Myopic Amici? The Participation of Non-disputing Parties in ICSID Arbitration

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I. The 'Growing Pains' of Investor-State Arbitration

Investor-state arbitration has been attracting substantial scrutiny and criticism over the last few years. Scrutiny because there has been a sharp increase in the number of arbitration proceedings being launched by investors against states, with some significant awards making the headlines.[1] Criticism because a number of defending states, public interest groups, and other stakeholders have voiced concerns about the way in which this dispute settlement mechanism is structured and operated.[2] While these criticisms focus on different issues with varying impact on the overall nature and efficiency of investor-state arbitration, together they have led to a sizeable literature on a purported 'crisis' of the system.[3] So loud and

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1 *See The Arbitration Game*, ECONOMIST (Oct. 11, 2014), http://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration [https://perma.cc/S7SJ-HZPT] (discussing a $2.3 billion award to Occidental against the Ecuadorian government).

2 *See* Todd Tucker, *How to Fix the Most Controversial Element of Trade Deals*, POLITICO (Sept. 21, 2016 5:15 AM), http://www.politico.com/agenda/story/2016/09/fix-isds-trade-deals-000204 [https://perma.cc/XQ2R-LWRH] (explaining criticism of investor/state dispute resolution mechanisms).

3 *See, e.g.*, Ari Afilalo, *Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve Their Legitimacy Crisis*, 17 GEO. INT'L ENVTL. L. REV. 51 (2004); Charles Brower & Jeremy Sharp, *The Coming Crisis in the Global*

vigorous was the tone of some of the critiques that some authors referred to the existence of a 'backlash' against investor-state arbitration.[4] Signs of dissatisfaction can be seen in the fine-tuning of the substance and procedure of investment treaties in ways that reveal concerns about previous trends[5] and, even more clearly, in the withdrawal of some states from the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).[6] Taken together, these developments suggest the existence of, at least, 'growing pains' and call for a re-thinking and re-shaping of the of investor-state dispute settlement mechanism.

Two of the most frequent critiques that have been levelled against investor-state arbitration are of a procedural nature, as they focus on institutional features of the system that are considered problematic: the lack of transparency of the proceedings, and the existence of limited opportunities for public participation.[7]

First, investor-state arbitration has been accused of lacking

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Adjudication System, 19 ARB. INT'L 415 (2003); Susan Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005) [hereinafter Franck]; Muthcumaraswamy Sornarajah, *A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration, in* APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES 39 (Karl Sauvant ed., 2008). *But see* Davasish Krishnan, *Thinking About BIT's and BIT Arbitration: The Legitimacy Crisis That Never Was, in* NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: IN MEMORIAM THOMAS WALDE 107 (Todd Weiler & Freya Baetens eds., 2011).

4 Asha Kaushal, *Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime*, 50 HARV. INT'L L.J. 491 (2009) [hereinafter Kaushal]. *See generally* MICHAEL WAIBEL ET AL., THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY (2010) (analyzing factors that contribute to backlash of international investment regime).

5 *See, e.g.*, Karen Cross, *Converging Trends in Investment Treaty Practice*, 38 N.C. J. INT'L L. 151 (2012); Filippo Fontanelli & Giuseppe Bianco, *Converging Towards NAFTA: An Analysis of FTA Investment Chapters in the European Union and the United States*, 50 STAN. J. INT'L L. 211 (2014); Kenneth Vandevelde, *Model Bilateral Investment Treaties: The Way Forward*, 18 SW. J. INT'L L. 307 (2011).

6 Sergey Ripinksy, *Venezuela's Withdrawal From ICSID: What it Does and Does Not Achieve*, INT'L INST. FOR SUSTAINABLE DEV. (Apr. 13, 2012), https://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/ [https://perma.cc/M5VA-QFH5].

7 *See A Response to the Criticism Against ISDS*, EUR. FED'N FOR INV. L. & ARB. 14 (May 17, 2015) [hereinafter EFILA], http://efila.org/wp-content/uploads/2015/05/EFILA_in_response_to_the-criticism_of_ISDS_final_draft.pdf [https://perma.cc/UV2G-RG2F].

transparency.[8] Transparency is an essential constituent of good governance, for investors and states alike. In the realm of investment arbitration the concept refers to the extent to which the general public may be alerted to the existence of a dispute, have access to key arbitration documents including the final award, and attend oral hearings.[9] For the most part, the investment arbitration process parallels the commercial arbitration mechanism, where disputing parties are masters of the proceedings and generally favour confidentiality.[10] The applicable procedural rules are often the same as those applicable to ordinary commercial cases, except in disputes governed by the Arbitration Rules of the International Centre for Settlement of Investment Disputes (ICSID Arbitration Rules), which were designed specifically for investor-state arbitrations.[11] As a result, confidentiality has been a traditional feature of investment arbitration.[12] The topic has assumed considerable importance over the last years, not only in academic circles but also in the media, with some accusing the investor-state

8 *See, e.g.*, Cristina Knahr, *Transparency, Third Party Participation and Access to Documents in International Investment Arbitration*, 23 ARB. INT'L 327 (2007) [hereinafter *Access*]; Cristina Knahr & August Reinisch, *Transparency versus Confidentiality in International Investment Arbitration – The Biwater Gauff Compromise*, 6 L. & PRAC. INT'L CTS. & TRIB. 97 (2007) [hereinafter *Biwater Gauff*]; Daniel B. Magraw, Jr. & Niranjali M. Amerasinghe, *Transparency and Public Participation in Investor-State Arbitration*, 15 ILSA J. INT'L & COMP. L. 337 (2009) [hereinafter Magraw & Amerasinghe]; J. Anthony VanDuzer, *Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation*, 52 MCGILL L.J. 681 (2007) [hereinafter VanDuzer].

9 Jack J. Coe, Jr., *Transparency in the Resolution of Investor-State Disputes: Adoption, Adaptation, and NAFTA Leadership*, 54 U. KAN. L.R. 1339 (2006); Katia F. Gómez, *Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest*, 35 FORDHAM INT'L. L.J. 510, 528 (2012).

10 *See* David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community* 10 (OECD Working Papers on Int'l Inv., Paper No. 3, 2012) [hereinafter OECD], http://www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf [https://perma.cc/XX2Z-2X2U].

11 *See generally ICISD Convention Arbitration Rules*, INT'L CTR. FOR SETTLEMENT INV. DISPS., https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Pages/ICSID-Convention-Arbitration-rules.aspx [https://perma.cc/QCK6-STRF].

12 *Confidentiality and Transparency – ICISD Convention Arbitration*, INT'L CTR. FOR SETTLEMENT INV. DISPUTES, https://icsid.worldbank.org/apps/ICSIDWEB/process/Pages/Confidentiality-and-Transparency.aspx [https://perma.cc/9KVU-MGQV].

arbitration system of being secret.[13]

Several commentators have criticised the emulation of the private and confidential model, as investor-state arbitration is a different creature from commercial arbitration.[14] Investment disputes often raise public interests because their subject matter impacts on the provision of public services such as water, waste management, electricity, or gas;[15] or touches upon sensitive socio-political concerns such as environmental protection – which are normally absent from commercial arbitration[16]. In such proceedings, investors challenge measures adopted by the host-state that the latter frequently argues to be in the public interest.[17] The arbitral tribunal scrutinises the conduct of the host state against the standards of protection prescribed in international investment agreements.[18] As investor-state functions as an equivalent of judicial review of governmental measures, substantial public interests are

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13 *See, e.g.*, *Behind Closed Doors; Investment Arbitration and Secrecy*, ECONOMIST (Apr. 25, 2009), http://www.economist.com/node/13527961 [https://perma.cc/Q52U-ARV3]; Anthony DePalma, *NAFTA's Powerful Little Secret: Obscure Tribunals Settle Disputes, But Go Too Far Critics Say*, N.Y. TIMES (Mar. 11, 2001), http://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html?_r=0 [https://perma.cc/JC8N-5PGJ]; *The Secret Trade Courts*, N.Y. TIMES: THE OPINION PAGES (Sept. 27 2004), http://www.nytimes.com/2004/09/27/opinion/the-secret-trade-courts.html [https://perma.cc/8WYM-38QP].

