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Third Party Participation in Investment-Environment Disputes: Recent Developments

Kyla Tienhaara

This article outlines recent developments in investor–State dispute settlement related to the participation of third parties in arbitration. A particular focus is given to third party participation in disputes with a clear public interest based on the relevance of the cases to the protection of the environment, or sustainable development more generally. The benefits and drawbacks of third party participation and the relationship of participation to broader issues of transparency are also briefly discussed.

INTRODUCTION

In recent years, the incidence of investor–State disputes has risen significantly[1] and with this rise has come a corresponding increase in the level of public interest in these disputes, and the institutions that facilitate their resolution. This latter development is a consequence of not only the greater frequency of disputes, but also of increased public awareness and heightened concern about the broader implications of these disputes. Marshall and Mann outline five reasons why there is a clear public interest in investor–State disputes:

(1) disputes often arise in public service sectors such as water, oil and gas, transport, waste disposal and telecommunications;
(2) disputes may concern government regulation aimed at the protection of public welfare (human rights, health and safety, labour laws, environmental protection);
(3) the threat of a dispute may have a ‘chilling’ effect on government policy;
(4) arbitration is costly and has implications for the public purse; and
(5) case law may determine the future development of investment law, which in turn may have implications for other public-interest cases.[2]

Despite the compelling rationale that investor–State disputes have a strong public-interest nature, the arbitration procedures that govern the resolution of such disputes are based on the model of private firm-to-firm arbitration, which was designed with the protection of commercial interests in mind. As such, arbitration has traditionally been confidential. Consequently, there are generally no requirements for investor–State disputes to be made known to the public, or any provisions for public access to documents and awards produced in the course of the arbitration. The Secretariat of the International Centre for the Settlement of Investment Disputes (ICSID), the most commonly used arbitration institution in investor–State cases, does keep a registry of all cases filed under its rules, and also publishes the awards on its website if neither party to the dispute objects.[3] However, other arbitration institutions, such as the International Chamber of Commerce (ICC), do not have such a public register and cases resolved under *ad hoc* mechanisms of dispute resolution are only kept track of in an *ad hoc* manner by interested academics and lawyers.[4]

There is also no tradition of involving non-disputant third parties in arbitration. The most common means of third party participation in other international tribunals is through the submission of *amicus curiae* (‘friend of the court’) briefs. *Amicus curiae* submissions generally contain ‘supplementary information

[1] See UNCTAD, *Latest Developments in Investor–State Dispute Settlement*, IIA Monitor No 4 (UNCTAD/WEB/ITE/IIA/2005/2, 2005), available at <http://www.unctad.org/en/docs//webiteiit20052_en.pdf>. This report suggests that there was a significant surge in numbers of disputes in the late 1990s and early 2000s, which may now be tailing off.

[2] F. Marshall and H. Mann, *Revision of the UNCITRAL Arbitration Rules, Good Governance and the Rule of Law: Express Rules for Investor–State Arbitrations Required* (International Institute for Sustainable Development, 2006), available at <http://www.iisd.org/pdf/2006/investment_uncitral_rules_rrevision.pdf>.

[3] See the website available at <http://www.worldbank.org/icsid>.

[4] Three websites in particular are excellent sources of information on arbitration cases: <http://www.investmentclaims.com>, <http://www.naftaclaims.com> and <http://ita.law.uvic.ca/>. The governments of Canada and the USA also have websites that provide access to documents and decisions in NAFTA cases: <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-en.asp> and <http://www.state.gov/s/l/c3439.htm>.

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on the case, particularly the occurrence of events or technicalities relating to the subject at hand'.[5] *Amici* are different from expert witnesses, which can be called on in the course of a proceeding, as they are not remunerated for their services and they are in no contractual relationship to the arbitration parties.[6]

While historically there has been no role for *amici* in investor–State disputes, in recent years a trend of such participation has been emerging. The precedent[7] for such participation was set within the context of the North American Free Trade Agreement (NAFTA),[8] but the idea has also spread to bilateral investment treaties (BITs) negotiated by Canada and the USA, and was incorporated into the new ICSID Rules in 2006. This article outlines these developments and traces the recent history of third party participation in investor–State disputes related to the environment or sustainable development more generally. At the same time, it also addresses some of the other changes that have occurred which have resulted in increased transparency in the arbitration system. The issue of transparency and third party participation are intimately linked. Without public knowledge of the existence of disputes, *amici* will be precluded from making submissions. Furthermore, it can be argued that without access to relevant documents and to the proceedings, third parties will be incapable of formulating effective and worthwhile submissions.

BREAKING NEW GROUND: METHANEX AND THE NAFTA NOTES OF INTERPRETATION

Previous issues of this publication have reported on both the substantive aspects of the *Methanex Corp. v. United States of America* case and the specific decision on the acceptance of *amicus curiae* briefs.[9] As such, despite the importance of the *Methanex* Tribunal decision, it will only be briefly reviewed here, allowing for more discussion of post-*Methanex* developments in arbitration practice.

The *Methanex* case revolved around a Californian ban of a gasoline additive (methyl tertiary butyl ether or MTBE), a potential groundwater contaminant that also poses significant health risks. Methanex Corp., a Canadian company, filed a claim under Chapter 11 of NAFTA and sought compensation of US$970 million. The dispute was resolved under the *ad hoc* arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).

In 2000, two requests for permission to file *amicus curiae* briefs, to make oral submissions and have observer status at oral hearings were made by non-governmental organizations (NGOs).[10] The respondent State in the case (the USA) and the claimant both filed submissions responding to the petitioners' requests, as did the non-disputing parties of NAFTA (Canada and Mexico).[11] The claimant and Mexico opposed the acceptance of *amicus curiae* briefs, while both Canada and the USA showed support. The USA also indicated its willingness to open the proceedings and to disclose documents to the public.

In a groundbreaking decision, the Tribunal concluded that it had the power to accept *amicus curiae* submissions, but no power to authorize access to materials or to allow the petitioners to attend hearings.[12] The Tribunal found that Article 15(1) of the UNCITRAL Rules, which states that 'the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case', provided it with the discretion to accept *amicus curiae* submissions.[13] However, the Tribunal made it clear that UNCITRAL, Rule 25(4), which requires hearings to be private unless otherwise agreed by the parties, limits the flexibility of Article 15(1). Furthermore, while indicating that it was minded to accept *amicus curiae* submissions in this case, the Tribunal chose to delay its final decision until the later stages of the dispute. It is clear that one of the reasons why the Tribunal was minded to accept briefs was because it was felt that this would improve the public image of investment arbitration:

[5] O. Bennaim-Selvi, 'Third Parties in International Investment Arbitrations: A Trend in Motion', 6:5 *Journal of World Investment and Trade* (2005), 773, at 786.

