contentieux de l'OMC," 2 Rev. gén. de dr. int'l pub. 219 (2003); "The Intervention of Private Entities and States as 'Friends of the Court' in WTO Dispute Settlement Proceedings," in P. Macrory, A. Appleton and M. Plummer, The World Trade Organization: Legal, Economic and Political Analysis, vol. I, chap. 32, 427–458, New York, Springer (2005); "The Emergence of Non-State Actors in International Commercial Disputes through WTO Appellate Body Case Law," in G. Sacerdoti, A. Yanovich and J. Bohanes (eds.), The WTO at 10: The Role of the Dispute Settlement System 372–385, Cambridge, Cambridge University Press (2006).

[4] This subject is very topical in view of the numerous recent publications devoted to this theme. *See* in particular the Project on International Courts and Tribunals (PICT), T. Treves (ed.), "Civil Society, International Courts and Compliance Bodies," The Hague, T.M.C. Asser Press (2005); C. Kessedjian, "La nécessité de généraliser l'institution de l'*amicus curiae* dans le contentieux privé international," in H.-P. Mansel, Th. Pfeiffer *et al.* (eds.), Festschrift für Erik Jayme, Band 1, 403–408, Munich, Sellier (2004); and by the same author, "Sir Kenneth Bailey Memorial Lecture: Dispute Resolution in a Complex International Society," 29 Melb. Univ. L. Rev. 3–21 (2005) (hereinafter Kessedjian, "Sir Kenneth"); J.-F. Flauss, "Les organisations non gouvernementales devant les juridictions internationales compétentes dans le domaine de la protection des droits de l'homme," in G. Cohen-Jonathan and J.-F. Flauss (eds.), Les organisations non gouvernementales et le droit international des droits de l'homme 71–101, The Hague, Bruylant (2005); L. Bartholomeusz, "The Amicus Curiae before International Courts and Tribunals," in Non-State Actors and International Law 209–286, The Hague, Kluwer (2002); G. Canivet, "L'amicus curiae en France et aux Etats-Unis," Rev. de jur. comm., 99–113 (March-April 2005); F. Grisel and J. E. Vinuales, L'admission d'amici curiae dans le cadre de l'arbitrage d'investissement : Analyse et sources, Geneva, 2008, Collection Etudes et travaux de l'Institut des hautes études internationales et du développement (HEI) (hereinafter Grisel and Vinuales); P. Friedland, "The Amicus Role in International Arbitration," in L. Mistelis and J. Lew (eds.), Pervasive Problems in International Arbitration 321–328,

be friends of the court,[6] nor whether to exclude or include intergovernmental organizations—even if it appears that to date there have been few proceedings in which the latter have asked to intervene as *amici curiae*.[7] It should however be noted that ICSID recently received a petition for *amicus curiae* participation from the European Commission, in two cases involving the interpretation of European law and of the Energy Charter Treaty.[8]

It bears noting that when examining the role of *amici curiae*, a number of writers have objected to their designation as such because in their view it does not reflect the true meaning of their role. One has only to cite Alain Prujiner, who became interested in the solution adopted in the NAFTA cases which will be examined in this study, and in this regard pointed out that "the term was badly chosen because there was no court and they were not friends of any court. They were rather intervenors who wished to emphasize a point of view other than those of the State Party and the Claimant, a point of view that expressed the position of other individuals or groups having an interest in the issues at stake in the case."[9] This appears to be a rather gratuitous criticism of a Latin expression that is widely used and has become part of the language of national and international law. If it is true that the friends of the court present a point of view different from those of the two parties,

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The Hague, Kluwer (2006); A. Mourre, "Are Amicus Curiae the Proper Response to the Public's Concerns on Transparency in Investment Arbitration?", L. and Prac. of Int'l Cts. and Tribs., vol. 5, no. 2, 257–271, The Hague, Nijhoff (2006).

[5] C. Kessedjian, "L'amicus curiae," Keynote Speech, XVIIth Congress of the International Academy of Comparative Law 13–14 (Utrecht, July 16–22, 2006) (document provided by the author, to whom I am grateful, publication pending) (hereinafter Kessedjian, "L'amicus curiae").

[6] C. Kessedjian noted that not everyone has agreed on the definition to be given to this concept of "civil society." For example, according to the documents consulted, businesses were either to be considered as a part of civil society or, on the contrary, to be excluded from being participants in a market society side-by-side with civil society. *See* "Sir Kenneth" *supra* note 4, at 5.

[7] It would seem particularly appropriate, however, that an intergovernmental organization under whose aegis an international treaty was adopted should intervene in legal proceedings where the interpretation of that treaty is at issue. For a suggestion along these lines concerning the 1980 Hague Convention on the Civil Aspects of International Child Abduction, *see* L. Silberman, "Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence", New York University Public Law and Legal Theory Working Papers, paper 18, at 32 (2006). *See also* the remark made by L. Boisson de Chazournes during a discussion transcribed in "Transparency, Amicus Curiae Briefs and Third Party Rights—Discussion Session," 5 J. World Invest. & Trade 341, 342 (2004) (stating that "[i]n our international system, we have actors which should play a better role in promoting public-interest issues, and these are the public international organizations").

[8] *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19.

[9] A. Prujiner, "L'arbitrage unilatéral : un coucou dans le nid de l'arbitrage conventionnel?", Rev. de l'arb. 4, at 86 (2005). *See also* what M. Mendelson had to say on the same subject in a discussion transcribed in 5 J. World Invest. & Trade 2, at 346–347 (2004), wherein he stated with regard to industry or trade union organizations that "[t]hey are not there as friends of the court. They are there as friends of themselves," and

they may nevertheless be considered as friends of the court since their role is precisely to help the court determine, in the general circumstances of the case, whether the applicant or the defendant should win. For the purposes of this paper, therefore, I will use, as many other authors, this widely used expression.

I. THE EVOLUTION OF THE APPROACH TO *AMICUS CURIAE* BRIEFS IN THE WTO CONTEXT

This question of *amicus curiae* briefs has evolved over time in the field of international trade disputes.

During the General Agreement on Tariffs and Trade (GATT) period, some documents of this type were in fact submitted to the Secretariat, but they were never taken into consideration by panel members, who stuck to the principle that the GATT dispute settlement system was for States only. The same solution was adopted when the WTO dispute settlement mechanism began to operate. Thus, in the *Gasoline* and *Hormones* cases, *amicus curiae* briefs submitted to the panels were disregarded in accordance with previous practice from the GATT period. However, international society has evolved to such an extent,[10] that this policy of abstention has ceased to be viable.

It should be recalled that the WTO's dispute settlement mechanism (DSM) has several players:

- The Dispute Settlement Body (DSB), which is otherwise known as the WTO Council, which is composed of representatives of all WTO Member States, sitting as an adjudicative body. This body appoints the members of the Appellate Body and adopts the Reports of the panels and of the Appellate Body;
- The non-permanent panels, to whom States submit their international trade disputes, and of which the members may but need not be chosen from a list drawn up by the Secretary General of the WTO; and
- The permanent Appellate Body composed of seven members who are broadly representative of the membership of the WTO, who have demonstrated expertise in law, and who must perform their functions impartially.

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with regard to NGOs that "[a]gain they are not friends of the court. They may think that they are friends of the public interest or of the interests of a particular group of victims which are not represented."

[10] With regard to the diversification of actors in international relations, *see* B. Stern, "Etats et souveraineté : la souveraineté de l'Etat face à la mondialisation," in Y. Michaud, Université de tous les savoirs, Qu'est-ce que la société ? 828–839, Paris, Odile Jacob (2000).

Under this multi-stage mechanism, there has been a tremendous growth in the admittance of impartial briefs in inter-State WTO proceedings.[11]

A. Amicus Curiae *Briefs before WTO Panels*

The turning point came with the *Shrimp-Turtle* case. Having received *amicus curiae* briefs from environmental protection NGOs, the Panel, on the basis of a literal reading of Article 13 of the Dispute Settlement Understanding (DSU),[12] refused to take them into consideration as directly submitted briefs, while allowing them to be attached to the parties' submissions.[13] It considered that, in accordance with the text of Article 13 of the DSU, *amicus curiae* briefs could only be submitted at the Panel's own request,[14] and it declared that "accepting non-requested information from non-governmental sources would be, in our opinion, incompatible with the provisions of the DSU as currently applied."[15]

The Appellate Body rejected this analysis,[16] stating that "authority to *seek* information is not properly equated with a *prohibition* on accepting information which has been submitted without having been requested by a panel. A panel has the discretionary authority either to accept and consider, or to reject, information and advice submitted to it, *whether requested by a panel or not.*"[17]

[11] For bibliographical references additional to those mentioned in my articles cited *supra* at note 3, *see* L. Boisson de Chazournes, "Transparency and Amicus Curiae Briefs," 5 J. World Invest. & Trade 2, 333–336 (2004); R. S. Martha, "Capacity to Sue and Be Sued under WTO Law," 3 World Trade Rev. 27 (2004) (hereinafter Martha); M. Matsushita, "Transparency, *Amicus Curiae* Briefs and Third Parties Rights," 5 J. World Invest. & Trade 2, 329–332 (2004); M. Slotboom, "Participation of NGOs Before the WTO and EC Tribunals: Which Court is the Better Friend?" 5 World Trade Rev. 69 (2006).

[12] DSU Article 13: Right to Seek Information.

1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body or authorities of the Member providing the information.
2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects on the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group.

[13] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Panel, WT/DS58/R (WTO, May 15, 1998) (hereinafter *Shrimp-Turtle*).

[14] *Shrimp-Turtle*, *supra* note 13, at para. 7.8 (noting that "pursuant to Article 13 of the DSU, the initiative to seek information and to select the source of information rests with the Panel").

[15] *Id.*

[16] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, AB-1998–4, WT/DS58/AB/R (WTO, 1998).

[17] *Id.* at para. 108 (emphasis in original).

However, inasmuch as the Panel had allowed the United States to attach the NGOs' briefs to its own submission, the Appellate Body considered that this was a means that the Panel could have used to obtain certain information from NGOs. It also pointed out that the Panel had given the other countries two additional weeks to respond, which meant that the way in which the NGOs' submissions had been taken into account had not infringed due process.

Thus, the conclusion of the Appellate Body was clear:

> We find, and so hold, that the Panel erred in its legal interpretation that accepting non-requested information from non-governmental sources is incompatible with the provisions of the DSU. At the same time, we consider that the Panel acted within the scope of its authority under Articles 12 and 13 of the DSU in allowing any party to the dispute to attach the briefs by non-governmental organizations, or any portion thereof, to its own submissions.[18]

Since this decision, many *amicus curiae* briefs have been submitted to panels, and the principled freedom of the panels has not again been called into question. This freedom has been used to accept *amicus curiae* briefs, to reject them while giving reasons for their rejection (*e.g.* late submission or unnecessary duplication), and, finally, to reject them without the least word of explanation.

B. Amicus Curiae *Briefs before the WTO Appellate Body*

The accessibility of the Appellate Body to *amicus curiae* briefs directly addressed to it has developed more gradually.

The question first arose in *Shrimp-Turtle* when the United States attached to its submission three "independent" NGOs' briefs, to which all the appellees objected. In addition to the arguments already put forward in connection with the submission of such documents to the Panel, a further claim was made by the appellees, namely that taking the briefs into consideration would be incompatible with the very essence of the appeal procedure, as according to Article 17.6 of the DSU an appeal should be limited "to issues of law covered in the Panel Report." Indeed, although only issues of law are argued before the Appellate Body, and one would expect that members of this body, chosen for their competence, would not need to have recourse to NGOs to interpret legal rules, the Appellate Body decided to accept for its consideration the information provided by the NGOs without distinguishing between the different ways of submitting the briefs, and without really explaining the legal basis for its decision.

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[18] *Id.* at para. 110.

Even by adopting a flexible interpretation, as it did in connection with the independent briefs submitted at the panel level, the Appellate Body certainly had greater difficulty in finding a legal basis for accepting non-requested *amicus curiae* briefs. At the panel level, DSU Article 13 refers to the possibility of seeking information "from any individual or body which it deems appropriate," whereas there is no equivalent article for the Appellate Body, and under Rule 28(1) of the *Working Procedures for Appellate Review*, the Appellate Body may request additional submissions only "from any participant or third participant."

Even if the Appellate Body did not say in so many words that it could accept directly submitted *amicus curiae* briefs, it did implicitly accept such a document. It should also be borne in mind that although the final version of the document was in fact directly submitted to the Appellate Body, the first version had been appended to the U.S. submission. Thus, it was not possible to predict with any certainty what the Appellate Body's future position would be.

The matter was clarified in a subsequent case. In *United States-Carbon Steel*, the Appellate Body explicitly considered that it had discretionary authority to accept *amicus curiae* briefs. In this case, certain submissions by industry associations (*i.e.* the American Iron and Steel Institute and the Specialty Steel Industry of North America) which had been rejected by the Panel for being late were resubmitted to the Appellate Body.

Having failed to explain the legal basis for accepting a directly submitted *amicus curiae* brief in the *Shrimp-Turtle* case, the Appellate Body finally did so in the *United States-Carbon Steel* case:

> In considering this matter, we first note that nothing in the DSU or the *Working Procedures* specifically provides that the Appellate Body may accept and consider submissions or briefs from sources other than the participants and third participants in an appeal. On the other hand, neither the DSU nor the *Working Procedures* explicitly prohibit acceptance or consideration of such briefs. However, Article 17.9 of the DSU provides: "Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information." This provision makes clear that the Appellate Body has broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements.[19]

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[19] *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, Report of the Appellate Body, AB-2000–1, WT/DS138/AB/R (WTO, May 10, 2000).

In the same case, the Appellate Body clearly found that it had the discretionary power to accept any *amicus curiae* communication, explaining the legal grounds for its decision as follows:

> We are of the opinion that we have the legal authority under the DSU to accept and consider *amicus curiae* briefs in an appeal in which we find it pertinent and useful to do so. In this appeal, we have not found it necessary to take the two *amicus curiae* briefs filed into account in rendering our decision.[20]

More precisely, it is on the bases of Article 17.9 of the DSU and, though mentioned only in a footnote,[21] also of Rule 16(1) of the *Working Procedures for Appellate Review* that the Appellate Body has agreed to accept *amicus curiae* briefs at its discretion. The Appellate Body appears on these grounds to have granted itself unlimited freedom of action, with the only criterion used for guiding its policy in this field being summed up in the phrase "if we find it pertinent and useful to do so."[22]

However, in the subsequent *Asbestos* case,[23] an additional step was again taken. Urged on by numerous NGOs, the Appellate Body, despite or perhaps because of heated discussions between Members of the WTO concerning the recent evolution in the approach concerning *amicus curiae* briefs, decided to establish "operating instructions" for the handling of *amicus curiae* briefs. It did so by adopting procedural and substantive rules for their admission, although it restricted these rules exclusively to the case under consideration, as is indicated in a letter from the Presiding Member of the Appellate Body to the Chairman of the DSB:

> I am writing to inform you that the Division hearing the above appeal has decided, in the interests of fairness and orderly procedure in the conduct of this appeal, to adopt an additional procedure to deal with any written

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[20] *Id.* at para. 39 (first citation) and para. 42 (second citation).

[21] *Id*. at fn. 33. This footnote reads as follows: "In addition, Rule 16(1) of the *Working Procedures* allows a division hearing an appeal to develop an appropriate procedure in certain specified circumstances where a procedural question arises that is not covered by the *Working Procedures.*"

[22] *Id*. at para. 42.

[23] *European Communities—Measures Affecting Asbestos and Products Containing Asbestos*, Report of the Panel, WT/DS135/R (WTO, 2000), Report of the Appellate Body, WT/DS135/AB/R (2001) (hereinafter *Asbestos*). On this case, *see* in particular G. Zonnenkeyn, "The Appellate Body's Communication on Amicus Curiae Briefs in the Asbestos Case," J. World Trade 553–563 (2001). The letter dated November 8, 2000 mentioned in this paragraph is cited in the Appellate Body Report at para. 51, and its reference is WT/DS135/9.

> briefs received by the Appellate Body from persons other than a party or a third party to this dispute. This additional procedure has been adopted by the Division hearing this appeal for the purposes of this appeal only pursuant to Rule 16(1) of the *Working Procedures for Appellate Review*, and is *not* a new working procedure drawn up by the Appellate Body pursuant to paragraph 9 of Article 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes.*

It seems as if the Appellate Body wanted to reach a point of no return by obliging governments to take a position on its reasonable attitude, now that the premise of the admission of *amicus curiae* briefs had been accepted, and which it no doubt hoped would not again be called into question by Members. In fact, the Appellate Body had very soon realized that the discretionary authority it had granted itself in the *United States-Carbon Steel* case needed to be consolidated. Therefore, in *Asbestos*, the Appellate Body laid down rules enabling it to deal in a transparent fashion with requests for authorization to file *amicus curiae* briefs. It considered that "the fair and orderly conduct of this appeal could be facilitated by the adoption of appropriate procedures, for the purposes of this appeal only,"[24] and it accordingly proceeded to adopt such procedures.

In a document adopted on November 7, 2000, and, it should be noted, following consultations among all its seven members, the Appellate Body established an additional procedure which included a number of requirements to be met:

> An application for leave to file such a written brief shall:
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> (a) be made in writing, be dated and signed by the applicant, and include the address and other contact details of the applicant;
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> (b) be in no case longer than three typed pages;
>
> (c) contain a description of the applicant, including a statement of the membership and legal status of the applicant, the general objectives pursued by the applicant, the nature of the activities of the applicant, and the sources of financing of the applicant;
>
> (d) specify the nature of the interest the applicant has in this appeal;
>
> (e) identify the specific issues of law covered in the Panel Report and legal interpretations developed by the Panel that are the subject of this appeal, as set forth in the Notice of Appeal (WT/DS135/8) dated 23 October 2000, which the applicant intends to address in its written brief;

[24] *Asbestos Case*, Report of the Appellate Body, *supra* note 23, at para. 50.

> (f) state why it would be desirable, in the interests of achieving a satisfactory settlement of the matter at issue, in accordance with the rights and obligations of WTO Members under the DSU and the other covered agreements, for the Appellate Body to grant the applicant leave to file a written brief in this appeal; and indicate, in particular, in what way the applicant will make a contribution to the resolution of this dispute that is not likely to be repetitive of what has been already submitted by a party or third party to this dispute; and
>
> (g) contain a statement disclosing whether the applicant has any relationship, direct or indirect, with any party or any third party to this dispute, as well as whether it has, or will, receive any 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 additional procedure provided for in the *Asbestos* case did more than merely regulate applications for authorization to file *amicus curiae* briefs. It also laid down rules for the authorized brief itself in order to save the Appellate Body from being deluged with submissions to read and study:

> A written brief filed with the Appellate Body by an applicant granted leave to file such a brief shall:
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> (a) be dated and signed by the person filing the brief;
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> (b) be concise and in no case longer than 20 typed pages, including any appendices; and
>
> (c) 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.

This additional procedure was widely circulated by the Secretariat on the WTO's website and by e-mail to all of the NGOs on the WTO's distribution list, the very day it was adopted. There were many Members of the WTO who felt that this amounted to an outright invitation to file *amicus curiae* briefs—a further step taken by the Appellate Body showing that it was not only willing to receive the submissions of NGOs, but also encouraging them and giving them its blessing.

