



Universiteit
Leiden
The Netherlands

The role of civil society in investment treaty arbitration : status and prospects

El Hossey, F.F.

Citation

El Hossey, F. F. (2016, May 26). *The role of civil society in investment treaty arbitration : status and prospects*. Retrieved from <https://hdl.handle.net/1887/42075>

Version: Not Applicable (or Unknown)

License: [Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden](#)

Downloaded from: <https://hdl.handle.net/1887/42075>

Note: To cite this publication please use the final published version (if applicable).

Cover Page



Universiteit Leiden



The handle <http://hdl.handle.net/1887/42075> holds various files of this Leiden University dissertation.

Author: El Hosseney F.F.

Title: The role of civil society in investment treaty arbitration : status and prospects

Issue Date: 2016-05-26

2. Procedural rules governing civil society's participation as *amicus curiae*

The access granted by investor-state tribunals to civil society as *amicus curiae* comes as a destabilizing phenomenon to the investor-state dispute settlement regime. It was not initially foreseen when the system was created. Treaty-based investor-state arbitration inherently – and solely – opposes foreign investors, acting as claimants; and host states, acting as respondents. As discussed, the international commercial arbitration model was meant to ensure the private settlement of disputes between foreign investors and host states under the same rules that govern international commercial disputes between two private persons. This was construed as an alternative to diplomatic protection, and the interference of capital-exporting states. Such arbitration rules were not initially tailored to the ‘particular needs’ of investor-state disputes where significant public issues appear to be at stake.⁴²⁴ Again, international commercial arbitration allows business competitors for instance to settle their disputes while protecting trade secrets and avoiding any potentially negative publicity, or public-listed companies to avoid adverse effects on their stock price. Under such a model, no potential role for third parties that are concerned with the public interest could have been foreseen.

However, it will be argued that the impact of the international commercial arbitration model on investor-state arbitration eventually receded in certain respects with (i) the increasing recognition by arbitral tribunals – starting with the *Methanex v. United*

⁴²² J. Maupin, *supra* note 48, at 32; A. Kawharu, *supra* note 393, at 283.

⁴²³ See *supra* note to 343 note 348.

⁴²⁴ The term ‘particular needs’ of investor-state arbitration was coined by the *Methanex* tribunal – as will be further discussed below. See *Methanex Corporation v. United States*, *infra* note 428, at para 26-27.

States tribunal's decision⁴²⁵ – for a shift in procedure where the public interest is at stake (**Section 2.1**); (ii) both ICSID and UNCITRAL amending existing, or adopting new, arbitration rules; (iii) NAFTA parties setting out new guidelines to increase third-party participation and transparency under Chapter XI disputes; and (iv) newly negotiated BITs adhering to similar principles (**Section 2.2**).

The aim of this section is thus to highlight the acceptance of civil society's *amicus curiae* role as a means to positively address the peculiarity of investor-state arbitration vis-à-vis international commercial arbitration; again, in light of the often significant public interest issues at stake.

2.1 Acceptance of civil society's participation as *amicus curiae*

Following the relative success at the WTO with the *Shrimps*⁴²⁶ case and earlier precedents from the Iran-US tribunal case law, and in light of the prevalence of the practice in domestic jurisdictions,⁴²⁷ civil society organizations have sought to push for the acceptance of the *amicus curiae* procedure in investor-state disputes where public interest issues were at stake. *Methanex Corporation v. United States* presented in 2001 the first investor-state arbitration in which civil society actors have successfully made such a request.⁴²⁸ Numerous arbitral decisions later confirmed the acceptance of *amicus curiae* briefs. However, the *amicus curiae* practice was only endorsed in a binding manner once the substantive rules governing investor-state disputes were amended. This was indeed the case for the ICSID Arbitration Rules, the UNCITRAL Rules on Transparency, and a number of newly signed BITs.

⁴²⁵ Ibid.

⁴²⁶ Report of the Appellate Body, *United States: Import Prohibitions of Certain Shrimp and Shrimp Products*, *infra* note 1027.

⁴²⁷ Two South African human rights organizations, the Legal Resources Centre and the Centre for Applied Legal Studies, requested to intervene in the *Piero Foresti* ICSID dispute partly on the basis of this rationale. See J. Brickhill and M. Du Plessis, 'Two's Company, Three's a Crowd: Public Interest Intervention in Investor-State Arbitration (*Piero Foresti v South Africa*)', (2011) 27 *South African Journal on Human Rights* 152, at 152. Also, a more detailed analysis of the regulation of the *amicus curiae* procedure under US law will be undertaken in Part III – Section 3.1.

⁴²⁸ *Methanex Corporation v. United States, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae of 15 January 2001*. See also E. De Brabandere, *infra* note 852, at 98.

2.1.1 The Iran-US Claims Tribunal precedent

As will be subsequently shown in this research, the WTO Appellate Body's decision in the *Shrimps* case marked a turning point in international adjudication and presented a pivotal precedent for international jurisdictions in terms of accepting *amicus curiae* submissions by non-state actors in general, and those made by civil society in particular.⁴²⁹ The *Shrimps* decision dated back to 1998, i.e. three years preceding the *Methanex* decision. In addition to the *Shrimps* decision, the *Methanex* tribunal relied as well on the practice of the Iran-US Claims Tribunal, an earlier precedent given that the Tribunal was established in 1981. Its mandate covers the settlement of disputes that ensued the November 1979 hostage crisis at the US embassy in Tehran, and the subsequent global freezing of Iranian assets. It has jurisdiction to decide, *inter alia*, claims of US nationals against Iran, and conversely of Iranian nationals against the US, which arise out of debts, contracts, expropriations or other measures affecting property rights; as well as claims between US and Iranian banks.⁴³⁰ It has operated for nearly twenty-five years and has produced a substantial jurisprudence that has triggered changes beyond the jurisdiction of the tribunal – as illustrated by its interpretation of Article 15(1) of the UNCITRAL Arbitration Rules (detailed below).⁴³¹ The function of the tribunal is reminiscent of various post-conflict *ad hoc* mixed claim dispute settlement organs, such as the arbitral tribunals instituted under Article 304 of the Treaty of Versailles. It has set an important precedent for subsequent international organs such as the UN Compensation Commission, which was established following Iraq's aggression against Kuwait in 1990.⁴³²

⁴²⁹ See P. Sands, *infra* note 1048. For a review of the analysis on the Appellate Body's decision, see Part III – Section 3.2.

⁴³⁰ Claims had to be filed with the Tribunal by 19 January 1982. Approximately 4,000 claims were filed.

⁴³¹ See F. Francioni, *infra* note 882, at 20.