[6] L. Mistelis, 'Confidentiality and Third Party Participation', 21:2 *Arbitration International* (2005), 211, at 231.

[7] The term 'precedent' is used here very loosely, as there is no formal *stare decisis* in investment arbitration.

[8] North American Free Trade Agreement (Ottawa, Mexico, Washington, 17 December 1992).

[9] S. Saha, 'Methanex Corporation and the USA: The Final NAFTA Tribunal Ruling', 15:1 *RECIEL* (2006), 110; H. Mann, 'Opening the Doors, At Least a Little: Comment on the Amicus Decision in *Methanex v. United States*', 10:2 *RECIEL* (2001), 241.

[10] Petition to the Arbitral Tribunal of the International Institute for Sustainable Development (25 August 2000), available at <http://www.iisd.org/pdf/methanex_petition_sept72000.pdf>, and Amended Petition of Communities for a Better Environment, the Bluewater Network of the Earth Island Institute, and the Center for International Environmental Law to Appear Jointly as *Amici Curiae* (13 October 2000), available at <http://www.earthjustice.org/library/legal_docs/Methanex.pdf>.

[11] Under NAFTA, n. 8 above, Article 1128 non-disputing State parties may make submissions to arbitral tribunals on the interpretation of the treaty.

[12] *Methanex Corp. v. United States of America*, Decision of the Tribunal on Petitions from Third Parties to Intervene as 'Amici Curiae' (15 January 2001), at para. 47, available at <http://www.investmentclaims.com>.

[13] UNCITRAL Arbitration Rules (UNCITRAL, 1976), available at <http://www.uncitral.org/>.

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> [the] arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. 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.[14]

On 7 October 2003, the Free Trade Commission (FTC) of NAFTA, made up of representatives of the three NAFTA countries, issued a statement on third party participation in Chapter 11 disputes.[15] The statement stipulated that any non-disputing party that is a person of a party (a NAFTA State), or that has a significant presence in the territory of a party, could apply for leave to file a submission. The statement also outlined guidelines for the acceptance of such submissions. According to these guidelines, in the application for *amicus* status, the person or organization should disclose any affiliations or financial ties to either party in the dispute, indicate the nature of their interest in the dispute, and provide reasoning as to why the tribunal should accept the submission. Furthermore, the guidelines suggest that the tribunal, when making its decision, should consider 'the extent to which':

- the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
- the non-disputing party submission would address matters within the scope of the dispute;
- the non-disputing party has a significant interest in the arbitration; and
- there is a public interest in the subject matter of the arbitration.

Shortly after the FTC statement was issued, Methanex Corp. wrote to the Tribunal, on behalf of both disputing parties, to suggest that the Tribunal adopt the FTC guidelines for the acceptance of *amicus curiae* submissions. The Tribunal did so in January of the following year and issued a press release outlining the procedures to be followed by potential *amici*. The original petitioners submitted their briefs in March 2004.[16]

The proceedings of the *Methanex* case were also eventually opened to the public, but only with the consent of both parties. As a result, the *amici* became aware of the fact that the US was defending the measure in question only on the grounds of the need to protect public health. In June 2004, the International Institute for Sustainable Development jointly with Bluewater Network, Communities for a Better Environment and the Centre for International Environmental Law petitioned for the right to submit a post-hearing submission to argue that the measure should also be considered as an environmental one. The claimant opposed that application and the Tribunal declined to accept the brief.

In the same period as the *Methanex* case was transpiring, another (NAFTA/UNCITRAL) tribunal in the case *UPS v. Canada*[17] also found that it had the power to accept *amicus* briefs, and more recently the (NAFTA/UNCITRAL) tribunal in *Glamis Gold Ltd v. United States of America*[18] has also done so (see further below).

THE CANADIAN AND AMERICAN 'RE-MODELLED' BITS

Despite the prevalence of BITs (there are now nearly 2500 worldwide and almost every country has negotiated at least one such treaty),[19] these treaties have received far less attention in academia than regional agreements such as NAFTA or (failed) attempts at developing a multilateral agreement on investment. However, BITs are increasingly recognized as having important implications, particularly for developing countries, including with regard to the regulation of the environment.

Many countries have taken up the practice of producing what is called a 'model' or 'prototype' BIT; a template that is used in negotiations. Actual BITs tend to follow these models quite closely, with only minor changes. In 2003 and 2004 respectively, the Governments of Canada and the USA released new versions of their model BITs.[20]

[14] See *Methanex Corp. v. United States of America*, n. 12 above, at para. 49.

[15] Statement of the Free Trade Commission on Non-Disputing Party Participation, *Celebrating NAFTA at Ten*, NAFTA Commission Meeting Joint Statement, Montreal (7 October 2003), available at <http://www.dfait-maeci.gc.ca/nafta-alena/Nondisputing-en.pdf>.

[16] Submission of Non-Disputing Parties Bluewater Network, Communities for a Better Environment and Center For International Environmental Law (9 March 2004), available at <http://www.ciel.org/Publications/MethanexAmicusSubmission_Mar04.pdf>, and Amicus Curiae Submission by the International Institute for Sustainable Development (9 March 2004), available at <http://www.iisd.org/pdf/2004/trade_methanex_submissions.pdf>.

[17] Documents and decisions from the proceedings of this case are available at <http://www.naftaclaims.com>.

[18] This case is ongoing. Documents and decisions from the proceedings of this case are available at <http://www.naftaclaims.com>.

[19] Not all BITs have entered into force. UNCTAD estimates that of the 2495 BITs concluded prior to 2006, 1891 (i.e. 75.8%) had entered into force. See UNCTAD, *The Entry into Force of Bilateral Investment Treaties (BITs)*, IIA Monitor No 3 (UNCTAD/WEB/ITE/IIA/2006/9, 2006), available at <http://www.unctad.org/en/docs/webiteiia20069_en.pdf>.

[20] In Canada, BITs are called Foreign Investment Promotion and Protection Agreements (FIPAs). The Canadian model FIPA is available at <http://www.dfait-maeci.gc.ca/tna-nac/documents/2004-FIPA-model-en.pdf>. The US Model BIT is available at <http://www.state.gov/documents/organization/29030.doc>.