It has to be stated, however, that despite this apparent encouragement given by the Appellate Body to the submission of *amicus curiae* briefs, and despite the more diversified origin of the briefs both geographically and in terms of the would-be *amici* concerned (a group including professors and university centers, environmental NGOs and associations of asbestos multinationals), the end

result was particularly disappointing since not a single authorization to submit an *amicus curiae* brief was granted in the *Asbestos* case.

In summary, it can be said that the Appellate Body has recognized that the panels have a discretionary power to allow *amicus curiae* briefs based on Article 13 of the Memorandum of Understanding. Similarly, the Appellate Body has acknowledged that it has wide discretionary powers in this regard under Article 17.9 of the Memorandum of Understanding, and it has laid down rules for an additional procedure (albeit applicable only to the *Asbestos* case) based on Article 16(1) of the *Working Procedures for Appellate Review*. These "precedents" were met with frank hostility from almost all WTO States except the United States. After this development, which is very favorable to NGOs, a certain conservatism was noted on the part of the panels[25] and the Appellate Body[26]—perhaps a clear manifestation of the strong reservations to accepting said precedents that were expressed by numerous WTO Member States during discussions of the Dispute Settlement Body.[27] The precedents were nevertheless relied on by international arbitral tribunals in the context of NAFTA proceedings.[28]

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[25] For example, in the report of the Panel adopted on March 22, 2004 in *United States—Investigation of the International Trade Commission in Softwood Lumber from Canada* (Canada v. United States), WT/DS277 (WTO), para. 7.10, note 75, the following words are found: "Having considered carefully the question of how to treat that communication, and any further such communications that might be received, and in light of the absence of consensus among WTO Members on the question of how to treat *amicus* submissions, we decided not to accept unsolicited *amicus curiae* submissions in the course of this dispute."

[26] A point-blank but unexplained refusal is found in *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada* (Canada v. United States), Report of the Appellate Body, WT/DS257/AB/R, January 19, 2004, para. 9: "Ultimately, in this appeal, the Division did not find it necessary to take the two *amicus curiae* briefs into account in rendering its decision."

[27] As noted by R. Martha, "[d]uring a special meeting, Members sent a strong signal that it must proceed with extreme caution with respect to how it deals with non-governmental participation in the dispute settlement process." Martha, *supra* note 11, at 48.

[28] For bibliographical references, *see* my article, B. Stern, "L'entrée de la société civile dans l'arbitrage entre Etat et investisseur," 2 Rev. de l'arb. 329–345 (2002); A. Newcombe and A. Lemaire, "Should *Amici Curiae* Participate in Investment Treaty Arbitration?", 5 Vindobona J. Int'l Com. L. and Arb., 1, 22–40 (2001) (hereainafter Newcombe and Lemaire); A. Bjorklund, "La participation des amici curiae dans les poursuites engagées en vertu des dispositions du chapitre 11 de l'ALENA," http://www.dfait-maeci.gc.ca/tna-nac/participate-fr.asp; P. Dumberry, "The Admissibility of *Amicus Curiae* Briefs by NGOs in Investors-States Arbitration: The Precedent Set by the *Methanex* Case in the Context of NAFTA Chapter 11 Proceedings," in Non-State Actors and International Law, vol. 1, n. 3, 201–214 (2001) (hereinafter Dumberry); H. Mann, "Opening the Doors, at Least a Little: Comment on the Amicus Decision in Methanex v. United States," 10 Rev. Euro. Comm. & Int'l Environ. L. 2, 241–245 (2002) (hereinafter Mann); G. A. Alvarez, "Mexican View on the Operation of NAFTA for the Resolution of Canada-U.S.-Mexico Disputes," 26 Can.-U.S. L. J., 219 (2000); W.W. Park, "The New Face of Investment Arbitration: NAFTA Chapter 11," 28 Yale J. Int'l L. 365 (2003); Th. Wälde, "Transparency, Amicus Curiae Briefs and Third Party Rights," 5 J. World Invest. & Trade 2, 337–339 (2004) (hereinafter Wälde); M. Hunter and A. Barbuk, "Non-disputing Party Interventions in Chapter 11 Arbitrations," in T. Weiler (ed.), Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects 151, London, Cameron (2004).

II. THE EVOLUTION OF THE APPROACH TO *AMICUS CURIAE* BRIEFS IN THE NAFTA CONTEXT

A. The Methanex *Case, The First Arbitration in which Amicus Curiae Briefs Were Accepted*

In *Methanex Corporation v. United States*,[29] the protection of the environment was at issue. Three organizations petitioned the Tribunal to be allowed to present *amicus curiae* briefs—the International Institute for Sustainable Development (IISD),[30] Communities for a Better Environment, and the Earth Island Institute.[31] In that particular case, a Canadian company, Methanex, claimed compensation from the United States in the amount of one billion U.S. dollars for a reduction in its profits caused by the state of California's ban on the use of a gas additive known as methyl tertiary butyl ether (MTBE) manufactured by the company.

Methanex was a NAFTA Chapter 11 arbitration conducted under the UNCITRAL Arbitration Rules.[32] After a petition to file *amicus curiae* briefs

[29] *Methanex Corp. v. United States*, Decision on Petitions from Third Persons to Intervene as "Amici Curiae" (January 15, 2001), http://naftalaw.org/methanex/Methanex-Amicus.Decision.pdf (hereinafter *Methanex* "Amici Curiae" Decision). It may be noted that the award on the merits was rendered on August 3, 2005, rejecting all of Methanex's claims and ordering it to pay approximately 4 million dollars in costs to the United States.

[30] This is an NGO based in Canada.

[31] These are American NGOs.

[32] With regard to this type of arbitration, there is an abundant literature in English, and an article in French in the Revue de l'arbitrage. *See* G.N. Horlick and F.A. DeBusk, "Dispute Resolution under NAFTA," 27 J. World Trade, 21–41 (1993); D.M. Price, "An Overview of the NAFTA Investment Chapter Substantive Rules and Investor-State Dispute Settlement," The International Lawyer, Vol. 27, 731 (1993); Ch. Eklund, "A Primer on the Arbitration of NAFTA Chapter Eleven Investor State Disputes," 11 J. Int. Arb. 135 (1994); K.L. Oelstrom, "A Treaty for the Future: The Dispute Settlement Mechanisms of NAFTA," 25 Law & Pol'y Int'l Bus. 783 (1994); G.L. Sandrino, "The NAFTA Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective," 27 Vand. J. Transnat'l L. 259 (1994); G.N. Horlick and A. Marti, "NAFTA Chapter 11B: A Right of Action to Enforce Market Access through Investment," 14 J. Int. Arb. 43 (1997); J.A. Vanduzer, "Notes and Comments. Investor-State Dispute Settlement under NAFTA Chapter 11: The Shape of Things to Come?", Can. YB Int'l L. 263 (1997); L.L. Herman, "Settlement of International Trade Disputes—Challenges to Sovereignty—A Canadian Perspective," 24 Can.-U.S. L. J. 121 (1998); D. MacDonald, "Chapter 11 of NAFTA: What are the Implications for Sovereignty?", 24 Can.-U.S. L. J. 281 (1998); J. Soloway, "NAFTA's Chapter 11—The Challenge of Private Party Participation," J. Int'l Arb. 1 (1999); J.C. Thomas, "Investor-State Arbitration under NAFTA Chapter 11," Can. YB Int'l L. 99 (1999); A. Lemaire, "Le nouveau visage de l'arbitrage entre Etat et investisseur étranger: le chapitre 11 de l'ALENA," Rev. de l'arb. 43 (2001); M. Kinnear, "Transparency and Third Party Participation in Investor-State Dispute Settlement," Presentation, Symposium co-organized by ICSID, the OECD and UNCTAD, "Making the Most of International Investment Agreements" (Paris, December 12, 2005), at http://www.oecd.org/dataoecd/6/25/36979626.pdf (hereinafter Kinnear); L. Mistelis, "Confidentiality and Third Party Participation. *UPS v. Canada* and *Methanex Corporation v. United States*," Arb. Int'l, vol. 21, no. 2, 205–225, LCIA (2005).

was submitted to the Arbitral Tribunal,[33] the Tribunal asked the opinions of the two parties (*i.e.* the Methanex company and the United States) as well as those of Canada and Mexico, the other two States Parties to the NAFTA treaty, as it believed that the admissibility of the *amici curiae* briefs raised important legal questions that "touch upon important general principles directly affecting the future conduct of these arbitration proceedings."[34]

The NGOs in fact demanded total access to the proceedings, which implied several requests—to be permitted to make written submissions, to attend the hearings and make oral submissions, and to have access to all of the documents exchanged between the parties, *i.e.* the memorials, counter-memorials, annexes, evidence, etc. Such demands were unprecedented in an investment-related arbitration between a State and a private investor. Such an arbitration is, at least in theory, still based on the consent of both parties, despite it being well known that the consensual aspect has considerably diminished in recent years, so that this type of arbitration increasingly seems like a quasi-obligatory dispute settlement process.[35]

The arguments from the "friends of the court" were many. First, they insisted on "the immense public importance of the case," and they then put forward a more "political" argument based on a broad perspective of international economic relations: "participation of an amicus would allay public disquiet as to the closed nature of arbitration proceedings under Chapter 11 of NAFTA."[36] Methanex for its part disapproved of the intervention of other private parties in the proceedings, because it had complained about the environmental protection measures having led to a decline in its profits, while the aim of the environmental NGOs was to defend these measures.

This tension between different private interests in a dispute settlement mechanism officially putting on the same plane the State and private persons—in the instant case foreign investors acting under the NAFTA Chapter 11 provisions for the protection of international investments—also exists in the WTO's dispute settlement arrangements. The latter is certainly an inter-State mechanism, but one in which opposing private interests also seek to make their voices heard. Under NAFTA, investors—private sector players—have used the arbitration mechanism under Chapter 11 to object to environmental

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[33] This Arbitral Tribunal was comprised of William Rowley, Warren Christopher and V.V. Veeder, President.

[34] *Methanex* "Amici Curiae" Decision, *supra* note 29, at para. 4.

[35] On certain aspects of this question, *see* B. Stern, "Un coup d'arrêt à la marginalisation du consentement dans l'arbitrage international (A propos de l'arrêt de la Cour d'appel de Paris du 1er juin 1999)," Rev. de l'arb. 403 (2000).

[36] *Methanex* "Amici Curiae" Decision, *supra* note 29, at para. 5.

regulations that have caused their profits to decline. In so doing, they have been opposing environmental NGOs—other private players—who now go so far as to advocate a modification of the system, suggesting, for example, the need for the government of the State against which arbitration proceedings have been brought by private investors to accept the arbitration on a case-by-case basis.[37] Indeed, Meg Kinnear stated that "[s]ome analysts have expressed concern that amicus participation in the investor-State context has been exclusively progovernment and anti-investor," adding that she did not share this point of view because, according to her, "this criticism is unfounded and … amicus participation has been from a variety of perspectives."[38]

It was no surprise that the United States—and Canada, which joined forces with it[39]—were favorable to the admission of *amicus curiae* briefs, because such had been their invariable policy. Mexico, meanwhile, followed the stance of the developing countries, opposing such a move. Faced with these irreconcilable points of view, the Arbitral Tribunal decided to accept the *amicus curiae* briefs based on the reasoning set out below. In doing so, it made repeated references at each step of the way to the above-mentioned rulings of the WTO Appellate Body.

The Arbitral Tribunal began by noting that nothing in the rules governing its procedure, *i.e.* neither the NAFTA Chapter 11 Rules nor the UNCITRAL Rules of Procedure, "either expressly confers upon the Tribunal the power to accept amicus submissions or expressly provides that the Tribunal shall have no such power."[40]

As the Tribunal found no clear directive in its constitutive document to determine what its power was, it referred to Article 15 of the UNCITRAL Rules of Procedure, which gave it wide powers in the conduct of arbitration proceedings. It held that "in the Tribunal's view, its receipt of written submissions from a person other than the Disputing Parties is not equivalent to adding that person as a party to the arbitration,"[41] which it is not empowered to do. It added, as if to buttress this reasoning, that in the *United States-Carbon Steel* case settled under the WTO, "[t]he distinction between Parties to an arbitration and their right to make submissions and a third party person having no such right was adopted by the WTO Appellate Body…. For present purposes, this WTO

[37] Six NGOs jointly filed a report to the United States Trade Representative (USTR) in September 2001 proposing a modification of the existing procedures. These NGOs were the Center for Environmental Law, the Defenders of Wildlife, Friends of the Earth, the Natural Resources Defense Council, Pacific Environment, and the Sierra Club.

[38] Kinnear, *supra* note 32, at 7.

[39] This was apparently done after "considerable internal negotiations and deliberations." Mann, *supra* note 28, at 242.

[40] *Methanex* "Amici Curiae" Decision, *supra* note 29, at para. 24.

[41] *Id.* at para. 30.

practice demonstrates that the scope of a procedural power can extend to the receipt of written submissions from non-Parties third persons."[42] Taking the parallel even further, the Arbitral Tribunal gave due consideration to the two pertinent articles, namely Article 15 of the UNCITRAL Rules and Article 17.6 of the WTO Memorandum of Agreement:

> [T]he Appellate Body there found that it had power to accept amicus submissions under Article 17.9 of the Dispute Settlement Understanding to draw up working procedures. That procedural power is significantly less broad than the power accorded to this Tribunal under Article 15(1) to conduct the arbitration in such manner as it considers appropriate.[43]

Having established an underlying legal basis for exercising its power, the Arbitral Tribunal widened its comments to some extent in order to emphasize that insofar as questions of public interest had been raised, its decision would be taken against the background of current international relations: "In this regard, the Tribunal's willingness to receive amicus submissions might support the process in general and this arbitration in particular, whereas a blanket refusal could do positive harm."[44]

Whatever the overall political impact, the Arbitral Tribunal held in this decision that it had the power to accept *amicus curiae* briefs in investor-State arbitration *even if one of the parties was not in agreement*. It is the author's view that this is a new marginalization of the parties' consent, which provides the basis for the arbitration process. It should be noted, however, that NGO participation was limited in this case to written submissions. The NGOs were not authorized to attend hearings or present oral arguments. This was the case only because there is a specific UNCITRAL arbitration rule providing for hearings *in camera* as a general rule.[45] The door has therefore been left open for them to participate in the absence of such a general rule. Likewise, it was considered that NGOs were not permitted to access all of the documents related to the arbitration. There again, however, this was for the specific reason that there was a confidentiality agreement between the parties covering the documents exchanged by the parties during the arbitration process.

Furthermore, although the Tribunal laid down "the general principle permitting written submissions from third persons,"[46] it did not immediately

[42] *Id.* at para. 33.

[43] *Id.*

[44] *Id.* at para. 49.

[45] "Hearings shall be held *in camera* unless the parties agree otherwise." UNCITRAL Rules of Arbitration, Article 25(4).

exercise its power because it believed that it should draw up a clearer, more detailed procedure:

> Weighting all the factors, the Tribunal considers that it could be appropriate to allow amicus written submissions from these Petitioners. Whilst the Tribunal is at present minded to allow the Petitioners to make such submissions at a later stage of these arbitration proceedings, it is premature now for the Tribunal finally to decide the question at this relatively early stage. The Tribunal intends first to consider with the Disputing Parties procedural limitations as to the timing, form and content of the Petitioners' submissions.

In reality, the procedural framework was not decided upon in conjunction with the disputing parties, even if they had accepted the principle of the intervention of *amici curiae*. It was rather drawn up by the States Parties to NAFTA in their Statement of Interpretation of the Free Trade Commission (FTC) dated October 7, 2003. Based on this procedure, two applications for leave to file *amicus curiae* briefs were then presented, as explained by the Tribunal in the Final Award in *Methanex*:[47]

> In accordance with the procedures of the FTC statement, as put in place by the Tribunal with the agreement of the Disputing Parties, the Tribunal received two applications for permission to file a non-disputing party submission: (i) the application for amicus curiae status by International Institute for Sustainable Development dated 9th March 2004, and (ii) the application of non-disputing parties for leave to file a written submission by Earthjustice on behalf of Bluewater Network, Communities for a Better Environment and Center for International Environmental Law, also dated 9th March 2004. In each case, as provided in the FTC statement, the application was accompanied by the written submission that the amicus curiae sought to submit to the Tribunal. By letter of 26th March 2004, the USA submitted that the Tribunal should grant the permission requested by the potential amici, whilst by letter of the same date Methanex indicated that it did not object to the granting of such permission by the Tribunal.[48]

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[46] *Methanex* "Amici Curiae" Decision, *supra* note 29, at para. 37.

[47] *Methanex Corp. v. United States*, Final Award (August 3, 2005), at http://www.state.gov/documents/organization/51052.pdf

[48] *Id.* at Part II, Chapter C, para. 28.

Interestingly, the Tribunal made a reference in its reasoning to an argument presented by IISD:

> The International Institute for Sustainable Development (IISD), in its carefully reasoned Amicus submission, also disagrees with Methanex's contention that "trade law approaches can simply be transferred to investment law."[49]

In closing, it bears noting that the Arbitral Tribunal's acceptance of *amicus curiae* briefs relied heavily on the admission of interventions from disinterested parties under the WTO's dispute settlement mechanism and the reasoning followed by the WTO's Appellate Body.

B. Confirmation of Acceptance of Amicus Curiae *Briefs in the* UPS *Case*

The first step taken in *Methanex* was confirmed by a second step taken in the *UPS (United Parcel Service of America Inc.) v. Government of Canada* case.[50] The *UPS* case was also a NAFTA Chapter 11 arbitration conducted under the UNCITRAL Arbitration Rules. It involved a worldwide express delivery service company, UPS, which instituted proceedings against Canada because of the existence in that country of a state monopoly, Canada Post, which UPS accused of breaching the national treatment rules laid down in NAFTA. UPS alleged that Canada Post had abused its monopoly in order to develop express delivery services that competed with the activities of UPS, and that it had benefited from customs facilities that were not granted to UPS. The latter therefore claimed 160 million dollars in damages from Canada. Two Canada Post labor unions, namely the Canadian Union of Postal Workers and the Council of Canadians, wanted to intervene in the case as *amici curiae*. In fact, the application to

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[49] *Id.* at Part IV, Chapter B, para. 27. *See also* the reference made to the *amici curiae* in the preface of the Final Award: "From this Award and from the Partial Award also, it will be evident that the Tribunal has relied heavily on the submissions of Counsel, who were assisted by many others whose names do not appear on the transcript of the hearings. In adversarial proceedings addressing such a massive, complicated and difficult dispute over many years, it could not be otherwise. At the beginning of this Award, therefore, it is appropriate to record our appreciation of the scholarship and industry which Counsel for the Disputing Parties, Mexico and Canada as NAFTA Parties and the *amici* have deployed during these lengthy arbitration proceedings, together with their respective experts, assistants and other advisers." *Id.* at para. 11 (emphasis added).

[50] *UPS (United Parcel Service of America Inc.) v. Government of Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae (October 17, 2001), at http://www.dfait-maeci.gc.ca/tna-nac/IntVent_oct.pdf (hereinafter *UPS* "Amici Curiae" Decision). It may be noted that the award on the merits was rendered on June 11, 2007, the UPS claims having been unanimously rejected in their entirety by the Tribunal.

intervene as *amici curiae* was requested simply as an option for the unions in the event that the main application—that the two trade unions could become parties to the case—was rejected. This illustrates the fact that the submission of an *amicus curiae* brief can play basically the same role as an entity's intervention as a party in a dispute.

