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ARE *AMICI CURIAE* THE PROPER RESPONSE TO THE PUBLIC'S CONCERNS ON TRANSPARENCY IN INVESTMENT ARBITRATION?

ALEXIS MOURRE[*]

Abstract

In the context of investment arbitration, *amici curiae* have for a long time been quite unheard of. This can easily be explained by the privacy of international arbitration, which implies that only directly involved parties can participate in the proceedings. Several recent decisions have, however, brought renewed attention to the issue of *amici curiae* intervention in investment arbitration.

I. THE APPARITION OF *AMICUS CURIAE* IN INVESTMENT ARBITRATION

An *amicus curiae* is, according to *Black's Law Dictionary*, "a person with strong interest in or views on the subject matter of an action, [who] may petition the court for permission to file a brief, ostensibly on behalf of a party but actually to suggest a rationale consistent with its own views. Such *amicus curiae* briefs are commonly filed in appeals concerning matters of broad public interest; e.g. civil rights cases".

Amici curiae are commonly heard before *common law* jurisdictions, albeit with differences between the United States and the United Kingdom. The institution is not unknown, however, in civil law countries, and French courts have heard *amici curiae* on different occasions.[1] *Amici curiae* are also heard before many international jurisdictions,[2] and the practice has become frequent in the WTO context.[3]

[*] amourre@cmdslaw.com. This article is an extension of the presentation made by the author at the 20 March 2006 joint colloquium organized in London by the Queen Mary School of International Arbitration and the ICC Institute of World Business Law on "Procedural Issues: Practical Problems of Regular Occurrence".

1 Paris, 6 July 1988, G.P 1988, 700; Cass. Ass. Plén. 29 June 2001, JCP G 2001, II, 10569.

2 Hervé Ascensio, "L'amicus curiae devant les juridictions internationales", RGDIP 2001/4, pp. 897 et seq.

3 Brigitte Stern, "L'intervention des tiers dans le contentieux de l'OMC", RGDIP 2003/2, p. 257.

In the context of investment arbitration, *amici curiae* have for a long time been quite unheard of.[4] This can easily be explained by the privacy of international arbitration, which implies that only directly involved parties can participate in the proceedings.[5] Several recent decisions have, however, brought renewed attention to the issue of *amici curiae* intervention in investment arbitration.

In a 19 May 2005 decision in the *Vivendi v. Argentina* case, and in a 17 March 2006 decision in the *Aguas Provinciales de Santa Fe v. Argentina* case, two Tribunals[6] decided in almost identical terms that *amici curiae* briefs could be admitted on the basis of the public interest vested in a dispute relating to the distribution of water in large cities. In doing so, the *Vivendi* and *Aguas Provinciales de Santa Fe* Tribunals followed two 2001 NAFTA decisions (15 January 2001 decision in the *Methanex v. United States* case[7] and 17 October 2001 decision in *UPS v. Canada*),[8] and reversed the stand taken in 2003 by the ICSID tribunal in the *Aguas del Tunari* case.[9]

[4] See Brigitte Stern, "L'entrée de la société civile dans l'arbitrage entre Etat et investisseur", Rev. Arb. 2002/2, p. 329; Eric Teynier, "L'Amicus curiae dans l'arbitrage CIRDI", *Cahiers de l'arbitrage*, 2005/3, G.P 2005, n° 348–349, p. 19; Dierk Ullrich, *Intervenors for the public good? Amici curiae in BIT and NAFTA arbitrations*, UBC Faculty of Law Jubilee Event, International Trade and Intellectual Property Panel, 30 September 2005; Andrea K. Bjorklund, "The participation of Amici Curiae in NAFTA Chapter Eleven Cases", http://www.dfait-maeci.gc.ca.

[5] Loukas A. Mistelis, "Confidentiality and Third Party Participation", *Arbitration International*, 2005/2, pp. 211 et seq.

[6] ICSID Case N° ARB/03/19 and ICSID Case N° ARB/03/17. Prof. Gabrielle Kaufmann Kohler, Prof. Pedro Nikken, Prof. Jeswald W. Salacuse (Chairman) sat in both tribunals. Although the petitioners were different in the two arbitrations, the issues at stake were "*virtually identical*" (para. 4 of the *Aguas Provinciales de Santa Fe* decision).