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The Canadian Government had been a strong proponent of permitting third party participation in NAFTA Chapter 11 disputes, and the government website notes that '[one] of the most significant improvements' made in the new model BIT is the 'institutionalization' of *amicus curiae* submissions.[21] The model follows the NAFTA FTC guidelines on *amicus curiae* submissions quite closely.[22] The model also stipulates that hearings will be open to the public and that all documents and awards will be freely available (with certain limits to protect confidential information).[23]

The US Model BIT has a less detailed provision, which states that '[t]he tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party'.[24] The model also provides public access to all documents and awards and open proceedings.[25] These provisions have already been incorporated into the US-Chile Free Trade Agreement,[26] the US-Dominican Republic-Central America Free Trade Agreement,[27] the US-Morocco Free Trade Agreement,[28] the US-Singapore Free Trade Agreement,[29] the US-Uruguay BIT,[30] the US-Columbia Trade Promotion Agreement[31] and the US-Peru Trade Promotion Agreement.[32]

ICSID'S RULES, OLD AND NEW

In 2006, ICSID updated its Rules of Procedure for Arbitration Proceedings.[33] Changes to two rules in particular are relevant to the issues of third party participation and transparency. The most significant change was to Rule 37 (Visits and Inquiries), where a second paragraph was added stipulating that:

> 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:
>
> (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.

Rule 32 (Oral Procedure) was also slightly modified. Paragraph 2 now states that:

> 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.

However, the modification from the wording of the former Rule, which stated 'The Tribunal shall decide, with the consent of the parties' to the new wording of 'Unless either party objects' is, in practice, very limited. The bottom line is that not all proceedings will be opened to the public under the new Rules.

Prior to the change in the Rules, there were several cases that dealt with the issue of third party participation, and since their adoption there has been a further case in which NGOs have petitioned for *amicus curiae* status.

DECISIONS ON THIRD PARTY PARTICIPATION UNDER THE OLD ICSID RULES

Several cases involving water privatizations in South America have dealt with the issue of *amicus curiae* submissions under the old ICSID Rules.

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[21] See the website available at <http://www.dfait-maeci.gc.ca/tna-nac/what_fipa-en.asp#structure>.
[22] Agreement between Canada and _________ for the Promotion and Protection of Investments in Canadian model FIPA, n. 20 above, at Article 39.
[23] Ibid., Article 38.
[24] Treaty between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment in US model BIT, n. 20 above, Article 28(3).
[25] Ibid., Article 29.
[26] US-Chile Free Trade Agreement (Miami, 6 June 2003), Articles 10.19 and 10.20.
[27] US-Dominican Republic-Central America Free Trade Agreement (Washington, 5 August 2004), Articles 10.20 and 10.21.
[28] US-Morocco Free Trade Agreement (Washington, 15 June 2004), Articles 10.19 and 10.20.
[29] US-Singapore Free Trade Agreement (Washington, 6 May, 2003), Articles 15.19 and 15.20.
[30] US-Uruguay BIT (Mar del Plata, 4 November 2005), Articles 28 and 29.
[31] US-Columbia Trade Promotion Agreement (Washington, 22 November 2006), Articles 10.20 and 10.21.
[32] US-Peru Trade Promotion Agreement (Washington, 12 April 2006), Articles 10.20 and 10.21.
[33] Rules of Procedure for Arbitration Proceedings (Arbitration Rules) in *ICSID Convention, Regulations and Rules* (ICSID, April 2006), available at <http://www.worldbank.org/icsid/basicdoc/basicdoc.htm>.

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The first was *Aguas del Tunari, S.A. v. Republic of Bolivia*. This case dealt with the highly publicized and highly controversial case of the privatization of water services in the City of Cochabamba in Bolivia. After a 40-year concession was awarded to the company Aguas del Tunari (a subsidiary of Bechtel Corporation) water prices sky-rocketed, leading to widespread public protest. In 2000, the company abandoned the project and in 2001 filed a request for arbitration with ICSID.[34]

In 2002, several organizations and individuals petitioned for *amicus curiae* status, requesting permission to make submissions as well as the right to attend all hearings, to make oral presentations, to have immediate access to all submissions made to the Tribunal, and to respond to arguments made by either party.[35] In addition, the petitioners requested that the proceedings be opened to the public, and that there be public disclosure of the submissions to the Tribunal. Finally, they requested that the Tribunal visit Cochabamba and hold public hearings concerning the facts underlying the claim.

The arbitrators unanimously decided that it was beyond their authority to grant the request.[36] Absent agreement of the parties, the Tribunal reasoned that it could not open the proceedings or provide access to documents. Furthermore, the Tribunal in its decision stated that it did not see the need to request submissions from third parties at that particular point in the case. The dispute was settled and the arbitration proceedings were discontinued at the mutual request of the parties on 28 March 2006.

In two cases currently pending against Argentina, the openness of ICSID Tribunals to *amicus curiae* briefs has also been tested. The cases, which relate to sewage and water distribution services, concern the government's freeze of public utility rates following the abandonment in 2001 of the system that pegged Argentina's currency to the dollar. In 2005, five NGOs filed a petition in the case of *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic* ('*Suez/Vivendi*').[37] In June of the same year, in a second case – *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic* ('*Suez/InterAguas*') – one NGO and three individuals filed a similar petition.[38] In both cases, the Tribunal was made up of the same members, and the orders in response to the petitions are substantively similar.

In both cases, the Tribunal determined that the petitioners' request was composed of three parts: first that they, and the public at large, should be allowed access to the hearings in the case; second that they should be allowed the opportunity to present legal arguments as *amicus curiae*; and finally that they should be allowed access to documents and other information on the case.[39] In both cases, the claimants asked the Tribunal to reject the petition while the respondent State (Argentina) made no objection.

The Tribunal determined first that it was not able to open the hearings to third parties or to the public because of the requirement under ICSID Arbitration Rule 32(2) for the consent of both parties; in both the *Methanex* and the *UPS* cases there was explicit consent to open the hearings, but in these cases it was lacking.[40] Next, the Tribunal moved on to the issue of *amicus curiae* and determined that it did have the authority to accept briefs. Interestingly, in its explanation of this decision, the Tribunal noted that:

> The acceptance of *amicus* submissions would have the additional desirable consequence of increasing the transparency

[34] ICSID Case No ARB/02/3, *Aguas del Tunari, S.A. v. Republic of Bolivia*, Decision on Respondent's Objections to Jurisdiction (21 October 2005), available at <http://www.worldbank.org/icsid/cases/adt_en.pdf>.

[35] ICSID Case No ARB/02/3, Petition of La Coordinadora Para la Defensa del Agua y Vida, La Federacion Departmental Cochabamba de Organizaciones Regantes, Sempa Sur, Friends of the Earth Netherlands, Oscar Olivera, Omar Ferdandez, Father Luis Sanchez, and Congressman Jorge Alvarado to the Arbitral Tribunal in *Aguas del Tunari, S.A. v. Republic of Bolivia* (29 August 2002), available at <http://www.investmentclaims.com>.