The unions' *amici curiae* intervention was supposed to be extremely broad because the two trade unions had petitioned the Tribunal requesting, first, the right that all procedural documents generated by the parties and the Arbitral Tribunal be provided to them, second, the right to make submissions concerning the place of arbitration, and third, the right to make submissions concerning the jurisdiction of the Arbitral Tribunal and the arbitrability of the dispute.

The arguments in support of their application to intervene in the proceedings, either as parties or as "friends of the court," were, first, their direct interest in the settlement of the dispute, the solution of which could impact on them negatively and second, their "interest in the broader public policy implications of the dispute."[51] From the unions' point of view, it was the very concept of postal services as well as of the public service in general that could be affected by the arbitral decision, since according to them, "this dispute is not essentially private in character, but rather is likely to have far reaching impacts on a broad diversity of non party interests."[52] The trade unions raised two further concerns. The first was their desire to see the seat of the arbitration located in Canada "to ensure judicial oversight by the appropriate Canadian court of these proceedings in accordance with Canadian constitutional principles and the rule of law."[53] This was a manifestation of the concern that can arise when certain social organizational issues are withdrawn from the jurisdiction of the domestic legal system in order to have them entrusted to the decision of international trade arbitrators, who are not necessarily sensitive to public policy concerns prevailing in the local legal environment. The second concern raised by the unions was their determination "to address the lack of transparency that has historically attended international arbitral processes."[54] Finally, the unions urged the Arbitral Tribunal to grant them fair and equitable treatment in accordance with international laws governing the protection of human rights and workers' rights.

Part of the Tribunal's reasoning dealt with the first application of the trade unions, which was to be granted party status in the proceedings. It should be noted here, without entering into the details of the arguments made in relation to the joinder of a party, that in advocating their right to fair and equitable

[51] *Id.* at 3.
[52] *Id.*
[53] *Id.* at 4.
[54] *Id.*

treatment under the law, the two unions argued that "investor-state claims can be seen more analogous to the judicial review applications than to private contract disputes."[55] This would seem to support the notion that the "freedom of parties to arrange their own affairs" based on a concept of arbitration as an institution performing a private function should be set aside in cases of arbitration without privity,[56] which instead fulfills a public function and should not prevent the intervention of interested parties. The Arbitral Tribunal did not, however, go beyond its mandate by agreeing to add new parties on its own authority in an arbitration that had been submitted to it based on the consent of the two original parties. According to the Tribunal, "[t]he disputing parties have consented to arbitration only in respect of the specified matters and only with each other and with no other person."[57]

Having refused to grant party status to the two trade unions, the Tribunal turned its attention to their alternative petition, which was to be granted "friends of the court" status. While invoking and approving in part the position adopted previously by the Arbitral Tribunal in *Methanex*, the trade unions criticized that body for adopting an excessively narrow notion of what was involved in an *amici curiae* intervention. In particular, it was the unions' view that friends of the court ought not only to be able to make written submissions, but should also be able to attend hearings and have access to all documents related to the arbitration.

The two disputing parties—UPS and Canada—presented briefs seeking to prevent the unions' intervention as *amici curiae* even though it was recognized by UPS that the Tribunal did perhaps have the power to accept *amicus curiae* briefs, and by Canada that the Tribunal certainly had a discretionary power in this regard. The two parties nevertheless believed that questions concerning the place of arbitration, the jurisdiction of the Tribunal, and procedure in general should not justify the submission of *amicus curiae* briefs. UPS in particular drew the attention of the Tribunal to the dangers of leaving the door wide open for *amici curiae* briefs, as this risked rendering arbitral proceedings unmanageable. For its part, Canada announced its "appreciation of the contribution that transparency brings to building confidence in the investor-state dispute settlement process."[58]

[55] *Id.* at 12.

[56] This is an expression coined by J. Paulsson in "Arbitration without Privity," ICSID Rev. 232 (1995).

[57] *UPS* "Amici Curiae" Decision, *supra* note 50, at 16. The Arbitral Tribunal believed in particular that Article 15 of the UNCITRAL Arbitration Rules—the veritable *Magna Carta* of international commercial arbitration—which recognizes the right of the Parties to due process, could not be interpreted as conferring the right of participation upon non-parties: "It does not itself confer power to adjust jurisdiction to widen the matter before it by adding as parties persons additional to those which have mutually agreed to its jurisdiction or by including subject matter in its arbitration additional to that which the parties have agreed to confer." *Id.* at 17.

[58] *Id.* at 21.

The United States and Mexico, like Canada and Mexico in *Methanex*, were called upon in their capacity as States Parties to NAFTA and adopted unsurprising positions. The United States favored the admission of *amicus curiae* briefs while Mexico argued that the Arbitral Tribunal did not have the power to accept such briefs. The latter, in particular, stated that the concept of *amicus curiae* was unknown in Mexico and that "[c]oncepts and procedures alien to its legal tradition and which were not agreed to … should not be imported into NAFTA dispute settlement proceedings."[59]

Referring frequently to the decision adopted in *Methanex*, the Arbitral Tribunal agreed in principle that communications from the two trade unions should be admitted, and that they should be able to file written communications but not attend hearings. In the latter respect, as had been the case in *Methanex*, the Tribunal cited Article 25(4) of the UNCITRAL Rules, stipulating that hearings should be held *in camera*. The Tribunal seemed to wish to go beyond its predecessor in the *Methanex* case, however, since it added that "[t]he privacy of the hearing is perhaps to be distinguished from confidentiality or availability of documents."[60] It remained vague on the criteria to be used to determine when arbitral documents should be provided to *amici curiae*, being content merely to indicate that the principle of transparency could result in the transmission of certain documents while others ought to remain confidential.

For practical reasons, the Tribunal did not want to overburden the arbitral process and indicated that it would limit the length of authorized communications, albeit without giving any details at that stage. The Tribunal further appears to have made a Freudian slip when it added that "*[t]he third parties* would not have the opportunity to call witnesses (given the effect of article 25 (4))."[61] Although the Tribunal was relatively silent on the exact form that the *amici curiae* interventions would take, and affirmed its power to admit such briefs, it did not believe that they would be appropriate in procedural matters. Nevertheless, the Tribunal's "profession of faith" in favor of *amicus curiae* briefs is noteworthy. It was based on systemic considerations and the desire for "transparency," a buzz word that seems to open the doors to the arbitral process. The basic idea seems to be that the international system of investor-state arbitration has changed fundamentally, the result being that *amicus curiae* briefs must be accepted in investor-state disputes. Such disputes are not seen purely as commercial disputes, but rather as having much more at stake. According to the Tribunal in *UPS*, "[s]uch proceedings are not now, if

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[59] *Id.* at 23.

[60] *Id.* at 26.

[61] *Id.* at 27 (emphasis added).

they ever were, to be equated to the standard run of international commercial arbitration between private parties."[62]

The matter arose again at the merits stage, when in an order dated April 4, 2003, the hearings were opened up with the consent of the parties: "In accordance with UNCITRAL Arbitration Rules Article 25(4), to the extent the Disputing Parties have agreed as recorded in this order, the hearings in this arbitration shall not be held in camera."[63] Then, once the Free Trade Commission laid down broad guidelines for *amicus curiae* interventions in October 2003 in its Statement of Interpretation, the Arbitral Tribunal specified the procedure applicable to such interventions in April 2004 and August 2005. Based on these specifications, a new joint application was submitted by the unions on October 20, 2005. A further application was presented the same day by the Chamber of Commerce of the United States, albeit through a different lawyer.[64]

Responses to the various details required by the Tribunal before it could give approval to *amici curiae* interventions were set out in these applications: information on the intervening parties, their independence, their interest in the proceedings, and the factual and legal issues to be addressed in their briefs.

The unions made the following submission: "The Canadian Union of Postal Workers … represents approximately 46,000 operational employees of the Canadian Post" and has been "actively involved in the public policy debate about postal services,"[65] while "[t]he Council of Canadians … is a non-governmental organization with more than 100,000 members" and "is strongly committed to preserving the integrity of Canadian postal services as public services providing high quality, reliable and affordable mail, parcel and courier services to all Canadians regardless of where they live."[66] The Chamber of Commerce's submission for its part stated that "[t]he Chamber of Commerce of the United States of America … is the world's largest business federation, representing an underlying membership of more than three million businesses, state and local chambers of commerce and professional organizations."[67] The two applications were accepted and the Tribunal received the two *amicus curiae* briefs.

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[62] *Id.*

[63] *UPS (United Parcel Service of America Inc.) v. Government of Canada*, Procedural Directions and Order of the Tribunal, (April 4, 2003), http://www.naftaclaims.com/disputes_canada_ups.htm, at para. 14.

[64] *See* Amicus Submission – CUPE and "Council of Canadians," and Amicus Submission—US Chamber of Commerce (October 20, 2005), at http://www.naftaclaims.com/disputes_canada_ups.htm.

[65] First application, http://www.naftaclaims.com/disputes_canada_ups.htm, at paras. 1 and 5.

[66] *Id.* at paras. 7–8.

[67] Second application, http://www.naftaclaims.com/disputes_canada_ups.htm

C. The "Routine" Use of Amicus Curiae *Briefs in the* Glamis *Case*

It should be emphasized that applications for *amicus curiae* interventions are becoming increasingly frequent, as was seen recently in a NAFTA Chapter 11 arbitration conducted under the UNCITRAL Arbitration Rules between a Canadian company, Glamis Gold Ltd., and the United States.[68]

In December 2003, Glamis Gold Ltd., a Canadian precious metals mining company, filed an application for arbitration on behalf of its subsidiaries, Glamis Gold Inc. and Glamis Imperial Corporation, concerning alleged losses suffered at a gold mining project in California. It alleged that certain measures taken by the U.S. federal government and the state of California relating to open-pit mining were in breach of the obligations assumed by the United States under Chapter 11 of the NAFTA.

In this case, the Tribunal received a series of applications from organizations to intervene as *amici curiae*. The first application was filed in August 2005 by the Quechan Indian Nation ("the Tribe"), an American Indian tribe recognized at the federal level.[69] The Tribe, whose sacred places were located at the site where the gold mine conceded by the United States to Glamis was to be developed, wanted to intervene to protect its ancestral rights. In its application, the Tribe, after being required to state that it was not connected to any of the disputing parties, explained that "the Quechan's interest in this NAFTA arbitration is multi-faceted." It emphasized that it had "proactively tracked all of the legal, administrative and policy initiatives known to it, to ensure that the sacred places at Indian Pass would be protected to the maximum extent possible." According to the Tribe, this arbitration was "one of those processes that could affect the integrity of the sacred area and the Tribe's relation to it," and "the manner in which this sacred area and the Tribe's interest in it will be portrayed in this arbitral process is of great concern for native peoples worldwide, who are similarly attempting to protect their irreplaceable sacred places and ensure religious freedoms." Thus, it wanted to ensure that "the sensitive and serious

[68] *Glamis Gold Ltd. v. United States* (hereinafter *Glamis*). Documents relating to this case can be found on the U.S. Department of State website at http://www.state.gov/s/l/c10986.htm. It bears noting that this case is of particular interest because, according to two authors, "it was the first case in which the admissibility criteria determined by the Free Trade Commission were themselves applied. The Tribunal held that it was necessary to determine the question of admissibility in accordance with the principles laid down by the Free Trade Commission, and (contrary to the Tribunals in *Methanex* and *UPS*), without having to rely on the discretionary power granted to it by Article 15(1) of the UNCITRAL Arbitration Rules." Grisel and Vinuales, *supra* note 4, at 19 (footnote omitted). It should be added that this remark is only true, however, if the entire proceeding is considered as a whole.

[69] *Glamis*, Quechan Indian Nation Application for Leave to File a Non-Party Submission (August 19, 2005), at http://www.state.gov/documents/organization/52531.pdf. The citations of the two following paragraphs all come from this application.

nature of indigenous sacred areas" would in fact be taken into account not only in the present arbitration, but also "in all future, international proceedings."

To ensure acceptance of its application, the Tribe argued that it could assist the Tribunal "in the determination of factual and legal issues by bringing the perspective, particular knowledge and insight that is unique to American tribal sovereign governments." According to the Tribe, none of the parties to the arbitration could make such a contribution. Moreover, in its capacity as a sovereign government recognized by the United States Constitution, the Tribe felt it could not "be adequately represented by another sovereign: the United States Government," nor, *a fortiori*, by the Canadian company Glamis. It has therefore a unique and different approach, since "the Claimant is adverse in interest to the Tribe, and the Respondent is not constitutionally equipped to speak for it." In particular, "no party can speak with expertise or authority to the cultural, social or religious value of the Indian Pass area to the Tribe or the severity of impacts to the area and the Tribe, except for qualified members of the Tribe." The Tribe put forward the "significant interest" it had in this arbitration as being that from time immemorial the Quechan people had occupied the region where the mining project was to be carried out, and that "the Indian Pass area remains of extremely high value to the Tribe because of its historical/cultural associations and its continuing ceremonial and religious values to the Quechan people."

The Tribe's application to submit an *amicus curiae* brief elicited responses from both the United States[70] and Glamis Gold Ltd.[71] On September 16, 2005, the Tribunal heard the issue and accepted the Tribe's submission.[72] At the end of September, however, another application for authorization to submit *amici curiae* briefs was jointly filed by the Friends of the Earth Canada and the Friends of the Earth United States,[73] two not-for-profit environmental advocacy organizations.

Moreover, the Sierra Club and Earthworks, two other environmental NGOs, addressed to the Tribunal a Request for Extension to File Submissions in order to shift the date for filing from October 13, 2006 to November 7, 2006, or at least October 25, 2006. The Tribunal, after emphasizing that

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[70] *Glamis*, Response of United States of America to Application of the Quechan Indian Nation for Leave to File a Non-Party Submission (September 15, 2005), at http://www.state.gov/documents/organization/54087.pdf

[71] *Glamis*, Response of Glamis Gold Ltd. to Application of the Quechan Indian Nation for Leave to File a Non-Party Submission (September 15, 2005), at http://www.state.gov/documents/organization/54090.pdf

[72] *Glamis*, Decision on Application and Submission by Quechan Indian Nation (September 16, 2005), at http://www/state/gov/documents/organization/53592.pdf

[73] *Glamis*, *Amicus Curiae* Application of Friends of the Earth Canada and Friends of the Earth United States (September 30, 2005), at http://www.state.gov/documents/organization/54364.pdf; *Id.*, *Amicus Curiae* Submissions of Friends of the Earth Canada and Friends of the Earth United States (September 30, 2005), at http://www.state.gov/documents/organization/54363.pdf

submissions of non-disputing parties should be concise and not exceed 20 pages, granted an extension to October 16, 2006.[74] On that date, the Sierra Club and Earthworks filed an Application for Leave to File Submissions.[75] The very same day, the Tribe, which had already filed a submission in September 2005, filed an Application for Leave to File a Supplemental *Amicus Curiae* Brief.[76] It stated that "[a]s the Tribunal is aware, those initial submissions … were made prior to the filing of Glamis's Memorial or the State Department's Counter-Memorial in the matter. As part of those initial submissions, the Tribe respectfully requested that it be provided the opportunity to respond to the Disputing Parties' Memorials, and other submissions, as may be necessary and appropriate." Meanwhile, the National Mining Association, "a not-for-profit trade organization that represents the interests of the mining industry before each branch of the United States government and the public," had also filed an Application for Leave to File Submissions.[77]

The Tribunal had emphasized that the submissions of the non-disputing parties should be concise and not exceed 20 pages,[78] and it ended up with five submissions of roughly this size. Two came from the Tribe, the first comprising 15 pages and the second 20 pages. One came from the Friends of the Earth Canada and the Friends of the Earth United States with 19 pages, another from the Sierra Club and Earthworks with 20 pages, and finally one from the National Mining Association with 22 pages.

If acceptance of *amicus curiae* submissions is intended to ensure greater transparency and foster a greater understanding of the social challenges involved in a case, it cannot be denied that this places an additional burden on parties to the dispute and on the Tribunal.[79]

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[74] *Glamis*, Request for Extension to File Application for Leave to File a Non-Disputing Party Submission and Associated Submission (October 10, 2006), at http://www.state.gov/documents/organization/73890.pdf

[75] *Glamis*, Application of Non-Disputing Parties for Leave to File a Written Submission by Sierra Club and Earthworks (October 16, 2006), at http://www.state.gov/documents/organization/74831.pdf; *Id.*, Submission of Non-Disputing Parties Sierra Club and Earthworks (October 16, 2006), at http://www.state.gov/documents/organization/74832.pdf

[76] *Glamis*, Quechan Indian Nation Application for Leave to File a Supplemental Non-Party Submission (October 16, 2006), at http://www.state.gov/documents/organization/75015.pdf; *Id.*, Non-Party Supplemental Submission of the Quechan Indian Nation (October 16, 2006), at http://www.state.gov/documents/organization/75016.pdf

[77] *Glamis*, Application for Leave to File a Non-Disputing Party Submission by the National Mining Association (October 13, 2006), at http://www.state.gov/documents/organization/75178.pdf; *Id.*, Non-Disputing Party Submission of the National Mining Association (October 13, 2006), at http://www.state.gov/documents/organization/75179.pdf

[78] *Glamis*, Request for Extension to File Application for Leave to File a Non-Disputing Party Submission and Associated Submission, *supra* note 74.

[79] Evidence of this is provided by the relevant documents produced in *Glamis* and quoted *supra* at notes 68–78 and their accompanying text.

Without analyzing the content of the various briefs in *Glamis*, it is nevertheless interesting to present the principal arguments of the Tribe, given that up to now this type of intervention has not been as common as those of environmental advocacy or human rights NGOs.

In its written submission, the Tribe developed certain points of fact and of law. With respect to the former, the Tribe believed that the mining project threatened Quechan cultural resources and sacred places. The Tribe pointed out in particular that it "has utilised the Indian Pass area since time immemorial for religious, ceremonial and educational purposes," that it still used it, and that hopefully future generations would continue to use it. With regard to the points of law, the Tribe described the current framework for the protection of indigenous cultural resources erected under domestic and international laws. California and the U.S. federal government had adopted legislation "to protect tribes and tribal cultural resources." Moreover, according to the Tribe, "there is a considerable body of international pronouncement, spanning nearly fifty years, on cultural resource protection," including Article 27 of the Covenant on Civil and Political Rights. After presenting this general framework for protection, the Tribe developed its argument on the issues in dispute. After pointing out that "in its notice of arbitration, the Claimant has identified two provisions of the NAFTA upon which it hopes to rely: Articles 1105(1) (the 'minimum standard of treatment') and 1110 (requiring compensation for expropriation)," the Tribe indicated that in order to interpret those provisions, the Tribunal ought to be guided by the following two considerations:

- that the preservation and protection of indigenous rights in ancestral land is an obligation of customary international law which must be observed in accordance with the principle of good faith; and
- that an investor seeking compensation for an alleged taking of property cannot rely upon a claim to acquired rights in which no legitimate expectation to enjoy such rights existed.

According to the Tribe, NAFTA States Parties, while having regard for the treatment of investors and their investments, must also act in accordance with the minimum standards imposed by customary international law. It indicated that "communal rights to property exist for indigenous people in international law, above and apart from whichever of their rights in land are recognized within any particular domestic system of law." It cited in support of its argument the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, as well as International Labour Organization Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, which

according to the Tribe "stands as a *de facto* restatement of the core principles of international law generally applicable to the conduct of States in respect of the rights and interests of indigenous people." It also cited judgments rendered by the Inter-American Court of Human Rights and the position of the Inter-American Commission on Human Rights with respect to the American Declaration of the Rights and Duties of Man.[80] Concerning the interpretation of NAFTA Article 1110, the Tribe recalled that "many tribunals have already concluded that NAFTA Article 1110 is not a remedy for any investor whose business plans were ultimately frustrated by governmental regulation." It ended its brief by explaining how an award in favor of Glamis could negatively affect the management of the area in question.