⁴³² Article 304 of the Treaty of Versailles gave *ad hoc* arbitral tribunals the competence to adjudicate a variety of claims lodged by citizens of the allied powers against Germany, which included those concerning war damage suffered as a consequence of 'exceptional war measures', such as requisition and other measures affecting the property of claimants, and claims arising in connection with disputes over contracts concluded before the entry into force of the treaty. See F. Francioni, *supra* note 882, at 16, and at 21 regarding UN Compensation Commission.

The Tribunal has its own arbitration rules, inspired by the UNCITRAL Arbitration Rules, and contains interpretive notes to each of their provisions. The most relevant of these provisions is Article 15(1) ‘General Provisions’ 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.⁴³³

The interpretive notes provide that:

(5) The arbitral tribunal may, having satisfied itself that the statement of one of the two Governments — or, under special circumstances, *any other person* — who is not an arbitrating party in a particular case is likely to assist the tribunal in carrying out its task, permit such Government or person to assist the tribunal by presenting oral or written statements.⁴³⁴

Although third parties made a limited number of submissions before the Iran-US Claims Tribunal, both the *Methanex* and *UPS* tribunals resorted to the Tribunal’s interpretation of Article 15 and did in fact cite a number of its cases where *amicus curiae* submissions were effectively made.⁴³⁵ These did not include submissions by civil society *per se*. Rather, they most notably included ‘certain interested’ banks.⁴³⁶

In light of the absence of any explicit guidance under Article 15(1) of the UNCITRAL Arbitration Rules on the question of *amicus curiae*, the Iran-US Claims Tribunal’s interpretation allowed the *Methanex* tribunal to find that the procedure is acceptable under international arbitration, and not just under common law proceedings – as will be shown directly below.

2.1.2 The *Methanex* precedent – a point of no return

Methanex Corporation v. United States is a seminal case. It paved the way for investor-state tribunals to accept *amicus curiae* submissions. It shall be dealt with at this stage mainly from a procedural standpoint, whereas a more substantive analysis will be

⁴³³ Iran-US Claims Tribunal, ‘Tribunal Rules of Procedure’ (03 May 1983), available at: <http://www.iusct.net/General%20Documents/5-TRIBUNAL%20RULES%20OF%20PROCEDURE.pdf> (last accessed 02 December 2013).

⁴³⁴ *Ibid* (our emphasis).

⁴³⁵ See *UPS v Canada*, *infra* note 517, at para 64 citing *Iran v United States* case A/15 Award No. 63 – A/15 – FT; 2 Iran – US CTR 40, 43. See also E. De Brabandere, *infra* note 852, at 99.

⁴³⁶ *Ibid*.

engaged subsequently on civil society's arguments with respect to the protection of the environment.⁴³⁷

Methanex, a Canadian company and major producer of methanol, filed a claim against the US on the ground that a Californian ban on MTBE,⁴³⁸ a methanol-based fuel additive, amounted to expropriation in violation of NAFTA's Chapter XI. The decision explored here was merely a procedural order dealing with the *amicus curiae* issue; thus, the Methanex case will be considered from the perspective of (i) the *amicus curiae* petitioners; (ii) Methanex; (iii) the US; and finally (iv) the tribunal. Concluding observations will then highlight some of the major points raised by the decision for the purposes of the present research (v).

i. The amicus petitioners

The International Institute for Sustainable Development (IISD), the Communities for a Better Environment and the Earth Island Institute submitted separate petitions for leave to file *amicus curiae* briefs:

on the basis of the immense public importance of the case and the critical impact that the Tribunal's decision will have on environmental and other public welfare law-making in the NAFTA region.⁴³⁹

Their petitions included requests to (a) make oral and written *amicus curiae* submissions; (b) participate in the arbitration proceeding as *amici curiae*; (c) have the opportunity to review pleadings of the parties (preferably prior to submitting the briefs) and any other submissions or orders in the proceedings; and (d) attend and gain observer status at oral hearings.⁴⁴⁰ The petitioners argued that the tribunal has the authority to grant such requests under its general procedural powers contained in Article 15(1) of the UNCITRAL Arbitration Rules, and that there are no contrary provisions under NAFTA Chapter XI which would preclude the tribunal from doing so. They further asserted that the acceptance of the *amicus curiae* practice at the WTO Appellate Body as well as judicial instances in both Canada and the US should serve as a relevant precedent.

ii. The claimant

⁴³⁷ See Part II – Section 4.2.

⁴³⁸ MTBE stands for: Methyl Tertiary Butyl Ether.

⁴³⁹ Methanex Corporation v. United States, *supra* note 428, at para 5.

⁴⁴⁰ *Ibid.*, at para 5-8.

Methanex made a number of arguments against the acceptance of the *amicus curiae* petitions that were based on three fundamental principles: (a) confidentiality, (b) jurisdiction, and (c) fairness.⁴⁴¹ Firstly, the principle of confidentiality meant that, pursuant to Article 25(4) of the UNCITRAL Arbitration Rules, hearings are to be held *in camera*, i.e. not only meaning that solely the disputing parties had the right to attend the hearings, but also all documents of the proceedings were to be kept confidential. Secondly, the principle of jurisdiction precluded the tribunal from adding a party to the proceedings without the disputing parties' consent. Methanex clearly considered that granting the petitioners the status of *amicus curiae* would amount to adding them as parties to the dispute in clear contradiction with NAFTA provisions, which restrict access to arbitral tribunals to the disputing parties, as well as NAFTA parties pursuant to Article 1128.⁴⁴² Finally, the principle of fairness would not be upheld given that the disputing parties would have no opportunity to cross-examine the factual basis of the *amici*'s contentions. It is precisely for this reason that, according to Methanex, only NAFTA parties should raise public interest issues pursuant to Article 1128 and not any other person. Methanex also suggested that the NAFTA disputing party would have the possibility to call on any of the petitioners as witnesses, thereby making cross-examination possible. Methanex' argument plainly suggests that legal arguments in favour of the public interest rest within the sphere of the state, who should be the sole entity asserting it, and not the petitioners.

iii. *The respondent*

The US on the other hand was in favour of the acceptance of the *amicus curiae* petitions by the tribunal on the basis that the tribunal (a) had the power to accept *amicus curiae* submissions; and (b) would benefit from the assistance it would be afforded by the petitioners.

According to the US, Article 15(1) of the UNCITRAL Arbitration Rules grants the tribunal a wide discretion to conduct arbitral proceedings subject to both parties being treated equally and given a full opportunity to present their case. This discretion includes

⁴⁴¹ Ibid. at para 12-14.