[36] See the letter from the president of the Tribunal responding to the petition in ICSID Case No ARB/02/3, *Aguas del Tunari, S.A. v. Republic of Bolivia* (29 January 2003), available at <http://www.investmentclaims.com>.

[37] ICSID Case No ARB/03/17, Petition for Transparency and Participation as *Amicus Curiae* of Centro de Estudios Legales y Sociales, Asociación Civil por la Igualdad y la Justicia, Consumidores Libres Cooperativa Ltda. de Provisión de Servicios de Acción Comunitaria, Unión de Usuarios y Consumidores, and Center for International Environmental Law in *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic* (27 January 2005), unofficial translation from Spanish original available at <http://www.cels.org.ar/english/index.html>.

[38] ICSID Case No ARB/03/19, Petición de Participación como Amicus Curiae (Petition for Participation as *Amicus Curiae*) of Fundación para el Desarrollo Sustentable, Professor Ricardo Ignacio Beltramino, Dr Ana María Herren, and Dr Omar Darío Heffes in *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic* (21 June 2005).

[39] ICSID Case No ARB/03/17, *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic* (*Suez/InterAguas*), Order in Response to a Petition for Participation as *Amicus Curiae* (17 March 2006), available at <http://www.worldbank.org/icsid/cases/ARB0317-AC-en.pdf> and ICSID Case No ARB/03/19, *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic* (*Suez/Vivendi*), Order in Response to a Petition for Transparency and Participation as *Amicus Curiae* (19 May 2005), available at <http://www.worldbank.org/icsid/cases/pdf/12_Amicus_Curiae_03-19_e.pdf>.

[40] See ibid., paras 6–7 in both Orders.

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> of investor–state arbitration. 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. It is this imperative that has led to increased transparency in the arbitral processes of the World Trade Organization and the North American Free Trade Agreement. Through the participation of appropriate representatives of civil society in appropriate cases, the public will gain increased understanding of ICSID processes.[41]

In the *Suez/Vivendi* case, the Tribunal set out conditions by which the NGOs could apply for leave to make submissions, and in the *Suez/InterAguas* case the Tribunal determined that the petitioners had not met those same conditions, but could provide the Tribunal with further information in order to do so. In both cases, the decision as to whether to provide the petitioners with access to documents was deferred until leave was granted to file *amicus curiae* briefs.

In December 2006, the petitioners in the *Suez/Vivendi* case filed with the Tribunal a second petition,[42] again requesting the opportunity to submit a written *amicus* submission, as well as to be given access to documents. The claimant asked the Tribunal to reject the petition, while the respondent State made no objection.

In February 2007, the Tribunal made its Order in response to the petition.[43] Following the guidelines that it had laid out in its initial Order in 2005, the Tribunal first assessed the suitability of the petitioners to act as *amici*, based on their expertise, experience and independence. It found that the NGOs had provided sufficient information to prove that they met these criteria. The Tribunal also found that there was a sufficient public interest in the case to justify third party participation. Finally, it found that the submission would not unduly impede the proceedings, although it did restrict the petitioners to a 30-page brief. Turning next to the issue of access to documents, the Tribunal noted that even the new ICSID Rules (which in any case did not apply to this case) provided no guidance on this issue. The Tribunal noted that:

> As a general proposition, an *amicus curiae* must have sufficient information on the subject matter of the dispute to provide 'perspectives, expertise and arguments' which are pertinent and thus likely to be of assistance to the Tribunal. Otherwise the entire exercise serves no purpose.[44]

However, the Tribunal went on to suggest that in this particular case, the petitioners appeared to have access to sufficient information that was available in the public domain, and were therefore capable of making a useful brief without further access to arbitral documents. The Tribunal emphasized in this respect that the proper role of an *amicus curiae* 'is not to challenge arguments or evidence put forward by the parties' but to 'provide their perspective, expertise, and arguments to help the court'.[45] The Petitioners made their submission in April 2007.[46]

TESTING THE WATER: BIWATER AND THE APPLICATION OF THE NEW ICSID RULES

The *Biwater Gauff Ltd v. United Republic of Tanzania* case is also worth reviewing, as it displays some of the limitations of the changes to ICSID's Rules, as well as the tension between transparency and confidentiality in proceedings.

In 2005, the Government of Tanzania cancelled a 10-year contract of the private utility City Water, owned by British company Biwater. The contract was to supply water to the country's commercial capital, Dar es Salaam. The government claimed that the reason for the cancellation was that the residents have had to cope with erratic supplies and water shortages.[47] In August of 2005, the company filed a request for arbitration based on a UK-Tanzania BIT and under ICSID Rules. By the time that the case had begun, the new ICSID Rules had come into effect and the Tribunal determined that they would govern the proceedings.

The Tribunal's first session began in March 2006. In July of that year, Biwater wrote a letter to the Tribunal claiming that the Government of Tanzania

[41] See *Suez/InterAguas*, n. 39 above, at para. 21 and *Suez/Vivendi*, n. 39 above, at para. 22.

[42] ICSID Case No ARB/03/19, Petition for Permission to Make an Amicus Curiae Submission of Centro de Estudios Legales y Sociales, Asociación Civil por la Igualdad y la Justicia, Consumidores Libres Cooperativa Ltda. de Provisión de Servicios de Acción Comunitaria, Unión de Usuarios y Consumidores, and Center for International Environmental Law in *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic* (*Suez/Vivendi*) (1 December 2006), unofficial translation from Spanish original available at <http://www.cels.org.ar/english/index.html>.

[43] ICSID Case No ARB/03/19, *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 (12 February 2007), available at <http://www.worldbank.org/icsid/cases/pdf/ARB0319_ORDER.pdf>.

[44] Ibid., at para. 24.

[45] Ibid., at para. 25.

[46] ICSID Case No ARB/03/19, *Amicus Curiae* Submission of Centro de Estudios Legales y Sociales, Asociación Civil por la Igualdad y la Justicia, Consumidores Libres Cooperativa Ltda. de Provisión de Servicios de Acción Comunitaria, Unión de Usuarios y Consumidores, and Center for International Environmental Law in *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic* (4 April 2007), available at <http://www.ciel.org/Publications/SUEZ_Amicus_English_4Apr07.pdf>.

[47] 'Tanzania Ditches Private Water Supplier', *BBC News* (18 May 2005), available at <http://news.bbc.co.uk/2/hi/business/4558725.stm>.