D. Outlook Following These Various WTO and NAFTA Decisions

Following the WTO developments discussed above, the second stage in which *amicus curiae* briefs were accepted by arbitral tribunals in foreign investor-State arbitrations was performed under NAFTA Chapter 11 and conducted under the UNCITRAL Arbitration Rules. At that point, some wondered if the acceptance of *amicus curiae* briefs would continue or if the trend would instead cease or at least slow down. Walid Ben Hamida, for example, pointed out after examining the two NAFTA cases, *Methanex*[81] and *UPS*,[82] that it was not at all sure that the same solution would have been conceivable if other arbitration rules had been applicable. There are indeed rules which bring to mind Article 15 of the UNCITRAL Arbitration Rules in the Washington Convention, the ICSID Rules, the Additional Facility Rules, the International Chamber of Commerce (ICC) Rules of Arbitration, and the International Commission on Civil Status (ICCS) Regulations. However, as Ben Hamida notes, "even where there is a legal basis for the admission of written briefs from disinterested third parties, it is not at all certain, in light of the traditions of each institution, their conception of arbitration, and their respective roles for arbitrators, that

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[80] In the 2001 *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* case, Judgment of August 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001), the Inter-American Court held that by granting a concession to a foreign investor, Nicaragua had violated the property rights of the Mayagna Community because rights in the communal property of indigenous peoples are protected under the Inter-American Convention on Human Rights. Likewise, the Inter-American Commission on Human Rights in the 2000 *Mary & Carrie Dann* case (No. 11.140), "made clear that a *sui generis* regime of international norms protecting indigenous rights in land now exists and should be applied within the context of any international dispute, as in the Inter-American system of human rights, even where the parties to that dispute were not parties to ILO Convention 169."

[81] *See supra* notes 29–49 and accompanying text.

[82] *See supra* notes 50–67 and accompanying text.

the solution adopted in the *Methanex* and *UPS* cases would be systematically replicated under such regulations. An example of divergence is to be found in the *Aguas Del Tunari S.A. v. Republic of Bolivia* case, which was submitted to ICSID on the basis of a 1992 Netherlands-Bolivia BIT."[83]

At the conclusion of his article on *amici curiae* in the NAFTA cases, Patrick Dumberry showed the same skepticism with regard to extending the solution adopted in the NAFTA cases:

> [I]t is uncertain whether arbitral tribunals established pursuant to the *ICSID Convention* or under the *Additional Facility Rules* (AFR) will interpret their power and discretion in the same fashion as the Tribunal in the *Methanex* Case …. [I]t is feasible to assume that the Tribunal in the *Methanex* Case would probably not have taken the decision to allow amicus briefs without the support from both the state of the investor (Canada) and the state receiving the investment (the United States). This award is closely linked with the special circumstances actually prevailing in the NAFTA context and its result will therefore probably not be easily transportable to other types of investment disputes.[84]

By contrast, in an article on the first two NAFTA cases published in 2002, I pointed out that the above-mentioned trend had doubtless not yet come to an end:

> [T]he mechanism of adjudicating WTO cases largely opened the door to private entities, by authorizing the filing of *amicus curiae* briefs in commercial litigation between States. The favorable position toward civil society adopted through these means is in any event unlikely to remain so limited. The Tribunal in a recent arbitral case, *Methanex Corporation v. United States*,[85] accepted *amicus* briefs partly on the basis of the existing WTO practice, and a second, confirmatory step was

[83] W. Ben Hamida, Thesis, "L'arbitrage transnational unilatéral—Réflexions sur une procédure réservée à l'initiative d'une personne privée contre une personne publique," Université Panthéon-Assas (Paris II) (Ph. Fouchard, directeur, June 2003), para. 826 (hereinafter Ben Hamida). Indeed, the passage quoted was written before orders accepting *amicus* briefs were adopted in the ICSID context. *See also* E. Teynier, "Investissements internationaux et arbitrage," in I. Fadlallah, Ch. Leben and E. Teynier (eds.), Cahiers de l'arbitrage 2, para. 4 (A. Mourre, series manager, 2005), where Eric Teynier wonders whether we should see in the increasingly frequent admittance of *amicus curiae* submissions the emergence of a rule of international law. In his view, it was not easy to give a definitive response to this suggestion at that stage (hereinafter Teynier).

[84] Dumberry, *supra* note 28, at 213–214.

[85] *See supra* notes 29–49 and accompanying text.

taken in this direction in the arbitral case of *UPS (United Parcel Service of America Inc.) v. Government of Canada*.[86] These cases appear to lay down the foundation for a new customary approach.[87]

Two other authors have underscored the point that developments initiated across the Atlantic under NAFTA Chapter 11 have undoubtedly been important, as they have acted as a kind of catalyst in a context where the lack of transparency in international arbitration is being questioned.[88] It thus appears that the trend will continue in investment arbitration in general, in the same direction as that adopted in the investment arbitration cases under NAFTA Chapter 11, as will be seen in the next Section, which deals with *amicus curiae* briefs in ICSID's case law.

III. THE EVOLUTION OF THE APPROACH TO *AMICUS CURIAE* BRIEFS IN THE ICSID CONTEXT

The trend in favor of admitting *amicus curiae* briefs initiated under the WTO and continued under NAFTA has indeed been confirmed by the evolution of ICSID's case law revealed in the order issued by the ICSID Arbitral Tribunal on May 19, 2005 in the *Aguas Argentinas et al. v. The Argentine Republic* case (hereinafter referred to as *Aguas Argentinas/Vivendi 1*)[89] and the very similar and even further-reaching one by an ICSID Tribunal composed of the same arbitrators in *Aguas de Santa Fe et al. v. The Argentine Republic* (hereinafter referred to as *Aguas de Santa Fe/InterAguas*),[90] issued

[86] *See supra* notes 50–67 and accompanying text.

[87] Stern, *supra* note 28, at 331.

[88] Grisel and Vinuales, *supra* note 4, at 15. The authors use the term "*détonateur*."

[89] *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A, and Vivendi Universal, S.A. v. The Argentine Republic*, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, ICSID Case No. ARB/03/19 (May 19, 2005). (This case is hereinafter referred to as *Aguas Argentinas/Vivendi 1*.) *See* G. Flores, "Introductory note to *Aguas Argentinas*, Order of May 19, 2005," ICSID Rev. 339 (2006). In light of an April 14, 2006 Order terminating the *Aguas Argentinas* proceeding, the case was henceforth entitled *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic*. This explains the double reference employed in the short-form title "*Aguas Argentina/Vivendi*," and renders the case's presentation consistent across time. It may be noted for the record that a Decision on Jurisdiction was rendered on August 3, 2006 in this case.

[90] *Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, Order in Response to a Petition for Participation as Amicus Curiae, ICSID Case No. ARB/03/17 (March 17, 2006). On April 14, 2006, an Order having terminated the *Aguas de Santa Fe* proceeding, the case was henceforth entitled *Suez, Sociedad General de Aguas de Barcelona, S.A. and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, which explains the double reference employed in the short-form title "*Aguas de Santa Fe/InterAguas*," and renders the case's presentation consistent across time. It may be noted for the record that a Decision on Jurisdiction was rendered on May 16, 2006 in this case.

on March 17, 2006.[91] These two cases followed the same path taken in the NAFTA cases for accepting *amicus curiae* briefs, even though an intervening ICSID case (*Aguas del Tunari v. Bolivia*, hereinafter referred to as *Aguas del Tunari*),[92] may have seemed to point in another direction. In any event, the opening up of ICSID Tribunals to *amicus curiae* briefs was included in the new ICSID Regulations and Rules of April 2006, which were first applied in the *Biwater Gauff* case.[93] Later developments, as demonstrated particularly by the second order made in the *Aguas Argentinas et al. v. The Argentine Republic* case (hereinafter referred to as *Aguas Argentinas/Vivendi 2*), have confirmed this new state of affairs.[94]

A. A Decision Unfavorable to Amicus Curiae *Briefs Going Against the General Trend*

In the *Aguas del Tunari* case, which concerned water distribution and sewage treatment in the town of Cochabamba in Bolivia under a concession contract granted to the Aguas del Tunari company, a number of environmental NGOs[95] and natural persons filed a petition on August 28, 2002 before the Tribunal requesting permission to intervene in the arbitration.[96] In fact, these NGOs and individuals, through their legal counsel, Earthjustice, demanded as a matter of priority a right to intervene as parties, and only secondarily, in the event this first request was refused, a right to intervene as *amici curiae*. The request to intervene as *amici curiae* was particularly broad, as it had been in

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[91] *See* my article, B. Stern, "Un petit pas de plus : l'installation de la société civile dans l'arbitrage CIRDI entre Etat et investisseur," Rev. de l'arb. 3 (2007), and also the commentary of E. Teynier on *amicus curiae* in ICSID arbitration, in Teynier, *supra* note 83; *see also* Kinnear, *supra* note 32.

[92] *Aguas del Tunari S.A. v. Republic of Bolivia*, Decision on Respondent's Objections to Jurisdiction, ICSID Case No. ARB/02/3 (October 21, 2005) (hereinafter *Aguas del Tunari*). This case was stricken from the ICSID list upon the petition of the Parties, by an Order taking note of the discontinuance pursuant to ICSID Arbitration Rule 44, dated March 28, 2006.

[93] *Biwater Gauff (Tanzania) Ltd. v. Republic of Tanzania*, Procedural Order No. 5 (Amicus Curiae), ICSID Case No. ARB/05/22 (February 2, 2007); *id.*, Procedural Order No. 6 (Amicus and post-hearing process) (May 7, 2007) (hereinafter *Biwater*).

[94] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic*, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an Amicus Curiae Submission, ICSID Case No. ARB/03/19 (February 12, 2007). (This case is hereinafter referred to as *Aguas Argentina/Vivendi 2*.) For things to be perfectly clear, *Aguas Argentina/Vivendi 1* refers to the first order on *amicus curiae* in this case, (*i.e.* the Order of May 19, 2005), and *Aguas Argentina/Vivendi 2* to the second order (*i.e.* the Order of February 12, 2007).

[95] These organizations and individuals were La Coordinadora para la Defensa del Agua y Vida, La Federación Departamental Cochabambina de Organizaciones Regantes, SEMAPA Sur, Friends of the Earth-Netherlands, Oscar Olivera, Father Luis Sánchez and Member of Congress Jorge Alvarado.

[96] NGO Petition to Participate as *Amici Curiae* (August 29, 2002), at http://ita.law.uvic.ca/alphabetical_list_content.htm

the NAFTA cases, since it involved the right to make written submissions, the right to attend hearings and to make oral submissions at hearings, and the right to immediate access to all of the documents related to the arbitration. But the desire for transparency expressed by the would-be *amici* went further and also concerned the public in general. The Tribunal was indeed asked to make public all documents related to the arbitration, to open its hearings to the public, and to go to the site at issue to see for itself the true situation in Cochabamba.

The usual arguments were advanced in the application for leave to intervene. The applicants first reminded the Tribunal of the context in which the concession granted to the Dutch company had ended:

> Within weeks of taking control of the water system, the company raised water rates by an average of over 50% and in some cases far higher. Unable to pay their water bills, the people of Cochabamba participated in widespread public protests that caused the Government of Bolivia to declare a state of emergency, suspend constitutional rights, and ultimately to use violence to repress the protests, injuring more than 100 people and killing a 17 year-old boy. When these measures failed to halt the protests, Aguas del Tunari abandoned its management of the water system and left the country. Aguas del Tunari has now brought a claim to this Tribunal demanding compensation for anticipated profits lost as a result of its departure.[97]

The existence of "issues of broad public interest" was the main justification for the application for leave to intervene.[98] According to the petitioners, their intervention would ensure greater transparency and would guarantee a more democratic process:

> Each Petitioner also has an interest in addressing the lack of transparency that traditionally attends international arbitral processes and in ensuring that issues with broad public impacts are resolved through democratic processes that provide for meaningful public participation.[99]

It should be noted that the rather rapid and undiscussed assimilation of a more transparent process to a democratic process would doubtless merit wider discussion, and the notion that ICSID is "a Bank-controlled institution"[100]

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[97] *Id.* at para. 1.
[98] *Id.* at para. 2.
[99] *Id.*
[100] *Id.* at para. 23.

can likewise be disputed, because ICSID tribunals are indeed composed of independent arbitrators.

It bears noting that the application also pointed to an alleged wide and representative support:

> Support for this Petition is widespread. Over 300 representatives of civil society in Bolivia (the locus of the dispute), the Netherlands (whose investment agreement with Bolivia Aguas del Tunari cites as a basis for bringing its claim before this Tribunal), the United States (where Bechtel Corporation, Aguas del Tunari's parent company is based), and 38 other countries have written to the Tribunal to express their concerns and urge the Tribunal to allow Petitioners to intervene.[101]

This was not the first time that the rather confidential nature of ICSID mechanisms was criticized. According to the petitioners, "[e]ven before this dispute arose, the ICSID system had developed a public reputation as being a 'secret trade court' in which urgent public matters are decided behind a shroud of secrecy, without any of the opportunities for public vigilance and participation."[102] It was this public participation that was demanded so that the Tribunal could be fully informed of the opinions of those who would be directly affected by the award, rather than simply of the opinions of the foreign company and the Bolivian Government. According to the petitioners, only such participation could guarantee the public acceptance of the arbitral proceedings in this case, as well as in other cases:

> As noted above, there is strong and wide-spread public skepticism concerning the legitimacy of this Tribunal's resolution of Aguas del Tunari's claim, based in large part on the secrecy of the Tribunal's proceedings and their potentially broad impacts. If not addressed, that skepticism could weaken public acceptance of this Tribunal's award, as well as the operations of other arbitral tribunals.[103]

The Tribunal summarily rejected all of the petitioners' demands in a letter dated January 23, 2003 from the President of the Tribunal, who pointed out that the Tribunal had examined very seriously and in detail the request submitted:

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[101] *Id.* at para. 4.
[102] *Id.* at para. 30.
[103] *Id.* at para. 61.

> The Tribunal wishes to emphasize that it has given serious consideration to your request. The briefness of our reply should not be taken as an indication that your request was viewed in other than a serious manner.[104]

Extracts from this letter were incorporated into the Decision of the Tribunal on Objections to Jurisdiction, of October 21, 2005:

> The Tribunal's unanimous opinion is that your core requests are beyond the power of the authority of the Tribunal to grant. The interplay of the two treaties involved (the Convention on the Settlement of Investment Disputes and the 1992 Bilateral Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and Bolivia) and the consensual nature of arbitration places the control of the issues you raise with the parties, not the Tribunal. In particular, it is manifestly clear to the Tribunal that it does not, absent the agreement of the Parties, have the power to join a non-party to the proceedings; to provide access to hearings to non-parties and a fortiori, to the public generally; or to make the documents of the proceedings public.[105]

While the consensual nature of the arbitration was highlighted as the reason why the Tribunal believed acceptance of the request would be *ultra vires*, the Tribunal left open the possibility of its appealing to witnesses *sua sponte*, stating that its position was "without in any way prejudging the question of the extent of the Tribunal's authority to call witnesses or to receive information from non-parties on its own initiative."[106] At the same time, the Tribunal believed that such an approach was not necessary at the jurisdictional phase.

B. Two Decisions Favorable to Amicus Curiae *Briefs Following the General Trend*

Two ICSID cases adopting a different approach concern precisely the same type of public services as in the *Aguas del Tunari* case, and the inconsistent reasonings behind these decisions is quite interesting. In the first case, *Aguas*

[104] Letter from President of Tribunal Responding to Petition (January 29, 2003), at http://ita.law.uvic.ca/alphabetical_list_content.htm

[105] *Aguas del Tunari*, Decision on Respondent's Objections to Jurisdiction, *supra* note 92, at para. 17.

[106] *Id.* at para. 18.

Argentinas/Vivendi 1, five NGOs[107] wanted to intervene because they believed that important issues of general interest to the public concerning water distribution and sewage treatment in the Buenos Aires region were at stake. In the second case, *Aguas de Santa Fe/InterAguas*, the same type of services—water distribution and sewage treatment in the Santa Fe region—were also at stake and gave rise to the intervention of one NGO[108] and three natural persons.[109]

The first comment to be made about these cases is that the orders concerning *amici curiae* do not mention the negative position adopted by the ICSID Tribunal in the *Aguas del Tunari* case. This is easily explained with respect to the first order because even though the letter of the President of the *Aguas del Tunari* Tribunal was dated January 29, 2003, an official and public reference to it was made by that Tribunal only in the decision of October 21, 2005, that is, after the *Aguas Argentinas/Vivendi 1* order. Silence is less easily explained in the *Aguas de Santa Fe/InterAguas* order of 2006, in which the Tribunal—without any reference *expressis verbis* to the *Aguas del Tunari* case—noted that "to the knowledge of the Tribunal, no previous tribunal functioning under ICSID Rules has granted a nonparty to a dispute the status of *amicus curiae* and accepted *amicus curiae* submissions,"[110] before the May 19, 2005 decision in *Aguas Argentinas/Vivendi 1*. In other words, the Tribunal also ignored the *Aguas del Tunari* decision, and indicated that it "believes that the issues raised by the present Petition in this case are virtually identical to those raised in the petition filed by the five nongovernmental organizations and decided in the Tribunal's order of May 19, 2005. The Tribunal has therefore decided to apply the principles of that decision to the present petition."[111]

In the two cases, the would-be *amici curiae* presented three different requests—access to hearings, the right to submit written *amicus curiae* briefs, and access to all documents related to the arbitration—over which the two parties expressed diametrically opposed views. In the second case, the request for access to hearings also included an application for leave to make oral submissions. The Claimants in the two cases wanted the Tribunals to reject the requests totally, while the defendant State advocated that the Tribunals admit them. The

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[107] These NGOs were the Asociación Civil por la Igualdad y la Justicia (ACIJ), Centro de Estudios Legales y Sociales (CELS), Center for International Environmental Law (CIEL), Consumidores Libres Cooperativa Ltda. de Provisión de Servicios de Acción Comunitaria, and Unión de Usuarios y Consumidores.

[108] This NGO was la Fundación para el Desarrollo Sustentable.

[109] These natural persons were Professor Ricardo Ignacio Beltramino, Dr. Ana María Herren and Dr. Omar Darío Heffes.

[110] *Aguas de Santa Fe/InterAguas*, Order in Response to a Petition for Participation as Amicus Curiae, *supra* note 90, at para. 9.

[111] *Id*. at para. 4.

Tribunals successively examined the three different requests of the petitioners, rejecting the first, half-opening the door to the second, and deferring their decision on the third.

1. Refusing Access to Hearings of the Tribunal

The Arbitral Tribunals in the two cases made their decision on access to hearings quite rapidly. The Tribunals referred to the arbitration rule contained in the version of Article 32 of the ICSID Arbitration Rules which was then applicable to the facts of the case, and which was cited in the orders:

> The Tribunal shall decide, with the consent of the parties, which other persons besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal may attend the hearings.