⁴⁴² Article 1128 of NAFTA states that: 'On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement'. See NAFTA, *supra* note 170.

the authority to accept *amicus curiae* submissions as the Iran-US Claims Tribunal and WTO Appellate Body, particularly in light of the public international law issues and ‘substantial public interests’ at stake in the dispute. The US emphasized the need to distinguish the dispute from ‘typical’ commercial arbitration given that it could have ‘a significant effect extending beyond the two Disputing Parties’.⁴⁴³ It also pointed out that an *amicus curiae* is not a party to the dispute. However, it acknowledged that it did cause an additional burden that could be nonetheless justified if the tribunal deems the *amicus* submission as helpful.⁴⁴⁴

The US then asserted that the petitioners might have valuable knowledge or expertise. The US’ arguments reveal its seemingly pressing concern to mitigate the perception of NAFTA Chapter XI dispute resolution as being ‘*exclusionary and secretive*’.⁴⁴⁵ Citing this precise same reason, it also consented to the open and public hearing of all proceedings as well as disclosure of documents to the extent permissible by the tribunal.

It is worthy to note that both Canada and Mexico made written submissions to the tribunal, pursuant to Article 1128 of NAFTA, containing opposite positions with regard to the acceptance of the *amicus curiae* petitions.⁴⁴⁶ Indeed, the latter was for an outright dismissal of *amicus* petitions; whereas the former favoured their acceptance for the sake of enhancing openness and transparency of NAFTA proceedings. Mexico in fact reiterated its opposition towards the *amicus curiae* procedure in the *UPS* case – discussed subsequently below.⁴⁴⁷

iv. *The tribunal’s decision*

⁴⁴³ *Methanex Corporation v. United States*, *supra* note 428, at para 17.

⁴⁴⁴ *Ibid.* at para 21.

⁴⁴⁵ *Ibid.* at para 22 (our emphasis).

⁴⁴⁶ On the one hand, Mexico opposed the acceptance of the *amicus curiae* petitions. It argued that NAFTA did not provide for the participation of non-disputing parties in a given dispute other than in the case set forth by Article 1128. It also pointed out that, unlike in the US and Canada, its domestic courts do not have the authority to accept *amicus curiae* petitions, and that the dispute settlement mechanism established under Chapter XI of NAFTA was meant to strike a balance between those common law states, and Mexico as a civil law state. As such, the fact that the procedure is accepted in common law domestic jurisdictions does not mean it could be ‘transported to a transnational NAFTA arbitration’. On the other hand, Canada asserted that it supports greater openness in arbitration proceedings, as well as the tribunal’s acceptance of the *amicus curiae* petitions whilst pointing out that only NAFTA parties had the right to make submissions on questions of interpretation of NAFTA. See *Ibid.*, at para 9-10.

⁴⁴⁷ *UPS v Canada*, *infra* note 517, at para 10.

The tribunal's decision may be broadly scrutinized under three headings: (a) its discretionary powers under Article 15(1) of the UNCITRAL Arbitration Rules; (b) the rights afforded to *amici curiae*; and finally (c) transparency and confidentiality issues as well as the public interest arguments that were raised by both the petitioners, the US, and Canada.

First, the tribunal noted that there were no provisions under the UNCITRAL Arbitration Rules or NAFTA Chapter XI that expressly authorize or preclude the tribunal from accepting *amicus curiae* submissions. The tribunal found that the *amicus curiae* issue falls under Article 15(1) of the UNCITRAL Arbitration Rules. The Article allows the tribunal 'to conduct the arbitration in such manner as it considers appropriate' and is intended to provide it with 'the broadest procedural flexibility'. It noted that the provision is one of the 'hallmarks' of international arbitration and enabled it to adapt to the 'particular needs' of a given arbitration.⁴⁴⁸ As mentioned previously, the tribunal then referred to the practice of the Iran-US Claims Tribunal and cited its interpretive note (5) on Article 15(1).⁴⁴⁹ According to the tribunal, not only both the US and Iran resorted to this provision in order to request leave to make written submissions, but also other 'non-state third persons' such as foreign banks.⁴⁵⁰ Against this backdrop, it asserted that it did not need to rely on the relevance of the *amicus curiae* procedure in the respective domestic jurisdictions of NAFTA parties.⁴⁵¹

Second, the tribunal had to consider whether *amici curiae* would be potentially granted any rights if their petitions would be accepted – as contended by Methanex. It noted that accepting *amicus curiae* submissions does not confer third parties any substantive rights. Petitioners would in no way acquire the rights of disputing parties nor NAFTA parties as set forth by Article 1128 of NAFTA. In reaching this conclusion, the tribunal referred to WTO case law as well. It looked at the Appellate Body's report in the *Hot-Rolled Lead and Carbon Steel* dispute, which emphasized that solely WTO member states have a 'right to be heard' by the Appellate Body and that the acceptance of *amicus*

⁴⁴⁸ Ibid., at para 5, 26-27 (our emphasis).

⁴⁴⁹ Iran-US Claims Tribunal, 'Tribunal Rules of Procedure', *supra* note 433.

⁴⁵⁰ Ibid. at para 32.

⁴⁵¹ Ibid., at para 47.

curiae submissions is a mere matter of discretion rather than third-party rights.⁴⁵² The tribunal indeed noted that WTO case law demonstrates that the acceptance of such submissions ‘confers no rights, procedural or substantive, on such persons’.⁴⁵³ It is worthy to note here that Methanex pointed to the limited scope of the *amicus curiae* practice at the WTO, and stressed that it should not therefore constitute an example.⁴⁵⁴ The tribunal seemingly acknowledged this limited scope but has nonetheless used it to back its conclusion and clarify an essential, as well as a systematically recurring, characteristic of *amici curiae*: they do not have the *right* to take part in proceedings, or in other words, *the right to be heard*. In reasserting its discretion on whether to accept or even consider *amicus curiae* submissions, the tribunal noted that the additional burden that could be potentially caused would be mitigated by the fact that (i) submissions would be made solely in writing in a form and subject to limitations set by the tribunal; and (ii) it would be for the tribunal ‘to decide what weight (if any) to attribute to those submissions’.

On the petitioners’ request to attend hearings and access case materials, the tribunal found that, pursuant to Article 25(4) of the UNCITRAL Arbitration Rules, hearings are to be held *in camera* unless both parties consent otherwise, thereby excluding members of the public – including ‘non-party third persons’, i.e. the petitioners. Although the US was in favour to open hearings to the public as previously mentioned, Methanex categorically opposed it; thus, the tribunal rejected the petitioners’ request in this regard. As to the disclosure of case materials, the tribunal found that the disputing parties had concluded a ‘Consent Order’ regarding disclosure and confidentiality, it therefore deferred to the parties to decide on that matter.⁴⁵⁵

More fundamentally, the tribunal’s procedural analysis was further complemented by the recognition of the public importance of the case in its concluding remarks:

There is an undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties. This is not merely because one of the Disputing Parties is a State: there are of course disputes involving States which are of no greater general public importance than a dispute between private persons.

⁴⁵² Ibid., at para 33. See also WTO, Report of the Appellate Body, *Hot-Rolled Lead and Carbon Steel* case, *infra* note 1042.

⁴⁵³ Ibid., at para 33.

⁴⁵⁴ Methanex Corporation v. United States, *supra* note 428, at para 15.

