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

El Hossey, F.F.

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Author: El Hosseney F.F.

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3. From theory to practice: Investor-state tribunals' regulation of *amicus curiae* participation

Having looked at the substantive issues raised by *amici curiae*, and thereby identifying the underlying rationale for their participation in investor-state arbitrations, a closer look at the criteria regulating such participation is now merited. As mentioned previously, the amendment to the ICSID Arbitration Rules, as well the adoption of the

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.

UNCITRAL Rules on Transparency, explicitly allowing, and regulating, *amicus curiae* submissions now ensures consistency at the level of ICSID and UNCITRAL arbitral decisions.⁵¹³ At the NAFTA level, the FTC has issued a statement on the matter, which has been effectively used by arbitral tribunals as guidance. Numerous recently negotiated BITs also confirm the acceptance of the *amicus curiae* procedure. The aim of this section is thus to highlight that the regulation, and therefore acceptance, of the *amicus curiae* procedure is currently a *fait accompli* in international investment arbitration.

Investor-state tribunals' treatment of the *amicus curiae* procedure may be divided into two groups; i.e. (i) those who applied the *Methanex* criteria (**Section 3.1**) and (ii) those applying the newly-enacted criteria of the ICSID and UNCITRAL Arbitration Rules (**Section 3.2**).

3.1 Tribunals that applied the *Methanex* precedent

Below is a closer look at investor-state tribunals' procedural analysis of the *amicus curiae* issue in the disputes of *UPS v Canada*, *Aguas del Tunari SA v. Republic of Bolivia*, and *Chevron and Texaco v. Ecuador*. These were some of the earlier cases dealing with civil society's petitions to intervene as *amicus curiae*. Equally, these arbitrations raise a number of core substantive public interest issues that shed light, from a holistic perspective, on the relevance of *amicus curiae* intervention, including most notably the provision of basic public services (*UPS*), the human right to access to water (*Aguas del Tunari*), and indigenous peoples' rights and interests (*Chevron*).

3.1.1 Amicus acceptance as a mere matter of procedural discretion: *UPS v. Canada*

In *UPS v. Canada*, UPS – an American postal and courier services company – essentially alleged that Canada violated the protection and promotion of fairness enshrined by NAFTA, and in particular Article 1102⁵¹⁴ by not providing 'UPS and UPS

⁵¹³ See ICSID Arbitration Rules, *supra* note 411, and UNCITRAL Rules on Transparency, *supra* note 414.

⁵¹⁴ NAFTA Article 1102 provides that: '1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. 2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in

Canada with the best treatment available to domestic competitors’, i.e. Canada Post, which is a state-run company that benefits from a partial monopoly.⁵¹⁵

The Canadian Union of Postal Workers and the Council of Canadians submitted *amicus* petitions. They requested to address the potential ramifications of the tribunal’s decision on Canadian postal workers and consumers, an issue that neither Canada nor UPS raised.⁵¹⁶ The petitioners’ request to the tribunal included, *inter-alia*, (i) standing as parties to certain proceedings; (b) alternatively, the right to intervene as *amicus curiae* in the proceedings ‘on terms that are consistent with the principles of fairness, equality, and fundamental justice’; as well as (c) the disclosure of case materials.⁵¹⁷

It is worthy to note that an *amicus curiae* petition was subsequently submitted by the US Chamber of Commerce. The Chamber’s interest was said to be significant as (i) it is a proponent of free trade, consistently supports ambitious and comprehensive free trade agreements, and remains a staunch advocate of NAFTA; as well as (ii) its members are collectively responsible for a substantial portion of overseas investment activity, and that the matters at issue directly implicate the interests and reasonable expectations of those investors.⁵¹⁸ The US and Mexico have also provided comments on the petitioners’ requests pursuant to Article 1128 of NAFTA.⁵¹⁹

The tribunal first noted the disputing party’s position with regards to the petitioners’ requests. Although both clearly opposed the petitioners’ request for third

like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. 3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part. 4. For greater certainty, no Party may: (a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or (b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party.’. See NAFTA, *supra* note 170.

⁵¹⁵ United Parcel Service v Canada, *Final Award of 11 June 2007*, at para 13 (‘UPS v Canada’).

⁵¹⁶ T. Ishikawa, *supra* note 108, at 402.

⁵¹⁷ United Parcel Service v. Canada, *Decision of the Tribunal on Petitions for Intervention and Participation as Amicus Curiae of 17 October 2001*, at para 1.