14 Kate Miles, *Reconceptualising International Investment Law: Bringing the Public Interest into Private Business*, *in* INTERNATIONAL ECONOMIC LAW AND NATIONAL AUTONOMY 295, 296 (Meredith Lewis & Susy Frankel eds., 2010) [hereinafter *Reconceptualising*].

15 Loukas Mistelis, *Confidentiality and Third-Party Participation: UPS v. Canada and Methanex Corp. v. United States*, *in* INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 169, 197 (Todd Weiler ed., 2005).

16 Ross Buckley & Paul Blyschak, *Guarding the Open Door: Non-Party Participation Before the International Centre for Settlement of Investment Disputes*, 22 BANKING & FIN. L.R. 353, 354 (2007) [hereinafter Buckley].

17 *See generally* Lise Johnson et al., *Investor-State Dispute Settlement, Public Interest and U.S. Domestic Law*, COLUMBIA CTR. ON SUSTAINABLE INV. (2015), http://ccsi.columbia.edu/files/2015/05/Investor-State-Dispute-Settlement-Public-Interest-and-U.S.-Domestic-Law-FINAL-May-19-8.pdf [https://perma.cc/FK6V-T5V8].

18 *Investment Protection and Investor-to-State Dispute Settlement in EU Agreements*, EUR. COMM'N (Nov. 2013), http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf [https://perma.cc/79YT-QWGG] (outlining the investment protections for investors).

involved.[19] Because the controversy is so deeply connected with national policies, its resolution will have direct effects on the community.[20] The public has an interest in assuring that decisions are made using proper procedures and taking due account of public interests.[21] The outcome of the case may limit the future legislative and administrative freedom of manoeuvre of states, affecting their ability to pursue public welfare policies.[22] The opacity of investment arbitration has been considered a "lamentable violation of public law principles"[23] that may hamper efforts to track down disputes, evaluate their features, and gauge their consequences. While confidentiality suits commercial disputes well, it is not appropriate in investor-state arbitration, where tribunals are frequently required to balance investment protection with varied societal concerns.[24] Such proceedings are public by their very nature and need to be accessible to the community at large. [25]

A second common criticism regards the lack of openness of the investment arbitration system to public participation.[26] Because it

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19 Nigel Blackaby & Caroline Richard, *Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration?, in* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 253, 255 (Michael Waibel et al. eds., 2010) [hereinafter Blackaby & Richard]; *Biwater Gauff, supra* note 8, at 113.

20 RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 133 (2008); CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 233–34 (2007).

21 Epaminontas Triantafilou, *Amicus Submissions in Investor-State Arbitration After Suez v. Argentina*, 24 ARB. INT'L. 571, 575 (2008) [hereinafter Triantafilou].

22 *Biwater Gauff, supra* note 8, at 113; KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL 373–74 (2013).

23 GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 159 (2007).

24 See Organisation for Economic Co-operation and Development, Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures, OECD Working Papers on International Investment, 2005/01, OECD Publishing, 2005, p. 2, available at http://dx.doi.org/10.1787/524613550768; R. Buckley, P. Blyschak, Guarding the Open Door: Non-Party Participation Before the International Centre for Settlement of Investment Disputes, in Banking and Finance Law Review, 2007, 22(3), p. 354.

25 M. Kinnear, Transparency and Third Party Participation in Investor-State Dispute Settlement, Symposium Co-Organized by ICSID, OECD and UNCTAD, Making the Most of International Investment Agreements: a Common Agenda, 12 December 2005, Paris, p. 2, available at: http://www.oecd.org/investment/internationalinvestmentagreements/36979626.pdf.

26 *See, e.g.*, Nathalie Bernasconi-Osterwalder, *Transparency and Amicus Curiae in ICSID Arbitrations, in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 191

is modelled after commercial arbitration, where the only relevant interests are those of the disputing parties, normally investor-state arbitration does not permit public access to the proceedings.[27] However, this confidential atmosphere is incompatible with the public interest nature of many investments disputes. While commercial arbitration is a system of settling disputes between (mostly) private parties, investor-state arbitration necessarily involves states with their public interest considerations. Since matters of public concern are frequently at the heart of the controversy, third parties such as public interest groups and non-governmental organisations (NGOs) want to have access to the decision-making process.[28] The problems dealt with by investment tribunals are often societal challenges and quite understandably civil society wants to have its say.[29] More specifically, third parties want to be allowed to submit briefs, consult the documents, and attend the hearings.[30] This would increase the transparency of the proceedings but also allow for the incorporation of broader policy considerations into the dispute resolution process. While confidentiality and privacy are traditional features of arbitration, the political legitimacy of the dispute settlement mechanism is put at risk if genuine stakeholders cannot participate in decisions affecting their rights and interests.[31] The deeper the connection between the dispute and public interests, the greater the need for transparency and public input in the decision-making process.[32]

The specific characteristics of investor-state arbitration justify a greater measure of transparency and public participation. The fact

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(Marie-Claire Segger et al. eds., 2011) [hereinafter Bernasconi-Osterwalder]; Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT'L L. 775, 814 (2008) [hereinafter Choudhury]; *Biwater Gauff*, *supra* note 8; Magraw & Amerasinghe, *supra*, note 8.

27 *See* EFILA, *supra* note 7, at 14.

28 *See generally* OECD, *supra* note 10 (discussing Third Party [NGO] access to ISDS).

29 Brigitte Stern, *Civil Society's Voice in the Settlement of International Economic Disputes*, 22 ICSID REV. 280 (2007).

30 A. Sarvanan, *The Participation of Amicus Cuiae in Investment Treaty Arbitration*, 5 J. CIV. & LEGAL SCIS. 201 (2016).

31 Buckley, *supra* note 16.

32 Maciej Zachariasiewicz, *Amicus Curiae in International Investment Arbitration: Can It Enhance the Transparency of Investment Dispute Resolution?*, 29 J. INT'L. ARB. 205, 206 (2012) [hereinafter Zachariasiewicz].

that tribunals are dealing with what are essentially public law issues requires that the population of the host state be informed about the conduct of governments and arbitrators.[33] Citizens will not be pleased if they feel that unknown and unelected people are deciding the future of their country under a veil of secrecy.[34] In the words of Nigel Blackaby, "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".[35] The perceived lack of transparency and openness poses a serious challenge to the investor-state mechanism. The system needs to be reformed under penalty of dying before it can survive its growing pains.[36]

II. Amicus Curiae as a Remedy for the Ills of the System

Responding to public criticism and pressure, over the last decade the investor-state arbitration mechanism has been adjusting its structure to accommodate the participation of third parties, namely through the figure of amicus curiae. An amicus curiae, literally "a friend of the court", is, according to Black's Law Dictionary, "a person who is not a party to a law suit but who petitions courts or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter."[37] Normally amici curiae are individuals or organisations who do not have the right to participate in the dispute as parties but want to intervene because the outcome of the proceedings may affect their interests.[38]

The participation of non-disputing parties in investment arbitration has been justified as a useful tool to promote different public interests. First, amicus participation increases the

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33 Stephan Schill, *International Investment Law and Comparative Public Law – an Introduction, in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 3, 15 (Stephan Schill ed., 2010).

34 Alexis Mourre, *Are Amici Curiae the Proper Response to the Public's Concerns on Transparency in Investment Arbitration,* 5 L. & PRAC. INT'L CTS. & TRIBUNALS 257, 266 (2006) [hereinafter Mourre].

35 Nigel Blackaby, *Public Interest and Investment Treaty Arbitration, in* INTERNATIONAL COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS 355, 356 (Albert Jan van den Berg ed., 2003).

36 Franck, *supra* note 3, at 1625.

37 *Amicus Curiae,* BLACK'S LAW DICTIONARY (8th ed. 2004).