⁴⁵⁵ Ibid., at para 41, 46.

*The public interest in this arbitration arises from its subject-matter, as powerfully suggested in the [amicus] Petitions. 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.*⁴⁵⁶

Here, the tribunal explicitly referred to arguments raised by the IISD, the Communities for a Better Environment and the Earth Island Institute, on the public importance of the case. The public interest in this instance was both used as an underlying rationale for procedural contentions, as well as substantive ones. The tribunal seemingly accepted it from a procedural standpoint, and explicitly referred to the public interest as complementary to its analysis of Article 15(1) of the UNCITRAL Arbitration Rules. Incidentally, this raises the need to assess the weight of the *amici*'s substantive arguments, which would be later put to the test in the tribunal's subsequently discussed final award.⁴⁵⁷

v. *Concluding remarks*

By focusing on public interest arguments, and stating that accepting *amicus curiae* submissions 'might support the process in general and this arbitration in particular, whereas a blanket refusal could do positive harm', the tribunal responded to an argument raised by the IISD and other civil society actors to the effect that the participation of an *amicus curiae* 'would allay public disquiet as to the closed nature of arbitration proceedings' under NAFTA's Chapter XI.⁴⁵⁸ The fact that the tribunal acquiesced to this argument echoes the growing recognition by arbitral tribunals for greater transparency in investor-state disputes. This was also an argument raised by both Canada and the US. The tribunal's conclusion is diametrically opposed to the position of the *Metalclad* tribunal mentioned previously, whereby the latter recommended the parties to '*limit public discussion of the case to a minimum*'.⁴⁵⁹ The *Methanex* tribunal indeed showed how both issues of transparency and third-party participation are intertwined and confirmed the need to address them in investor-state arbitrations where public interest issues are at stake.

Methanex's concerns regarding third-party intervention resonate with those preoccupied with the consensual nature of arbitration and other fundamental principles of

⁴⁵⁶ *Ibid.*, at para 49 (our emphasis).

⁴⁵⁷ See Part II – Section 4.1.

⁴⁵⁸ *Ibid.*, at para 5.

⁴⁵⁹ See *Metalclad Corporation v. United Mexican States*, *supra* note 273.

international commercial arbitration. As mentioned, international commercial arbitration has been used as a tool to settle both disputes arising from (i) ‘all relationships of a commercial nature’, as defined by the UNCITRAL Model Law on International Commercial Arbitration, as well as (ii) ‘investment transactions’.⁴⁶⁰ Investor-state arbitration is in such case viewed as solely fulfilling the function of an international dispute settlement mechanism that should not be concerned with law-making, standardization, or legitimation functions of other international jurisdictions.⁴⁶¹ In other words, investor-state tribunals should solely focus on settling disputes between foreign investors and host states without the need to consider other functions, imperatives or objectives.

Yet, the *Methanex* tribunal dismissed such concerns. The acceptance by the *Methanex* tribunal of the *amicus curiae* practice is portrayed as a procedural innovation. It clearly departed from the general practice of international commercial arbitration and adapted the 1976 UNCITRAL Arbitration Rules proceedings in order to ‘*fit the particular needs*’ – to use the terms of the tribunal – of investor-state arbitration.⁴⁶² In other words, it confirmed the need to distinguish between international commercial arbitration and investor-state arbitration where public interest issues are at stake.

2.2 Formalization of *amicus curiae* participation – the opening up to ‘third persons’

Not long after the *Methanex* decision, ICSID amended its arbitration rules, UNCITRAL followed suit by adopting new rules specifically ‘tailored’ for investor-state arbitrations, and NAFTA parties confirmed, through interpretative statements, the *Methanex* tribunal’s approach. This was also confirmed by a number of other states in newly negotiated BITs. With ICSID and UNCITRAL arbitration rules governing the overwhelming majority of investor-state proceedings, these measures effectively

⁴⁶⁰ See Article 1(1), UNCITRAL Model Law, *supra* note 109. See also T. Ishikawa, *supra* note 108, at 373.

⁴⁶¹ A. Von Bogdandy and I. Venzke, *supra* note 162, at 59, 63. Also citing Romak SA (Switzerland) v. Uzbekistan, PCA Case No. AA280, *Award of 26 November 2009*, at para. 171. On the wider functions of international jurisdictions, see also Shany’s arguments with respect to the European Court of Justice or the WTO Appellate Body in Y. Shany, ‘No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary’, (2009) 20 *The European Journal of International Law* 73, at 82.

⁴⁶² *Methanex Corporation v. United States*, *supra* note 428, at para 27 (our emphasis). See also A. Van Duzer, *supra* note 171, at 685.

constitute the formalization of *amicus curiae* participation in investor-state disputes. They merit close attention at this stage in order to be fleshed out prior to the analysis of the case law in the subsequent section.⁴⁶³

2.2.1 Amendments to the ICSID Arbitration Rules

The *Methanex* precedent was supported by an increasing recognition in public and academic discourse of the need for greater transparency and third party participation in investor-state arbitration.⁴⁶⁴ The ICSID Arbitration Rules were amended on 10 April 2006. The amended rules were implemented following consultations with member states and recommendations made by the ICSID Secretariat as early as 2004. According to the latter, the amended rules aim to achieve a more efficient and transparent process.⁴⁶⁵ Not only do they cover access of third parties to proceedings and publication of awards, but also preliminary procedures concerning provisional measures, expedited procedures for the dismissal of unmeritorious claims as well as additional disclosure requirements for arbitrators. In this sense, the amendments to the ICSID Arbitration Rules were considered as substantially extensive and not merely as a response to public pressure regarding the pivotal issues of transparency and third party participation.⁴⁶⁶

As mentioned above, the amended version of Article 32(2) requires an objection from the parties to prevent access to hearings as opposed to a positive consent to access.⁴⁶⁷ More fundamentally for the purposes of this research, Article 37(2) now explicitly grants arbitral tribunals the authority to accept *amicus curiae* briefs subject to certain conditions:

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 “nondisputing 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,

⁴⁶³ See Part I – Section 3.

⁴⁶⁴ See generally, Y. Fortier and S. Drymer, *supra* note 323.

⁴⁶⁵ See ICSID Annual Report (2006), available at: <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnualReports#> (last accessed 01 July 2013), at 3.

⁴⁶⁶ R. Buckley, and P. Blyschak, ‘Guarding the Open Door: Non-party Participation Before the International Centre for Settlement of Investment Disputes’, (2007) 22 Banking and Financial Law Review 353, at 354-355.

⁴⁶⁷ Article 32(2) 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’. See ICSID Arbitration Rules, *supra* note 411.