⁵¹⁸ The Chamber’s submission was essentially concerned with Canada’s arguments in relation to the scope of its national treatment obligations under Article 1102 of NAFTA. In this regard, it contended that Canada cannot avoid international responsibility by taking treaty inconsistent measures through state enterprises that it controls, i.e. Canada Post. See United Parcel Service v Canada, *Amicus curiae submission by the Chamber of Commerce of the United States of 20 October 2005*, at para 5-6. It is worthy to note as well that neither Canada nor UPS objected to Chamber’s submission, but only the former responded to it. Having said that, the tribunal did not revisit any of the Chamber’s arguments – as was the case with the other *amici*. See United Parcel Service v Canada, *Final Award of 11 June 2007*, at para 3.

⁵¹⁹ Article 1128 of NAFTA, *supra* note 442.

party intervention, both UPS and Canada were not necessarily against granting petitioners ‘an *amicus curiae* status’, and did indeed recognize that the tribunal may grant such status by virtue of its discretionary authority pursuant to Article 15(1) of the UNCITRAL Arbitration Rules.⁵²⁰ As in the *Methanex* case, Canada expressed its support for greater openness in NAFTA Chapter XI proceedings as well as ‘its appreciation of the contribution that transparency brings to building public confidence in the investor-state dispute settlement process’.

Having said that, both disputing parties conversely specified the conditions that should govern the tribunal’s acceptance of granting such status, most notably in order to mitigate the potential burden on the costs and efficiency of proceedings.⁵²¹ By following the criteria governing the practice in its domestic judicial system, Canada proposed the following four factors for the tribunal to consider:

In exercising its discretion, the Tribunal should consider whether:

- (a) There is a public interest in the arbitration;
- (b) The Petitioners have sufficient interest in the outcome of the arbitration;
- (c) The Petitioners’ submissions will assist in the determination of a factual or legal issue related to the arbitration by bringing a perspective or particular knowledge that is different from that of the disputing parties; and
- (d) The Petitioners’ submissions can be received without causing prejudice to the disputing parties.⁵²²

UPS on the other hand specified that the *amicus* status should (i) not be granted at – what was then – an early stage of the proceedings; (ii) not entail the attendance of hearings or access to any material submitted to the tribunal; and (iii) be restricted to a written submission of a limited number of pages on specific issues to be determined by the tribunal.⁵²³ Mexico proposed an outright dismissal of the *amicus* petition, on the basis of the absence of express provisions under NAFTA allowing its submission, as well as the inexistence of the *amicus* procedure under Mexican law. Both disputing parties as well as the US were against allowing *amici* to make submissions on the tribunal’s jurisdiction or the place of arbitration.⁵²⁴

⁵²⁰ UPS v Canada, *supra* note 517, at para 6(i), 7(ii).

⁵²¹ For instance, Canada proposed that potential *amicus* briefs should not exceed 20 pages, whilst UPS suggested 10 pages. See *Ibid.*, at para 54.

⁵²² *Ibid.*, at para 7(iii).

⁵²³ *Ibid.*, at para 5(iii).

⁵²⁴ *Ibid.*, para 9-10. On Mexico’s arguments, see para 56-58.

It is worthy to note for now that the tribunal rejected the petitioners' request for standing as third-parties in the dispute by finding that it did not have the authority to join a party without both disputing parties' consent.⁵²⁵ It also noted that such a question does not fall under its discretionary authority pursuant to Article 15(1) of the UNCITRAL Arbitration Rules.⁵²⁶ Following the same rationale, the tribunal did not allow the disclosure of case materials nor the attendance at hearings in light of the lack of both disputing parties' consent.⁵²⁷

In deciding on the scope of Article 15(1), and whether it allows tribunals to accept *amicus* submissions, the tribunal explicitly referred to the *Methanex* precedent, but also to the practice of both the Iran-US Claims tribunal and the WTO Appellate Body.⁵²⁸ While recognizing the public interest nature of the dispute, the tribunal acknowledged that it had the power to accept *amicus curiae* submissions pursuant to Article 15(1) and emphasized that '*it is a matter of its power rather than of third party right*'.⁵²⁹ In the same vein, it acknowledged the criteria proposed by Canada and noted that those were indeed in line not only with Canadian court practice, but also those developed by the WTO Appellate Body in the *Asbestos* case⁵³⁰ as well as the *Methanex* tribunal.⁵³¹ More fundamentally, the tribunal emphasized once more a fundamental and consistently applied principle in relation to *amici curiae*, i.e. they are not entitled to make submissions pursuant to a procedural or substantive right such as the right of affected third persons to be heard; rather, the acceptance of *amicus curiae* submissions is merely a matter of procedural discretion. In addition, in agreement with both disputing parties, it found that the *amici* could not make submissions in relation to the tribunal's jurisdiction nor the place of arbitration.⁵³² The tribunal asserted that the requirement of equality and the parties' right to present their cases do limit the power of the tribunal to conduct the arbitration in such manner as it considers appropriate. That power is to be used not only to protect the rights

⁵²⁵ The issue of third-party standing will be discussed in further detail in Part III.