38 Lance Bartholomeusz, *The Amicus Curiae before International Courts and Tribunals,* 5 NON-STATE ACTORS & INT'L. L. 209, 273 (2005) [hereinafter Bartholomeusz].

transparency of the system.[39] Their involvement in the proceedings draws the general public's attention to a controversy that may have a significant impact on public interests and public finances.[40] Second, the participation of third-parties also promotes greater accountability of investment arbitration,[41] addressing a democratic deficit that has been identified in the system.[42] Citizens are given a chance to assess how diligent the state is in the protection of public interests and in the use of public funds.[43] Third, it increases the openness of investment treaty arbitration to civil society, ensuring that the broader community does not perceive it as "secretive".[44] This is in line with the changing nature of investment arbitration, where tribunals are increasingly required to settle disputes that touch upon public interests.[45] The participation of civil society in the proceedings is meant to safeguard the public interests at stake and ensure the sensitivity of governmental entities towards the

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39 Lucas Bastin, *The Amicus Curiae in Investor-State Arbitration*, 1 CAMB. J. INT'L. & COMP. L. 208, 223 (2012) [hereinafter Bastin]; Laurence Boissson De Chazournes, *Transparency and Amicus Curiae Briefs*, 5 J. WORLD INV. & TRADE 333 (2004); Eric De Brabandere, *NGOs and the "Public Interest": The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes*, 12 CHI. J. INT'L. L. 85, 102 (2011) [hereinafter *NGOs and the Public Interest*]; *Biwater Gauff*, *supra* note 8, at 97; Eugenia Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 29 CAL. J. INT'L. L. 200, 206 (2011) [hereinafter Levine]; Phillipe Sands & Ruth Mackenzie, *International Courts and Tribunals, Amicus Curiae*, *in* MAX PLANCK ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW 519 (Rudiger Wolfrum ed., 2011).

40 Triantafilou, *supra* note 21, at 575.

41 Bastin, *supra* note 37, at 227; Choudhury, *supra* note 24, at 808; Amokura Kawharu, *Participation of Non-Governmental Organizations in Investment Arbitration as Amici Curiae*, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 275, 285 (Michael Waibel et al. eds., 2010); VanDuzer, *supra* note 8, at 685.

42 Blackaby & Richard, *supra* 19 at 257; Choudhury, *supra* note 24 at 808; Chiara Ragni, *The Role of Amicus Curiae in Investment Disputes: Striking a Balance Between Confidentiality and Broader Policy Considerations*, *in* FOREIGN INVESTMENT, INTERNATIONAL LAW AND COMMON CONCERNS 86, 87 (Tullio Treves et al. eds., 2014) [hereinafter Ragni]; Triantafilou, *supra* note 21, at 575; Carl Zoellner, *Third-Party Participation (NGO's and Private Persons) and Transparency in ICSID Proceedings*, *in* THE INTERNATIONAL CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES (ICSID): TAKING STOCK AFTER 40 YEARS 179, 200 (Rainer Hofmann & Christian Tams eds., 2007) [hereinafter Zoellner];.

43 Triantafilou, *supra* note 21, at 575.

44 Levine, *supra* note 37, at 217.

45 Andrew Newcombe & Axelle Lemaire, *Should Amici Curiae Participate in Investment Treaty Arbitrations?*, 5 VINDOBONA J. INT'L COM. L. & ARB. 22, 40 (2005).

possible consequences of the arbitral award.[46] Without public input, public interests are less likely to be elaborated upon by the tribunal. Allowing for amicus curiae participation shows the community that investment tribunals are cognisant of societal concerns such as the protection of public health or the environment.[47]

Besides contributing to the advancement of several public interests (greater transparency, accountability, and openness), amicus curiae participation has also been justified as a way to help investment tribunals in rendering better awards.[48] For different reasons, disputing parties may lack the necessary ability or the appropriate incentives to submit all of the relevant facts, legal arguments, and policy implications to the tribunal.[49] Amici can draw the attention of arbitrators to interests that do not necessarily coincide with those of the state,[50] providing the tribunal with its scientific or technical knowledge and offering an additional lawyer of information relevant to the dispute.[51] While arbitrators are required to have appropriate qualifications and experience, this does not mean that they are necessarily able to understand all the aspects of a dispute.[52] The main function of amici curiae is, therefore, to assist the tribunal by offering information and arguments different from those of the disputing parties.[53] Amici are given a role in investment arbitration and, in a broader sense, in the making of international law and policy[54], opening the door for some creative

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46 E. Triantafilou, Amicus Submissions in Investor-State Arbitration After Suez v. Argentina, in Arbitration International, 2008, 24(4), pp. 575-576.

47 Mourre, *supra* note 32, at 266.

48 *Id.* at 265.

49 McLachlan, Shore & Weiniger, *supra* note 20, at 59-60. ; Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AMERICAN J. INT'L L. 611, 615 (1994); Christine Chinkin & Ruth Mackenzie, *Intergovernmental Organizations as "Friends of the Court"*, *in* INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL DISPUTE SETTLEMENT: TRENDS AND PROSPECTS 135–37 (2002); Jarrod Wong & Jason Yackee, *The 2006 Procedural and Transparency-Related Amendments to the ICSID Arbitration Rules: Model Intentions, Moderate Proposals, and Modest Returns, in* 2009-2010 Y.B. ON INT'L INV. L. & POL'Y 233, 250–51.

50 Markus W. Gehring & Avidan Kent, *International Investment Agreements and Sustainable Development: Future Pathways, in* ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 561, 561–71 (Shawkat Alam et al. eds., 2013)

51 Magraw Jr. & Amerasinghe, *supra* note 8, at 337, 347.

52 Gómez, *supra* note 9, at 544.

53 De Brabandere, *supra* note 37, at 107.

54 Tomoko Ishikawa, *Third Party Participation in Investment Arbitration*, 59 INT'L

legal thinking[55] and possibly even helping to reduce the perceived fragmentation of international law.[56] Third party involvement in the proceedings may contribute to improve the quality of awards but also to the development of international investment law as a whole.[57]

Traditionally, investment treaties contained no express provisions concerning the participation of non-parties, neither prohibiting it nor giving an express legal ground for it.[58] In proceedings conducted pursuant to the ICSID Arbitration Rules, Rule 32(2) required the consent of both investor and host state for third parties to attend the hearings.[59] Regarding the submission of briefs by non-disputing parties, the rules were completely silent.

As a result of the mounting pressure for greater public participation in investor-state arbitration, ICSID amended its Arbitration Rules in 2006.[60] The new text of Rule 32(2) governs oral hearings as follows:

> Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.[61]

The amendment basically consisted in a change in language from 'the tribunal shall decide, with the consent of the parties' to 'unless either party objects'.[62] It now suffices that neither party objects for third parties to be allowed to attend oral hearings.[63] The revised version contraries the private character of hearings but still

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& COMP. L.Q. 373–77 (2010).

55 De Chazournes, *supra* note 37, at 335.

56 Bartholomeusz, *supra* note 36, at 278.

57 Levine, *supra* note 37, at 217.

58 *Id.* at 204.

59 *Id.* at 211.

60 *Id.* at 200.

61 INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, ICSID CONVENTION, REGULATIONS AND RULES art. 32(2) (2006).

62 *Id.*

63 *Id.*

allows the parties to veto public access to them.[64] While the result is thus essentially the same, the rationale is different.[65] There is the also additional requirement that the tribunal has to consult with the Secretary General before allowing non-disputing parties to attend hearings.[66] The last sentence of Rule 32(2), requiring the tribunal to establish procedures for the protection of proprietary or privileged information, did not exist prior to the amendment.[67]

As regards the submission of briefs by third parties, a new provision – Rule 37(2) – was introduced:

> After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:
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> (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.[68]

The new rule makes an express reference to the participation of non-disputing parties in arbitral proceedings, namely by allowing them to file written submissions.[69] This basically corresponds to the figure of amicus curiae. Pursuant to Rule 37(2), the decision is

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64 Citation needed

65 ERIC DE BRABANDERE, INVESTMENT TREATY ARBITRATION AS PUBLIC INTERNATIONAL LAW: PROCEDURAL ASPECTS AND IMPLICATIONS 162 (2014).

66 ICSID, *supra* note 59, at r. 32(2).

67 *Id.*

68 *Id.* at r. 37(2).

69 *Id.*

within the full discretion of the tribunal, even though there is the obligation to consult both parties first and to consider, among other things, the three factors mentioned in paragraphs a) to c).[70] The tribunal should also 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.[71] The decision on whether to accept amicus curiae briefs cannot be vetoed by the parties.[72] Naturally, if both parties object the tribunal may find it harder to justify the alleged advantages of third-party participation.[73] Still, the final decision rests with the tribunal.