The Arbitral Tribunals have considered this rule to be perfectly clear:

> Rule 32 (2) is clear that no other persons, except those specifically named in the Rule, may attend hearings *unless both Claimant and Respondent affirmatively agree* to the attendance of those persons ... Although the Tribunal, as the Petition asserts, does have certain inherent powers with respect to arbitral procedure, it has no authority to exercise such power in opposition to a clear directive in the Arbitration Rule, which both Claimants and Respondent have agreed will govern the procedure in this case.[112]

The Tribunals therefore decided unanimously, and without any hesitation, to refuse access to hearings by the petitioners.

2. Limited and Conditional Acceptance of Amicus Curiae *Briefs*

The Tribunals in *Aguas Argentinas/Vivendi 1* and *Aguas de Santa Fe/InterAguas* adopted an innovative solution within the ICSID context—despite its being in line with a clearly perceptible general trend in the arbitration field—but also took care to be extremely meticulous. They began by offering a definition of the role that, according to them, ought to be played by an "*amicus curiae*" intervention:

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[112] *Aguas Argentinas/Vivendi 1*, para. 6; *Aguas de Santa Fe/InterAguas*, para. 7 (emphasis added in both).

> In such cases, a nonparty to the dispute, as "a friend," offers to provide the court or tribunal its special perspectives, arguments, or expertise on the dispute, usually in the form of a written *amicus curiae* brief or submission.[113]

Once the role of the *amicus curiae* has been clearly defined, the Tribunals have examined what are the possible jurisdictional grounds that may enable them to authorize a submission of *amicus curiae* briefs and, on the assumption that they have such jurisdiction, the conditions under which it may properly be exercised. According to the actual words of the Tribunals, two questions arise:

> 1) Does the Tribunal have the power to accept and consider *amicus curiae* submissions by nonparties to the case? And 2) If it has that power, what are the conditions under which it should exercise it?[114]

a. Assertion of a Limited Procedural Power

The Tribunals' examination of the jurisdictional grounds for accepting *amicus curiae* briefs started with their finding that the admittance of *amicus curiae* briefs is neither explicitly authorized nor explicitly forbidden by the Washington Convention or the ICSID Arbitration Rules.[115] It was therefore deemed proper to do a further analysis by interpreting certain general provisions in order to determine whether the Tribunals possessed an inherent power to authorize the submission of *amicus curiae* briefs. It was in Article 44 of the ICSID Convention that the Tribunals found what they called a "residual power … to decide procedural questions."[116]

Evidently, there was open discussion about whether an *amicus curiae* intervention is a question of procedure or of substance. This discussion had already raged in the WTO, and therefore the Tribunals proceeded step by step, taking the reader by the hand, proceeding first to a definition of what constitutes a question of procedure, then identifying the characteristics of an *amicus curiae* brief:

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

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[113] *Aguas Argentinas/Vivendi 1*, para. 8; *Aguas de Santa Fe/InterAguas*, para. 9.

[114] *Aguas Argentinas/Vivendi 1*, para. 9; *Aguas de Santa Fe/InterAguas*, para. 10.

[115] "Neither the ICSID Convention nor the Arbitration Rules specifically authorize or prohibit the submission by nonparties of *amicus curiae* briefs or other documents." *Aguas Argentinas/Vivendi 1*, para. 9; *Aguas de Santa Fe/InterAguas*, para. 10.

[116] *Aguas Argentinas/Vivendi 1*, para. 10; *Aguas de Santa Fe/InterAguas*, para. 11.

> The admission of an *amicus curiae* submission would fall within this definition of procedural question since it can be viewed as a step in assisting the Tribunal to achieve its fundamental task of arriving at a correct decision in this case.[117]

The Tribunals therefore rejected the analysis submitted by the petitioners,[118] according to whom it was a question of substance insofar as everything, in the event of an *amicus curiae* intervention, takes place as if a new party had been introduced into the proceedings. The Tribunals insisted on the contrary that "[a]n *amicus curiae* is, as the Latin words indicate, a 'friend of the court,' and is not a party to the proceeding."[119] The Tribunals were firm on this point in a paragraph devoted entirely to this specific issue:

> The traditional role of an *amicus curiae* in an adversary proceeding is to help the decision maker arrive at its decision by providing the decision maker with arguments, perspectives, and expertise that the litigating parties may not provide. In short, a request to act as *amicus curiae* is an offer of assistance—an offer that the decision maker is free to accept or reject. An *amicus curiae* is a volunteer, a friend of the court, not a party.[120]

It bears noting that the Tribunals quoted NAFTA precedents at each stage of their reasoning. Thus, the Tribunals justified their interpretation of Article 44 of the ICSID Convention by comparing it to the analysis made by the Tribunal in *Methanex*.[121] Likewise, the Tribunals invoked the *Methanex* case to justify defining the issue of an *amicus curiae* brief's submission as a procedural one. But not only did the Tribunals refer to NAFTA cases, they also referred to other forums' precedents: "The Tribunal in the present case finds further support for the admission of amicus submissions in international arbitral proceedings in the practices of NAFTA, the Iran-United States Claims Tribunal[122] and the World Trade Organization."[123]

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[117] *Aguas Argentinas/Vivendi 1*, para. 11; *Aguas de Santa Fe/InterAguas*, para. 12.

[118] This was expressly elaborated upon only by the claimants in *Aguas Argentinas/Vivendi 1*.

[119] *Aguas Argentinas/Vivendi 1*, para. 13; *Aguas de Santa Fe/InterAguas*, para. 13.

[120] *Id.*

[121] For a critique of this comparison between the ICSID rule and the UNCITRAL rule, *see* Kessedjian, "L'amicus curiae," *supra* note 5, at 13.

[122] This is done indirectly through a reference to the decision in *Methanex*, where the tribunal referred to the fifth footnote added by the Iran-United States Claims Tribunal to the UNCITRAL Arbitration Rules, in order to explain its own understanding and application of Article 15(1) of the UNCITRAL Arbitration Rules, which was accepted to govern the procedure of the Iran-United States Claims Tribunal, and which reads: "The arbitral tribunal, having satisfied itself that the statement of one of the two Governments—or, under special circumstances, any other person—who is not an arbitrating party in a particular case is likely to assist the arbitral tribunal in carrying out its task, may permit such Government or person to assist the arbitral tribunal by presenting written and [or] oral statements." *Methanex* "Amici Curiae" Decision, *supra* note 29, at para. 32.

[123] *Aguas Argentinas/Vivendi 1*, para. 15; *Aguas de Santa Fe/InterAguas*, para. 15. (Internal citations omitted.)

The Tribunals therefore concluded that they had the power under Article 44 of the ICSID Convention to admit *amicus curiae* briefs. They also indicated, however, that they could exercise that power only under certain conditions. It is indeed worthwhile to analyze carefully the Tribunals' assertion of the extent of their power, for they did not recognize that they had an absolute power, but rather a strictly circumscribed one:

> The Tribunal [unanimously] concludes that Article 44 of the ICSID Convention grants it the power to admit *amicus curiae* submissions from suitable nonparties in appropriate cases.[124]

Two conditions underlying the power that the Tribunals asserted are hereby expressed. One condition has to do with the "friend of the court," and the other with the nature of the case. The friend must be "suitable" or "appropriate."[125] The case must also itself be "appropriate." To these two conditions—more or less inherent in the Tribunals' power—was added a third, more extrinsic procedural condition. Three cumulative conditions must thus be considered:

> (a) the appropriateness of the subject matter of the case; (b) the suitability of a given nonparty to act as *amicus curiae* in that case, and (c) the procedure by which the *amicus* submission is made and considered.[126]

According to the Tribunals, it is only if these three conditions are met that they will have performed their role fully, while still respecting the specific interests of the disputants and also the more general interests of persons deemed affected by the proceedings in question:

> The Tribunal believes that the judicious application of these criteria will enable it to *balance the interests* of concerned nondisputant parties to be heard and at the same time protect the substantive and procedural rights of the disputants to a fair, orderly, and expeditious arbitral process.[127]

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[124] *Aguas Argentinas/Vivendi 1*, para. 16; *Aguas de Santa Fe/InterAguas*, para. 16. Oddly enough, the word "unanimously" does not appear in paragraph 16 of the *Aguas de Santa Fe/InterAguas* decision, but this was probably an oversight.

[125] This is repeated several times: "suitable nonparties" (*Aguas Argentinas/Vivendi 1*, para. 20; *Aguas de Santa Fe/ InterAguas*, para. 19); "appropriate nonparties" (*Aguas Argentinas/Vivendi 1*, para. 21; *Aguas de Santa Fe/ InterAguas*, para. 20); and "appropriate representatives of civil society in appropriate cases" (*Aguas Argentinas/Vivendi*, para. 22; *Aguas de Santa Fe/InterAguas*; para. 21).

[126] *Aguas de Argentina/Vivendi 1*, para. 17; *Aguas de Santa Fe/InterAguas*, para. 17.

[127] *Aguas Argentinas/Vivendi 1*, para. 17; *Aguas de Santa Fe/InterAguas*, para. 17 (emphasis added in both). Along the same lines, the Tribunals' insistence on maintaining a balance between opposing interests

b. Conditions for Exercising This Limited Procedural Power

During their evaluation of the respective interests at stake, the Tribunals conducted a review to determine whether characteristic criteria were present that would justify an *amicus curiae* intervention. They did this by first determining whether there was a genuine public interest in the case, that is, by verifying "[t]he appropriateness of the subject matter of the case for *amicus curiae* submissions."[128]

As in the other discussed cases where *amici curiae* have sought to intervene, the NGOs and private persons seeking to intervene cited significant public interests as justification for their intervention. The Tribunals first adopted a very general approach to the notion of a public interest, stating that a case raises issues of public interest when it has "the potential, directly or indirectly, to affect persons beyond those immediately involved as parties in the case."[129] However, in light of the theory that the movement of a butterfly's wing at one end of the world can have an impact on the other end, a case's ability to have some potential direct or indirect effect on third-parties cannot be a sufficient condition for an *amicus curiae* intervention. The Tribunals therefore sought to provide a more precise definition of the notion of a general public interest.

In my view, the Tribunals adopted a relatively restrictive notion of public interest so that any challenge to the legality of an act of a State under international law does not appear to pose sufficient grounds in itself for a public interest to arise and create the possibility of an *amicus curiae* intervention. The act of the State in question must also have an object and purpose that involves broader interests than those raised in the dispute submitted for arbitration. For example, the act must pertain to public services.

After conducting a review of the facts of the cases, the Tribunals determined that such an interest existed in the cases under discussion. The Tribunals first noted that the international responsibility of Argentina was at stake, but seemed to indicate that this was not a sufficient condition in itself for an *amicus curiae* intervention. Indeed, were this the interpretation to be given to the reasoning of the Tribunals, the restrictive condition regarding the nature of the cases would cease to exist since, as indicated by the Tribunals, all ICSID matters could then be claimed to be of public interest:

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bears noting: "Rather than to reject offers of such assistance peremptorily, the Tribunal, while taking care to preserve the procedural and substantive rights of the disputing parties and the orderly and efficient conduct of the arbitration, believes it is appropriate to consider carefully whether to accept or reject such offers." *Aguas Argentinas/Vivendi 1*, para. 21; *Aguas de Santa Fe/ InterAguas*, para. 20.

[128] *Aguas Argentinas/Vivendi 1*, para. 19; *Aguas de Santa Fe/InterAguas*, para. 18.

[129] *Id.*

> This case will consider the legality under international law, not domestic private law, of various actions and measures taken by governments. The international responsibility of a state, the Argentine Republic, is also at stake, as opposed to the liability of a corporation arising out of private law. While these factors are certainly matters of public interest, they are present in virtually all cases of investment treaty arbitration under ICSID jurisdiction.[130]

It appears that the Tribunals were of the view that there must be a more specific public interest, and in fact, the Tribunals clearly cited what they referred to as a "particular public interest," meaning that a very large number of persons were affected by the basic public service in question—water distribution and sewage treatment—and that this could even raise human rights considerations:

> The factor that gives this case particular public interest is that the investment dispute centers around the water distribution and sewage systems of a large metropolitan area, the city of Buenos Aires and surrounding municipalities [of urban areas in the province of Santa Fe]. Those systems provide basic public services to millions of people and as a result may raise a variety of complex public and international law questions, including human rights considerations.[131]

I cannot share the view expressed in Eric Teynier's analysis on this point, which found that the Tribunals had acknowledged that any dispute brought before an ICSID tribunal under a BIT involved a public interest, and had thereby paved the way for the submission of *amicus curiae* briefs in all cases. He further found that the Tribunals had recognized that the ICSID arbitration avenue established in the relevant investment treaties was essential to the public interest because what was at stake in these cases was the consideration under international law of the legality of measures taken by States vis-à-vis investors, and thus their international responsibility.[132]

Admittedly, while an evaluation of state responsibility was undoubtedly one of the factors contributing to the Tribunals' decisions, it did not appear, in my view, to be a sufficiently good reason for their judgment. In the same vein, two authors commenting on the *Methanex* case underscored this point,

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[130] *Id.*

[131] *Id.*

[132] Teynier, *supra* note 83, at 21, para. 8.

noting that the Tribunal in that case had linked the existence of this public-interest consideration to the substantive nature of that arbitration, and not to the "public" status of either of the two parties. In other words, they found that the public interest in that arbitration stemmed from its substantive content,[133] as did, in my view, the Tribunals in the two cases under discussion.

Once the substantive requirements of the law were established, the Tribunals had to determine whether they were met in the cases at hand. In order to make this determination, the Tribunals introduced the two-stage procedure that has been well known since its adoption by the WTO dispute settlement mechanism: first, the application for leave to intervene, and then, if the application has been approved, the actual intervention. The Tribunals at that point in time examined only the first stage of the proceedings.[134]

During the first step of the first stage, a friend of the court must submit an application to the Tribunal for leave to intervene in said court:

> In order for the Tribunal to make that determination, each nonparty wishing to submit an *amicus curiae* brief must first apply to the Tribunal for leave to make an *amicus* submission.[135]

This was the opportunity for the Tribunals to indicate what they regarded as the ideal profile of a friend of the court. The Tribunals indicated that a truly effective friend is one who has the "expertise, experience and independence"[136] to be of assistance in the case in question. In order to establish to their satisfaction the existence of these various qualities, the Tribunals, by referring to the experience gained under the WTO and NAFTA, requested that potential friends of the court provide certain information to enable the Tribunals to determine with whom they were dealing. The requested information should reveal any links between the friend of the court and the parties in the dispute, and should state whether an individual friend of the court belongs to a relevant organization, the nature of this person's relationship with said organization, and any evidence pointing to a possible financial relationship between the friend of the court and the parties. More specifically, the Tribunals attached great importance to four types of information described in their decisions:

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[133] Grisel and Vinuales, *supra* note 4, at 41.

[134] It was only in *Aguas Argentina Vivendi 2* that the second stage was dealt with.

[135] *Aguas Argentinas/Vivendi 1*, para. 24; *Aguas de Santa Fe/InterAguas*, para. 23.

[136] "The Tribunal will therefore only accept *amicus* submissions from persons who establish to the Tribunal's satisfaction that they have the expertise, experience, and independence to be of assistance in this case." *Aguas Argentinas/Vivendi 1*, para. 24; *Aguas de Santa Fe/InterAguas*, para. 23.

a. The identity and background of the petitioner, the nature of its membership if it is an organization, and the nature of its relationships, if any, to the parties in the dispute.
b. The nature of the petitioner's interest in the case.
c. Whether the petitioner has received financial or other material support from any of the parties or from any person connected with the parties in this case.
d. The reasons why the Tribunal should accept petitioner's *amicus curiae* brief.[137]

After the submission of a petition, the second phase of this first stage involved the Tribunals' consultation with the parties to ascertain their opinions on the *amicus curiae* intervention. Then it was time for the Tribunals to render their decision. Here again, the Tribunals demonstrated transparency by listing the various factors that in their view must be taken into account when authorizing or rejecting an intervention. In addition to the information included in the petition from the would-be friend of the court, and the views of the parties, the Tribunals indicated that weight would be given to the burden created for the parties by the *amicus curiae* briefs submitted, as well as the usefulness of the latter to the Tribunals' decision. Such an approach was indeed extremely sound and balanced.

3. The Actual Exercise of Amicus Curiae *Acceptance Power in the Two Cases*

a. The Rejection of Amicus Curiae *Interventions at the Jurisdictional Stage in the Two Cases*

On the basis of the aforementioned criteria, the Tribunals opined that the parties had sufficiently discussed the issues of jurisdiction raised in the two cases, so that an intervention by friends of the court would not effectively assist the Tribunals in making a decision regarding their jurisdiction. This should not be viewed as a general statement declaring that *amicus curiae* briefs will always be deemed ineffective at the jurisdictional stage, but only as an evaluation by the Tribunals that this was so in the two cases submitted to them.[138] The logical conclusion to be drawn is that the Tribunals did not deem it necessary or appropriate to state the procedure that should be followed during the second phase, when an *amicus curiae* brief is actually accepted. But there was little risk

[137] *Aguas Argentinas/Vivendi 1*, para. 25; *Aguas de Santa Fe/InterAguas*, para. 24.
[138] *Aguas Argentinas/Vivendi 1*, para. 28; *Aguas de Santa Fe/ InterAguas*, para. 27.

in predicting that, as was the case during the initial stage of the procedure, the procedure regarding the submission of an *amicus curiae* brief may very well be modeled on those used first under the WTO, and then under NAFTA.

It should also be noted that in these first two orders, the Tribunals underscored the fact that although the proposed intervention was rejected, "[n]othing in this order … should be read as implying any determination on jurisdiction."[139]

A last remark that may be made concerns the way in which the procedure was handled during the jurisdictional phase. It appears from a mention in the two decisions on jurisdiction that the Respondent, in spite of the orders denying access to *amici curiae* at the jurisdictional stage, tried to "present unsolicited documents,"[140] during the proceedings on jurisdiction. Both Tribunals requested the parties to refrain from making such unsolicited submissions.

b. An Evaluation of the Criteria Allowing for Amicus Curiae *Status which, when Applied, Led to Different Rulings in the Two Cases at the Merits Stage*

In the *Aguas de Santa Fe/InterAguas* case, the Tribunal had already addressed the question of the suitability of the would-be *amici curiae* for participation in the merits stage, in its initial Order in Response to a Petition for Participation as Amicus Curiae. In the *Aguas Argentinas/Vivendi* case, this issue was examined in a second order, the Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an Amicus Curiae Submission, which was an answer to a new application for leave to submit *amicus curiae* briefs entered by five NGOs for the merits stage.

In the *Aguas de Santa Fe/InterAguas* case, the Tribunal proceeded first to examine whether the petitioners qualified as appropriate *amici curiae* in the case. In order to respond to this question, the Tribunal examined in succession the information submitted to it, using as its yardstick the four required criteria noted above. After doing this, the Tribunal considered itself to be still insufficiently informed on these points to render a reasoned decision based on law.

With regard to "the identity and background of the petitioners," the Tribunal opined that the information provided lacked sufficient details, and consequently did not allow the Tribunal to ascertain whether the would-be friends of the court truly possessed the necessary qualifications:

> However the Petition provides no information on the nature and size of its membership, the qualifications of its leadership, the expertise of

[139] *Aguas Argentinas/Vivendi 1*, para. 32; *Aguas de Santa Fe/InterAguas*, para. 31.
[140] *Aguas Argentinas/Vivendi 1*, para. 15; *Aguas de Santa Fe/InterAguas*, para. 15.