⁵²⁶ *Ibid.*, at para 36-37.

⁵²⁷ *Ibid.*, at para 68.

⁵²⁸ *Ibid.*, at para 64 citing Iran v United States case A/15 Award No. 63 – A/15 – FT; 2 Iran – US CTR 40, 43.

⁵²⁹ *Ibid.*, at para 61 (our emphasis).

⁵³⁰ Report of the Appellate Body, *European Communities: Measures Affecting Asbestos and Asbestos-Containing Products*, *infra* note 1030. See also our discussion of those criteria in our WTO analysis in Section – 4.2 of Part II.

⁵³¹ *Methanex Corporation v. United States*, *supra* note 428.

⁵³² *UPS v. Canada*, *supra* note 517, at para 53.

of the disputing parties, but also to investigate and determine the matter subject to arbitration in a just, efficient and expeditious manner. The power of the tribunal to permit *amicus* submissions is not to be used in a way that is unduly burdensome for the parties or which unnecessarily complicates the tribunal process. The tribunal envisaged that it would place limits on the submissions to be made in writing in terms, for instance, of their length. The third parties would not have the opportunity to call witnesses and, as a result, the disputing parties would not face the need to cross-examine or call contradictory evidence. The disputing parties would also be entitled to have the opportunity to respond to any such submissions.

3.1.2 Exclusion of *amicus* at the jurisdictional phase: *Aguas del Tunari v. Republic of Bolivia*

*Aguas del Tunari SA v Republic of Bolivia*⁵³³ is the first ICSID case in which the third-party standing and *amicus curiae* issues have arisen. A number of activists and civil society organizations,⁵³⁴ including the *Coordinadora para la Defensa del Agua y la Vida*, a local Bolivian civil society organization, requested ‘permission to intervene in the arbitration’ shortly after the tribunal was constituted.⁵³⁵ As in the *Methanex* case, the petition was presented as an enhancer of the transparency of arbitral proceedings. Petitioners argued that they had a ‘direct’ interest in the case and could provide ‘unique expertise and knowledge’.⁵³⁶ Their primary request was for the tribunal to grant them standing, through Earthjustice acting as their ‘representative’, and therefore to participate as parties ‘in any proceedings convened to determine AdT’s claim, and to afford the petitioners all rights of participation accorded to other parties’.⁵³⁷ Alternatively, the petitioners sought leave to participate in the proceedings as *amici curiae*, which according to them entailed (i) making submissions concerning the procedural aspects of the tribunal, its jurisdiction, the arbitrability of the claims raised by AdT and their merits;

⁵³³ *Aguas del Tunari, S.A. v. The Republic of Bolivia* (ICSID Case no. ARB/02/3) (the ‘Bechtel’ case).

⁵³⁴ Those were: La Federación Departamental Cochabambina de Organizaciones Regantes, SEMAPA Sur, Friends of the Earth-Netherlands, Oscar Olivera, Omar Fernandez, Father Luis Sánchez, and Congressman Jorge Alvarado.

⁵³⁵ See the tribunal’s decision on jurisdiction, *Aguas del Tunari, S.A. v. The Republic of Bolivia*, *supra* note 12, at 3-4.

⁵³⁶ *Ibid.*, at 4.

⁵³⁷ *Ibid.*, at 3.

(ii) attending all hearings; (iii) making oral presentations during hearings of the tribunal; and, (iv) having immediate access to all submissions made to the tribunal. In addition, petitioners requested that the tribunal: (i) publicly disclose all statements, including written submissions, concerning the claims and defenses of both Parties; (ii) open all hearings to the public; and, (iii) visit the area of Cochabamba.⁵³⁸