The new rule ratified past arbitral practice, as different investment tribunals had previously considered that they had the power to accept or refuse amicus submissions.[74] It is a noteworthy example of a growing movement in favour of greater public participation in investor-state arbitration. This trend has been hailed as 'one of the most important evolutions weathered by international law in recent decades',[75] a 'groundbreaking'[76] and 'fascinating' development[77]. Amicus curiae is becoming an 'entrenched'[78], 'standardised'[79] feature of investment arbitration, a symbol of the emergence of the idea of civil society in the settlement of investment disputes[80].

III. Myopic Amici?

The involvement of amici curiae in investment arbitration is

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70 *Id.*

71 *Id.*

72 De Brabandere, *supra* note 37, at 223.

73 Miles, *supra* note 14, at 374.

74 Wong & Yackee , *supra* note 47, at 268.

75 De Brabandere, *supra* note 37, at 112.

76 Ibid.

77 Catherine Kessedjian, *Sir Kenneth Bailey Memorial Lecture: Dispute Resolution in a Complex International Society*, 29 MELBOURNE U. L. REV. 765–75 (2005).

78 VanDuzer, *supra* note 8, at 720.

79 Charles H. Brower II, *Introductory Note to International Centre for Settlement of Investment Disputes (ICSID): Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Procedural Order No. 5*, 46 I.L.M. 572 (2007).

80 Francesco Francioni, *Access to Justice, Denial of Justice, and International Investment Law*, 20 EUR. J. INT'L L. 729, 729–42 (2009).

becoming more common in disputes that raise public policy considerations.[81] As a result, critiques of the system based on lack of transparency and openness to public participation are diminishing in tone.[82] The 2006 amendments to the ICSID rules endowed the system with greater transparency and facilitated the participation of civil society in the proceedings.[83] Despite these amendments, the ICSID Rules do not go far enough in ensuring a full application of the public participation principle. Amici curiae normally request permission from the tribunal to submit briefs.[84] Moreover, frequently amici also seek authorisation to consult the disputing parties' documents, respond to questions from the tribunal, attend the hearings and make oral submissions, and even cross-examine witnesses.[85] However, the access by non-disputing parties to arbitration documents and hearings is still handled rather restrictively under the ICSID Arbitration Rules.[86] The changes introduced in 2006 constituted a modest improvement, of limited practical effect.[87] A review of the ICSID jurisprudence shows that arbitral tribunals have only occasionally allowed amici curiae a role which goes beyond the filing of written submissions.[88]

While Rule 37(2) of the ICSID Rules empowers tribunals to grant third parties amicus curiae status, it does not regulate the access to documents.[89] As a result, amici's access to key arbitral documents is normally dependent upon the parties' consent.[90] Furthermore, the tribunal may deny access by arguing that documents are already publicly available or are privileged.[91] Even if a tribunal decides to grant access to documents, it may still place conditions on the use of that information, for instance, by banning

81 *Id.* at 740.

82 VanDuzer, *supra* note 8, at 687.

83 *Id.* at 687.

84 *Id.* at 703.

85 Bartholomeusz, *supra* note 36, at 277; Bastin, *supra* note 37, at 212.

86 *Id.* at 210.

87 Levine, *supra* note 37, at 214; VanDuzer, *supra* note 8, at 722; Zachariasiewicz, *supra* note 30, at 221.

88 Citation needed

89 Levine, *supra* note 37, at 211.

90 *Id.*

91 VanDuzer, *supra* note 8, at 698.

any public disclosure.[92]

The access of non-disputing parties to hearings is also problematic. Rule 32(2) stipulates that the tribunal can allow non-parties to attend the arbitration hearings unless either party objects.[93] Proposals for the inclusion of an expanded right of non-disputing parties to attend hearings failed to reach the required majority during the discussions that led to the 2006 amendments.[94] The revised rule is disappointing[95] and of limited practical impact,[96] as the opening of the hearings to amici can still be blocked by the parties. Without public access to the hearings, investment arbitration remains rather opaque.[97]

According to information provided by the ICSID,[98] amicus curiae participation has been requested in a total of 20 cases. Requests were denied in six[99] and granted in at least ten cases.[100] In

92 Leon E. Trakman, *The ICSID and Investor-State* Arbitration, *in* REGIONALISM IN INTERNATIONAL INVESTMENT LAW 253, 283 (Leon E. Trakman & Nicola W. Ranieri eds., 2013).

93 CATHERINE A. ROGERS & ROGER P. ALFORD, THE FUTURE OF INVESTMENT ARBITRATION 79 (2009).

94 Alessandra Asteriti & Christian J. Tams, *Transparency and Representation of the Public Interest in Investment Treaty Arbitration*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 787, 794 (Stephan W. Schill ed., 2010).

95 Mourre, *supra* note 32, at 270.

96 Mariel Dimsey, *Foreign Direct Investment and the Alleviation of Poverty. Is Investment Arbitration Falling Short of its Goals?*, *in* POVERTY AND THE INTERNATIONAL ECONOMIC LEGAL SYSTEM: DUTIES TO THE WORLD'S POOR 159, 167 (Krista N. Schefer ed., 2013).

97 Miles, *supra* note 14, at 304–05.

98 *Decisions on Non-Disputing Party Participation*, INT'L CTR. FOR SETTLEMENT INV. DISPS., https://icsid.worldbank.org/apps/ICSIDWEB/process/Pages/Decisions-on-Non-Disputing-Party-Participation.aspx [https://perma.cc/3QS3-MV5L].

99 Aguas del Tunari, S.A. v. Bolivia, ICSID Case No. ARB/02/3, Tribunal's Letter in Response to Non-Disputing Parties' Petition Denied (Jan. 29, 2003); Iberdrola Energía, S.A. v. Guatemala, ICSID Case No. ARB/09/5, Non-Disputing Party Participation Denied (Feb. 12, 2014); Bernhard von Pezold v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Non-Disputing Party Participation Denied (June 26, 2012); Border Timbers Ltd. v. Republic of Zimbabwe, ICSID Case No. ARB/10/25, Non-Disputing Party Participation Denied (June 26, 2012); Apotex Holdings Inc. v. United States of America, ICSID Case No. ARB(AF)12/1, Non-Disputing Party Participation Denied (Mar. 4, 2013).

100 Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae Granted (Mar. 17, 2006); Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency

four cases a request was decided by the tribunal, but whether it was accepted is unknown.[101] The continuation of the proceedings without any reference to the submission of amicus briefs in the case details provided by ICSID allows one to assume that the requests were denied. A review of the ten cases where the participation of non-disputing parties was accepted shows that the position of arbitral tribunals regarding the access of amici curiae to arbitral documents and oral hearings has varied according to the circumstances of the case.

In *Suez and Vivendi v. Argentina*, the amici's request for access to arbitral documents was refused.[102] The tribunal recalled that Rule 37(2) did not deal with the amicus curiae's access to the record and thus provided no guidance.[103] While recognising that amicus must have sufficient information on the subject matter of the dispute in order to be of any assistance, the tribunal considered that the petitioners had sufficient information without access to the

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and Participation as Amicus Curiae Granted (May 19, 2005) and Order in Response to a Petition by Five Non-Governmental Organizations for Permission to make an Amicus Curiae Submission Granted (Feb. 12, 2007); Micula v. Romania, ICSID Case No. ARB/05/20, Application of a Non-Disputing Party to File a Written Submission Granted, (May 15, 2009).; Biwater Gauff (Tanzania) Ltd. v. United Republic Tanzania, ICSID Case No. ARB/05/22, Petition for Amicus Curiae Status Granted (Dec. 1, 2016); Foresti v. Republic of South Africa, ICSID Case No. ARB(AF)/07/1, Further Decision Concerning the Applications of the Non-Disputing Parties Granted (Sept. 25, 2009); Electrabel S.A. v. Hungary, ICSID Case No. ARB/07/19, Procedural Order Concerning the Application of a Non-Disputing Party to File a Written Submission Granted (Apr. 28, 2009); AES Summit Generation Ltd. v. Hungary, ICSID Case No. ARB/07/22, Procedural Order Concerning the Application of a Non-Disputing Party to File a Written Submission Granted (Nov. 26, 2008); Pac Rim Cayman, LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, Procedural Order on Amicus Curiae Granted (Mar. 23, 2011); Philip Morris Brand Sàrl (Switz.) v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Request to Submit an Amicus Curiae Brief Granted (Feb. 12, 2015); Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Non-Disputing party application granted (Mar. 25, 2015). In the last case, the tribunal accepted the non-disputing party's written submission but there is no further information available.