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.⁴⁶⁸

Although the term is not explicitly mentioned under the amended Rules, (i) the ‘public interest’ subject-matter of a given dispute, and (ii) the role of the civil society organization as a representative of that interest, could be viewed as *sine qua non* conditions to the acceptance of *amicus curiae* briefs by civil society actors. It is indeed expected from these *amici curiae* to ‘represent a “public”, that is, a non-state, non-corporate interest’.⁴⁶⁹ This is in addition to a clearly articulated condition on the utility of the briefs, i.e. they should assist the tribunal by covering arguments that are distinct from those of the disputing parties.⁴⁷⁰ It is important to emphasize that the Rules are not exclusively aimed at civil society organizations; rather, they open the door to ‘a person or entity that is not a party to the dispute’.

In sum, the amended rules signal a clear departure from the international commercial arbitration model initially construed by the World Bank when ICSID was created.⁴⁷¹ In turn, this has also led UNCITRAL to adapt its own arbitration rules to the particular needs of investor-state arbitration – as further detailed below.

2.2.2 Adoption of the UNCITRAL Rules on Transparency

Proposals to adapt the UNCITRAL Arbitration Rules – typically used for most NAFTA Chapter XI disputes – to the same effect as the ICSID Arbitration Rules have been recently enacted. The UNCITRAL Rules on Transparency are an attempt to adapt to the ‘particular needs’ of investor-state arbitration.⁴⁷² In contrast to the ICSID Arbitration Rules, the UNCITRAL Rules on Transparency do not consist of an amendment to the

⁴⁶⁸ Article 37(2), ICSID Arbitration Rules, entered into force 10 April 2006, available at: https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf (last accessed 20 November 2013).

⁴⁶⁹ E. De Brabandere, *supra* note 852, 103.

⁴⁷⁰ *Ibid.*, at 103.

⁴⁷¹ A. Van Duzer, *supra* note 171, at 706, 722-723.

⁴⁷² UNCITRAL Rules on Transparency, *supra* note 414. See also *Methanex Corporation v. United States*, *supra* note 428, at para 27.

UNCITRAL Arbitration Rules *per se* – which were recently amended in 2010. Rather, the Rules are essentially meant to apply to investor-state arbitration initiated under the UNCITRAL Arbitration Rules pursuant to an investment treaty concluded following 1 April 2014 and/or those concluded prior to 1 April 2014 if (i) the disputing parties agree to their application, or (ii) the parties to an investment treaty have agreed to their application.⁴⁷³ This has effectively allowed UNCITRAL to establish two separate sets of procedural rules for each type of arbitration and is, therefore, a positive response to calls for a distinct procedural approach in investor-state arbitration as discussed above.⁴⁷⁴

It is worthy to note here that the question of transparency in general, and *amicus curiae* participation in particular, stirred seemingly extensive debates amongst UNCITRAL's Working Group members. As early as 2006, some members argued for Article 15 of the UNCITRAL Arbitration Rules to be amended in order to provide that (i) all documents received or issued by the arbitral tribunal should be published; and (ii) the arbitral tribunal should have the discretion to allow persons or entities other than the disputing parties to submit *amicus curiae* briefs.⁴⁷⁵ Arguments were also made in favour of amending Article 25(4) to provide that hearings should be open to the public rather than *in camera* and that Article 32(5) should provide for the systematic publication of awards. Most Working Group members had noted, however, that investor-state arbitration was 'still developing', and had agreed to maintain a generic approach applicable to all types of arbitration irrespective of the subject matter of the dispute.⁴⁷⁶ Certain issues such as wider transparency concerns, particularly akin to investor-state arbitration, would be dealt with subsequently but as 'a matter of priority'. This indeed materialized with the adoption of the new Rules.⁴⁷⁷

Effective as of April 2014, the UNCITRAL Rules on Transparency thus set the publicity of proceedings as the general over-arching rule, and confidentiality as the

⁴⁷³ See Article 1. *Ibid.*

⁴⁷⁴ See Part I – Section 1.5.

⁴⁷⁵ UNCITRAL, Report of the Working Group II (Arbitration and Conciliation), 46th session, 5-9 February 2007 (A/CN.9/592), available at: http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html (last accessed 12 November 2013), at para 61.

⁴⁷⁶ *Ibid.*, at para 62.

⁴⁷⁷ UNCITRAL, Report of the Working Group II (Arbitration and Conciliation), 53rd session, 4-8 October 2010 (A/CN.9/712), available at: http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html (last accessed 12 November 2013), at para 2.

exception.⁴⁷⁸ More fundamentally, Article 4(1) adopts the wording of the first part of Article 37(2) of the amended ICSID Arbitration Rules⁴⁷⁹ by stating that:

After consultation with the disputing parties, the arbitral tribunal may allow a person that is not a disputing party, and not a non-disputing Party to the treaty (“third person(s)”), to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute.

There are differences between the UNCITRAL Rules on Transparency and the ICSID Arbitration Rules in the subsequent paragraphs. The UNCITRAL Rules on Transparency adopt a two-pronged test on the acceptance of *amicus curiae* submissions. The first deals with information required from potential *amici* when applying for leave to make submissions; whilst the second provides guidance to arbitral tribunals in deciding whether or not to grant such leave.

First, third persons wishing to act as *amicus curiae* are requested to submit significantly detailed information regarding their: (i) identity, (ii) connection to disputing parties; (iii) sources of funding; (iv) interest in the dispute; and (v) arguments of facts or law in the arbitration they would like to address.⁴⁸⁰ Regarding the issue of identity, the Rules provide interesting insight by requiring a description of the ‘third person’ that would include its ‘legal status (e.g., trade association or other non-governmental organization)’ thereby leaving the door open to both civil society actors as well as business or trade groups to file *amicus curiae* briefs. This is effectively in line with WTO case law. For instance, in the previously discussed *Hot-Rolled Lead and Carbon Steel* case, the American Iron and Steel Institute and the Speciality Steel Industry of North America groups filed *amicus curiae* submissions.⁴⁸¹ Also, in *UPS v. Canada*, the US

⁴⁷⁸ See Article 6, UNCITRAL Rules on Transparency, *supra* note 414.

⁴⁷⁹ Article 37(2), ICSID Arbitration Rules, *supra* note 411.

⁴⁸⁰ Article 4(2) states that: ‘2. A third person wishing to make a submission shall apply to the arbitral tribunal, and shall, in a concise written statement, which is in a language of the arbitration and complies with any page limits set by the arbitral tribunal: (a) Describe the third person, including, where relevant, its membership and legal status (e.g., trade association or other non-governmental organization), its general objectives, the nature of its activities and any parent organization (including any organization that directly or indirectly controls the third person); (b) Disclose any connection, direct or indirect, which the third person has with any disputing party; (c) Provide information on any government, person or organization that has provided to the third person (i) any financial or other assistance in preparing the submission; or (ii) substantial assistance in either of the two years preceding the application by the third person under this Article (e.g. funding around 20 per cent of its overall operations annually); (d) Describe the nature of the interest that the third person has in the arbitration; and (e) Identify the specific issues of fact or law in the arbitration that the third person wishes to address in its written submission.’ See UNCITRAL Rules on Transparency, *supra* note 414.