In a letter addressed to Earthjustice dated 29 January 2003, the tribunal considered that, in the absence of both disputing parties' consent, the intervention of a third party would contravene the consensual nature of investment arbitration.⁵³⁹ The same rationale applied with regards to granting access to hearings to non-disputing parties and/or the public in general, as well as disclosure of case materials and documents. In each of these cases, the tribunal needed both parties' consent in order to acquiesce to the petitioners' requests. Furthermore, and partially due to the early jurisdictional stage of the proceedings, the tribunal discarded the *amicus curiae* request while reserving the right to subsequently 'call witnesses or receive information from non-parties on its own initiative'.⁵⁴⁰ Therefore, the tribunal did not entirely discard the possibility of a subsequent participation by civil society petitioners. It did finally emphasize that it was confined to the authority it receives from the underlying investment treaties and arbitration rules, and for that matter it noted that *amicus curiae* participation had been recognized under the US-Singapore BIT; but that this was arguably not the case with the relevant Netherlands-Bolivia BIT.⁵⁴¹

3.1.3 *Sociedad General de Aguas de Barcelona v. Argentina* – the first *amicus* ICSID case

The case of *Sociedad General de Aguas de Barcelona, S.A. v Argentina*⁵⁴² became the first ICSID case where *amicus curiae* briefs were filed.⁵⁴³ It concerned the protection

⁵³⁸ *Ibid.*, at 3.

⁵³⁹ *Aguas del Tunari, S.A. v. The Republic of Bolivia, Letter to NGO regarding petition to participate as amici curiae of 29 January 2003*, available at: http://www.italaw.com/sites/default/files/case-documents/ita0019_0.pdf (last accessed 06 October 2014). See also E. De Brabandere, *supra* note 852, 101.

⁵⁴⁰ *Ibid.*, at 5.

⁵⁴¹ *Aguas del Tunari, S.A. v. The Republic of Bolivia*, *supra* note 539, at 2.

⁵⁴² *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic* (ICSID Case no. ARB/03/19) ('*Sociedad General de Aguas de Barcelona case*' or '*Sociedad General de Aguas de Barcelona v. The Argentine Republic*').

⁵⁴³ E. De Brabandere, *infra* note 852, 101.

of foreign investments in a privatisation concession for water distribution and wastewater treatment services in the city of Buenos Aires in the wake of the country's financial crisis.⁵⁴⁴ The claimants alleged that Argentina's refusal to apply previously agreed incremental tariff adjustments, and the ensuing termination of their concession, essentially amounted to expropriation, and violations of their right to fair and equitable treatment as well as the full protection and security of their investments.⁵⁴⁵

The case was regarded in the same vein as the *Bechtel* case as it raised fundamental issues relating to human rights and access to water. Five civil society organizations⁵⁴⁶, including local grassroots Argentine associations such as the *Asociación Civil por la Igualdad y la Justicia* and the *Centro de Estudios Legales y Sociales*, filed a 'Petition for Transparency and Participation as Amicus Curiae' on the basis of '*the right of every person to participate and make their voices heard in cases where decisions may affect their rights*'.⁵⁴⁷ They referred to the *Methanex* and *UPS* precedents. Their requests included (a) access to hearings; (b) an opportunity to submit *amicus curiae* briefs; and (c) unrestricted access to materials of the case.

By an order dated 19 May 2005, the tribunal rejected the petitioners' request to access hearings in light of the absence of both parties' consent to that effect – in line with the provisions of Article 32(2) of the ICSID Arbitration Rules.⁵⁴⁸ It deferred its decision on access to materials of the case until it decided on whether or not to grant leave to the petitioners to submit *amicus curiae* briefs.⁵⁴⁹ Referring to the *Methanex* precedent, the tribunal found that it had in principle the authority to accept *amicus curiae* briefs

⁵⁴⁴ The claims were therefore made pursuant to the France, Spain and United Kingdom BITs entered into with Argentina. *Sociedad General de Aguas de Barcelona v. The Argentine Republic, Decision on liability of 30 July 2010*, at para 2.

⁵⁴⁵ *Ibid.*, at para 127.

⁵⁴⁶ The remaining three were: the Center for International Environmental Law, *Consumidores Libres Cooperativa Ltda. de Provisión de Servicios de Acción Comunitaria*, and *Unión de Usuarios y Consumidores*.

⁵⁴⁷ *Sociedad General de Aguas de Barcelona v. The Argentine Republic*, *infra* note 731, at 2 (our emphasis).

⁵⁴⁸ Article 32(2) of the ICSID Arbitration Rules states that: 'The tribunal shall decide, with the consent of the parties, which other persons besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal may attend the hearings'. See *Sociedad General de Aguas de Barcelona v. The Argentine Republic*, *supra* note 547, at 3.