[7] William Rowley QC, Warren Christopher Esq., V.V. Veeder QC (Chairman).

[8] Dean Donald A. Cass; L. Yves Fortier CC, QC; Justice Kenneth Keith (Chairman).

[9] ICSID Case N° ARB/02/3, José Luis Alberro-Semerena, Henri C. Alvarez, David D. Caron (Chairman).

II. THE POWER OF THE TRIBUNAL TO AUTHORISE *AMICI* BRIEFS AND THE PRIVATE NATURE OF THE PROCESS

While the *Aguas del Tunari* decision had dismissed the *amici curiae* petitions on the basis of the consensual nature of arbitration,[10] the *Methanex*,[11] *UPS*,[12] *Vivendi*[13] and *Aguas Provinciales de Santa Fe*[14]

[10] "The Tribunal's unanimous position is that your core requests are beyond the power or the authority of the Tribunal to grant. The interplay of the two treaties involved (the Convention on the Settlement of Investment Disputes and the 1992 Bilateral Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and Bolivia) and the consensual nature of arbitration places the control of the issues you raise with the parties, not the Tribunal. In particular, it is manifestly clear to the Tribunal that it does not, absent the agreement of the parties, have the power to join a non-party to the proceedings; to provide access to hearings to non-parties and, *a fortiori*, to the public generally; or to make the documents of the proceedings public" (para. 17).

[11] The *Methanex* Tribunal decided that: "[…] there is nothing in either the UNCITRAL Arbitration Rules or Chapter 11, Section B, that either expressly confers upon the Tribunal the power to accept amicus submissions or expressly provides that the Tribunal shall have no such power (para. 24). It follows that the Tribunal's powers in this respect must be inferred, if at all, from its more general procedural powers. In the Tribunal's view, the Petitioners' requests must be considered against Article 15(1) of the UNCITRAL Arbitration Rules; and it is not possible or appropriate to look elsewhere for any broader power or jurisdiction (para. 25). Article 15(1) of the UNCITRAL Arbitration Rules grants to the Tribunal a broad discretion as to the conduct of this arbitration, subject always to the requirements of procedural equality and fairness towards the Disputing Parties (para. 26). […] Article 15(1) is intended to provide the broadest procedural flexibility within fundamental safeguards, to be applied by the arbitration tribunal to fit the particular needs of the particular arbitration (para. 27). […] The Tribunal considers that allowing a third person to make an amicus submission could fall within its procedural powers over the conduct of the arbitration, within the general scope of Article 15(1) of the UNCITRAL Arbitration Rules (para. 31)".

[12] "Is it within the scope of Article 15(1) [of the UNCITRAL Rules] for the Tribunal to receive submissions offered by third parties with the purpose of assisting the Tribunal in that process? The Tribunal considers that it is. It is part of its powers to conduct the arbitration in such manner as it considers appropriate" (para. 61).

[13] "Article 44 of the ICSID Convention states: '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 of the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question'. The last sentence of

Tribunals all decided that they had discretion to admit written *amici curiae* briefs (respectively on the ground of Article 15-1 of the UNCITRAL Rules and Article 44 of the ICSID Convention). Interestingly, the *Methanex* and *UPS* Tribunals found support, in doing so, in the practice of the Iran-US Claims Tribunal and the WTO.[15] It is also to be noted that the *Methanex*

Article 44 is a grant of residual power to the Tribunal to decide procedural questions not treated in the Convention itself or in the rules applicable to a given dispute. In applying this provision to the present case, the Tribunal faces an initial question as to whether permitting an amicus curiae submission by a non disputing party is a 'procedural question'. At a basic level of interpretation, a procedural question is one which relates to the manner of proceeding or which deals with the way to accomplish a stated end. The admission of an amicus curiae submission would fall within this definition of procedural questions since it can be viewed as a step in assisting the Tribunal to achieve its fundamental task of arriving at a correct decision in this case" (paras. 10–11).

[14] The quote of paras. 11–12 of the *Aguas Provinciales de Santa Fe* decision is identical to that of paras. 10–11 of the *Vivendi* decision.