101 Vattenfall AB v. Federal Republic of Germany, ICSID Case No. ARB/12/12; RREEF Infrastructure (G.P.) Ltd. v. Kingdom of Spain ICSID Case No. ARB/13/30; Antin Infraestructure Services Luxembourg S.à.r.l. v. Kingdom of Spain , ICSID Case No. ARB/13/31; Eiser Infrastructure Ltd. v. Kingdom of Spain (ICSID Case No. ARB/13/36).

102 Suez, Sociedad General de Aguas de Barcelona, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to make an Amicus Curiae Submission Granted, at No. 24 (Feb. 12, 2007).

103 *Id.*

arbitration record.[104] The amici's request to attend the hearings was also rejected based on the opposition of the claimants.[105] In *Suez and Interagua v. Argentina*, the tribunal was exactly the same and the decision closely similar.[106] In *Biwater v. Tanzania*, the tribunal denied access to the parties' written pleadings due to the investor's objection.[107] The tribunal did not feel that the information was necessary, as this was a "very public and widely reported dispute" and the information that led to the amici's application to intervene was sufficient to make further submissions.[108] The tribunal also denied access of amici to the oral hearings in the absence of both parties' consent.[109] Nevertheless, the tribunal reserved the right to ask the amici specific questions in relation to their written submission.[110] This case provides a good illustration of the limitations of the current ICSID Rules. The amici had to file a written submission without knowing key arbitral documents.[111] The potential relevance and usefulness of their submission was irremediably affected because they had no access to the allegations made by the claimant and the respondent's defense.[112] The tribunal later justified its divergence on one of the amici's assertions by noting that they did not have all the relevant information.[113] Because they were denied access to the key arbitral documents, the amici were, if not totally blindfolded, at least myopic. They were not totally ignorant of the circumstances of the case – because it was a "very public and widely reported dispute" – but did not perceive

104 *Id.*

105 *Id.* at No. 4.

106 Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae Granted (Mar. 17, 2006).

107 Biwater Gauff (Tanzania) Ltd. v. United Republic Tanzania, ICSID Case No. ARB/05/22, Petition for Amicus Curiae Status Granted, at No. 62–68 (Dec. 1, 2016).

108 *Id.* at No. 65.

109 *Id.* at No. 69–72.

110 *Id.* at No. 72.

111 *Id.*

112 Fiona Marshall, *The Precarious State of Sunshine: Case Comment on Procedural Orders in the Biwater Gauff (Tanzania) Ltd. v. Tanzania Investor-State Arbitration*, 3 MCGILL INT'L J. SUSTAINABLE DEV. L. & POL'Y 202–03 (2007).

113 *See* Biwater Gauff (Tanzania) Ltd. v. United Republic Tanzania, ICSID Case No. ARB/05/22, Petition for Amicus Curiae Status Granted, at No. 60(c) (Dec. 1, 2016) (holding that the Arbitral Tribunal "will be better placed after the April hearing to make further determienation on this issue").

it with a clear vision.[114] Their comprehension of the facts and issues raised was blurred. Because they were not given the chance to read the claim and reply, go through the parties' submissions, and attend the hearings, they were seriously prevented from exercising their function. Restraining public input in this way seems a perverse decision.[115]

In *Piero Foresti and others v. South Africa*, the tribunal allowed the access of amici to a redacted version of the parties' key documents despite the strong objections of the claimants.[116] While the arbitration was discontinued shortly afterwards, the fact is that this decision, the first of its kind by an ICSID tribunal, was a clear step towards greater transparency in investment arbitration.[117] The tribunal held that access to documents was necessary to enable the non-disputing parties to focus their submissions upon the issues arising in the case and to know the parties' positions on those issues.[118] The adopted solution preserved the confidentiality of sensitive information while giving amici the opportunity to make a useful contribution.[119]

In August 2008, the European Commission (EC) applied to the tribunal in *Electrabel v. Hungary* for permission to make a written submission as a non-disputing party.[120] After consulting the parties, the request was accepted by the tribunal.[121] The EC was granted access to some of the parties' pleadings (in redacted form) but was not authorised to attend the hearing.[122] In September 2008, the EC also requested participation as a non-disputing party in *AES Summit*

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114 *Id.* at No. 65.

115 DAVID SCHNEIDERMAN, RESISTING ECONOMIC GLOBALIZATION: CRITICAL THEORY AND INTERNATIONAL INVESTMENT LAW 67 (2013).

116 Foresti v. Republic of South Africa, ICSID Case No. ARB(AF)/07/1, Letter Regarding Non-Disputing Parties (Oct. 5, 2009).

117 Marcus A. Orellana, *The Right of Access to Information and Investment Arbitration*, 26 ICSID REV.: FOREIGN INV. L.J. 102 (2011).

118 Foresti v. Republic of South Africa, ICSID Case No. ARB(AF)/07/1, Letter Regarding Non-Disputing Parties (Oct. 5, 2009).

119 Luigi Crema, *Testing Amici Curiae in International Law: Rules and Practice*, 22 ITALIAN Y.B. INT'L L. 115 (2013).

120 Electrabel S.A. v. Hungary, ICSID Case No. ARB/07/19, Procedural Order Concerning the Application of a Non-Disputing Party to File a Written Submission Granted (Apr. 28, 2009).

121 *Id.*

122 *Id.*

Generation and other v. Hungary.[123] The EC also petitioned for access to the parties' written submissions but it was refused due to lack of consent by both parties.[124] The EC did not request permission to attend the hearings.[125] In April 2009, the EC also requested authorisation to take part in the case *Ioan Micula and others v. Romania*.[126] The petition was accepted and the EC was allowed access to the parties' pleadings, except for confidential or legally privileged documents.[127] The representatives of the EC attended the oral hearing where they provided clarifications to their written submission and answered the parties' questions.[128] In these three cases the amicus curiae was none other than the EC, who participated in the proceedings in order to clarify issues relating to the scope and content of European Law related to the disputes.[129] Being the 'guardian of the treaties', the EC has a vested interest in becoming involved in such arbitrations.[130] This is a significant development in that it means that the grant of amici curiae status is not limited to non-government or private organisations.[131]

In another case, Pac Rim Cayman v. El Salvador, the tribunal invited non-disputing parties to make applications for participation as amici curiae.[132] Several public interest groups successfully

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123 AES Summit Generation Ltd. v. Hungary, ICSID Case No. ARB/07/22, Award Decision, at No. 3.18 (Sept. 23, 2010).

124 *Id.* at No. 3.22.

125 *Id.* at No. 3.1–3.39.

126 Micula v. Romania, ICSID Case No. ARB/05/20, Application of a Non-Disputing Party to File a Written Submission Granted (May 15, 2009).

127 Micula v. Romania, ICSID Case No. ARB/05/20, Award Decision, at No. 36(6) (Dec. 11, 2013).

128 *Id.* at No. 73.

129 The same happened in a case administered by the UNCITRAL. Achmea B.V. v. The Slovak Republic, UNCITRAL PCA Case No. 2008-13, Award (Dec. 7, 2012).

130 Christina Knahr, *The New Rules on Participation of Non-Disputing Parties in ICSID Arbitration: Blessing or Curse?*, *in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 319, 320 (Chester Brown & Kate Miles eds., 2011).