> its staff, and the activities in which it has engaged. In short, it fails to provide the Tribunal with specific information to judge whether the *Fundación para el Desarrollo Sustentable* possesses the expertise and experience to qualify as an appropriate *amicus curiae* in this case. Similarly, the Petition only briefly and summarily identifies and gives the background of the three individual petitioners. Without detailed curricula vitae of the three named individuals, the Tribunal is unable to judge whether they possess the expertise and experience to serve as *amici curiae* in the present case.[141]

In other words, the Tribunal must have information adequate to enable it to determine whether those wishing to intervene do in fact possess two of the three basic qualities required, namely expertise and experience, which help to ensure the effectiveness of such an intervention. Non-governmental organizations must provide information on the nature and size of their membership, the qualifications of their leadership, and specific details on the activities in which they engage. Individual petitioners must provide *curricula vitae* that are sufficiently detailed to enable the Tribunal to determine their suitability. In *Aguas de Santa Fe/InterAguas*, the Tribunal ruled that the information provided by the NGO and the individual petitioners was inadequate, and thus did not allow the Tribunal to determine whether they truly possessed the necessary qualifications.

With regard to "the interests of the petitioner in the case," the decision indicated that a would-be friend of the court must provide evidence of a relatively specific interest and cannot merely cite a general interest in sustainable development, the environment or human rights. According to the Tribunal, "[t]he Petitioners state their interest in this case in the most general of terms .... [I]t is impossible for the Tribunal to infer such interest with any degree of specificity from the Petition as a whole."[142] This was perhaps an indication of a desire not to grant all NGOs and all activists access to the arbitral process, but to limit interventions to those NGOs or individuals that are specifically interested in the legal issues at stake. It appears that the Tribunal also wanted to communicate the fact that it would not presume the existence of such an interest based solely on the filing of an application for an *amicus curiae* intervention.

A third factor affecting qualification as a friend of the court is "the petitioners' financial or other relationships with the parties." Once again, the Tribunal did not believe it had sufficient information to be able to determine to its satisfaction that those who had submitted an application for intervention met the independence criterion:

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[141] *Aguas de Santa Fe/InterAguas*, para. 30.

[142] *Id.* at para. 31.

> In order for the Tribunal to evaluate the independence of the *Fundación*, it would be necessary to have additional information on its membership. To judge the independence of the three individual petitioners it would be necessary to know the nature, if any, of their professional and financial relationships, with the Claimants or the Respondent.[143]

Lastly, the Tribunal asked the potential interveners to specify "the reasons why the Tribunal should accept the petitioners' *amicus curiae* brief." The Tribunal in making this demand made it clear that "[i]t is not enough for a nongovernmental organization to justify an *amicus* submission on general grounds that it represents civil society or that it is devoted to humanitarian concerns."[144] Given the lack of sufficiently specific information received in this regard, the Tribunal concluded that it could not at that stage determine that the potential interveners were qualified as friends of the court. The Tribunal nevertheless left the door open for another review if more specific information were submitted to it in support of a new application to intervene. As of the writing of this article, no new request or new information has been presented to the Tribunal.

In *Aguas Argentinas/Vivendi 1*, like in *Aguas de Santa Fe/InterAguas*, the Tribunal both accepted the principle of *amicus curiae* and did not consider it appropriate at the jurisdictional stage. It thereby showed that the door for interveners is quite narrow, and that those chosen to enter should be few in number. The *Aguas Argentinas/Vivendi 2* order, however, provided an opportunity for greater access. At the merits stage, after referring to its order in the *Aguas Argentinas/Vivendi 1* case, in which the Tribunal had explained the conditions necessary for authorization to file an *amicus curiae* brief, the Tribunal turned its attention to new applications from the five aforementioned NGOs that had already filed an unsuccessful application to intervene at the jurisdictional stage. The first application was for approval to file a joint brief, while the second was "to be given timely, sufficient, and unrestricted access to the documents produced during the course of the arbitration in order to focus their *amicus* submission on the questions most pertinent to the case."[145]

Before taking its decision, the Tribunal requested observations from both parties to the dispute. The Claimant asked the Tribunal to reject the request on the ground, among others, that Aguas Argentina was no longer the concessionnaire and that the question was now merely one of damages and no longer involved questions of public interest. The Respondent for its part had no objection to

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[143] *Id.* at para. 32.
[144] *Id.* at para. 33.
[145] *Aguas Argentinas/Vivendi 2*, para. 7.

the intervention. The Tribunal subsequently verified that the friends of the court were suitable and that the subject matter of the case was appropriate for intervention. The Tribunal considered that it now had "sufficient information to show that the five Petitioners are respected nongovernmental organizations and that they have as a group developed an expertise in and are experienced with matters of human rights, the environment, and the provision of public services."[146] The Tribunal also accepted that they were independent, and that "the Petitioners have demonstrated their suitability to make amicus submissions in this case."[147]

The second matter to be considered was the appropriateness of the subject matter of the case for intervention. The Tribunal did not accept the idea that the withdrawal of Aguas Argentinas[148] had fundamentally changed the nature of the subject matter of the case, which involved "basic public services to millions of people."[149] Although the Tribunal's decision on the merits could not bind the new concessionnaire, the Tribunal found that such a decision in respect of this type of subject matter can have a kind of didactic importance:

> More generally, because of the high stakes in this arbitration and the wide publicity of ICSID awards, one cannot rule out that the forthcoming decision may have some influence on how governments and foreign investor operators of the water industry approach concessions and interact when faced with difficulties.[150]

The Tribunal concluded on this basis that the case presented sufficient aspects of public interest to justify an *amicus curiae* submission.

Going forward, the Tribunal emphasized that *amicus* briefs need to be properly prepared. The Tribunal provided substantive guidelines as well as procedural directives in this regard. The Tribunal recalled that in its first order, it had stated that a friend of the court was there "to help the decision maker arrive at its decision by providing the decision maker with arguments, perspectives, and expertise that the litigating parties may not provide."[151] The Tribunal added that "[s]uch 'arguments, perspectives and expertise' may relate to law, facts, or the application of law to the facts."[152]

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[146] *Id.* at para. 16.
[147] *Id.*
[148] *See supra* note 89.
[149] *Aguas Argentinas/Vivendi 2*, para. 18.
[150] *Id.*
[151] *Aguas Argentinas/Vivendi 1*, para. 13.
[152] *Aguas Argentinas/Vivendi 2*, para. 20.

The Tribunal limited the *amicus* briefs to 30 double-spaced pages (in font size 12), and gave the parties two months to make their observations on the *amicus* briefs.[153]

c. The Lack of a Decision in Either Case on Access to All Documents Related to the Case

In the *Aguas Argentina/Vivendi 1* and *Aguas de Santa Fe/InterAguas* cases, the third request made by the would-be *amici curiae* concerned access to all documents related to the case. In *Aguas de Santa Fe/InterAguas*, a further request was entered asking for leave to make oral submissions. The Tribunals linked the review of this issue to that of the submission of *amicus curiae* briefs. Taking the view that access to documents related to the proceedings is warranted only to allow friends of the court to better present their observations, and having not deemed it necessary in the first two orders in the cases to authorize the submission of *amicus curiae* briefs, the Tribunals determined that it would be premature to make a landmark ruling regarding access to documentation related to the proceedings. The Tribunals, however, pointed out that the issues raised by this type of application could not be easily resolved in the ICSID context:

> This broad request for all documentation in the case raises difficult and delicate questions because of certain constraints in the ICSID Convention and Rules and in the practice of the Centre.[154]

The Tribunal in *Aguas Argentinas/Vivendi 2* was again presented at the merits phase with an opportunity to rule on the question of full access to the entire case file. The Tribunal opted not to take a position on this question, which it described as delicate, because it found the new version of the ICSID Arbitration Rules, while not applicable to the case, to be silent on this question. The Tribunal also took cover behind the specific facts of the case in order to rule that access to the documents was not necessary. The Tribunal did not take a position on the theoretical aspect of the question, however:

> In the present case, the Petitioners have sufficient information even without being granted access to the arbitration record. Hence, because of the specifics of these proceedings, the Tribunal can dispense with resolving the general question of a non-party's access to the record.[155]

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[153] *Id.* at para. 27.

[154] *Aguas Argentinas/Vivendi 1*, para. 30; *Aguas de Santa Fe/InterAguas*, para. 35.

[155] *Aguas Argentinas/Vivendi 2*, para. 24.

4. A Profession of Faith Favorable to Transparency in International Investor-State Arbitration

After noting that there was a clear public interest justifying the taking into consideration of the perspectives and arguments of *amici curiae*, the Tribunals added that an intervention by friends of the court had a further desirable consequence, namely increased transparency in international investor-state arbitration that guaranteed a higher level of understanding and acceptance of such processes:

> Public acceptance of the legitimacy of international arbitral processes, particularly when they involve states and matters of public interest, is strengthened by increased openness and increased knowledge as to how these processes function …. Through the participation of appropriate representatives of civil society in appropriate cases, the public will gain increased understanding of ICSID processes.[156]

This notion whereby "transparency" facilitates widespread acceptance of international arbitration is often advanced,[157] and has been perfectly explained in the April 2005 OECD Working Paper on International Investment prepared by Katia Yannaca-Small:

> Investment arbitral awards may have a significant impact on the State's future conduct, the national budget and the welfare of the people, so the public interest in investment disputes is understandable. Increased transparency can contribute to enhancing effectiveness and continued acceptance of the system of investment arbitration.[158]

In the subsequent Statement of the OECD Investment Committee, which was adopted in June 2005, the Committee's Member States adopted this same view, although they remained relatively cautious with regard to the wording used in their Statement.

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[156] *Aguas Argentinas/Vivendi 1*, para. 22; *Aguas de Santa Fe/InterAguas*, para. 21.

[157] For a critique of the secret nature of courts settling international economic disputes, *see, e.g.*, an editorial in the New York Times entitled "The Secret Trade Courts" (September 27, 2004).

[158] OECD, "Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures," Working Paper No. 2005/1 (June 2005), http://www.oecd.org/dataoecd/25/3/34786913.pdf, at 14, para. 41.

C. The "Routine" Use of Amicus Curiae *Briefs in the* Biwater Gauff *Case*

It bears noting first of all that the order of February 2, 2007 regarding the *Biwater Gauff* case was the first to be premised on the new Article 37(2) of the amended ICSID Arbitration Rules.[159] In this case, five entities filed an application for leave to participate in the written and oral phases of the arbitral process, and to gain access to the parties' submissions.[160] Interestingly, one of these would-be "friends of the court" was "a company limited by guarantee," while the four others were NGOs, two of which—CIEL and IISD—had already been granted *amicus curiae* status in *Methanex* and (in CIEL's case) *Aguas Argentina/Vivendi 2*. A class of NGOs specializing in the formulation of *amicus curiae* briefs seems thus to be emerging. The interest of these petitioners was expressed in very general terms:

> [T]his arbitration process goes far beyond merely resolving commercial or private conflicts, but rather has a substantial influence on the population's ability to enjoy basic human rights .... How international investment agreements, which by and large share similar structures and substantive content, can be applied to govern foreign investments in major infrastructure projects is asserted to be of critical concern for the sustainable development of these countries.[161]

The Claimants objected to the petition and to the entities' requests to have access to the key documents of the case, and to be allowed to access the hearing and answer any questions which the Tribunal might want to ask them. The Respondent's position was the opposite:

> Respondent submits that the Petitioners appear to be potentially appropriate *amici* in light of their organisational interests, their experience as *amici* and the experience and reputation of their counsel .... Respondent states that it would not object in principle to the Petitioners having access to the four categories of documents identified in the Petition .... The Republic submits that it would be willing to admit the Petitioners to the hearing.[162]

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[159] This is mentioned in the award: "Since April 10, 2006, the amended ICSID Arbitration Rules have explicitly given tribunals the power to allow for submissions of non-disputing parties." *Biwater*, *supra* note 93, Award at para. 17.

[160] These entities were the Lawyers Environmental Action Team (LEAT), the Legal and Human Rights Center (LHRC), the Tanzania Gender Networking Programme (TGNP), the Center for International Environmental Law (CIEL), and the International Institute for Sustainable Development (IISD).

[161] *Biwater*, *supra* note 93, Award at para. 14.

[162] *Id.* at paras. 42–43, 45.

Although it declared that "Rule 37(2) establishes the right of *third parties* to apply for *amicus curiae* status,"[163] the Tribunal made it clear from the outset that an *amicus curiae* is not a party:

> It might be noted at the outset that the ICSID Rules do not, in terms, provide for an *amicus curiae* "*status*", in so far as this might be taken to denote a standing in the overall arbitration akin to that of a party, with the full range of procedural privileges that that might entail … a "non-disputing party" does not become a party to the arbitration by virtue of a tribunal's decision under Rule 37, but is instead afforded a specific and defined opportunity to make a particular submission.[164]

The Tribunal nevertheless granted the petitioners authorization to submit an *amicus* brief:

> The Arbitral Tribunal has carefully considered each of the conditions in Rule 37(2) (a), (b) and (c). On the basis of the information provided in the Petition, the nature and expertise of each Petitioner, and the submissions summarised above, the Arbitral Tribunal is of the view that it may benefit from a written submission by the Petitioners, and 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.[165]

The usual concern that the submissions of the *amici curiae* not disturb the proceedings was mentioned by the parties, and as a consequence the Tribunal decided to limit the *amicus* brief to a maximum of 50 pages (double-spaced),[166] and added that there should be no evidence or documentation attached. As in *Aguas Argentina/Vivendi 2*, the Tribunal did not make a decision on the principle of access to documents related to the case, noting that it did not consider such access necessary "for the time being."[167] The Tribunal thus in practice refused such access, without expressing a general, abstract position on the issue.

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[163] *Id.* at para. 17 (emphasis added).

[164] *Id.* at para. 46.

[165] *Id.* at para. 50.

[166] Interestingly, no precision is given, as was done in *Aguas Argentina/Vivendi 2*, as to the size of the font! *See supra* note 153 and accompanying text for information on the latter case's imposition of such a requirement.

[167] *Biwater*, *supra* note 93, Award at para. 65.

With regard to access to hearings, the Tribunal strictly applied the new Article 37(2) of the ICSID Arbitration Rules, which allows such access "unless either party objects." In light of the objection presented by the Claimant, the Tribunal had no alternative but to deny the petitioners access to the hearings. It is necessary to point out, however, that the Tribunal believed it was prudent to add that it "reserve[d] the right to ask the Petitioners specific questions in relation to their written submission, and to request the filing of further written submissions and/or documents or other evidence, which might assist in better understanding the Petitioners' position, whether before or after the hearing."[168] This statement in turn led two authors to point out that this left the door half-open to participation by the *amici* in the hearings.[169] The matter was again raised before the hearings that were to take place in The Hague on April 21, 2007, and the Tribunal questioned the parties on that occasion and accepted their joint position:

> By reference to its *Procedural Order No 5*, the Arbitral Tribunal asked the Parties how they intended to deal with the Amici brief, and whether they considered that any further intervention of the Amici was necessary. The Parties expressed the following agreement:
> i. that they will address the issues raised by the Amici in their final oral submissions;
> ii. that no further intervention of the Amici in these proceedings is necessary.[170]

In conclusion, it must be noted that after having entered into WTO Dispute Settlement procedures, and having expanded into investor-State arbitration under NAFTA, friends of the court are now accepted actors in investment arbitrations pursued under the ICSID Rules.

IV. OBSERVATIONS ON THE CREATION AND EVOLUTION OF INTERNATIONAL ECONOMIC LAW

It may be useful now to review carefully the interactions between jurisprudential activity and what could be referred to as international legislative activity. It has to be noted that when the tribunal's hands are tied by a very clear rule and it cannot interpret it with some flexibility, it is essential, for the law to evolve, that the "international legislative power" intervene in order to modify

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[168] *Id.* at para. 72.

[169] Grisel and Vinuales, *supra* note 4, at 21.

[170] *Biwater*, *supra* note 93, Procedural Order No. 6 (Amicus and post hearing process), at para. 3.

the rule. In other words, States must decide on the adoption of new rules. When the wording of a rule leaves some room for interpretation, however, the role of the arbitral tribunal as initiator, and even creator, of new rules of law becomes crucial. These subtle interactions can be highlighted in the three areas to which the petitions generally submitted by friends of the court are related.

A. The Trend Toward Open Public Hearings

1. A WTO Practice That Respects All Sovereignties Involved

The major change in WTO practice to accommodate the demands of civil society was undertaken during the long-lasting *Hormones* case. This comes as no surprise, given that public health issues were at the heart of the case.

The first step was taken by the Panel, which opened up the proceedings on September 12–13, 2005, through a closed-circuit broadcast. This first such move in the WTO's ten-year history was due to the agreement of all three disputing parties—the EU, the U.S. and Canada. The session of September 14 was closed, however, since not all of the third-parties in the case intervening that day (*i.e.* Australia, Brazil, China, Chinese Taipei, India, Mexico, New Zealand, Norway) were similarly willing to open the proceedings to the public. At the Appellate Body level, the proceedings were again broadcast through closed-circuit television after the parties requested this procedure. The public hearing was also likewise cut whenever China or Brazil intervened, since these States did not accept a public hearing.

Parties, NGOs and lawyers have considered this developing practice to be of the utmost importance in bringing transparency to WTO dispute settlement processes. After the breakthrough in the *Hormones* case, it has indeed become a common practice to hold open hearings whenever the States Parties so agree. For example, an open hearing has been held on this basis at the Appellate Body in a dispute between the EU and the U.S., on the issue of the zeroing of anti-dumping duties.

2. An Imminent Amendment under NAFTA?

A definite trend is underway within NAFTA, where the United States and Canada are, as is well known, in favor of maximum transparency, and where Mexico has gradually accepted and become less reluctant to accept a certain degree of openness in Chapter 11 proceedings. In the *Methanex*[171]

[171] *Methanex Corp. v. United States, supra* note 47.

and *UPS*[172] cases, the Tribunals authorized open hearings following consent by both parties. The hearings were broadcast live from the World Bank's headquarters.[173] Case law was therefore established to the effect that hearings may be open to the public once the parties are in agreement. However, contrary to the wishes of the two aforementioned States, there is still no rule requiring open hearings.

The difficulty for this rule's evolution stemmed from the initial opposition by Mexico to open hearings, which explains why the Statement of Interpretation adopted by the NAFTA Free Trade Commission in 2001 did not authorize public access to arbitration hearings under NAFTA Chapter 11.[174] This is so, despite progress having been made with regard to access to documentation, which in turn led to less confidentiality. It may further be noted that although the legal principles governing NAFTA do not currently grant a right of access to hearings by those who are not parties to the arbitration, it has been noted that in practice, arbitration hearings involving Canada and the United States are in fact open to the public.[175]

Mexico is itself gradually evolving toward acceptance of public hearings, under pressure from its partners and public opinion. An additional step was taken in the Joint Statement of the Parties of July 16, 2004,[176] which suggested a more widespread acceptance of transparency when it stated that "[we] were pleased Mexico has now joined Canada and the United States in supporting open hearings for investor-state disputes. In addition, we have agreed that the same degree of openness should apply to proceedings under the Dispute Settlement provisions of Chapter 20 of the NAFTA, and asked officials to develop rules governing open hearings for such proceedings." There is no doubt, therefore, that the amendment of the rule on open hearings in the NAFTA context could be imminent.

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[172] *UPS*, *supra* note 50. Both the hearings on jurisdiction (July 29–30, 2002) and on the merits (December 12–17, 2005) were open to the public.