[15] After having considered that the wording of Article 15(1) of the UNCITRAL Rules sufficed to support its power to admit *amicus* briefs, the Tribunal nevertheless added, in paras. 21–32 of its decision, that "its approach is supported by the practice of the Iran-US Claims Tribunal and the World Trade Organisation. Note 5 of the Iran-US Claims Tribunal Notes to Article 15(1) of the UNCITRAL Arbitration Rules states: '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 arbitral tribunal in carrying out its task, permit such Government or person to assist the arbitral tribunal by presenting written and [or] oral statements'. This provision was specifically drafted for the Iran-US Claims Tribunal as a supplementary guide. Although (so it appears from published commentaries) it was invoked by Iran or the US as non-arbitrating parties, it was also invoked by non-state third persons (albeit infrequently), such as the foreign banks submitting their own memorial to the Tribunal in *Iran v United States, Case A/15*: see the Award No 63-A/15-FT made by the Full Tribunal (President Böckstiegel and Judges Briner, Virally, Bahrami, Holtzmann, Mostafavi, Aldrich, Ansari and Brower) 2 Iran-US C.T.R. 40, at p. 43. For present purposes, the authoritative guide to the exercise of the Iran-US Claim Tribunal's discretion under Article 15(1) and this award demonstrate that the receipt of written submissions from a non-party third person does not necessarily offend the philosophy of international arbitration involving states and non-state parties. WTO: The distinction between parties to an arbitration and their right to make submissions and a third person having no such right was adopted by the WTO Appellate Body in *Hot-Rolled Lead and Carbon Steel*, paragraph 41: 'Individuals and organisations, which are not Members of the WTO, have no legal "right" to make submissions to or to be heard by the Appellate Body. The Appellate Body has no legal "duty" to accept or

and *UPS* Tribunals took care to include in their decision reasoning in respect of the International Court of Justice's practice – which has traditionally been reluctant to admit *amici* briefs – and as to why such practice should not prevent *amici*'s intervention in the context of an investment arbitration.[16]

In deciding to admit the petitioners' briefs, the *Methanex* and *UPS* Tribunals had to address the issue of whether Article 1128 of NAFTA, providing that a non-disputing State party may make submissions to the Tribunal, stands in the way of admitting *amici* briefs. The argument made in this respect was that private interest groups wishing to put their views before an arbitration tribunal could convey their information to the NAFTA parties, who could then intervene in the arbitration. Both Tribunals rightfully responded that, by being authorised to submit a brief, the *amicus* does not acquire the rights provided in favour of non-disputing parties by Article 1128.[17] The solution is now confirmed, as far as NAFTA

consider unsolicited amicus curiae briefs submitted by individuals or organisations, not members of the WTO […]'. Further, the Appellate Body there found that it had power to accept *amicus* submissions under Article 17.9 of the Dispute Settlement Understanding to draw up working procedures. That procedural power is significantly less broad than the power accorded to this Tribunal under Article 15(1) to conduct the arbitration in such manner as it considers appropriate. For present purposes, this WTO practice demonstrates that the scope of a procedural power can extend to the receipt of written submissions from non-party third persons, even in a juridical procedure affecting the rights and obligations of state parties; and further it also demonstrates that the receipt of such submissions confers no rights, procedural or substantive, on such persons". See also para. 64 of the *UPS* decision.

16 "In the Tribunal's view, the ICJ's practices provides little assistance to this case. Its jurisdiction in contentious cases is limited solely to disputes between States; its Statute provides for intervention by States; and it would be difficult in these circumstances to infer from its procedural powers a power to allow a non-state third person to intervene" (*Methanex*, para. 34). See also para. 64 of the *UPS* decision.

17 The *Methanex* Tribunal decided that "The rights of the Disputing Parties in the arbitration and the limited rights of a Non-Disputing Party under Article 1128 of NAFTA are not thereby acquired by such a third person" (para. 30). The *UPS* Tribunal decided that "As the *Methanex* Tribunal said, the receiving of such submissions from a third person is not equivalent to making that person a party to the arbitration. That person does not have any rights as a party or as a non-disputing NAFTA party" (para. 61).

arbitrations are concerned, by the Free Trade Commission's Statement on Non-Disputing Party Participation adopted on 7 October 2003.[18]