131 Lucas Bastin, *Amici Curiae in Investor-State Arbitration: Eight Recent Trends*, 30 ARB. INT'L 125, 130 (2014).

132 *Procedural Order Regarding Amici Curiae*, INT'L CTR. FOR SETTLEMENT INV. DISPS. para. 1 (November 2, 2011), http://www.italaw.com/sites/default/files/case-documents/ita0608.pdf [https://perma.cc/E9DW-6DZY]. A similar invitation was made recently by the tribunal in Eli Lilly & Co. v. Canada. *See* Eli Lilly & Co. v. Government of Canada, ICSID Case No. UNCT/14/2, Amici Curiae, para. 1 (Nov. 5, 2015) https://icsid.worldbank.org/apps/icsidweb/Pages/News.aspx?CID=169&ListID=74f1e8b

submitted requests.[133] For the first time in the history of investment arbitration, oral hearings were transmitted live via internet.[134] Amici were also provided with access to the transcripts.[135]

Finally, in Philip Morris and others v. Uruguay, the ICSID received a request for amicus participation from the World Health Organization and the WHO's Framework Convention on Tobacco Control Secretariat.[136] The request was accepted.[137] The amici did not request access to documents or hearings.[138]

This excursion through the ICSID case law shows that while initial requests for access to documents and hearings were rejected, recently non-disputing parties have occasionally been granted rights beyond the mere submission of briefs.[139] In Piero Foresti and others v. South Africa the tribunal granted access to the parties' key documents.[140] In Ioan Micula and others v. Romania the amicus was allowed not only access to the parties' pleadings but also to hearings.[141] In *Pac Rim Cayman v. El Salvador*, amici had access to the arbitral documents and followed the hearings via the internet.[142] However, this only happened because the dispute was

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5-96d0-4f0a-8f0c-2f3a92d84773&variation=en_us [https://perma.cc/5QEW-YS2D].

133 *See* Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, http://www.italaw.com/cases/783 [https://perma.cc/83L8-785X]. Furthermore, the Republic of Costa Rica and the United States of America have also made written submissions on the interpretation of the Dominican Republic – Central America – United States Free Trade Agreement. *Id.*

134 CATHRIN ZENGERLING, GREENING INTERNATIONAL JURISPRUDENCE: ENVIRONMENTAL NGOS BEFORE INTERNATIONAL COURTS, TRIBUNALS, AND COMPLIANCE COMMITTEES 127 (2013).

135 *Id.*

136 Sarl v. Uruguay, ICSID Case No. ARB/10/7, Procedural Order No. 3, para. 1 (Feb. 17, 2015), http://www.italaw.com/sites/default/files/case-documents/italaw4161.pdf [https://perma.cc/24HU-LEG2].

137 *Id.* at para. 29.

138 *Id.*

139 Citation needed

140 Foresti v. Republic of South Africa, ICSID Case No. ARB(AF)/07/1), Letter Regarding Non-Disputing Parties, 1 (Oct. 5, 2009), http://www.italaw.com/sites/default/files/case-documents/ita0334.pdf [https://perma.cc/N3EG-G3HW].

141 Micula v. Romania, ICSID Case No. ARB/05/20, Award, para. 36 (Dec. 11, 2013), http://www.italaw.com/sites/default/files/case-documents/italaw3036.pdf [https://perma.cc/JGX5-G6YY].

142 *See* Zengerling, *supra* note **Error! Bookmark not defined.**, at 127.

subject to the Dominican Republic – Central America – United States Free Trade Agreement, whose article 10.21(1) provides that arbitral documents shall be made available to the public, and that hearings shall be conducted in public.[143] In one case subject to the ICSID Rules (Electrabel v. Hungary) the amicus was allowed access to key documents but not to hearings.[144] In another case (AES Summit Generation and other v. Hungary) the request for access to the parties' written submissions was rejected, and there was no request for permission to attend the hearings.[145] Finally, in one case (*Philip Morris and others v. Uruguay*) the amici did not require permission for access to documents or hearings, so it is not possible to know how the tribunal would have decided such requests.[146]

This survey shows that the extension of participatory rights of amici curiae beyond the presentation of written submissions has been timid. There were a few exceptions but they do not allow to identify a clear trend towards greater transparency and public participation in proceedings under the ICSID Rules. As a result, amici have a myopic vision of the dispute. The efficiency of amicus participation without access to arbitral documents and hearings is doubtful for different reasons. First, without having access to the key arbitral documents, potential amici cannot fully understand the nature of the dispute and the issues raised therein and decide whether they want to intervene.[147] Non-parties are unlikely to have a complete picture of the dispute by relying solely on the tiny description available on the ICSID website or by reading press reports.[148] Second, if not granted access to the parties' submissions, amici have difficulties in determining whether they can actually 'assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular

143 *CAFTA-DR, Chapter 10*, at 16 https://ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file328_4718.pdf [https://perma.cc/XJA8-DQKJ].

144 Electrabel v. Hungary, ICSID Case No. ARB/07/19, Procedural Order No. 4, 6–9 (Apr. 28, 2009), http://www.italaw.com/sites/default/files/case-documents/italaw7053.pdf [https://perma.cc/M99K-UP67].

145 AES Summit Generation Ltd. v. Hungary, ICSID Case No. ARB/07/22, Award (Sept. 23, 2010), http://www.italaw.com/sites/default/files/case-documents/ita0014_0.pdf [https://perma.cc/8AUM-U479].

146 *See* Morris v. Uruguay, *supra* note **Error! Bookmark not defined.**, at para 16.

147 *See* Bernasconi-Osterwalder, *supra* note 25, at 206.

148 *See* Blackaby, *supra* note 19, at 272.

knowledge or insight that is different from that of the disputing parties', as stipulated in the ICSID Arbitration Rules.[149] Without access to relevant documents and proceedings, the ability of amici to formulate effective, meaningful, and informed submissions is seriously limited;[150] even worse, they may end up giving opinions based on inaccurate or incomplete information.[151] As they do not know whether the parties have already addressed their main concerns or what arguments they have already presented,[152] there is also a risk of overlap or redundancy. As a result, the disputing parties may have to comment on submissions which may be useless or repetitive.[153]

In their current state the ICSID rules provide a limited solution to the perceived problem of lack of public participation in investment arbitration. Amicus curiae have been justified as a useful tool to, inter alia, increase the transparency of the dispute settlement mechanism.[154] However, this objective is ancillary to the true purpose of amicus curiae, which is to assist the tribunal by providing the arbitral panel with arguments, perspectives and expertise that

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149 *See* Bernasconi-Osterwalder, *supra* note 24, at 205; Orellana, *supra* note 113, at 101.

150 *See* Bernasconi-Osterwalder, *supra* note 24, at 206; Blackaby, *supra* note 19, at 268; Nicholas Hachez & Jan Wouters, *International Investment Dispute Settlement in the Twenty-First Century: Does the Preservation of the Public Interest Require an Alternative to the Arbitral Model?*, *in* INVESTMENT LAW WITHIN INTERNATIONAL LAW: INTEGRATIONIST PERSPECTIVES 417, 439 (Freya Baetens ed., 2013); Magraw, Jr., *supra* note 8, at 344; Miles, *supra* note 22, at 374–75; Rahim Moloo, *Evidentiary Issues Arising in an Investment Arbitrat*ion, *in* LITIGATING INTERNATIONAL INVESTMENT DISPUTES: A PRACTITIONER'S GUIDE 287, 310 (Chiara Giorgetti ed., 2014); Kyla Tienhaara, *Third Party Participation in Investment-Environment Disputes: Recent Developments*, 16 RECIEL 230, 231 (2007); Wong, *supra* note 47, at 266, 269.

151 *See* James Harrison, *Human Rights Arguments in Amicus Curiae Submissions: Promoting Social Justice?*, *in* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 396, 406 (Pierre-Marie Dupuy et al. eds., 2009); Triantafilou, *supra* note 21, at 577.

152 N. Blackaby, C. Richard, Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration?, in Waibel, M., Kaushal, A., Chung, K., Balchin, C. (eds.), "The Backlash against Investment Arbitration: Perceptions and Reality", Alphen aan den Rijn: Kluwer Law International, 2010, p. 272.

153 *See* Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 PA. ST. L. REV. 1269, 1294 (2009); Blackaby, *supra* note 19, at 272; Charles N. Brower, *The Ethics of Arbitration: Perspectives from a Practicing International Arbitrator*, 5 PUBLICIST 1, 29 (2010).