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had unilaterally disclosed certain orders made by the Tribunal to an 'unrelated' third party.[48] Subsequently, certain documents (a Procedural Order and the Minutes of the First Session) were published on the Internet. According to Biwater, the dispute was attracting public interest, which had led to, for example, a campaign by the World Development Movement (an NGO based in London) to discontinue the proceedings. In a second letter, the company filed a request to the Tribunal for provisional measures on confidentiality ('the Request').[49] The Request, which according to the company was based on the need to preserve the procedural integrity of the proceedings and to avoid aggravation or exacerbation of the dispute, called for the following:

- discussion on a case-by-case basis of the publication of all Decisions other than the Award (if mutual agreement cannot be reached then Tribunal should make the decision);
- no disclosure of the pleadings to third parties;
- no disclosure of any documents produced in the first and second rounds of disclosure to third parties;
- no disclosure of any correspondence between the parties and/or the Tribunal in respect of the arbitral proceedings to third parties.

The Tribunal noted that Biwater considered these measures to be necessary as they go to the company's 'ability to rely on the private nature of the oral hearings, and its ability to present its case and accompanying evidence without the threat of increased harassment and interference from third parties'.[50]

In its Decision on Provisional Measures, the Tribunal noted that what was required was 'a careful balancing between two competing interests: the need for transparency and the need to protect the procedural integrity of the arbitration'.[51] It commented that '[w]ithout doubt, there is now a marked tendency towards transparency in treaty arbitration', which is reflected in the changes to ICSID's Rules.[52] The Tribunal reasoned that the provisions that continue to limit the publication of documents apply to the actions of the ICSID Secretariat, rather than to the parties themselves. However, it also agreed with Biwater that 'the prosecution of a dispute in the media or in other public fora, or the uneven reporting and disclosure of documents or other parts of the record in parallel with a pending arbitration, may aggravate or exacerbate the dispute and may impact the integrity of the procedure'.[53] Furthermore, the Tribunal stated that placing restrictions on disclosure for the duration of the dispute is not necessarily inconsistent with the objective of transparency, as these restrictions can be removed upon the conclusion of the dispute.[54]

The Tribunal determined that decisions on the publication of certain documents during the proceedings (decisions, orders or directions) would be made on a case-by-case basis. Minutes or records of hearings would not be disclosed unless agreed by both parties or directed by the Tribunal, and furthermore any documents produced by one party would not be disclosed by the opposing party (the parties were permitted to release their own documents). Pleadings, written memorials, witness statements and expert reports (which could all contain details of the contents of other non-disclosed documents) would also be kept confidential pending the conclusion of the proceedings. Finally, correspondence between the parties and/or the Tribunal would also be kept confidential as these documents 'will usually concern the very conduct of the process itself, rather than issues of substance, and as such do not warrant wider distribution'.[55] The Tribunal emphasized that parties were permitted to 'engage in general discussion about the case in public' as long as this was 'restricted to what is necessary' and not used to 'antagonize' or 'unduly pressure' the other party or exacerbate the dispute, or make the resolution of the dispute more difficult.

In November 2006, five NGOs (three Tanzanian and two international) petitioned for *amicus curiae* status in this case.[56] In doing so, they referred to the decisions in the *Suez/Vivendi* and *Suez/InterAguas* cases on the criteria for accepting such petitions, and also to the new ICSID Rule 37(2). In the 'Reasons for the Petition' section, they argued that the arbitration 'raises a number of issues of vital concern to the local community in Tanzania, and a wide range of potential issues of concern to developing countries' and 'also raises issues from a broader sustainable development perspective and is potentially of relevance for the entire international community'.[57]

Interestingly, the petitioners appear to have anticipated some of the possible objections to their participation in the dispute, pointing out that by acting together

[48] ICSID Case No ARB/05/22, *Biwater Gauff Ltd v. United Republic of Tanzania*, Procedural Order No 3 (29 September 2006), available at <http://www.worldbank.org/icsid/cases/arb0522_procedural_order3.pdf>.

[49] The letter dated 17 July 2006 is referred to in Procedural Order No 3, ibid.

[50] See *Biwater Gauff Ltd v. United Republic of Tanzania*, ibid., at para. 38.

[51] Ibid., at para. 112.

[52] Ibid., at para. 114.

[53] Ibid., at para. 136.

[54] Ibid., at para. 140.

[55] Ibid., at para. 161.

[56] Petition for Amicus Curiae Status of the Lawyers' Environmental Action Team, the Legal and Human Rights Centre, the Tanzania Gender Networking Programme, the Center for International Environmental Law and the International Institute for Sustainable Development (27 November 2006), at 7, available at <http://www.ciel.org/Publications/Tanzania_Amicus_1Dec06.pdf>.

[57] Ibid., at 7.

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they had reduced the burden of additional *amicus curiae* submissions on the proceedings. The petitioners also argued, however, that without greater transparency in the proceedings, it would not be possible for them to participate meaningfully, nor would it be possible for the Tribunal to even determine whether they passed the *amicus curiae* test provided by the ICSID Rules:

> . . . it is not possible for the Petitioners to fulfil all the conditions necessary to allow the Tribunal to fully apply this test. The reason for this impossibility is the impact of the confidentiality order contained in Procedural Order No. 3 of the Tribunal. By precluding the release to the public of the documents that detail the facts and legal issues in dispute, the Petitioners cannot describe the scope of their intended legal submissions, and hence the extent to which the tests set out in Rule 37(2) are fully met.[58]

The petitioners, therefore, suggested that the Tribunal could either accept the petition and provide them with the legal documents needed to make a submission, or provide them with the legal documents in order that they might be able to prove that they meet the requirements of the *amicus curiae* test.

In response, the claimant argued that the petitioners had mistakenly assumed that the issues that concern them were of relevance to the arbitration simply because the case related to water.[59] The claimant disagreed that environmental issues and issues of sustainable development were in fact relevant to the case.

The Tribunal's decision on *amicus* was given in February 2007.[60] In line with previous decisions, submissions were allowed but access to documents and hearings were not. The Tribunal reasoned that the petitioners had 'a sufficient interest' in the proceeding, and that their submission had the potential to assist the Tribunal in the proceedings, by providing a perspective or knowledge that was different from that of the disputing parties. The Tribunal also noted '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'.[61] In terms of access to documents, the Tribunal suggested that the dispute had been very public and widely reported, and that the 'broad policy issues' that the petitioners would address in their brief did not require access to documents from the arbitration.[62] However, it was also noted that the issue might be revisited in the future, given the fact that the limitations on disclosure were put in place to preserve 'procedural integrity' and not necessarily to ensure confidentiality *per se*.[63] Finally, with regard to the request to open the proceedings, the Tribunal reasoned that Rule 32(2) of the amended ICSID Arbitration Rules was very clear on this matter. As the claimant had voiced its objection to opening the proceedings, the Tribunal had no option but to reject the request.[64]

UNCITRAL: ONE STEP FORWARD, TWO STEPS BACK?