⁵⁴⁹ In its order of 12 February 2007, the tribunal dispensed itself from 'resolving the general question of a non-party's access to the record' as it deemed the petitioners to have had already sufficient information on the case. *Ibid.*, at 8; and *Sociedad General de Aguas de Barcelona v. The Argentine Republic, Order in response to a petition by five non-governmental organizations for permission to make an amicus curiae submission of 12 February 2007*, at 12.

pursuant to its discretionary authority under Article 44 of the ICSID Convention states that:

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.⁵⁵⁰

In applying such authority, the tribunal stated that it had to take into account three basic criteria, i.e. ‘the appropriateness of the subject matter of the case’; ‘the suitability of a given non-party to act as *amicus curiae* in that case’; and ‘the procedure by which the *amicus* submission is made and considered’.⁵⁵¹ The tribunal provided further requirements to be met by non-disputing parties wishing to submit *amicus curiae* briefs. In particular, the tribunal expected the petition to include details regarding ‘the identity and background of the petitioner’; the nature of its interest in the case; whether the petitioner had received financial or any other support from any of the disputing parties; and the reasons why the tribunal should accept its brief.⁵⁵² In setting these conditions, the tribunal’s intention was to establish three factors of importance: expertise, experience, and independence.⁵⁵³ A petition was indeed submitted accordingly on 1 December 2006. The tribunal then issued an order dated 12 February 2007 finally accepting the petition and in which it noted that:

the five petitioners are respected nongovernmental organizations and that they have as a group developed an expertise in and are experienced with matters of human rights, the environment, and the provision of public services.⁵⁵⁴

This is in contrast with an earlier decision in 2006 by the same tribunal in a related dispute – *Aguas Provinciales de Santa Fe and others v. Argentina* – where it rejected an *amicus curiae* petition submitted by the *Fundación para el Desarrollo Sustentable*, a civil society organization based in Argentina, on the basis of the three factors mentioned above: expertise, experience, and independence.⁵⁵⁵ The tribunal found that no

⁵⁵⁰ See ICSID Convention, *supra* note 379.

⁵⁵¹ *Ibid.*, at 5.

⁵⁵² *Ibid.*, at 7.

⁵⁵³ *Ibid.*, at 6.

⁵⁵⁴ *Sociedad General de Aguas de Barcelona v. The Argentine Republic*, *supra* note 549, at 8.

⁵⁵⁵ The petition also included three individuals identified as experts in human rights law: Professor Ricardo Ignacio Beltramino, Dr. Ana María Herren, and Dr. Omar Darío Heffes. See *Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v.*

information had been provided on the nature and size of the *Fundación*'s membership, the qualifications of its leadership, the expertise of its staff, and the activities in which it had been engaged. The tribunal was therefore unable to determine the *Fundación*'s expertise and experience. As to the evaluation of its independence, the tribunal expected additional information on the *Fundación*'s membership, which again was, according to the tribunal, lacking. In addition, the tribunal further elaborated on the requirements it expected with respect to the interest criterion. It found that 'it is not enough for a nongovernmental organization to justify an *amicus* submission on general grounds that it represents civil society or that it is devoted to humanitarian concerns'.⁵⁵⁶ In this light, the tribunal found that the *Fundación* stated its interest in the case in 'the most general of terms' solely by specifying that it is 'a civic organization concerned with the management of sustainable development and with policies affecting environmental and human needs'.⁵⁵⁷

Against this background, the *Sociedad General de Aguas de Barcelona* tribunal cautiously reiterated that the role of the petitioners is not that of a litigant and is solely restricted to the assistance of the tribunal, i.e. 'the traditional role of an *amicus curiae*'.⁵⁵⁸ Petitioners should therefore not challenge arguments or evidence put forward by the disputing parties. The tribunal had defined the 'traditional role of an *amicus curiae*' as consisting of assisting the decision maker arrive at its decision by providing it with arguments, perspectives, and expertise that the litigating parties may not provide', i.e. as 'a volunteer' whose offer the tribunal is 'free to accept or reject'.

3.1.4 No assistance, no participation: *Chevron and Texaco v. Ecuador*

The case of *Chevron and Texaco v. Ecuador* is a highly complex investor-state dispute governed by the US-Ecuador BIT.⁵⁵⁹ Chevron's claims against Ecuador most notably relate to Ecuadorian court decisions in the Lago Agrio litigation and their

The Argentine Republic (ICSID Case no. ARB/03/19), *Order in response to a petition for participation as amicus curiae of 17 March 2006* ('Aguas Provinciales de Santa Fe S.A et. al. v. The Argentine Republic'). It is worthy to note that this case was later joined to the *Sociedad General de Aguas de Barcelona* case, *supra* note 547.

⁵⁵⁶ *Ibid.*, at para 33.

⁵⁵⁷ *Ibid.*, at para 30-34. See also A. Van Duzer, *supra* note 171, at 719.