The opposition between *Aguas del Tunari*, on one side, *Methanex*, *UPS*, *Vivendi* and *Aguas Provinciales de Santa Fe* on the other, should not be overemphasised. None of these decisions held that *amici* have a substantial *right* to be heard. All treated the issue as a matter of procedure: while the *Aguas del Tunari* decision held that *amici* should not be admitted as new parties into the arbitration in absence of an agreement of the parties, the *Methanex*, *UPS*, *Vivendi* and *Aguas Provinciales de Santa Fe* decisions held that, absent a consensus on the contrary, the tribunal has residual power to authorise them. This is to say that, would both disputing parties have agreed on the contrary, *amici* briefs would probably not have been admitted. The situation may evolve, however. In fact, if the rationale for *amici* briefs is indeed the interest of the public, the power of the tribunal to admit them should not depend on the parties' agreement, but rather on an assessment of whether its decision may really affect the public. Without going as far as envisaging the emergence of a customary international rule providing for the hearing of *amici curiae*,[19] it could therefore be submitted that in investment arbitration, the power of the tribunal to hear them should not be residual in respect of the parties' agreement. It can be noted, in this respect, that the new U.S. model BIT of 2004,[20] or the 2003 Canadian model BIT,[21] which both expressly provide for the power of the tribunal to accept *amicus curiae* submissions, make no reservation with respect to an agreement on the contrary by the disputing parties.

Consistently with their procedural approach, the *Methanex*, *UPS*, *Vivendi* and *Aguas Provinciales de Santa Fe* Tribunals decided that the applicable UNCITRAL (for *Methanex* and *UPS*) and ICSID (for *Vivendi* and *Aguas Provinciales de Santa Fe*) rules did not grant them the power to

[18] http://www.dfait-maeci.gc.ca/nafta-alena/Nondisputing-en.pdf. In its 16 September 2005 Decision in the NAFTA case opposing *Glamis Gold* to the United States (David D. Caron, Donald L. Morgan, Michael K. Young, Chairman), the Arbitral Tribunal accepted the *amicus* submission of the Quechan Indian Nation on the basis that it complied with the Free Trade Commission's Statement on non-disputing party participation.

[19] On this issue, see Laurence Boisson de Chazournes, "Transparency and Amicus Curiae Briefs", *The Journal of World Investment and Trade*, 2004/2, pp. 334–335.

[20] http://www.ustr.gov.

[21] http://www.dfait-maeci.gc.ca.

add the *amici* as new parties in the arbitration.[22] All found that these provisions did not allow them to give *amici curiae* access to oral hearings (based, respectively, on Article 25-4 of the UNCITRAL Rules and ICSID Arbitration Rule 32-2).[23]

The three tribunals decided that the intervention of *amici curiae* was justified by the fact that, in view of the subject-matter of the arbitration,

[22] The *Methanex* Tribunal decided that: "The Tribunal is required to decide a substantive dispute between the Claimant and the Respondent. The Tribunal has no mandate to decide any other substantive dispute or any dispute determining the legal rights of third persons. The legal boundaries of the arbitration are set by this essential legal fact. It is thus self-evident that if the Tribunal cannot directly, without consent, add another person as a party to this dispute or treat a third person as a party to the arbitration of NAFTA, it is equally precluded from achieving this result indirectly by exercising a power over the conduct of the arbitration. Accordingly, in the Tribunal's view, the power under Article 15(1) must be confined to procedural matters. Treating non-parties as Disputing Parties or as NAFTA Parties cannot be matters of mere procedure; and such matters cannot fall within Article 15(1) of the UNCITRAL Arbitration Rules" (para. 29). The *UPS* Tribunal decided that the *amicus* "does not have any rights as a party or as a non-disputing NAFTA Party. It is not participating to vindicate its rights. Rather the Tribunal has exercised its power to permit that person to make the submission. It is a matter of its power rather than of third party right" (para. 61). The *Vivendi* Tribunal also stated that: "a request to act as *amicus curiae* is an offer of assistance – an offer that the decision maker is free to accept or reject. An *amicus curiae* is a volunteer, a friend of the court, not a party" (para. 13). Para. 13 of the *Aguas Provinciales de Santa Fe* decision is identical.