Although it was under UNCITRAL Rules that the Tribunal in *Methanex* first determined that it had the power to accept *amicus curiae* submissions, it is important to remember that Article 15(1), which provides this power, is first of all discretionary, and is second of all subordinated to other provisions in the Rules (the requirements that hearings will be held *in camera* unless the parties agree otherwise, and that the award may only be made public with the consent of both parties).[65] Some observers argue that the power to consider *amicus curiae* submissions should be made explicit, mandatory and coupled with increased transparency.[66]

At its thirty-ninth session (June/July 2006), UNCITRAL agreed that its Working Group II on International Arbitration and Conciliation should prioritize the revision of the UNCITRAL Arbitration Rules. In a note prepared by the Secretariat, several possible amendments were contemplated. Of relevance here are the following options for consideration: an express provision on third party intervention; explicit rules regarding the confidentiality of the proceedings as such, or of the materials (including pleadings) before an arbitral tribunal; and whether the UNCITRAL Rules should address the situation where a party is under a legal duty to disclose an award or its tenor (for example under access to information legislation). It would seem from this note that it is possible that the revision of UNCITRAL Rules could make them more, or less, transparent.

In September of the same year, an unofficial report was released, authored by two investment arbitration experts, with more specific recommendations for the

[58] Ibid., at 11.
[59] The claimant's response is referred to in ICSID Case No ARB/05/22, *Biwater Gauff Ltd v. United Republic of Tanzania*, Procedural Order No 5 (2 February 2007), available at <http://www.worldbank.org/icsid/cases/pdf/ARB0522_ProceduralOrdNo5.pdf>.
[60] Ibid.
[61] Ibid., at para. 50.
[62] Ibid., at para. 65.
[63] Ibid., at para. 66.
[64] Ibid., at paras 70–72.
[65] UNCITRAL Arbitration Rules, n. 13 above, Articles 25(4) and 32(5).
[66] See F. Marshall and H. Mann, n. 2 above.

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revision of the Rules.[67] In terms of the express provision on third party access, the report recommended inserting a new Article 15(5) that would read:

> Unless the parties have agreed otherwise, the Arbitral Tribunal may, after having consulted with the parties, and especially in cases raising issues of public interest, allow any person who is not a party to the proceedings to present one or more written statements, provided that the Tribunal is satisfied that such statements are likely to assist it in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight which the parties are unable to present. The Arbitral Tribunal shall determine the mode and number of such statements after consulting with the parties.[68]

With regard to the inclusion of an explicit confidentiality clause, the authors noted that there had been substantial discussion on this issue during the revision of the ICC Rules in 1998. In that case, it was decided that a general clause should not be included and that tribunals should make these decisions on a case-by-case basis. However, with regard to the documents and evidence produced in the course of the arbitration, the authors did feel the need to propose a new clause, which would state that:

> Unless the parties have agreed otherwise, all materials in the proceedings which are not otherwise in the public domain, including materials created for the purpose of the arbitration and all other documents or evidence given by a party, witness, expert, [or any other person,] shall be treated as confidential, save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, and in bona fide legal proceedings before a state court or other judicial authority in relation to an award.[69]

Finally, the report suggested an amendment to the clause on the publication of the award to allow for publication with the consent of both parties (as before) or when 'disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to [bona fide] legal proceedings before a State court or other judicial authority'.[70] This clearly does not go as far as the ICSID Rules, where either party is permitted to publish the award unilaterally.

Two NGOs, which have been involved as *amici* in several investor–State disputes, have also made a proposal to UNCITRAL, arguing that a separate set of arbitration rules should be developed to govern disputes that involve a State as a party. One of their suggestions is that in this separate set of rules, acceptance of *amicus curiae* briefs should be made explicit through a new Article 15(4) along the lines of Article 37(2) of the new ICSID Rules and the NAFTA FTC guidelines.[71] The NGO report also strongly cautions against the adoption of a confidentiality clause, stating that in the case of proceedings involving a State, such a clause 'would fly in the face of principles of good governance and human rights, and thus undermine the credibility and legitimacy of the arbitral proceedings'.[72] Furthermore, the report argues that such a restraint on transparency would render effective third party participation impossible:

> . . . a non-disputing party requesting leave to submit an *amicus curiae* brief to a tribunal could not elaborate on whether its perspective, knowledge or insight is different from the disputing parties' or useful to the tribunal, if the record remains secret. Likewise, it would be impossible for a non-disputing party to prepare a submission within the scope of the dispute when access to pleadings is denied.[73]

In February 2007, member governments rejected the idea of including a general provision on confidentiality in the UNCITRAL rules, but delayed the decision on whether or not to develop a separate set of rules for disputes involving States.[74] The revision of the rules is expected to be finalized in 2008.[75]

NOT ONLY FOR NGOs: GLAMIS GOLD AND THE PARTICIPATION OF BUSINESS ASSOCIATIONS

It is important to understand that third party participation is not restricted to environmental or other advocacy groups. An ICSID discussion paper has noted this, stating that '[t]here may well be cases where the process could be strengthened by submissions of third parties, not only civil society organizations but also for instance business groups or, in investment treaty arbitrations, the other States parties to the treaties concerned'.[76] A currently pending NAFTA Chapter 11 case (*Glamis Gold Ltd v. United States of America*)[77]

[67] J. Paulsson and G. Petrochilos, *Revision of the UNCITRAL Arbitration Rules* (Freshfields Bruckhaus Deringer, 2006).
[68] Ibid., at 72.
[69] Ibid., at 79.
[70] Ibid., at 135.

[71] Center for International Environmental Law (CIEL) and International Institute for Sustainable Development (IISD), *Revising the UNCITRAL Arbitration Rules to Address State Arbitrations* (CIEL/IISD, 2007), at 4, available at <http://www.iisd.org/pdf/2007/investment_revising_uncitral_arbitration.pdf.>.
[72] Ibid., at 10.
[73] Ibid.
[74] 'Governments Punt Discussion of Special UNCITRAL Rules for Investor–State Disputes', *Investment Treaty News* (14 February 2007), available at <http://www.iisd.org/investment/itn>.
[75] Ibid.
[76] ICSID, *Possible Improvements of the Framework for ICSID Arbitration: A Discussion Paper of the ICSID Secretariat* (ICSID, 2004).
[77] See n. 18 above.