⁴⁸¹ Report of the Appellate Body, *United States: Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismut Carbon Steel Products Originating in the United Kingdom*, *infra* note 1042.

Chamber of Commerce filed an *amicus* brief.⁴⁸² It confirms the prevalent understanding that a ‘third person’ in an investor-state arbitration context does not exclusively refer to civil society actors, but simply covers any ‘third person’ to the dispute in the literal sense – as is the case under the ICSID Arbitration Rules.⁴⁸³

Second, tribunals are required to consider the following:

In determining whether to allow such a submission, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant: (a) whether the third person has a significant interest in the arbitral proceedings; and (b) the extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.⁴⁸⁴

Again, as is the case under the ICSID Arbitration Rules, the ‘public interest’ subject-matter of a given dispute is not an explicitly identified criterion. As mentioned above, both civil society actors as well as business or trade groups may file *amicus curiae* briefs. That said, civil society actors wishing to participate in arbitral proceedings arguably need to make a case for their interest, i.e. they will need to assert that there is a significant public interest at stake.

In addition, in line with Article 37(2) of the ICSID Arbitration Rules, the UNCITRAL Rules on Transparency address the issue of the potential burden and prejudice to disputing parties. Indeed, the potentially adverse effect of *amicus* intervention on equality of arms is a commonly expressed concern amongst arbitration practitioners.⁴⁸⁵ Article 4 of the Rules provides that:

5. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

6. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by the third person.⁴⁸⁶

Finally, another key recurring criterion is setting the purpose of *amicus curiae* submissions as the assistance of the tribunal, rather than the exercise of any substantive

⁴⁸² United Parcel Service v. Canada, *infra* note 515.

⁴⁸³ Although it is worthy to note that submissions made by states are covered by Article 5 (‘Submission by a non-disputing Party to the treaty’). See *Ibid*.

⁴⁸⁴ Article 4(3), *ibid*.

⁴⁸⁵ On the impact of the *amicus curiae* submissions on the ‘equality of arms’ of disputing parties, see for instance T. Wälde, *supra* note 51, at 33.

⁴⁸⁶ Article 4(5) and 4(6), *Ibid*.

right the *amicus* might have.⁴⁸⁷ This is also reflected in the FTC Statement, which will be discussed directly below.

2.2.3 Acknowledgment through state practice – NAFTA parties and newly negotiated BITs

Prior to the amendment of the ICSID Arbitration Rules in 2006, measures were taken at the NAFTA level and through newly negotiated BITs to enhance transparency in general, and confirm *amicus curiae* participation in particular. These measures are complementary to the amendments at the ICSID level and the adoption of new rules at UNCITRAL.⁴⁸⁸ Indeed, IIAs or BITs systematically refer to either set of arbitration rules as the applicable procedural rules governing investor-state dispute proceedings. It is important to discuss these measures since they have in many respects paved the way for the amendment to the ICSID Arbitration Rules and the adoption of the new UNCITRAL Rules on Transparency.

i. NAFTA

Although the measures undertaken at the NAFTA level do not amount to an amendment of the treaty *per se*, they were viewed as a positive response to those who called for the amendment of investment treaties to confirm the possibility for third-parties, including civil society actors, to make *amicus curiae* submissions when relevant. The aim here was to avoid uncertainties, as well as to clearly set out criteria that would guide arbitral tribunals in their decisions as to whether or not to accept such submissions. The FTC Statement on Non-Disputing Party Participation (the ‘FTC Statement’)⁴⁸⁹ was passed on 07 October 2003 confirming the *amicus curiae* practice developed hitherto by arbitral tribunals. It asserted the discretionary authority of arbitral tribunals to accept

⁴⁸⁷ Article 4(3)(b). *Ibid.*

⁴⁸⁸ Having said that, IIA or BIT provisions allowing *amicus* participation may be crucial in UNCITRAL disputes to which the UNCITRAL Rules on Transparency do not apply (given their entry into force only in 2014).

⁴⁸⁹ NAFTA Free Trade Commission, ‘Statement of the Free Trade Commission on Non-disputing Party Participation’ (7 October 2003), available at: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Nondisputing-en.pdf> (last accessed 01 July 2013). The FTC is made up of ministerial representatives from NAFTA parties. Its mandate includes the supervision of the implementation of NAFTA and the provision of assistance in resolving disputes arising from its interpretation. It also oversees the work of NAFTA committees, working groups and other bodies.

amicus curiae submissions by non-disputing parties.⁴⁹⁰ Again, the FTC Statement does not amount to an amendment of Chapter XI provisions, and doubts had been raised as to what extent the FTC Statement may bind arbitral tribunals.⁴⁹¹

In its first section, the FTC Statement clearly sets out that no NAFTA provision ‘limits a Tribunal’s discretion to accept written submissions from a person or entity that is not a disputing party’. It also specifies the information that should be provided along with the application for leave to file *amicus curiae* briefs (section A):

- (d) disclose whether or not the applicant has any affiliation, direct or indirect, with any disputing party;
- (e) identify any government, person or organization that has provided any financial or other assistance in preparing the submission;
- (f) specify the nature of the interest that the applicant has in the arbitration;
- (g) identify the specific issues of fact or law in the arbitration that the applicant has addressed in its written submission;
- (h) explain, by reference to the factors specified in paragraph 6, why the Tribunal should accept the submission.⁴⁹²

Furthermore, the FTC Statement provides guidance to arbitral tribunals in deciding on whether or not to grant leave (section B). Tribunals are advised to assess the extent to which:

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

The Tribunal will ensure that:

- (a) any non-disputing party submission avoids disrupting the proceedings; and
- (b) neither disputing party is unduly burdened or unfairly prejudiced by such submissions.⁴⁹³

Again, and in line with arbitral precedents, the FTC Statement stressed the fulfillment of the quintessential role of an *amicus curiae*; i.e. its sole purpose is to assist the tribunal by raising arguments, perspectives, and expertise that the disputing parties have not been raised. The FTC highlighted another key condition, i.e. the ‘public interest’ subject-matter of the dispute. This could be viewed as a *sine qua non* condition to the acceptance

⁴⁹⁰ E. De Brabandere, *infra* note 852, 100.

⁴⁹¹ A. Van Duzer, *supra* note 171, at 706, 721.

⁴⁹² NAFTA Free Trade Commission, FTC Statement, *supra* note 489.