⁵⁵⁸ *Ibid.*, at 10, 13.

⁵⁵⁹ *Chevron and Texaco v. Ecuador*, *supra* note 141.

enforcement. Chevron/Texaco face nearly \$18 billion of damages to be paid to indigenous groups inhabiting the Oriente region in Ecuador, as well as others inhabiting the downstream area in Peru. The IISD and *Fundación Pachamama* sought to intervene in the arbitration as *amicus curiae*. The *amicus* petitioners recognized that their intervention primarily focused on the jurisdiction of the arbitral tribunal and the justiciability of Chevron/Texaco's claim.⁵⁶⁰

The tribunal dismissed their petition in its entirety. In light of both Chevron and Ecuador's objection, they were denied the request to attend oral hearings pursuant to Article 25(4) of the UNCITRAL Arbitration Rules. Given that the tribunal was at a preliminary stage dealing with jurisdictional and justiciability issues, it agreed with both parties that an *amicus* intervention would not assist it given that these issues were strictly legal and had been already extensively discussed by both disputing parties. Citing its discretionary powers under Article 15(1) of the Rules, the tribunal thus rejected the *amici*'s petition.⁵⁶¹

In this case, the outright dismissal of the *amicus* petition clearly sheds lights on (i) the fact that host states do not necessarily consider civil society's *amicus* interventions as additional support to their position; and (ii) investor-state tribunals' exercise of discretion on the matter, i.e. the acceptance of *amicus curiae* submissions is far from being considered as automatically granted by investor-state tribunals – in stark contrast to other jurisdictions such as international human rights jurisdictions as shown subsequently in Part II.

3.2 Tribunals that applied the recently-enacted criteria

Below are cases that have considered newly-enacted criteria under ICSID Arbitration Rules or referred to the ones set forth under the FTC Statement. Those were: *Glamis Gold v. the United States*; *Biwater Gauff v. the Republic of Tanzania*; and *Piero Foresti et al. v. the Republic of South Africa*. Similar to the arbitrations discussed in Section 3.1, these were some of the first tribunals to accept civil society's petitions to intervene as *amicus curiae*. Equally, these arbitrations raise a number of core substantive

⁵⁶⁰ Chevron and Texaco v. Ecuador, *infra* note 803, at para 3.3

⁵⁶¹ Chevron and Texaco v. Ecuador, *Procedural Order No. 8 of 18 April 2011*, at para 17-20.

public interest issues that shed light, from a holistic perspective, on the relevance of *amicus curiae* intervention, including most notably indigenous peoples' rights and interests (*Glamis* and *Piero Foresti*) and the human right to access to water (*Biwater*).

3.2.1 Clear guidelines and no objections: *Glamis Gold v. the United States*

Glamis Gold is a case that concluded following the release of the FTC Statement. The Quechan Indian Nation, which is a federally recognized tribe in the US, sought to intervene in the dispute as *amicus curiae*. In fact, had it not been through the *amicus curiae* procedure, the Nation – which is a direct stakeholder to the dispute – would not have had any access to the tribunal.⁵⁶² Friends of the Earth Canada and Friends of the Earth United States, the National Mining Association, and Sierra Club and Earthworks also made submissions. These submissions were accepted as appropriate in accordance with the principles stated in the FTC Statement.⁵⁶³ The tribunal acknowledged receipt of the petitioners' application and referred them to section B of the FTC Statement.⁵⁶⁴ It noted that accepting *amicus curiae* submissions falls within its discretionary authority under Article 15(1) of the UNCITRAL Arbitration Rules, and that the parties have not made objections to that effect (subject to the submissions being made in accordance with the FTC Statement). It also stated that no undue burden or delay would be caused.⁵⁶⁵ The authority of the tribunal to accept *amicus curiae* briefs was not questioned given that the proceedings began following the release of the FTC Statement. In fact, *Glamis* did not object to any of the briefs made by the *amici* except the one submitted by Friends of the Earth as it largely addressed the nationality of *Glamis*, i.e. a jurisdictional issue that exceeded the agreed scope of *amicus curiae* submissions.⁵⁶⁶

3.2.2 Bringing issues unaddressed by disputing parties to the fore – *Biwater Gauff v. the Republic of Tanzania*

The case was concluded following the amendment of the ICSID Arbitration Rules and provided useful guidance as to how the new rules applied. *Amicus curiae* petitions

⁵⁶² E. De Brabandere, *infra* note 852, at 105.

⁵⁶³ *Ibid.*, at 101.

⁵⁶⁴ NAFTA Free Trade Commission, FTC Statement, *supra* note 489.