[23] The *Methanex* Tribunal decided that: "Article 25(4) [of the UNCITRAL Arbitration Rules] provides that: '[Oral] Hearings shall be held in camera unless the parties agree otherwise […]'. The phrase 'in camera' is clearly intended to exclude members of the public, i.e. non-party third persons such as the Petitioners" (para. 41). The *UPS* Tribunal decided: "the relevant provision of the UNCITRAL Rules to which attention is given in the submissions is Article 25(4) under which hearings are in camera unless the parties agree otherwise. They have not so agreed" (para. 67). The *Vivendi* Tribunal decided: "The presence and participation of persons at ICSID hearings is expressly regulated by ICSID Arbitration Rule 32(2), which states: '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'. Rule 32(2) is clear that no other persons, except those specifically named in the Rule, may attend hearings unless both Claimants and Respondent affirmatively agree to the attendance of those persons" (paras. 5–6). The quote in paras. 6–7 of the *Aguas Provinciales de Santa Fe* decision is identical.

the award could affect the public's interests.[24] And they found – although that argument was not decisive – that the *amici* may eventually provide useful information in respect of the consequences of their awards for the public.[25]

[24] The *Methanex* Tribunal held that: "There is 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. The public interest in this arbitration arises from its subject-matter" (para. 49). The *UPS* Tribunal recalled in its reasoning: "the emphasis which the Petitioners, with considerable cogency, have placed both on the important public character of the matters in issue in this arbitration and on their own real interest in these matters" (para. 70). The *Vivendi* Tribunal has been much more specific in this respect, and held that: "Courts have traditionally accepted the intervention of *amicus curiae* in ostensibly private litigation because those cases have involved issues of public interest and because decisions in those cases have the potential, directly or indirectly, to affect persons beyond those immediately involved as parties in the case. In examining the issues at stake in the present case, the Tribunal finds that the present case potentially involves matters of public interest. This case will consider the legality under international law, not domestic private law, of various actions and measures taken by governments. The international responsibility of a state, the Argentine Republic, is also at stake, as opposed to the liability of a corporation arising out of private law. While these factors are certainly matters of public interest, they are present in virtually all cases of investment treaty arbitration under ICSID jurisdiction. The factor that gives this case particular public interest is that the investment dispute centers around the water distribution and sewage systems of a large metropolitan area, the city of Buenos Aires and surrounding municipalities. Those systems provide basic public services to millions of people and as a result may raise a variety of complex public and international law questions, including human rights considerations. Any decision rendered in this case, whether in favor of the Claimants or the Respondent, has the potential to affect the operation of those systems and thereby the public they serve" (para. 19). Para. 18 of the *Aguas Provinciales de Santa Fe* decision is almost identical.

[25] The *Methanex* Tribunal held that "at this early stage, the Tribunal cannot decide definitely that it would be assisted by these submissions on the Disputing Parties' substantive dispute. The Petitions set out the credentials of the Petitioners, which are impressive; but for now, the Tribunal must assume that the Disputing Parties will provide all the necessary assistance and materials required by the Tribunal to decide their dispute. At the least, however, the Tribunal must also assume that the Petitioners' submissions could assist the Tribunal" (para. 48). The *Vivendi* Tribunal felt that "it is possible that appropriate nonparties may be able to afford the Tribunal perspectives, arguments and expertise that will help it arrive at

The concern related to the public interest at stake is not, however, the only one at play in the three decisions admitting *amicus curiae* briefs. Also in line is a quite – albeit not unrelated – different consideration: the intervention of *amici curiae* is appropriate in order to render the process more transparent, and to favour the public's acceptance of the legitimacy of international arbitration in investment matters.[26] This concern of legitimacy is perfectly expressed by the *Methanex* ruling: "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".[27]

III. THE CASE FOR ADMITTING *AMICI CURIAE* IN INVESTMENT ARBITRATION

The case for admitting *amici curiae* in investment arbitration has been powerfully made by many eminent authors. It relies on two main arguments.

The first argument is that investment arbitration is not like private arbitration. It is about reviewing governmental conduct. It fundamentally affects the public's interests, although it uses the rules and culture of *private* arbitration. Private arbitration, unlike investment arbitration, is about settling private disputes. It is confidential. It ignores third party interventions. It therefore does not allow the public interest to be taken into account, and even less to be represented. So, there is a need for some sort

a correct decision" (para. 21). The quote in para. 20 of the *Aguas Provinciales de Santa Fe* decision is identical.