[173] The same solution was adopted in the *Canfor* case, in which the Arbitral Tribunal authorized, with the consent of the parties to the dispute, the holding of an open hearing which was also broadcast live (December 7–9, 2004). With respect to the consolidated cases, *Canfor Corp. v. United States of Amercia*, *Tembec. Inc. et al. v. United States of America* and *Terminal Forest Products Ltd. v. United States of America*, the transcripts of the hearing, which was held on January 11, 2006, were made available to the public. *See* http://www.state.gov/s/l/c14432.htm. (On September 7, 2005, the Tribunal that was appointed to decide the United States' request ordered the consolidation of the three cases.)

[174] Statements of Interpretation, including this one, can be found on the website of the Ministry of Foreign Affairs of Canada, at http://www.dfait-maeci-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp. It can be noted that it would have been difficult to "interpret" the arbitration rules differently in the face of explicit provisions which did not authorize public access.

[175] Kinnear, *supra* note 32.

[176] Mexico announced its support for open hearings in investor-State disputes following the 2004 NAFTA Commission Meeting. *See* NAFTA Free Trade Commission, "Decade of Achievement," Joint Statement (July 16, 2004), at http://www.dfait-maeci.gc.ca/nafta-alena/JS-SanAntonio-en.asp

3. A Minor Amendment to the ICSID Arbitration Rules on Open Hearings

Pursuant to the clear rule set forth in Article 32 of the ICSID Arbitration Rules, it has been noted in this article that tribunals had no alternative but to refuse NGOs access to hearings. The States intervened at this point, albeit while exercising extreme caution. Reluctant to grant civil society too much access to international arbitration fora, they decided to overturn the presumption applicable to hearings, so that while it traditionally appeared to be understood that hearings were open to the parties only, except where otherwise agreed by the parties, this principle was amended in the new ICSID Rules that came into force on February 1, 2006.[177] Although the new rule set forth in Article 32 of the current Rules is practically the same as that of the Rules' previous version, it is important to note the major change in perspective introduced by the new wording. The new Article 32 states as follows:

> Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.

We see now that the principle is one in favor of open hearings, unless one of the parties expresses a clear objection thereto. Tribunals now have an opportunity to decide whether hearings will be open to the public, except where there is an explicit rejection by one of the parties. This development is similar to that which led to the replacement of positive consensus, which held sway during the time of the GATT, with negative consensus, which has now become the norm adopted within the WTO dispute settlement system.

The possibility that *in camera* hearings will gradually become a thing of the past cannot be ruled out, at least with regard to those arbitrations to which

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[177] On the reform of ICSID's Arbitration Rules, see A. Cohen Smutny and A.E. Serran, "The Amended ICSID Rules—In Brief," Global Arb. Rev. 29 (August 2006); L. McDougall and A. Santens, "ICSID Amends its Arbitration Rules," Int' Arb. L. Rev. 119 (No. 4, 2006); M. Kantor, "New Amendments to ICSID's Arbitration Rules," Stockholm Int'l Arb. Rev., 213 (2006); B. Legum, "La réforme du CIRDI—Vers une juridictionnalisation de l'arbitrage transnational?", in F. Horchani, (ed.), Où va le droit de l'investissement ? Désordre normatif et recherche d'équilibre 283, Paris, Pedone (2006) (hereinafter Legum); A.R. Parra, "The 2006 Amendments of the ICSID Arbitration Rules," Zeitschrift für Schiedsverfahren 247 (September/October 2006).

States favoring such openness are parties. Several investment documents have introduced a requirement to hold open hearings. For example, mention can be made here of Article 29.2 of the new United States bilateral investment treaty model,[178] which states that "[t]he tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements." It bears noting that this principle is not incompatible with the rule set forth in Article 32 of the ICSID Rules, as the latter leaves the decision of whether to hold open or closed hearings to the agreement of the parties. It should therefore be considered that when arbitration is carried out pursuant to a treaty establishing open hearings as a rule, the States Parties have conditioned their consent upon transparency and therefore the investor must be considered as having consented to the transparency provisions simply by initiating the proceedings pursuant to that agreement.

The caution exercised by States within the ICSID context is attributable to each State being allowed great flexibility in this type of arbitration. There is a large number of States Parties to the ICSID Convention which do not all share the same conceptions regarding questions of confidentiality in international arbitration.

B. The Trend Toward Acceptance of Amicus Curiae *Briefs*

The first point that should be highlighted is the alacrity with which a "general case law" for *amicus curiae* interventions in international investment law was established, based on the position taken by the WTO Appellate Body, even though this latter opening up to *amici curiae* within an interstate framework was based on extremely fragile legal foundations. As Catherine Kessedjian noted, "[t]he use of the *amicus curiae* mechanism is a fascinating development in recent years in judicial processes around the world."[179] There is no question that the arbitral tribunals that accepted *amicus curiae* briefs in arbitrations between States and private individuals relied heavily on the reasoning of the WTO Appellate Body.[180] Others have also pointed to this influence, including Eric Teynier, who in underscoring this point noted that it was interesting to observe that the Arbitral Tribunals in *Methanex* and *Aguas Argentinas* had expressly made reference, by way of precedent, to the recognition of *amicus curiae* interventions

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[178] This document can be found at http://www.ustr.gov/Trade_Sectors/Investment/Model_BIT/Section_Index.html

[179] Kessedjian, "Sir Kenneth," *supra* note 4, at 9.

[180] I first pointed this out in an article published in 2002. Stern, *supra* note 28.

by the WTO on the basis of a similar reasoning.[181] Once the judgments of international arbitral tribunals had clearly established the doctrine, it was up to States to adopt the resulting principles.

1. The Very Negative Reaction of Almost All WTO States

Even at the meeting at which the DSB[182] adopted the Appellate Body's ruling in *Shrimp-Turtle*, and despite the ambiguity of that ruling, many voices were raised in criticism of what some governments regarded as an abuse of authority by the Appellate Body.[183] It is worth reproducing a few passages from the minutes in full.

According to Thailand, "[w]ith regard to the procedural issues, it was apparent that the Appellate Body had used this case to extend its authority beyond that granted to it under the WTO Agreement …. [H]is delegation believed that *Members, not the Appellate Body, should decide the extent to which NGOs might be involved in a dispute settlement process* …. The Appellate Body's conclusion … had defied the rights and obligations of Members and the basic intention under the DSU …. Thailand was also concerned that the 'evolutionary' interpretative approach newly adopted by the Appellate Body was a formula for adding to or diminishing the rights and obligations of Members …."[184]

According to Pakistan, "the DSU did not give NGOs the right to submit *amicus* briefs or give Members permission to attach briefs to their submissions that did not reflect their views …. The Appellate Body had disregarded the jurisdictional limits agreed by Members …. *Those Members who had negotiated the DSU were aware that it had never been intended to permit NGOs to submit amicus briefs to panels and to the Appellate Body*."[185]

According to India, "[t]he Panel had interpreted the word 'seek' in Article 13 of the DSU fully in accordance with the general rule of interpretation of the Vienna Convention on the Law of Treaties, *i.e.*, that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms contained therein. The word 'seek,' in its ordinary meaning, implied a pro-active search on the part of the subject, which in this case was the Panel .... The Appellate Body had alleged that the Panels' reading of the word 'seek' was too

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[181] Teynier, *supra* note 83, at 20, para. 2.

[182] As a reminder, "DSB" stands for "Dispute Settlement Body" and "DSU" stands for "Dispute Settlement Understanding."

[183] WTO DSB, Meeting of November 6, 1998, WT/DSB/M/50 (December 14, 1998), at http://www.wto.org/index.htm

[184] *Id.* at pp. 2–4 (emphasis added).

[185] *Id.* at p. 5 (emphasis added).

formal and technical .... India, therefore, believed that *the Appellate Body might have interpreted one of the important provisions of DSU loosely and wrongly*, which could upset the balance of rights and obligations of Members."[186]

Mexico also expressed concern about the systemic consequences of the Appellate Body's ruling, stating that "[t]he Appellate Body's findings, in particular … had paved the way for diverse groups not related to the WTO to become active participants in proceedings, *with the result that cases would be discussed at a political level at the expense of argumentation of a legal nature.*"[187]

Hong Kong, China, "was concerned that the ruling might open up *the floodgate of non-requested submissions which would in turn have serious implications on the work of future panels in terms of workload and efficiency*."[188]

Later, at the time of the DSB's adoption of the Appellate Body report in *United States-Carbon Steel*, governments again expressed critical points of view.[189]

In particular, the European Communities considered that "the way the Appellate Body had dealt with the issue of *amicus curiae* briefs was not entirely satisfactory …. [T]he Appellate Body had concluded that it had the legal authority under the DSU to accept and consider *amicus curiae* briefs in an appeal in which it found it pertinent to do so. However, the Appellate Body did not provide any guidance under what circumstances it might find it pertinent to consider *amicus curiae* briefs nor how this would be reflected in its Working Procedures."[190]

It was the United States that expressed the most enthusiasm for the positions taken by the Appellate Body concerning its authority to accept *amicus curiae* briefs at the appeal stage. While declaring itself to be disappointed with the ruling on the merits in *United States-Carbon Steel*, it approved of the procedural findings: "However, there was one positive aspect of the Appellate Body Report, namely, its finding that the Appellate Body had the authority to take into account submissions by interested private parties, so-called *amicus curiae* briefs."[191]

Argentina, on the contrary, gave vent to its concerns:

> The dispute settlement system established intergovernmental procedures and the authority to accept and consider unsolicited briefs submitted by individuals or organizations, not Members of the WTO, could distort

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[186] *Id.* at pp. 7–8 (emphasis added).

[187] *Id.* at p. 14 (emphasis added).

[188] *Id.* at p. 16 (emphasis added).

[189] WTO DSB, Meeting of June 7, 2000, WT/DSB/M/83 (June 7, 2000), at http://www.wto.org/index.htm

[190] *Id.* at para. 5 (emphasis added).

[191] *Id.* at para. 8.

> the character of dispute settlement procedures. Access to the WTO dispute settlement procedure was restricted to WTO Members and panels, and the Appellate Body only had a duty to consider submissions from parties or third parties in a given dispute.[192]

In addition, the representative of Hong Kong, China, put forward an important argument when he pointed out that the authority which the Appellate Body had arrogated to itself was not one of the procedural powers conferred upon it by Article 17.9 of the DSU: "To justify its claim, the Appellate Body had relied upon its interpretation of Article 17.9 of the DSU. However, that Article concerned only procedures for Appellate Review and allowed the Appellate Body to draw up its working procedures under certain constraints. Therefore, the issues to be considered in this context had to be procedural. However, the acceptance by the Appellate Body of *amicus curiae briefs was not a procedural but a substantive matter*. It affected the intergovernmental character of the WTO as well as Members' rights and their obligations."[193]

The Philippines considered that it was not the right time to take a decision on the subject of *amicus curiae* briefs since Members were still discussing the problem.[194]

Similar concerns were expressed by Canada at the DSB's meeting on November 17, 2000,[195] during which it was decided to hold a special meeting of the General Council precisely to discuss the implications of the Appellate Body's rulings in the *Asbestos* case: "In Canada's view, it was for Members as a whole, not the Appellate Body, to decide how the issue of *amicus* participation should be dealt with in the future. Members had to ensure that the government-to-government nature of the dispute settlement process was not weakened or compromised by the procedural initiatives of panels or the Appellate Body."[196]

A special meeting of the General Council on this topic, convened at the request of Egypt on behalf of the informal group of developing countries, met on November 22, 2001.[197] The meeting opened with a statement by the

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[192] *Id.* at para. 14.

[193] *Id.* at para. 15 (emphasis added). For a position along the same lines, *cf.* the following: "Brazil noted that the question of who could be heard by panels and the Appellate Body was not a 'procedural rule,' but rather a very substantive component of the DSU rules, which affected the way the system operated and significantly altered the rights and obligations Members negotiated under the Uruguay Round." WTO DSB, Meeting of January 23, 2002, WT/GC/M/60, http://www.wto.org/index.htm, at 13, para. 43.

[194] *Id.* at para. 20 (emphasis added).

[195] WTO DSB, Meeting of January 15, 2001, WT/DSB/M/92, at http://www.wto.org/index.htm

[196] *Id.* at 25, para. 128.

[197] *See* WTO DSB, Meeting of January 23, 2002, *supra* note 194.

Chairman of the General Council in which he endorsed a previous statement by the Chairman of the DSB, who had said that he was convinced that no Member, in discussing the question of *amicus* briefs, wanted to harm the reputation of the Organization. The preliminary statement of the Chairman of the General Council was accompanied by a Secretariat note retracing the Appellate Body's various rulings on this issue.[198]

In reality, rather than the content of the additional procedure, what governments most strongly objected to was the method of disseminating notice of that additional procedure. As mentioned earlier, this notice had been published on the WTO's website and e-mailed to NGOs on the very day on which the procedure had been adopted. Many Members, such as India, regarded this as an outright invitation to submit *amicus* briefs. Thus, in the statement it made in the course of the meeting, India denounced the Appellate Body's approach in the following terms:

> [I]t was not unfair to conclude that the Appellate Body knew, or at least should have known, that putting the additional procedure on the WTO web site, which was said to have been designed to discipline the process and was supposed to have been adopted for the particular appeal only, would virtually amount to an invitation to hundreds of NGOs to file *amicus curiae* briefs.[199]

It is symptomatic that in the course of this extraordinary meeting, out of the representatives of 24 countries and 6 groups of countries[200] that took the floor, only one—the representative of the United States—approved of the Appellate Body's decision to adopt an additional procedure.

Whatever the advantages and disadvantages of the new procedure, it would seem difficult for the WTO to go into reverse on the question of the admission of *amicus curiae* briefs, particularly as it is obvious that the position taken by the Appellate Body has spilled over into other international-dispute fora, as has been seen all along this article.

In reality, it may be true that governments could adopt clear rules prohibiting the admission of non-requested *amicus curiae* briefs if and when the dispute settlement mechanism is reviewed at a Ministerial Conference. From a political

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[198] WTO DSB, "Factual Background Note Relating to the Issue Raised by Certain Members," http://www.wto.org/index.htm

[199] WTO DSB, Meeting of January 23, 2002, *supra* note 193, at 9, para. 35.

[200] Egypt acted on behalf of the informal group of developing countries, Colombia on behalf of the Andean countries, Singapore on behalf of ASEAN, Hungary on behalf of seven Central European countries, and the European Communities acted for its members.

point of view, however, considering the strength of international feelings and the WTO's desire to establish its credibility in the eyes of civil society, it would seem difficult to oppose directly the movement initiated by the Appellate Body. There can in any event be no denying that if in the future, by a decision of the Members of the WTO, NGOs were to be refused access to the dispute settlement system via *amicus curiae* briefs, this would mean a setback for civil society relative to the present situation, and the credibility of the system would be seriously impaired.

2. The Acceptance of Amicus Curiae *Briefs by States in the NAFTA Context*

The trend toward State acceptance of *amici curiae* briefs within the context of investor-State arbitration began under NAFTA, where it could be said that two-thirds of the States were well known from the beginning to be in favor of this procedure. One State, Mexico, was very hostile from the outset, particularly because this procedure was not a part of its domestic legislation. However, Mexico has evolved in this regard, as pointed out by Mr. Hugo Perezcano:[201]

> Mexico, which had initially opposed *amicus curiae* participation, filed a brief submission in the Methanex case, which was not even our case, saying that the NAFTA rules did not allow for amicus curiae participation …. Mexico has moved from a position totally opposed to *amicus curiae* participation to a more open analysis as to the kind of procedures that we are facing, and it is moving toward more transparency …. A … step has recently been taken by the NAFTA Parties providing for amicus curiae participation and setting out clear rules as to how that participation has to take place. So it is a working process.[202]

It has already been stated above that it was the arbitrators who established the principle of accepting briefs from friends of the court in the *Methanex* and *UPS* cases in 2001. This trend was then adopted and embodied in the "Note of Interpretation of Certain Chapter 11 Provisions" adopted by the NAFTA Free Trade Commission in October 2003. This document contains a "Statement on non-disputing party participation":

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[201] Mr. Perezcano served as General Counsel for Trade Negotiations, Secretariat of the Economy, Mexico.

[202] This statement was made on the occasion of a discussion transcribed in 5 J. World Invest. & Trade (2004), at 347–348.

> No provision of the North American Free Trade Agreement ("NAFTA") limits a Tribunal's discretion to accept written submissions from a person or entity that is not a disputing party (a "non-disputing party").[203]

Although friends of the court thus appeared to be an established part of the proceedings for settling international economic disputes under NAFTA, and this ensured a certain degree of transparency in such proceedings, it should be recalled that "[t]ransparency is not anarchy,"[204] and that it would be necessary to structure their interventions. Therefore, following the landmark rulings by the Tribunals in the *Methanex* and *UPS* cases, the NAFTA Free Trade Commission, in its aforementioned Statement of October 7, 2003, established the procedural framework that should in the future be followed by tribunals presiding over disputes under NAFTA.[205]

Once this procedure was adopted by the States,[206] the arbitrators largely exercised the power to accept briefs from friends of the court in accordance with the stipulated procedure. In the Joint Statement by the NAFTA Free Trade Commission of July 16, 2004 entitled "A Decade of Achievement," the Commission noted that "[w]e are pleased that the transparency initiatives we took during our October 7, 2003 meeting in Montreal have already begun to improve the operation of the investment chapter's investor-state dispute-settlement mechanism. Earlier this year, for the first time a tribunal accepted written submissions from a non-disputing party and adopted the procedures that we recommended following our meeting in Montreal, for the handling of such submissions." Indeed, in the *Methanex* case, the Tribunal adopted on December 30, 2003 the procedures indicated by the NAFTA Free Trade Commission, and on January 30, 2004 authorized the submission of applications for intervention by friends of the court. This led the International Institute for Sustainable Development (IISD) to note on its website that "[i]nternational investment law history is made!"[207] On March 9, 2004, two applications for intervention were

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[203] NAFTA Free Trade Commission, "Statement on Non-Disputing Party Participation," in Note of Interpretation of Certain Chapter 11 Provisions (October 2003), at http://www.dfait-maeci.gc.ca/nafta-alena/JS-SanAntonio-en.asp

[204] L. Boisson de Chazournes and M. Moïse Mbengue, "The *Amici Curiae* and the WTO Dispute Settlement System: the Doors Are Open," in L. and Prac. of Int'l Cts. and Tribs., vol. 2, no. 2, 205–248, at 230, The Hague, Nijhoff (2003).

[205] One specific aspect of this procedure should be noted, however, namely that it provides for opening up the proceeding only to an *amicus curiae* that is a national of a party, or has a significant presence in the territory of a party.

[206] "Nafta Commission Statement on Amicus Curiae Participation in Arbitrations," in S. Murphy, "Contemporary Practice of the United States Relating to International Law," 98 Am. J. Int'l L. 841–842 (October 2004).

[207] http://www.iisd/pdf/2003/trade_methanex

respectively submitted by IISD and another group of three NGOs,[208] and these were accepted by the Tribunal after receiving the approval of the two parties.[209] It seems that Canada was very hesitant and finally gave its approval only after strong pressure was applied by NGOs.

Nevertheless, the question of what will be more likely to happen in reality if a party expressly objects to an *amicus curiae* intervention has perhaps not been fully resolved. Indeed, in a letter addressed to the parties on April 9, 2004, the president of the *Methanex* Tribunal wrote as follows:

> I acknowledge safe receipt of the two letters dated 26th March 2004 from Methanex and the United States regarding their respective non-objection to and acceptance of the "amici" applications .... *In the circumstances*, the Tribunal allows both applications ....[210]

The fact remains that, from a legal standpoint, a NAFTA tribunal now has the power to disregard an objection by one or even both parties.