154 Probably referencing Maxwell piece below.

the disputing parties may not provide.[155] Granting amicus curiae status to non-disputing parties is a fundamental gateway for public participation in the arbitration process. Naturally, the effectiveness and usefulness of this participation will depend upon the transparency of the proceedings, in particular the extent of access to key documents which enables the amici to understand the nature of the dispute and the arguments under discussion. Hence, a distinction should be drawn between transparency and public participation. One thing is to have access to information on the dispute; another is to be able to take part in the arbitral proceedings, not passively but actively, having a chance to influence the course of the proceedings. If amici are not given a proper chance to get acquainted with the statements of claim and defence and other essential documents, and attend the hearings, they are seriously prevented from exercising their role. Without effective knowledge of the essential elements of the dispute, amici are precluded from making informed submissions and instil public concerns into the decision-making process. The openness of proceedings to civil society through the participation of amici curiae requires a higher measure of transparency. Indeed, openness implies a form of active transparency – amici need to be able not only to 'see' what is going on but also to actively participate in the proceedings. Naturally, the issues of transparency and third party participation are intimately linked. Transparency allows for more informed public participation; just like third party participation increases the transparency of the process.

IV. The Need for a More Efficient Therapy

Amicus curiae participation has been hailed as a mechanism that raises public policy considerations which are necessary to properly decide disputes deeply associated with public interests.[156] In some cases the legitimacy of adjudicative decisions which affect regulatory concerns requires views other than those of the investor and host state to be represented in the process.[157] The participation of non-disputing parties in the proceedings allows for the introduction of public interests and common concerns in the

155 Iain Maxwell, *Transparency in Investment Arbitration: Are Amici Curiae the Solution?*, 3 ASIAN INT'L ARB. J. 176, 185 (2007).

156 *See* Newcombe, *supra* note 43, at 30.

157 *See* Van Harten, *supra* note 23, at 159.

arbitration system.[158] However, concerns regarding the openness of the dispute settlement mechanism may continue to linger in the absence of rules that endow amici curiae with proper participation rights.[159] The ICSID Rules grant amici curiae the right to file amicus briefs without simultaneously granting them access to the arbitration proceedings.[160] The 2006 reform seems to have stopped in the middle of the road towards greater public participation,[161] constraining the potential advantages of amicus curiae intervention.[162] Admitting amici without granting them true participatory rights is at most a 'political quick fix'.[163] Ten years have elapsed since the last amendment to the ICSID Arbitration Rules.[164] Over the last decade, tribunals, disputants, and non-disputing parties had the opportunity to get acquainted with the ICSID provisions on the participation of non-disputing parties and to test their advantages and shortcomings. The time is ripe to fine-tune them according to the lessons learned from the existent case law.

A movement towards the expansion of participatory rights of amici curiae is already noticeable in the negotiation of international investment treaties. A few recent investment agreements have incorporated express rules allowing for amicus curiae participation and granting them access to arbitral documents and hearings. In arbitral proceedings conducted under these instruments the disputing parties will not have the possibility of refusing public participation since the procedure to be applied by the tribunal is determined not only by the applicable rules of the arbitration institution but also by those laid down in the investment treaty.[165] "While this method of attaining amicus curiae participation is not as all-encompassing as amending the ICSID Arbitration Rules, it has an incremental effect."[166] If this trend becomes widespread, the ICSID may consider that extensive participatory rights are an

158 *See* Magraw Jr., *supra* note 8, at 343; Ragni, *supra* note 40, at 87.

159 Citation needed

160 *See* Magraw Jr., *supra* note 8, at 344.

161 *See* Zachariasiewicz, *supra* note 30, at 223.

162 *See* Ragni, *supra* note 40, at 98.

163 *See* Blackaby, *supra* note 19, at 274.

164 *See* ICSID Regulations and Rules, *supra* note 59.

165 *See* De Brabandere, *supra* note 62, at 163.

166 *See* Bastin, *supra* note 37, at 232.

integral part of the concept of amici curiae and should therefore be granted whenever this status is conceded to non-disputing parties.

In the framework of the North American Free Trade Agreement (NAFTA)[167], the public access to arbitration documents is much easier than under the ICSID Arbitration Rules. In a 2001 Statement,[168] the Free Trade Commission clarified that nothing in the relevant arbitral rules imposes a general duty of confidentiality or precludes the Parties from providing public access to documents submitted to, or issued by, Chapter Eleven tribunals, apart from the limited specific exceptions set forth expressly in those rules.[169] The NAFTA parties agreed to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of confidential business information; information which is privileged or otherwise protected from disclosure under the Party's domestic law; and information which the Party must withhold pursuant to the relevant arbitral rules, as applied.[170] The parties reaffirmed that disputing parties may disclose to other persons in connection with the arbitral proceedings such unredacted documents as they consider necessary for the preparation of their cases, but they shall ensure that those persons protect the confidential information in such documents.[171]

Similarly, article 29(1) of the 2012 U.S. Model Bilateral Investment Treaty[172] provides that the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing party and make them available to the public: pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions, minutes or transcripts of hearings of the tribunal, where available; and orders, awards, and decisions of the tribunal.[173] Article 3 of the UNCITRAL Rules on

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167 See http://www.naftanow.org/.

168 NAFTA Free Trade Commission, *North American Free Trade Agreement Notes of Interpretation of Certain Chapter 11 Provisions* (July 31, 2001), http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp [https://perma.cc/YL3B-QLZE].

169 *Id.*

170 *Id.*

171 *Id.*

172 *2012 U.S. Model Bilateral Investment Treaty*, https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf [https://perma.cc/6P83-L2PN].

173 *Id.*

Transparency in Treaty-based Investor-State Arbitration, which came into effect on 1 April 2014, also requires the following documents to be made available to the public, subject to some limitation on confidential or protected information: the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence and any further written statements or written submissions by any disputing party; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves; any written submissions by the non-disputing Party (or Parties) to the treaty and by third persons, transcripts of hearings, where available; and orders, decisions and awards of the arbitral tribunal.[174] Finally, article 9.23 (Transparency of Arbitral Proceedings) of the Trans-Pacific Partnership, as released in November 2015, provides that, subject to some limitations, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing parties and make them available to the public: the notice of intent; the notice of arbitration; pleadings, memorials and briefs submitted to the tribunal by a disputing party and any written submissions; minutes or transcripts of hearings of the tribunal, if available; and orders, awards and decisions of the tribunal.[175]

The ICSID Arbitration Rules contain no express provision on the access of non-disputing parties to arbitral documents. Thus, the tribunal can decide the question under the general procedural powers contained on Article 44 of the ICSID Convention.[176] Such a decision is not subject to the consent of the parties, unless there is a confidentiality order made earlier in the proceedings.[177] In order to

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174 *See* Christopher Kee, *Article 3. Publication of Documents*, *in* TRANSPARENCY IN INTERNATIONAL INVESTMENT ARBITRATION: A GUIDE TO THE UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION 91 (Dimitrij Euler et al. eds., 2015).

175 *See Chapter 9: Investment*, TRANS-PACIFIC PARTNERSHIP, https://medium.com/the-trans-pacific-partnership/investment-c76dbd892f3a#.qofpuzlbr [https://perma.cc/8ZJZ-UUS3]. *Trans-Pacific Partnership*, OFF. U.S. TRADE REPRESENTATIVE, https://medium.com/the-trans-pacific-partnership. See also article 8.36 of the Comprehensive Economic and Trade Agreement (CETA), available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.

176 ICSID Convention, Regulations and Rules, art. 42 (Apr. 2006).

177 Maciej Zachariasiewicz, *Amicus Curiae in International Investment Arbitration: Can It Enhance the Transparency of Investment Dispute Resolution?*, 29 J. INT'L ARB. 205, 218 (2012).

file informed submissions, amici normally need to have access to more information than that publicly available.[178] However, sometimes tribunals consider that the information in the public domain is sufficient and thus deny access to the arbitral record.[179] This approach to the problem is also a result of the traditional assimilation of the principle of confidentiality – habitually seen as one of the cornerstones of arbitration – in the settlement of investor-state disputes.[180] However, investment disputes are frequently associated with public interest and common concerns.[181] Therefore, the level of confidentiality should be lower in investment arbitration than in commercial arbitration. As the ICSID Arbitration Rules are silent on which documents should be made public and which should remain confidential, the tribunal has the discretion to determine which documents should be made accessible to amici in each case.[182]

The ICSID Arbitration Rules should be amended, expressly granting amici the right to access key arbitral documents. The existence of public interests associated with investor-state arbitrations should lead to a presumption of publicity of the proceedings, unless confidentiality can be justified, in whole or in part.[183] If amici are provided with essential documents they have a better opportunity to make an insightful contribution to the proceedings. Timely disclosure of information is vital to better participation, and the disadvantages are minimal.[184] In cases where parties express legitimate concerns about the disclosure of confidential or privileged information the tribunal should ask the disputing parties to summarize the facts, issues and arguments.[185] The legal instruments mentioned above are useful sources of

178 *Id.*

179 Eloïse Obadia, *Extension of Proceedings Beyond the Original Parties: Non-Disputing Party Participation in Investment Arbitration*, 22 ICSID REV. 349, 373 (2007).