[26] The *Methanex* Tribunal said that: "there is also a broader argument, as suggested by the Respondents and Canada: the Chapter 11 arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive" (para. 49). The *UPS* Tribunal recalled "the emphasis placed on the value of greater transparency for proceedings such as these" (para. 70). The *Vivendi* Tribunal held that: "the acceptance of amicus submissions would have the additional desirable consequence of increasing the transparency of investor-state arbitration. Public acceptance of the legitimacy of international arbitral processes, particularly when they involve states and matters of public interest, is strengthened by increased openness and increased knowledge as to how these processes function. It is this imperative that has led to increased transparency in the arbitral processes of the World Trade Organization and the North American Free Trade Agreement. Through the participation of appropriate representatives of civil society in appropriate cases, the public will gain increased understanding of ICSID processes" (para. 22). The quote in para. 21 of the *Aguas Provinciales de Santa Fe* decision is identical.

[27] Para. 49.

of *avocat general* to voice the concerns of the public, and that is – absent a better institution – an *amicus curiae*.[28]

The second argument is that opacity risks to kill investment arbitration. As Nigel Blackaby wrote in a recent article: "there is a risk of this new child [investment arbitration] dying in infancy, delicate and overprotected by its parents from exposure to the outside world".[29] There is a concern, as expressed by an OECD working paper, that public opinion will not tolerate unknown and unelected people to dispose of the destiny of nations in dark and secret rooms.[30] If the worries of the public are not properly addressed, States will step back from arbitration, and there is a risk that investors will, one day, be sent back to the old and ineffective mechanism of diplomatic protection. So, letting *amici curiae* enter the dark room will show the world how concerned international arbitrators are about issues like the environment, welfare or public health.

IV. CONCERNS RAISED BY THE ADMISSION OF *AMICI*

Those arguments cannot be ignored. Indeed, in cases where the award can have deep impacts on such issues of general interest, it would be outrageous for the tribunal to bluntly ignore any offer of assistance made by third parties claiming to voice the interest of the public.

The case for *amici curiae* also needs, however, to take into account issues of legitimacy and fairness.

The first concern is that of legitimacy. Groups, organisations, and even individuals, who petition to be admitted as third parties or *amici* in investment arbitration pretend to represent the interests of all or part of the civil society. For example, in *Methanex*, the petitioners[31] claimed to have an interest in governments maintaining an optimal environmental protection process through non-discriminatory regulation.

[28] Thomas Wälde, "Transparency, Amicus Curiae Briefs and Third Party Rights", *The Journal of World Investment and Trade* 2004/2, pp. 337 et seq.

[29] N. Blackaby, "Public interest and investment treaty arbitration", *Transnational Dispute Management*, Vol. I, Issue 1, February 2004.

[30] "The traditional manner in which governmental measures are reviewed for compliance with international law in a private setting, i.e. confidential in camera proceedings, has come under increased scrutiny and criticism", OECD, *Transparency and Third Party Participation in Investor State Dispute Settlement Procedures, Statement by the OECD Investment Committee*, June 2005, http://www.oecd.org/dataoecd/25/3/34786913.pdf.

[31] The petitioners were the International Institute for Sustainable Development, Communities for a Better Environment, and the Earth Island Institute.

Amici therefore introduce themselves as advocates for the environment, public health, workers rights, etc. […] But do they really have that legitimacy? That should be a question for the tribunal to decide. In *UPS*, the petition came from a trade-union representing hundreds of thousands of members.[32] Other petitioners, however, might have no such membership. Some might be politically oriented groups, whose views do not at all represent those of the public. A political party could petition to be heard as *amicus curiae*, but why should its views be given more credit than those of another political party? As Laurence Boisson de Chazournes wrote: "there is an issue of accountability and legitimacy".[33]

Is it realistic to expect that an arbitral tribunal will assess the representability of an NGO? Probably not. How then should the tribunal decide whether to authorise an applicant to file an *amicus curiae* brief? Clearly, setting a principle according to which *any* applicant should be allowed the right to file such a brief would be completely unsustainable. The issue therefore becomes one of expertise: the *amici*'s legitimacy would be based on his particular experience and expertise. As the *Vivendi* and *Aguas Provinciales de Santa Fe* Tribunals said in their 19 May 2005 and 17 March 2006 decisions: "the tribunal will only accept *amicus* submissions from persons who establish to the tribunal's satisfaction that they have the expertise, experience and independence to be of assistance".[34] Interestingly, in the *Aguas Provinciales de Santa Fe* case, the Tribunal ruled that insufficient information had been provided by the petitioners[35] in respect of their relevant expertise.[36] Should the conclusion then be that admitting an *amicus curiae* brief is equivalent to hearing an expert? If the answer to that question is affirmative, the question then arises of why should *amici* be treated differently than experts-witnesses.