3. The Introduction of an Article on Amicus Curiae *in the ICSID Rules*

It took less than a year for the first decision of an ICSID tribunal accepting the principle of *amicus curiae* interventions to take shape in a new rule, incorporated in a rather artificial manner in the second paragraph of Article 37 of the ICSID Arbitration Rules. The reason for this incorporation was certainly to avoid re-numbering all the subsequent rules, adjusting cross-references, and making the work of the Secretariat and the arbitrators more complicated. Article 37, entitled before the change "Visits and Inquiries," was entitled after the change "Visits and Inquiries; Submissions of Non-disputing Parties":

> After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

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[208] These NGOS were the Bluewater Network, Communities for a Better Environment, and the Center for International Environmental Law (CIEL).

[209] *See* Nafta Commission Statement on Amicus Curiae Participation in Arbitrations, *supra* note 206.

[210] *Methanex Corp. v. United States*, Letter to the parties from the president of the Tribunal (April 9, 2004), at http://state.gov/s/l/c5818.htm (emphasis added).

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

It bears noting that the fundamental criteria stipulated by the ICSID Tribunals, namely the presence of a public interest and an appropriate friend, are not reproduced or explained as such in the new rule. It has been suggested that a main reason why the aforementioned "fundamental criteria" were not included in the new rule was that the rule was written to cover submissions made not only or even primarily by NGOs, etc., but also or even more importantly submissions by non-disputing States which would in a BIT arbitration, for example, typically be the other party to the BIT.

It should also be noted that the wording of the factors that a tribunal must take into account in order to render its decision does not include very specific directives in this regard. Thus, point (b) appears to be somewhat superfluous, insofar as it is difficult to envision a friend of the court intervening in a matter that is unrelated to the dispute. Similarly, point (c) also appears to be irrelevant with regard to the decision of the tribunal, insofar as one cannot readily envision a non-disputing party intervening in a dispute as an *amicus curiae* if it does not have a significant interest in the matters raised in the dispute. The sole effect of this reference is, however, undoubtedly to state that the existence of a significant interest will not be presumed and will be determined by the tribunal. Point (a) for its part includes two pieces of useful information. First, the *amicus curiae* brief may be related to a factual or legal issue, and second, the intervention must bring a perspective that is different from that of the parties.

Even as arbitrators in the ICSID context began to accept briefs from friends of the court, it was evident that this trend was contingent upon prior developments in other fora. Thus, it has often been pointed out, as was done by Eric Teynier in his comments on the *Aguas Argentinas* case, that the required content of a request to intervene is almost identical to that set out in the Statement of October 7, 2003 issued by the NAFTA Free Trade Commission on third-party

participation, which served as the basis for accepting *amicus curiae* briefs in the *Methanex* and *UPS* cases. This statement was in turn directly based on the *ad hoc* procedure for intervention applications developed on March 12, 2001 by the WTO Appellate Body in the *Asbestos* case.[211] It should be mentioned here, however, that scholarship also at times plays a fairly important role in the evolution of this field of law. In the *Asbestos* case, for example, the criteria initially selected by the WTO Appellate Body were largely based on those set out in a scholarly article.[212]

4. Toward a Widespread Acceptance of Amicus Curiae *Briefs and a "Dilution" of Their Role*

The acceptance of briefs submitted by friends of the court has not remained limited to NAFTA and ICSID. In the "new generation of investment agreements,"[213] reference to *amicus curiae* interventions has become the norm. This has been the case for a number of free trade agreements (FTAs) signed by the United States in recent years,[214] for Canada's new Foreign Investment Protection Agreements (FIPAs) program,[215] and for the new United States model bilateral investment treaty (Articles 28 and 29).[216]

It appears that the OECD Members were somewhat more cautious than the NAFTA States Parties, as the Statement by the OECD's Investment Committee, adopted in June 2005 and entitled "Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures," simply stated that

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[211] Teynier, *supra* note 83, at 22, para. 8.

[212] G. Marceau and M. Stilwell, "Practical Suggestions for Amicus Curiae Briefs Before WTO Adjudicating Bodies," J. Int'l Econ. L. 155–187 (2001).

[213] This was the expression used by Katia Yannaca-Small in OECD, "Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures," *supra* note 158, at 7.

[214] United States-Chile Free Trade Agreement signed on June 6, 2003, entered into force on January 1, 2004; United States-Singapore Free Trade Agreement signed on May 6, 2003, entered into force on January 1, 2004; United States-Central America Free Trade Agreement (CAFTA), signed on January 28, 2004 and ratified by the U.S. Senate on July 27, 2005 (Article 10.20: "The tribunal shall have the authority to accept and consider amicus curiae submissions from a person or entity that is not a disputing party," but also Article 20.11: "A Party that is not a disputing Party, on delivery of a written notice to the disputing Parties, shall be entitled to attend all hearings, to make written and oral submissions to the panel, and to receive written submissions of the disputing Parties in accordance with the Model Rules of Procedure. Those submissions shall be reflected in the final report of the panel."); United States-Morocco Free Trade Agreement, signed on June 15, 2004, entered into force on January 1, 2006.

[215] Information on this program is available at http://www.international.gc.ca/tna-nac/what_fipa-fr.asp

[216] *See* US Model BIT, Art. 28.3: "The tribunal shall have the authority to accept and consider amicus curiae submissions from a person or entity that is not a disputing party." http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf

> [t]he Members of the Investment Committee generally share the view that especially insofar as proceedings raise important issues of public interest, it may also be desirable to allow third party participation, subject however to clear and specific guidelines.[217]

This passage reveals a certain degree of ambiguity in the recently introduced vocabulary for *amicus* matters, not only in the ICSID Arbitration Rules, which refer to "non-disputing parties," but also in the various other documents mentioned above. These include the Statement of Interpretation adopted by the NAFTA Free Trade Commission in October 2003, which undoubtedly pertains to *amicus curiae* briefs submitted by non-parties, and which utilizes expressions that may lead to some confusion, for example "non-disputing party" and "third party." The OECD Statement for its part refers also to "third parties." Perhaps this trend in the language should be viewed as a sort of Freudian slip which recognizes that in the final analysis, despite the evident denials of the arbitral tribunals that refused to consider friends of the court as parties, everything was happening as if there were indeed new parties intervening in the arbitration.

This sort of trend toward the inclusion of friends of the court in the same category as parties to the dispute, with friends of the court now almost routinely being referred to as "third parties," is further illustrated by the fact that a controversy developed between the friends of the court and the parties to the dispute in the *Methanex* case. This led to the inclusion of paragraph 8 in the October 2003 Statement from the NAFTA Free Trade Commission:

> The Tribunal will render a decision on whether to grant leave to file a non-disputing party submission. If leave to file a non-disputing party submission is granted, the Tribunal will set an appropriate date by which the disputing parties may respond in writing to the non-disputing party submission. By that date, non-disputing NAFTA Parties may, pursuant to Article 1128, address any issues of interpretation of the Agreement presented in the non-disputing party submission.

While in the *Methanex* case, this was certainly a procedure aimed at guaranteeing the right of defense to the parties, it truly integrated the friends of the court into the heart of the proceedings. It should be added in passing that

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[217] OECD Investment Committee, "Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures," Statement (June 2005), at http://www.oecd.org

although friends of the court intervene in the arbitration proceedings as non-parties, they should be considered neither as experts[218] nor as witnesses.[219]

In concluding this overview of the gradual introduction of the acceptance of briefs from friends of the court, it is important to shed light on the increasingly evident establishment of a global case law in international economic law supporting such acceptance. As has been seen earlier in this article, it all started in the WTO, where a procedure was adopted in the *Asbestos case*. Thereafter, a very similar procedure was adopted in the Statement of Interpretation adopted by the NAFTA Free Trade Commission in October 2003 and in the ICSID arbitrations that have accepted the principle of *amicus curiae*.

C. Trends Relating to Confidentiality and the Production of Documents

An important development has taken place with regard to confidentiality in international arbitration. It was observed that under NAFTA a reduction in the obligation of parties to preserve the confidentiality of the proceedings stemmed from arbitral case law,[220] with the United States and Canada having developed the habit of providing public access to documents for the cases to which they are parties, particularly by disseminating them on the Internet. This trend in the case law was then adopted by the States. The Statement of Interpretation adopted by the three NAFTA States Parties on July 31, 2001[221] confirmed the absence of a duty of confidentiality governing Chapter 11 arbitrations.[222] This Statement of Interpretation, which concerned the issue of access to documents and did not address the issue of public access to hearings, noted in the former regard that

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[218] "*[A]mici* should not be seen as experts, even though their expertise is a determining factor in the choice whether or not to accept their submissions." Newcombe and Lemaire, *supra* note 28, at 26. *See also* Grisel and Vinuales, *supra* note 4, at 6, in which the authors state that "*amicus curiae* status is not to be confused with that of an expert, as the modern *amicus curiae* typically seeks to advance a cause that he or she claims to represent. His or her action therefore goes well beyond the mere provision of assistance to the tribunal regarding issues of fact or law, and becomes a real expression of a position vis-à-vis issues raised by the dispute in question. The *amicus* thus plays an ambiguous role, varying between disinterested assistance in respect of the conduct of the proceedings and the taking of an open position, and also at times acting in the same manner in relation to the arguments of the parties."

[219] "Nor can *amici* be regarded as witnesses …. *[A]mici* seek, contrary to witnesses, to defend the public interest, and must refrain from favouring the private interest of a party." Newcombe and Lemaire, *supra* note 28, at 27.

[220] Ben Hamida, *supra* note 83, at para. 816. *See also* F. Fracassi, "Confidentiality and NAFTA Chapter 11 Arbitrations," Can. J. Int'l L. 213–222 (2001).

[221] A similar note was signed on October 31, 2002 by Canada and Chile to clarify certain provisions of Chapter G (on investment) of the Canada-Chile Free Trade Agreement. This note, available at http://www.dfait-maeci.gc.ca/tna-nac/bilateral-f.asp#01c, reproduces the provisions of the Statement of Interpretation adopted under NAFTA.

[222] Ben Hamida, *supra* note 83, at para. 817. It should be noted that the publication of documents was first permitted during the period 1995–1996 for State-to-State disputes under NAFTA Chapter 20.

> [n]othing in the NAFTA imposes a general duty of confidentiality on the disputing Parties to a Chapter Eleven arbitration, and, subject to the application of Article 1137(4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal.

With regard to such developments, some made a point of highlighting even more subtle interactions than those already mentioned, between the case law and the evolution of international norms, between national laws and international rules, and between multilateral and bilateral rules. Thus, during a conference held in April 2004, Margrete Stevens was able to demonstrate the influence of domestic law, and more specifically that of the United States Freedom of Information Act (FOIA), on the gradual opening-up of international arbitration, and on the introduction of greater transparency into proceedings,[223] while also focusing on the interaction between awards and the interpretations of the NAFTA rules adopted by the States. She showed in particular very clearly that it was after an arbitral tribunal had declared in the *Loewen* case that there was no general principle of confidentiality to be found in the ICSID Additional Facility Rules or under NAFTA that could prevent the United States from enforcing the FOIA, and after an arbitral tribunal had stated in the *Methanex* case that it had the authority to accept *amicus curiae* briefs in an arbitration that took place under the aegis of the UNCITRAL Arbitration Rules, that the two aforementioned Statements of Interpretation were successively adopted by the States Parties to the NAFTA to confirm the findings of these Tribunals.[224] National approaches persist, however, since following these two interpretations by the NAFTA States Parties, "the United States has incorporated novel provisions in its recent Free Trade agreements and in its 2004 draft model bilateral investment treaty reflecting these developments, as well as going further. The new provisions require that the public have access to all pleadings; that hearings be open; and provide that tribunals may receive *amicus* briefs from third parties."[225]

All the dialectical subtlety of the creation of norms at the international level was therefore brought to the fore by Margrete Stevens through her description

[223] *See* in particular her remark that "the Freedom of Information Act has been path-breaking in opening up investor-State arbitration processes to third parties in NAFTA arbitrations." M. Stevens, "The Right to Information and Investor-State Disputes: the Development of a New Procedural Framework in NAFTA Chapter 11 Arbitrations," Presentation, Conference entitled "International Economic Disputes—A Wider Perspective" 12 (St John's College, Cambridge, United Kingdom, April 1–3, 2004) (unpublished). This document was provided to me by the speaker, to whom I am grateful.

[224] *Id.*

[225] *Id.*

of these various interactions. Indeed, it is worth noting that what has occurred in the area examined in this study illustrates the variety of interactions caused by globalization: interactions between the domestic legal orders and the international legal order; interactions between various institutions such as the WTO, NAFTA and ICSID, within which international economic disputes are settled; and interactions between awards issued, doctrine and legal writing as well as international rules and regulations that have, for example, been clearly codified with respect to the acceptance of *amicus curiae* briefs in the context of international investment arbitration.

V. CONCLUDING REMARKS

Some have asked: "Do investor-state arbitral tribunals really need friends?"[226] This sort of question may also be posed in respect of trade disputes between States in the context of the WTO. Some perceive the new role granted to private parties as a blow to state sovereignty, while others believe that sovereignty has been strengthened by this development,[227] with States now relying on the expertise of civil society to enhance their credibility through State decision-making that is more widely participatory and accepted.

It is evident that recent developments are responding to new needs stemming from the enhanced role of an "obligatory jurisdiction" of States to implement free trade within the WTO, and also from the evolution of arbitration between States and investors, the nature of which has significantly changed.[228]

Freedom of trade, the founding tenet of the WTO, has entailed significant disruptions to the pre-GATT equilibrium, although it has been acknowledged that the overall gain for humanity stemming from free trade should prove to be greater than the loss. Nevertheless, anything that is now connected to international trade rules and regulations concerns all global economic actors and has a potential impact on everyone's life.[229] Issues discussed in the WTO raise

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[226] Newcombe and Lemaire, *supra* note 28, at 23.

[227] *See*, *e.g.*, D. Hollis, "Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty," 25 Boston Coll. Int'l and Comp. L. Rev. 235-255 (2002).

[228] Thomas Wälde even goes as far as stating that "investment arbitration is not really arbitration. It is an international judicial review of governmental conduct which—failing a better solution, at the moment—takes on and uses the rules, culture and community of international commercial arbitration." Wälde, *supra* note 28, at 337. *See also* B. Stern, "Le consentement à l'arbitrage CIRDI en matière d'investissement international : que disent les travaux préparatoires ?", in Mélanges Philippe Kahn, Souveraineté étatique et marchés internationaux à la fin du XXème siècle 223–244, Paris, Litec (2000).

[229] *See* R. Mackenzie, "The Amicus Curiae in International Courts: Towards Common Procedural Approaches?", in T. Treves *et al.* (eds.), Civil Society, International Courts and Compliance Bodies, 295–311, at 298, The Hague, T.M.C. Asser Press (2005).

the problem of linkages between trade liberalization, which is the key objective, and other needs in important areas such as health protection, environmental preservation and cultural diversity, to name but a few of the concerns often cited by NGOs that intervene in the context of the WTO.

Similarly, arbitration based on bilateral and multilateral investment protection treaties has clearly played a role in the tremendous strides toward a widespread quasi-obligatory arbitration system for all investment-related matters involving States, which comes into play at the initiative of the investors. In other words, there has been a progression from a consensual commercial arbitration system between two parties connected by contractual links to a completely different quasi-obligatory international arbitration system to which investors may seek recourse, once they deem that an action by the State, on whose territory they have invested, poses a serious threat to their economic interests. It is therefore clear that not only problems involving disputes between contracting parties are at stake, but also that issues related to various regulatory State actions directly related to the public interest may be raised in this new type of arbitration. Authors have thus pointed out that "[t]he participation of the *amici curiae* in investor-state arbitration is … consistent with the changing nature of investor-state arbitrations and the complex issues of public policies that tribunals are increasingly being called upon to address."[230] Similarly, it was also stated that "this system, which was traditionally based on private legitimacy arising from the consent of the parties, seems to now be in search of public legitimacy, which it is thought can be obtained from a certain degree of openness to civil society."[231]

The question remains whether the trend will continue and target other areas. Will *amici curiae* also be called upon to intervene in disputes between two private parties? Nothing should preclude this from happening, if these disputes involve public interests. Authors have therefore noted that while an *amici curiae* intervention in proceedings involving a State appeared to be logical, this did not, however, mean that it should be excluded from commercial arbitration between private parties, and that whenever there was a possibility that a dispute might have significant public repercussions, the issue of *amici curiae* should at least be raised.[232]

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[230] Newcombe and Lemaire, *supra* note 28, at 40.

[231] Grisel and Vinuales, *supra* note 4, at 3.

[232] *Id.* at 27, and more generally at 26–28 for a discussion of the UNCITRAL Arbitration Rules.

Similarly, one may well wonder whether this trend could also affect ICSID annulment committees.[233] A positive response should be provided, in my view, if the annulment procedure at issue raises questions of public interest.

Evidently, globalization places economic issues at the heart of the matter. The new dimensions of the settlement of economic disputes between States, caused by its "jurisdictionalization"[234] and the modern scale of investor-State arbitration, explain the demands of civil society and justify their accommodation and close control. As Bart Legum has pointed out, the ICSID provisions on transparency will serve as a reminder to ICSID arbitrators of the public interest inherent in investment treaty arbitrations. He has added that ICSID arbitrators, mindful of this interest, will probably tend to act somewhat more like judges than as international commercial arbitrators.[235]

Placing the individual at the heart of the matter should yield positive results, and accepting *amicus curiae* briefs should reinforce the feeling within civil society that economic justice is being done. This was the line taken by Ian Brownlie with regard to the general principle of acceptance of *amicus curiae* briefs, long before the question was raised in the WTO:

> Even if the individual is not given procedural capacity, a tribunal interested in doing justice effectively must have proper access to the views of individuals whose interests are directly affected whether or not they are parties as a matter of procedure.[236]

Depending on their use by WTO dispute settlement bodies and international arbitrators tasked with settling State-State or investor-State disputes, *amicus curiae* briefs may be a bane or a boon. It is a bane if the inevitably cumbersome nature of the process is focused upon, or a boon if they are seen as upholding a model of transparency that inspires confidence in the solutions adopted in the context of the settlement of international economic disputes.

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[233] *See* G. Kaufmann-Kohler, "Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are There Differences?", in E. Gaillard and Y. Banifatemi (eds.), Annulment of ICSID Awards 218, Paris, Iai Publication (2004). For a more reserved attitude, *see* Grisel and Vinuales, *supra* note 4, at 44, who state that it has also been suggested that there is no opposition to *amicus curiae* submissions before ICSID *ad hoc* Annulment Committees, although evidence of a valid interest, as well as of an ability to provide a perspective that differs from that of a party, appears to be more difficult to provide.

[234] H. Ruiz Fabri, "La juridictionnalisation du règlement des litiges économiques entre Etats," Rev. de l'arb. 881 (2003).

[235] Legum, *supra* note 177.

[236] I. Brownlie, "The Individual Before Tribunals Exercising International Jurisdiction," Int'l and Comp. L. Q. 719 (1962). *See also* Sh. Rosenne, "Reflections on the Position of the Individual in Inter-State Litigation in the International Court of Justice," in P. Sanders (ed.), International Arbitration: Liber Amicorum for Martin Domke 250, The Hague, Nijhoff (1967).