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surrounding reclamation requirements for open-pit mines in the State of California illustrates this. Four *amicus curiae* submissions have been filed in this case: the first by the Quechan Indian Nation in August 2004; the second as a joint submission of two NGOs (Friends of the Earth Canada and Friends of the Earth United States) in September 2005; the third by the National Mining Association in October 2006; and the fourth as another joint submission of two NGOs (Sierra Club and Earthworks) also in October 2006.[78]

The power of the Tribunal to accept *amicus curiae* submissions was never in question, as the proceedings began following the release of the NAFTA FTC guidelines on third party participation. What is worthy of note about this case is rather that, for the first time, a business association (rather than a labour, environmental or other social organization) requested permission to submit a brief. The National Mining Association is comprised of more than 325 corporations from the American mining sector, and its purpose is to advocate 'public policies designed to protect and expand domestic mining opportunities that are of vital importance to the United States' economic prosperity and national security'.[79] While generally *amicus curiae* submissions are thought to be impartial and intended to provide 'perspective, expertise and arguments' rather than direct support for either party, the National Mining Association application to file a submission states outright that it is 'in support of the Claimant'.[80] The Association also has direct ties with the claimant, as Glamis Gold Ltd is an Association Member.

ARGUMENTS FOR AND AGAINST THIRD PARTY PARTICIPATION IN INVESTOR–STATE DISPUTES

Those that argue in favour of increased transparency and third party participation suggest that due to the public-interest nature of investor–State disputes, the confidentiality that applies to private firm–firm disputes is inappropriate. As Legum notes, there are in fact a number of different kinds of interest implicated in investor–State disputes:

> . . . specific interest in the measure that is challenged in the case; general interest in the appropriate functioning of the investment protections; interest in the domestic law analogues of the treaty provision invoked [e.g. regulatory takings]; interest in the appropriate interaction between federal, state and local government authorities; and many others.[81]

There are also several different types of 'public'; Mistelis argues that in addition to the 'general public', which has an interest in investment disputes, there is also the 'specialist public' (practising lawyers and academics), which also has an interest in knowing how treaty provisions are interpreted by arbitration tribunals.[82] Limiting disclosure effectively privileges a small subset of the 'specialist public' (arbitrators and lawyers participating in cases), whilst increasing transparency would expand the range of actors which could potentially participate in disputes.

However, some observers take issue with the notion that because there is a 'public interest' at stake, this justifies third party participation. In this view, it is the respondent State that should act in the public interest, and there is no further need for any other actor to do so. Some take this argument even further by questioning the legitimacy of NGOs to act in the public interest in the first place. Brower, for example, suggests that 'many NGOs have very specific agendas and are not accountable to their own members, much less to the general public'.[83]

Even if NGOs do not represent the public interest, however, other arguments have been made in favour of third party participation. One is that third party participation can benefit arbitral decisions by adding an extra layer of expertise or perspectives on issues that would not be provided by the disputing parties. For example, in *Methanex*, the US Government argued that the regulation in question was an issue of public health, while the *amici* raised the environmental issues involved. The counter-argument to this is that interested third parties can petition the parties to the dispute directly to make claims on their behalf. However, there does seem to be a value in maintaining the independence of non-State actors in the process.[84]

One of the most salient claims of those that support third party participation is that it may help to allay public disquiet about 'secret trade courts',[85] and contribute to a higher level of accountability in the arbitration process. Many authors believe that investment arbitration is either in, or is heading for, a serious

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[78] All of the petitions and submissions are available at <http://www.naftaclaims.com>.

[79] *Glamis Gold Ltd v. United States of America*, Application for Leave to File a Non-Disputing Party Submission by the National Mining Association (13 October 2006), at 1, available at <http://www.naftaclaims.com>.

[80] Ibid.

[81] B. Legum, 'Trends and Challenges in Investor–State Arbitration', 19:2 *Arbitration International* (2003), 143, at 145.

[82] See L. Mistelis, n. 6 above, at 230.

[83] C.H. Brower, 'Legitimacy, and NAFTA's Investment Chapter', 36:1 *Vanderbilt Journal of Transnational Law* (2003), 37, at 73.

[84] See L. Mistelis, n. 6 above, at 223.

[85] As an editorial famously termed them; see 'The Secret Trade Courts', *New York Times* (27 September 2004).

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legitimacy crisis.[86] In several of the cases discussed above, the tribunals noted, in this regard, the potential benefits of providing greater openness, as well as the potential negative implications of not doing so. However, while this argument may hold when one is defending increased transparency in arbitration, it may be questioned whether the participation of private actors (which are not accountable to the public) actually increases the legitimacy of the process.

There appears to be a significant amount of support for the participation of *amici* and for increased transparency from States and outside observers, however, there are still those who do not view the trends in this area as positive. One basic argument against the participation of *amicus curiae* is the need to keep certain information (e.g. 'trade secrets') confidential. However, in practice, this can be dealt with quite easily, as it is in other fora, by redaction in documents released to the public and *in camera* restrictions when discussions of this nature arise in the proceedings.

Another criticism of third party participation is that it will increase the length and cost of arbitration. Investor–State disputes already run, on average, several years and entail large costs for both claimants and respondent States.[87] However, there are two counter-arguments here: the first is that the cost and delay in proceedings can be minimized by clear procedures for when and how *amici* may participate (e.g. only in the merits phase, limits to length of submission, etc.); and the second is that the tribunal is receiving additional information at no direct cost to either party (as *amici*, unlike experts, are not remunerated for their services).[88]

Related to the issues of the cost and the time burden to the parties is the notion that allowing third party participation will 'open the floodgates' to a large number of submissions. However, this is unlikely actually to occur; this has not been the experience in the World Trade Organization (WTO) or other bodies that accept *amicus curiae* briefs, and the experience thus far in investment disputes suggests that, in fact, NGOs are likely to make joint submissions rather than duplicative ones.

A further argument that has been made against the participation of third parties is that it is unfair and that it may upset the balance between the positions of the respondent and claimant by favouring one side. Again there are several key counter-arguments: first, in theory, *amici* are meant to provide information which is impartial, and not intentionally to support one party to the dispute; second, even if, in practice, *amicus curiae* submissions do support the position of one of the parties, this does not mean that the tribunal will necessarily give more weight to that party's position;[89] and, finally, while it is usually argued that the participation of *amici* unfairly favours the respondent State, the *Glamis* case illustrates that, in practice, *amici* may intervene to support the claimant as well.