This question leads us to the second concern raised by the admission of *amici* briefs, which is one of fairness: there are undoubtedly clear differences between experts and *amici*. *Amici* usually petition to be heard, which is not the case of experts. They claim to have an interest in the outcome of the dispute, which is also not the case of experts. At the difference of experts, they are not paid by the parties. Finally, *amici curiae* will provide a broad point of view on the case, whereas experts report on

32 The Canadian Union of Postal Workers.

33 Laurence Boisson de Chazournes, *op. cit.* p. 334.

34 Para. 24 of the *Vivendi* decision. Para. 23 of the *Aguas Provinciales de Santa Fe* decision.

35 The petitioners were the *Fundación para el desarrollo sustentable*, as well as three individuals.

36 Para. 33.

specific issues determined by the tribunal. It is therefore undebatable that an *amicus curiae* is not an expert.

The *UPS* Tribunal has clearly expressed the difference between an *amicus* and an expert-witness. Addressing the argument that Article 1133 of NAFTA[37] provided for a procedure which prevented the Tribunal to grant the petitioners special status as *amici*, the arbitrators responded that "[Article 1133] is about the power of the Tribunal to seek the assistance of independent experts on specialised factual matters. The contribution of an *amicus* might cover such ground, but is likely to cover quite distinct issues (especially of law) and also to approach those issues from a distinct position".[38] So has the *Methanex* Tribunal: "*Amici* are not experts; such third persons are advocates (in the non-pejorative sense) and not 'independent' in that they advance a particular case to a tribunal".[39]

The *amicus*, nevertheless, fulfils a role akin to that of an expert. As the *Vivendi* Tribunal said, the *amicus* is expected to provide "perspectives, arguments and expertise that will help [the tribunal] to arrive at a correct decision".[40] Treating *amici* like experts, however, would raise a number of procedural issues. Article 35 of the ICSID Rules provides that experts may be examined before the tribunal by the parties. Article 27 of the UNCITRAL Rules and Article 6 of the IBA Rules on the taking of evidence provide for a similar rule.

In *Methanex*, the claimant submitted that there was no need to admit the *amici*'s intervention, as any party could call them as witnesses. According to the claimant: "any of the disputing parties would be in a position to call upon the petitioners to offer their testimony as evidence in the proceedings, whereas if the petitioners were to appear as *amici curiae*, the disputing parties would have no opportunity to test by cross-examination the factual basis of their contentions".[41] This objection makes sense. Either the petitioners' briefs are relevant for the outcome of the arbitration, and there is no reason to deny the parties the right to examine

[37] Article 1133 of NAFTA provides that: "Without prejudice to the appointment of other kinds of experts where authorized by the applicable arbitration rules, a Tribunal, at the request of a disputing party or, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report in writing on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree".

[38] Para. 62.

[39] Para. 38.

[40] Para. 21.

[41] Para. 14.

the *amici*, or they are not, and such briefs should not be admitted at all. The *Methanex* Tribunal seemed to address that concern by recalling that "if any part of [the *amici* briefs] were arguably to constitute 'written' evidence, the Tribunal would still retain a complete discretion under Article 25-6 of the UNCITRAL arbitration rules to determine its admissibility, relevance, materiality and weight".[42] But such discretion generally applies to any expert statement, and this correct observation would not be a sufficient reason to deny the disputing parties the right to examine the *amicus*, as they have the right to examine any expert signing a written statement. The difficulty which here arises is to a certain extent an expression of the existing contradiction between the privateness of the arbitration and the public nature of the *amicus curiae*. A possible solution to that contradiction could be to distinguish the status of the *amicus*, which would not be the same as that of an expert-witness, and the conditions under which its testimony would be admitted, which could be assimilated to those applicable to an expert-witness.