⁵⁶⁵ *Glamis Gold Ltd v. United States*, *supra* note 496, at 127.

⁵⁶⁶ *Glamis Gold Ltd v. United States*, *supra* note 496, at 130.

were made by five civil society organizations⁵⁶⁷ including renowned international civil society organizations such as the IISD, but also local Tanzanian grassroots organization such as the Tanzania Gender Networking Programme. The tribunal accepted to grant the petitioners leave to submit an *amicus curiae* brief, notwithstanding Biwater Gauff's objection, by virtue of the newly amended Article 37(2) of the ICSID Arbitration Rules. Although the tribunal had such authority in accordance with the amended ICSID Arbitration Rules, it nonetheless cited the *Methanex* decision to highlight the public interest at stake as a rationale for accepting *amicus curiae* submissions.⁵⁶⁸

The tribunal also dismissed the claimant's contention that the *amici* could add nothing 'which could not be said by either party' and thus failing the test of 37(2)(a) of the Rules. The tribunal clearly noted the *amici*'s distinct position and perspectives vis-à-vis both parties.⁵⁶⁹ Tanzania had indirectly relied on human rights arguments and did not articulate the aspects raised by the *amici*, i.e. it did not invoke the access to water as a human right as part of its defense.⁵⁷⁰ The tribunal denied, however, their request to attend oral hearings in light of Biwater Gauff's objection.⁵⁷¹ As in the *Sociedad General de Aguas de Barcelona, S.A. v. Argentina* decision, the petitioners were requested to submit a single joint *amicus curiae* brief. The tribunal considered that information in the public domain was sufficient for the *amici* to make their submission and did not grant them access to the record. In their brief, the *amici* lamented this decision as the inability to properly access the record necessarily meant that their submission was based on an incomplete set of factual information. They were unaware of the legal arguments made

⁵⁶⁷ The Lawyers' Environmental Action Team, the Legal and Human Rights Center, the Tanzania Gender Networking, the Center for International Environmental Law, and the International Institute for Sustainable Development. See *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), *Final award of 24 July 2008*.

⁵⁶⁸ *Ibid.*, at para 358.

⁵⁶⁹ 'The five Petitioners comprise NGOs with specialised interests and expertise in human rights, environmental and good governance issues locally in Tanzania. They approach the issues in this case with interests, expertise and perspectives that have been demonstrated to materially differ from those of the two contending parties, and as such have provided a useful contribution to these proceedings'. See *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, *infra* note 741, at para 359.

⁵⁷⁰ For further analysis on this point, see C. Schreuer, U. Kriebaum, *infra* note 617, at 1091.

⁵⁷¹ Indeed, Article 32(2) states that: '(2) 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'. See *Ibid.*, at para 63-65.

by both parties or the facts they alleged; and therefore, they could not comment on the parties' positions.⁵⁷²

3.2.3 Unprecedented access to case materials in *Piero Foresti et al. v. the Republic of South Africa*

The South African Legal Resources Centre and the Centre for Applied Legal Studies' – acting amongst others as petitioners⁵⁷³ – requests included leave to submit a written *amicus curiae* brief, access to specifically identified case materials, attend hearings and present key submissions orally. The tribunal indeed granted the petitioners leave by applying the conditions set out under Article 41(3) of the ICSID Additional Facility Rules, which mirrors Article 37(2) of the ICSID Arbitration Rules and provides the same conditions.⁵⁷⁴ The tribunal emphasized that its decision was guided by two principles:

(1) [Non-disputing party ('NDP')] participation is intended to enable NDPs to give useful information and accompanying submissions to the Tribunal, but is not intended to be a mechanism for enabling NDPs to obtain information from the Parties.

(2) Where there is NDP participation, the Tribunal must ensure that it is both effective and compatible with the rights of the Parties and the fairness and efficiency of the arbitral process.⁵⁷⁵

On the basis of the above, in an unprecedented decision, the tribunal also partially accepted the petitioners' request to access certain case materials.⁵⁷⁶ It requested the parties to agree on submitting redacted versions of the Memorial and Counter-Memorial, as well as legal opinions, and a non-descriptive list of witnesses and experts that had provided evidence on facts and damages.⁵⁷⁷ The basis for the tribunal's decision in this regard was simply logical. It found that:

⁵⁷² Biwater Gauff v. Tanzania, *infra* note 744, at paras 13-14.

⁵⁷³ The remaining two other petitioners are renowned organizations: the International Centre for the Protection of Human Rights and the Centre for International Environmental Law.