⁴⁹³ *Ibid.*

of civil society *amicus curiae* briefs. By contrast, the ICSID Arbitration Rules and UNCITRAL Rules on Transparency do not explicitly refer to the notion of the ‘public interest’ as mentioned previously. The FTC Statement also confirms the position reiterated in several arbitral precedents by clearly dismissing the idea that *amici curiae* may be entitled to any procedural or substantive rights.⁴⁹⁴

In sum, the FTC Statement is only a ministerial declaration that solely provides guidance, it is not an amendment to NAFTA *per se*. From a legalistic standpoint, arbitral tribunals are not bound by it in deciding whether or not to accept *amicus curiae* briefs.⁴⁹⁵ The Statement seems nevertheless to have provided useful guidance to arbitral tribunals. This is clearly reflected in the subsequently discussed *Glamis Gold* case.⁴⁹⁶

ii. Recently signed BITs

Recently signed BITs confirm numerous decisions of arbitral tribunals in accepting *amicus curiae* briefs and reiterate the position adopted through the amendment to the ICSID Arbitration Rules and the adoption of the UNCITRAL Rules on Transparency. In fact, as early as 2004, the US BIT model contained a provision allowing arbitral tribunals to accept *amicus curiae* briefs.⁴⁹⁷ The exact provision has been retained in the 2012 US Model BIT.⁴⁹⁸ It has been adopted in the Central American Free Trade Agreement concluded by the US and the following states: the Dominican Republic, Nicaragua, Costa Rica, El Salvador, Guatemala, and Honduras.⁴⁹⁹ This is also reflected in the recently signed US and Peru BIT, as well as BITs signed by Canada with Columbia, Chile, and Peru. In sum, it is fair to expect that the US and Canada would essentially

⁴⁹⁴ Section B(9) of the FTC Statement states that: ‘The granting of leave to file a non-disputing party submission does not require the Tribunal to address that submission at any point in the arbitration. The granting of leave to file a non disputing party submission does not entitle the non-disputing party that filed the submission to make further submissions in the arbitration’.

⁴⁹⁵ A. Van Duzer, *supra* note 171, at 709.

⁴⁹⁶ *Glamis Gold Ltd v. United States, Award of 8 June 2009*.

⁴⁹⁷ Article 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’. See United States of America Bilateral Investment Treaty Model (2004), available at: <http://www.ustr.gov/sites/default/files/U.S.%20model%20BIT.pdf> (last accessed 12 November 2013).

⁴⁹⁸ See United States of America Bilateral Investment Treaty Model (2012), available at: <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> (last accessed 12 November 2013).

⁴⁹⁹ See Article 10.20(3), Central American Free Trade Agreement, entered into force 01 January 2009, available at: http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file328_4718.pdf (last accessed 12 November 2013) (‘CAFTA-DR’).

transpose provisions similar to the amended ICSID Arbitration Rules into their BITs over a decade ago. Both had indeed supported greater transparency and third-party involvement from the outset when the issue was first raised in the *Methanex* case as previously mentioned.⁵⁰⁰

Although some EU states such as France had expressed reservations with regard to the *amicus curiae* practice in investor-state arbitration,⁵⁰¹ the EU's Economic Partnership Agreement, amongst other agreements, with the CARIFORUM states allows it for instance.⁵⁰² The EU position vis-à-vis this issue has never been clearer, particularly in the wake of the TTIP negotiations.⁵⁰³ The trend also seems to have echoed in BITs concluded amongst non-North American and non-EU states. Chile for instance has entered into BITs with Mexico (1999), South Korea (2004), Japan (2007), Peru (2009), Australia (2009) and Colombia (2009), which explicitly authorize arbitral tribunals to accept *amicus curiae* submissions under their respective investment-related chapters.⁵⁰⁴

⁵⁰⁰ *Methanex Corporation v. United States*, *supra* note 428, at para 17.

⁵⁰¹ See France's comments on the use of the *amicus curiae* procedure at the UNCITRAL Working Group II regarding the UNCITRAL Transparency Rules: 'This procedure can be useful for the parties and for the judge, if the intervention of the *amicus curiae* clarifies the subject under discussion and thus contributes to the quality of the arbitration process and the settlement of the case. The procedure is, however, alien to the French legal tradition. It may, moreover, give rise to abuse and inequalities. *Its use should therefore be strictly limited*. The intervention of *amicus curiae* may actually extend a dispute to people not parties to the case. Such an intervention will also entail additional costs, which may be borne by both parties, even though only one party will benefit from the submissions concerned.' (our emphasis). See UNCITRAL, Working Group II (Arbitration and Conciliation) – 'Compilation of Comments by Governments', 53rd session, 4-8 October 2010 (A/CN.9/WG.II/WP.159/Add.3), available at: http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html (last accessed 12 November 2013), at 5.

⁵⁰² CARIFORUM states include: Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, the Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Saint Christopher and Nevis, Suriname, Trinidad and Tobago. Article 217 of the Agreement states that: 'At the request of a Party, or upon its own initiative, the arbitration panel may obtain information from any source, including the Parties involved in the dispute, it deems appropriate for the arbitration panel proceeding. The arbitration panel shall also have the right to seek the relevant opinion of experts as it deems appropriate. Interested parties are authorised to submit *amicus curiae* briefs to the arbitration panel in accordance with the Rules of Procedure. Any information obtained in this manner must be disclosed to each of the Parties and submitted for their comments'. See EC-CARIFORUM Economic Partnership Agreement, entered into force 30 October 2007 (L 289/I/3), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:289:0003:1955:EN:PDF> (last accessed 06 October 2014).

⁵⁰³ European Commission Concept Paper, Cecilia Malmström, *supra* note 17.

⁵⁰⁴ See for instance Article 11.20(3), *Acuerdo de Libre Comercio Chile – Perú*, entered into force 01 March 2009, available at: http://www.direcon.gob.cl/wp-content/uploads/2011/11/TLC-Chile-Per%C3%BA_Parte2.pdf (last accessed 12 November 2013). See also UNCITRAL, Working Group II (Arbitration and Conciliation) – 'Compilation of Comments by Governments', 53rd session, 4-8 October 2010 (A/CN.9/WG.II/WP.159/Add.4), available at: http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html (last accessed 12 November 2013).

Separately, BITs often provide guidance on the criteria governing the acceptance of *amicus curiae* submissions. Recently signed BITs contain similar criteria as the ones set out by ICSID, UNCITRAL, and the NAFTA FTC. Below is a look at criteria in the Canada-Peru FTA, as well as the United States-Peru BIT.⁵⁰⁵ Other interchangeable examples exist – *amicus curiae* participation is indeed finding its way in an increasing number of BITs.