Another concern raised by the hearing of *amici curiae* relates to ethics. The *Vivendi* Tribunal has set, as one of the requirements for admitting *amici curiae*, that they have sufficient "independence".[43] What exactly did the Tribunal mean by referring to the independence of the *amicus*? As the *Methanex* Tribunal correctly noted,[44] *amici* are not independent in that they advance a particular case to a tribunal. An *amicus curiae* cannot be expected to be independent in the same way as an expert or a witness because, unlike an expert or a witness, he has a purported interest in the outcome of the dispute. An *amicus* should nevertheless be expected to put forward his point of view in a way which is independent from the parties' procedural strategies. He should not have been invited to do so by one of the parties, and even less financed by one of them. Such requirement is needed to avoid manipulations that could be detrimental to the fairness and transparency of the process. The friend of the court should not be the friend of one of the parties.

There is at least one example of such manipulation of an *amicus curiae*. In the Thailand antidumping rights case,[45] the WTO Appellate Body had received an *amicus* brief from an American organisation named *Consuming Industries Trade Action Coalition* (CITAC). The brief included references to the submissions of the other party, Poland, while the *amicus*

42 Para. 36.

43 Para. 24. Interestingly, such requirement does not appear in the *Methanex* and *UPS* decisions.

44 Para. 38.

45 WT/DS122/AB/R.

had had no access to the file. It then appeared that counsel for Poland was also counsel for CITAC, which led the Appellate Body to reject the brief.

Manipulation of *amici* by parties might be a theoretical risk. Still, it ought to be addressed and tribunals should set appropriate rules to prevent it. Again, the proper remedy should be found in the requirements applying to expert testimony in international arbitration, and in particular to the duty to provide the tribunal and the parties with a statement of independence. From this standpoint, the *Vivendi* Tribunal was perfectly right in requiring from the petitioners that they disclose "the nature of their relationships, if any, to the parties in the dispute", and whether they "received financial or other material support from any of the parties or from any person connected with the parties in this case".[46]

V. FINAL REMARKS

In conclusion, there is certainly a trend towards increased transparency in investment arbitration, and the admission of *amicus curiae* briefs is part of that tendency. Still, the current situation is unsatisfactory. It is unsatisfactory from a procedural point of view, as the parties' right to examine the *amici* – whose testimony might be relevant to the outcome of the arbitration – should be ensured. It is also unsatisfactory from a substantial point of view, as it is hard to reconcile the view according to which the admission of *amici* briefs is justified by the interest of the public with the view according to which the power of the tribunal to authorise them is residual and only exists in the absence of a contrary agreement of the parties. From that standpoint, the recent agreement reached for changes to the ICSID Rules is disappointing, since the possibility to open hearings to the presence of *amici* would still be subject to the consent of the parties.[47]

[46] Para. 25.

[47] According to a release made by *Investment Treaty News* on 30 March 2006 (http://www.iisd.org/investment/itn), while the 2005 proposed amendment to ICSID Rule 32 (proposal made by the Secretariat in its 12 May 2005 Working Paper: Suggested Changes to the ICSID Rules and Regulations, www.worldbank.org/icsid. Such proposal followed a previous one, made in October 2004) would have handed the tribunal greater discretion to open hearings to the public ("after consultation with the Secretary General, and with the parties as far as possible, the tribunal may allow other persons […] to observe all or part of the hearings"), the proposed new rule would set the parties' agreement as a condition for the opening of the hearing. The new rule would now read as follows: "unless either party objects, the Tribunal, after consultation with the Secretary General, and with the parties as far as possible, may allow other persons […] to observe all or part of the hearings […]". The new ICSID Rules would also introduce a requirement that the

In addition, as far as transparency of the process is concerned, it is doubtful that opening hearings to *amici* will suffice to appease the public's worries. The path to the future might rather reside in a more radical change in the rules of investment arbitration to allow for full publicity of the hearings.[48]

Hearings could, for example, be opened to the public through television broadcasts. It remains to be seen whether they would then attract huge crowds of spectators, or whether the purported public's concern about investment arbitration is anything more than a instrument of political criticism against the resolution of investment disputes by private arbitration.

Centre promptly publish excerpts of the legal reasoning of its arbitral tribunals' awards.

[48] See Art. 29–2 of the U.S. 2004 Model BIT Agreement. Open hearings were allowed in the *Methanex* and *UPS* cases, as well as in *Canfor v. United States*.