The position of Biwater in the above-mentioned case in Tanzania illustrates another argument against third party participation, although it is perhaps more closely connected with the broader issues of transparency and disclosure. This is the notion that opening up arbitration to the 'court' of public opinion will lead to the 're-politicization' of investor–State disputes.[90] While Rubens suggests that such re-politicization is likely to be most costly for the respondent State, which runs the risk of losing credibility as an investor-friendly country in the face of publicity surrounding potentially frivolous or exaggerated claims, it is clear from the Biwater case that there is also concern on the part of investors that they will be subjected to negative publicity from NGO campaigns.[91] However, an obvious counter-argument is that some information about investor–State disputes is likely to reach the public domain whether investment arbitration is open or not. Increases in transparency and the acceptance of third party participation will result in the public having access to more accurate and balanced information, thus decreasing the opportunity for smear campaigns against either the respondent State or the claimant.

Finally, it should be noted that the notion of permitting *amicus curiae* submissions has also been viewed with some scepticism in the developing world, and not only because of concerns about the increased burden on the parties to the dispute in terms of length and cost of the proceedings. The South Centre, an intergovernmental body of developing countries, argues that '[p]ermitting amicus submissions effectively disadvantages developing countries because the civil society and industrial organizations in the developed

[86] A. Afilalo, 'Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels should solve their Legitimacy Crisis', 17:1 *Georgetown International Environmental Law Review* (2004), 51; J. Atik, 'Legitimacy, Transparency and NGO Participation in the NAFTA Chapter 11 Process', in T. Weiler (ed.), *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (Transnational Publishers Inc., 2004), 135; see also C.H. Brower, n. 83 above; and S.D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatising Public International Law through Inconsistent Decisions', 73 *Fordham Law Review* (2005), 1521.

[87] According to UNCTAD, countries can expect an average tribunal to cost US$400,000 or more, in addition to the US$1–2 million in legal fees. See UNCTAD, *Investor–State Disputes and Policy Implications*, Ninth Session of the Commission on Investment, Technology and Related Financial Issues (TD/B/COM.2/62, 11 March 2005), at 7.

[88] See O. Bennaim-Selvi, n. 5 above, at 804.

[89] Ibid., at 805.

[90] N. Rubens, 'Opening the Investment Arbitration Process: At What Cost, for What Benefit?', 3:3 *Transnational Dispute Management* (2006), available at <http://www.transnational-dispute-management.com>.

[91] Ibid.

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TABLE 1 ARGUMENTS AND COUNTER-ARGUMENTS FOR AND AGAINST THIRD PARTY PARTICIPATION

	ARGUMENT	*COUNTER-ARGUMENT*
In favour of third party participation	Public interest/public purse	Respondent State represents the public interest; NGOs not accountable
	Can provide knowledge, expertise or different perspectives	Third parties can petition one of the parties directly and can be called on as experts
	Allay public fears about secretive nature of arbitration (increase legitimacy)	Questionable whether the participation of actors, which are not accountable to the public, can increase legitimacy
Opposed to third party participation	Trade secrets	Can still be kept secret (redaction, partial *in camera*)
	Increases burden in time and cost	Burden is minimal, and can be controlled through set guidelines on participation; the tribunal obtains more information at no cost (*amici* are not paid)
	'Opens the floodgates'	No evidence of this in WTO or other settings, or in recent investment arbitration practice
	Unfair to one party	Third parties may participate to support either the claimant or the respondent State; tribunals do not weigh arguments more heavily just because more parties make them
	'Re-politicizes' disputes	Greater transparency and the involvement of third parties leads to more balanced representation of the case in the public sphere
	Northern actors/organizations more capable of intervening than southern ones	Southern/local actors/organizations have intervened in several cases; northern actors/organizations can support southern ones and increase their capacity to act as *amici*

countries are more experienced, better organized and equipped as well as better funded'.[92] However, this argument is not entirely convincing. First, in both the Argentinean and Tanzanian examples, it is evident that local NGOs were actively involved in the process of submitting briefs. Second, in all these cases, the local NGOs appear to have benefited from support and cooperation with northern-based NGOs, which can provide expertise in the highly specialized area of investment arbitration. Third, in none of the cases did the respondent State make an objection to the submission of briefs.

It is possible that the position taken by the South Centre is simply an extension of the stance taken by developing countries on the participation of *amici* in other fora, such as the WTO, where Sornarajah suggests that '[t]he fear is that private interests will be given representation through the back door of *amicus* briefs'.[93] If so, it may be a misplaced concern, as private interests can already use the 'front door' in investment arbitration, and State and NGO positions are often complementary. However, it is of course also possible that other private interests who may be more favourable to the claimant's side (e.g. business associations), may wish to involve themselves in arbitration more often in the future, in an attempt to balance the interests presented by third parties. This has already occurred in one case mentioned above. As such, developing countries' concerns in this regard may be legitimate.

Table 1 summarizes the main arguments for and against the participation of third parties in investor–State disputes, as well as the counter-arguments to each.

CONCLUSIONS

With the initiatives of NGOs and the subsequent support of some States there have been changes in the arbitration process to allow for greater transparency and participation by third parties in investor–State disputes. Thus far, the reforms have been largely *ad hoc*, though it seems unlikely that future tribunals will go against the general trend in this area. While there is no formal *stare decisis* in investment arbitration, tribunals often refer to past decisions made in other cases, and diverging sharply from the reasoning of the numerous tribunals that have laid out guidelines for

[92] South Centre, *Developments on Discussions for the Improvement of the Framework for ICSID Arbitration and the Participation of Developing Countries* (SC/TADP/AN/INV/1, February 2005), at 10.
[93] M. Sornarajah, 'A Developing Country Perspective of International Economic Law in the Context of Dispute Settlement', in A.H. Qureshi, *Perspectives in International Economic Law* (Kluwer Law International, 2002), 83, at 95.

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the submission of briefs would require strong justification. Furthermore, it is evident that there is a fervent desire within the international arbitration community to dispel the popular concerns about the 'secretive' nature of the investment arbitration process.

From an environmental perspective, the changes that have been made are generally positive, but are also still greatly limited. While the acceptance of *amicus curiae* briefs has occurred in several cases, transparency of proceedings and disclosure of documents appears to be far more difficult to achieve; the efficacy of third party participation will undoubtedly be limited as a result.

Now that third party participation has occurred in several environmentally relevant cases, a new area of research in the investment-environment debate has opened up. The focus of research in this area should be on the impact that *amicus curiae* briefs have on the outcome of specific cases, as well as the broader awareness-raising value that they may provide. Also required is an assessment of how the participation of third parties affects perceptions of the legitimacy of international investment arbitration.

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