The Canada-Peru FTA entitles ‘any person other than a disputing party’ to apply for leave in order to file a written submission. Such written submissions are required to be concise, only covering matters within the scope of the dispute, and in no case longer than twenty pages. The Canada-Peru FTA does not afford *amici curiae* an absolute right to file written submissions. Article 836 ‘Submissions by Other Persons’ sets forth the criteria governing the acceptance of those submissions:

4. In determining whether to grant the leave the Tribunal shall consider, among other things, the extent to which:
 - a. the applicant's 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;
 - b. the applicant's submission would address a matter within the scope of the dispute;
 - c. the applicant has a significant interest in the arbitration; and
 - d. *there is a public interest in the subject-matter of the arbitration.*
5. The Tribunal shall ensure that:
 - a. any applicant's submission does not disrupt the proceedings; and
 - b. neither disputing party is unduly burdened or unfairly prejudiced by such submissions.⁵⁰⁶

These conditions are in line with the FTC Statement. Furthermore, the fact that the *amicus curiae* does not benefit from any substantive rights is well-reflected in the following sub-paragraph of Article 836:

7. The Tribunal that grants leave to file a submission to an applicant *is not required to address the submission at any point in the arbitration*, nor is the person that files the submission entitled to make further submissions in the arbitration.

Although not explicitly mentioned by the ICSID Arbitration Rules, or the UNCITRAL Rules on Transparency, this provision clearly is in line with arbitral precedents discussed hitherto. *Amici curiae* are not entitled to make submissions pursuant

⁵⁰⁵ See United States Trade Promotion Agreement with the Republic of Peru (2006), available at: http://www.ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file144_9539.pdf (last accessed 12 November 2013).

⁵⁰⁶ Canada-Peru Free Trade Agreement, *supra* note 170 (our emphasis).

to a substantive right such as for instance the right of affected third persons to be heard; rather, tribunals followed the Iran-US Claims Tribunal and WTO Appellate Body's approach in restricting the matter to the mere procedural discretion of arbitrators.

Similar provisions exist under the United States-Peru BIT. Article 21.10 'Rules of Procedure' states that:

...the Panel will consider requests from non-governmental entities in the disputing Parties' territories to provide written views regarding the dispute that may assist the panel in evaluating the submissions and arguments of the disputing Parties.⁵⁰⁷

Tribunals would then assess whether or not to grant leave on the basis of (i) the identity of the 'non-governmental entity' (or 'NGE'), including its membership and sources of financing; (ii) the issues of fact or law relevant to the dispute that it wishes to address; (iii) the degree to which it may assist the tribunal; and (iv) its independence vis-à-vis disputing parties.⁵⁰⁸

In sum, that the US and Canada have embraced the *amicus curiae* procedure is not anomalous given that it is a common law procedure that is widely used in their respective domestic jurisdictions.⁵⁰⁹ They have also embraced the need to ensure transparency by providing that proceedings under their BITs will be public.⁵¹⁰ It is worthy to note here that provisions on *amicus curiae* participation are much more restrictive, in the procedural sense, from those regulating third party interventions by non-disputing BIT parties, i.e. contracting states – as will be further explored in Part III.⁵¹¹

⁵⁰⁷ United States-Peru BIT, *supra* note 505.

⁵⁰⁸ Specifically, the US Model Rules of Procedure for Dispute Settlement, state that: 'The request shall: (a) contain a description of the NGE submitting the request, including, if applicable, the nature of its activities, its membership, legal status, sources of financing, and the address in the territory of a Party; (b) identify the specific issues of fact and law directly relevant to any legal or factual issue under consideration by the panel that the NGE will address in its written views; (c) explain how the NGE's written views will contribute to resolving the dispute and why its views would be unlikely to repeat legal and factual arguments that a Party has made or can be expected to make, or why it brings a perspective that is different from that of the Parties; (d) contain a statement disclosing whether the NGE has any relationship, direct or indirect, with either Party as well as whether it has received or is expected to receive any assistance, financial or otherwise, from any Party, other governments, persons, or organizations other than its members or its counsel in the preparation of its request or written views...'. See Article 55, US Model Rules of Procedure for Dispute Settlement (2012), available at: <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/model-rules-of-procedure-for-dispute-settlement> (last accessed 06 October 2014).

⁵⁰⁹ A. Van Duzer, *supra* note 171, at 696.

⁵¹⁰ Although tribunals are granted powers to protect confidential information, see Article 835, Canada-Peru Free Trade Agreement, *supra* note 170; and Article 21.10(d), United States-Peru BIT, *supra* note 505.

⁵¹¹ See Part II – Section 4.2.2.

It is worthy to finally note that both the US and Canada are major capital-exporting economies, particularly in areas where environmental and human rights problems are ubiquitous such as the exploitation of natural resources. The BITs signed by both states with various Latin American states aim in several ways to support the activities of both American and Canadian petroleum and mining companies. The past years have seen numerous instances of unprecedented, and often violent, conflict between American and Canadian multinationals on the one hand, and local as well as indigenous communities on the other.⁵¹² Potential arbitrations under those BITs may well involve numerous *amicus* petitions by such communities or their representatives. The recently signed BITs clearly grant investor-state tribunals the authority to accept such petitions.

⁵¹² The controversy surrounding the Tia Maria project in Peru is one of such many examples. The project involves Southern Copper, an American mining multinational, which had been planning for a number of years to implement a major copper mining project in the Islay region in Peru. The project required over a billion dollars' worth of initial investments and its annual production capacity was estimated at 120,000 tons. It was thus highly promoted by the Peruvian government. Peru is indeed aiming to become the world leading exporter of copper and has been striving to meet an increasing demand for the metal from China and other emerging markets. However, local communities were concerned by the potentially adverse environmental impacts of the project, particularly with respect to the magnitude of forecasted mining activities and the ensuing risks of contamination of fresh water sources used both for drinking as well as local agriculture. Civil society and municipal authorities had organized a *consulta*, a common form of public consultation or local referendum in Latin America, where roughly 80% of voters expressed their opposition to the project. The Peruvian government had indicated that it would not be bound by the *consulta* results. Local communities carried out demonstrations, road-blocks, and strikes against the project over months and were often met with violence by government troops. Civil society organizations condemned the violence and Peru's handling of the situation. The government ultimately suspended plans to exploit the mine in 2011. Despite ongoing discussions over the continuation of the project and the possibility of a renewed approval by Peru, it is still not clear whether Southern Copper intends to file any claim against Peru under the United States-Peru BIT as a result of the project's suspension. See FIDH, '*La FIDH condena represión y violencia para resolver conflicto minero en Islay*' (8 April 2011), available at: http://www.fidh.org/IMG/Article_PDF/Article_a9491.pdf (last accessed 01 April 2013); BBC, '*Peru cancels Tia Maria copper mine after protest*' (9 April 2011), available at: <http://www.bbc.co.uk/news/world-latin-america-13025971> (last accessed 06 October 2014). See also World Finance, '*Southern Copper Corporation provide benchmark for mining transactions*', (31 October 2013) available at: <http://www.worldfinance.com/infrastructure-investment/project-finance/southern-copper-corporation-provide-benchmark-for-mining-transactions> (last accessed 06 October 2014). Similarly, see also The Renco Group, Inc. v. The Republic of Peru, ICSID Case No. UNCT/13/1 – a dispute governed by the US-Peru BIT.