⁵⁷⁴ ICSID Additional Facility Rules, entered into force 10 April 2006, available at: https://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR_English-final.pdf (last accessed 01 June 2013).

⁵⁷⁵ Piero Foresti, Laura de Carli and others v. Republic of South Africa, *Letter regarding non-disputing parties of 05 October 2009*, available at: <http://italaw.com/sites/default/files/case-documents/ita0334.pdf> (last accessed 06 October 2014). For additional commentary, see also J. Brickhill and M. Du Plessis, *supra* note 427, at 160.

⁵⁷⁶ *Ibid* (our emphasis).

⁵⁷⁷ The tribunal made this decision on the basis that: '(1) that NDP participation is intended to enable NDPs to give useful information and accompanying submissions to the Tribunal, but is not intended to be a mechanism for enabling NDPs to obtain information from the Parties; and (2) where there is NDP participation, the Tribunal must ensure that it is both effective and compatible with the rights of the Parties and the fairness and efficiency

NDPs must be allowed access to those papers submitted to the Tribunal by the Parties *that are necessary to enable the NDPs to focus their submissions upon the issues arising in the case and to see what positions the Parties have taken on those issues*. The NDPs must also be given adequate opportunity to prepare and deliver their submissions in sufficient time before the hearing for the Parties to be able to respond to those submissions.⁵⁷⁸

The tribunal had deferred making a final decision on the request relating to attendance of the hearings and oral submissions. As mentioned, the case was later discontinued following a settlement between the parties to the dispute.

3.3 Common procedural grounds

The UNCITRAL and ICSID cases examined hitherto show fairly consistent attitudes by investment treaty arbitration tribunals. Primarily, tribunals have asserted their discretion in accepting *amicus curiae* briefs while emphasizing that non-disputing parties do not benefit from any substantive right to file such briefs.⁵⁷⁹ By acknowledging their authority to accept *amicus curiae* briefs, as mentioned previously, tribunals have also sought to establish three factors of importance relating to petitioners, i.e. their expertise, experience, and independence. They also systematically expected petitioners to clearly establish and articulate their interest in the dispute, which has to necessarily be distinct from either disputing party's. As to attendance at hearings, oral submissions, and access to case materials, tribunals have generally found that they did not have the authority to acquiesce to such requests in the absence of both disputing parties' consent (with the exception of the *Piero Foresti* tribunal).

Again, more fundamentally for the purposes of this research, the most salient common denominator here is that there is clearly no right *per se* entitling non-disputing parties to submit *amicus curiae* briefs, i.e. non-disputing parties – whether represented by civil society actors or not – do not have the *right to be heard* by investor-state tribunals. As mentioned above, civil society actors sought to intervene as *amicus curiae* in the *Sociedad General de Aguas de Barcelona* on the basis of '*the right of every person to participate and make their voices heard in cases where decisions may affect their*

of the arbitral process'. See Piero Foresti, Laura de Carli and others v. Republic of South Africa, *infra* note 789, at para 27-28.

⁵⁷⁸ Piero Foresti, Laura de Carli and others v. Republic of South Africa, *supra* note 575.

⁵⁷⁹ T. Ishikawa, *supra* note 108, at 388-389.

rights'.⁵⁸⁰ It has been consistently pointed out that this argument is not relevant. Tribunals have regarded the *amicus curiae* issue as a strictly procedural one notwithstanding the significance of the public interest at stake. In this light, petitioners were particularly requested to limit their briefs to the sole and unique purpose of assisting tribunals by bringing arguments, perspectives, and expertise other than those of the disputing parties, i.e. *amici curiae* are not expected to, and should not, act as litigants, in other words, they should not challenge arguments or evidence put forward by the disputing parties, nor deal with jurisdictional or justiciability issues. In the same vein, investor-state tribunals fully exercise their discretion on the matter and have not shied away from entirely dismissing *amicus* petitions.⁵⁸¹

⁵⁸⁰ Sociedad General de Aguas de Barcelona v. The Argentine Republic, *infra* note 731, at 2 (our emphasis).

⁵⁸¹ See, as mentioned, Chevron and Texaco v. Ecuador, *supra* note 561, at para 17-20; Aguas Provinciales de Santa Fe S.A et. al. v. The Argentine Republic, *supra* note 555, at para 30-34; see also Section 5.1.

⁵⁸² In addition, depending on the drafting of the relevant treaty, contractual obligations as well.

⁵⁸³ C.E. Côté, *La participation des personnes privées dans le règlement des différends internationaux économiques : L'élargissement du droit de porter plainte à l'OMC* (2007), at 416, 419.