180 *Id.* at 374.

181 *Id.*

182 Christina Knahr, *Transparency, Third Party Participation and Access to Documents in International Investment Arbitration*, 23 ARB. INT'L 327, 329 (2007).

183 Bernardo M. Cremades & David J.A. Cairns, *The Brave New World of Global Arbitration*, 3 J. WORLD INV. 173, 197 (2002).

184 Daniel B. Magraw Jr. & Niranjali M. Amerasinghe, *Transparency and Public Participation in Investor-State Arbitration*, 15 ILSA J. INT'L & COMP. L. 337, 359 (2009).

185 Eloïse Obadia, *Extension of Proceedings Beyond the Original Parties: Non-Disputing Party Participation in Investment Arbitration*, 22 ICSID REV. 349, 373 (2007).

inspiration in shifting the role of amici in ICSID arbitrations from passive witnesses to active participants.

The last years have also witnessed a growing trend in favour of allowing public access to the arbitral hearings. Within NAFTA, Canada, the United States, and Mexico have agreed that investor-state hearings should be open to the public.[186] Similarly, article 29(2) of the 2012 U.S. Model Bilateral Investment Treaty provides: 'The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements.[187] However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal.[188] The tribunal shall make appropriate arrangements to protect the information from disclosure.'[189] Pursuant to article 6 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, hearings for the presentation of evidence or for oral argument shall be public.[190] Where there is a need to protect confidential information or the integrity of the arbitral process, the arbitral tribunal shall make arrangements to hold in private that part of the hearing requiring such protection.[191] The arbitral tribunal shall make logistical arrangements to facilitate the public access to hearings (including where appropriate by organizing attendance through video links or such other means as it deems appropriate).[192] However, the arbitral tribunal may, after consultation with the disputing parties, decide to hold all or part of the hearings in private where this becomes necessary for logistical reasons, such as when the circumstances render any original arrangement for public access to a hearing infeasible.[193] The second paragraph of article 9.24 of the Trans-Pacific Partnership also establishes the open nature of

186 NAFTA Free Trade Commission, *Joint Statement: Decade of Achievement* (July 16, 2004), http://www.sice.oas.org/tpd/nafta/Commission/Statement2004_e.asp [https://perma.cc/3H3Q-GM5F].

187 *2012 U.S. Model Bilateral Investment Treaty*, article 29(2).

188 *Id*.

189 OFFICE OF THE U.S. TRADE REPRESENTATIVE, U.S. MODEL BILATERAL INVESTMENT TREATY 1, 32 (2012).

190 *See* U.N. COMM'N ON INT'L LAW, UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION 1, 10 (2014).

191 *Id.*

192 *Id.*

193 *Id.*

hearings. [194] The tribunal is required to determine, in consultation with the disputing parties, the appropriate logistical arrangements and make appropriate arrangements to protect protected information.[195] The approach taken in the Trans-Pacific Partnership is different from previous provisions on procedural transparency because its application is mandatory and arbitral hearings can only be closed temporarily. [196] It is a substantial step towards greater transparency and openness in investment arbitration.

As the current text of rule 32(2) requires the consent of the parties, public access to the proceedings remains conditional.[197] In practice, most hearings and are not open because one of the parties objects to the presence of third parties at the hearings, even when the dispute presents a clear public interest.[198] ICSID tribunals should have the power to decide for themselves whether to permit amici's access to hearings. This could be achieved simply by removing the prerequisite of 'the consent of the parties'[199] mentioned on rule 32(2) or by introducing criteria similar to those contained in rule 37(2) concerning written submissions.[200] This change has been suggested previously but was not included in the amendments of 2006.[201] The removal of the veto power of the parties would increase the sphere of activity of amici curiae.[202] An evolution of the rule in this sense seems unstoppable in the long run.[203] NAFTA, the 2012 US Model BIT, the UNCITRAL Rules on Transparency in

194 *Trans-Pacific Partnership*, article 9.23.

195 *Id*.

196 Sonja Heppner, *A Right of Public Access to Investor-State Arbitral Proceedings?*, KLUWER ARB. BLOG (Dec. 8, 2015), http://kluwerarbitrationblog.com/2015/12/09/a-right-of-public-access-to-investor-state-arbitral-proceedings [https://perma.cc/8M62-9DVH].

197 ICSID Convention, Regulations and Rules, r. 32(2) (Apr. 2006).

198 ERIC DE BRABANDERE, INVESTMENT TREATY ARBITRATION AS PUBLIC INTERNATIONAL LAW. PROCEDURAL ASPECTS AND IMPLICATIONS 162, 163 (2014).

199 ICSID Convention, Regulations and Rules, r. 32(2) (Apr. 2006).

200 *Id.* at r. 32(7).

201 Jorge E. Viñuales, *Human Rights and Investment Arbitration: the Role of Amici Curiae*, 8 INT'L LAW: REVISTA COLOMBIANA DE DERECHO INTERNACIONAL 231, 259 (2006).

202 Lucas Bastin, *The Amicus Curiae in Investor-State Arbitration*, 1 CAMB. J. INT'L. & COMP. L. 208, 232 (2012).

203 Carl S. Zoellner, *Third-Party Participation (NGO's and Private Persons) and Transparency in ICSID Proceedings*, *in* THE INTERNATIONAL CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES - TAKING STOCK AFTER 40 YEARS 206 (Rainer Hofmann & Christian Tams eds., 2007).

Treaty-based Investor-State Arbitration and Chapter 9 of the Trans-Pacific Partnership constitute powerful examples of how the publicness of arbitral hearings is becoming an entrenched principle in modern investment instruments. According to Parra, the time may have come for ICSID to reverse the general rules regarding access to documents and attendance at hearings; more specifically, ICSID might amend its rules to provide for the publication of all documents generated in proceedings, unless or to the extent decided otherwise by the arbitrators, and for tribunals to have full authority to allow third parties to attend or observe hearings.[204]

The expansion of the participatory rights of amici curiae should, naturally, be made with caution. Still, if concerns regarding confidential information and the cost and time-efficiency are properly taken into account, it seems possible to strike an appropriate balance between preserving the traditional features of arbitration and enhancing the systemic legitimacy of state-investor dispute resolution.[205] Most, if not all, potential costs of increased transparency can be avoided if tribunals carefully exercise their discretion in the fields of transparency and third party participation. And, because the parties choose their arbitrators and trust them to rule on the substantive issues, there is no convincing reason why tribunals should be unfit to properly manage these procedural competence as well.[206]

While ICSID Arbitration Rules and international investment agreements are not amended, the expansion of the role of amici curiae will depend, to a large extent, on the efforts of amici themselves. A revision of these instruments takes time and requires negotiating efforts. As a result, the conditions of confidentiality and lack of capacity for amicus submissions are likely to remain the predominant practice for investor-state arbitration for the years to come.[207] The scenario does seem likely to change in the near future,

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204 ANTHONY R. PARRA, THE HISTORY OF ICSID 323, 324 (2012).

205 Eugenia Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 29 CAL. J. INT'L L. 200, 223 (2011).

206 Carl S. Zoellner, *Third-Party Participation (NGO's and Private Persons) and Transparency in ICSID Proceedings, in* THE INTERNATIONAL CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES - TAKING STOCK AFTER 40 YEARS 207 (Rainer Hofmann & Christian Tams eds., 2007).

207 Kate Miles, *Reconceptualising International Investment Law: Bringing the Public Interest into Private Business, in* INTERNATIONAL ECONOMIC LAW AND NATIONAL

particularly due to the nature of arbitration as a process driven by the parties' agreement.[208] Still, amicus status may be the only available route for public participation in many cases.[209] Third parties interested in having access to the proceedings and actively taking part in them should strive to win and deepen the familiarity and trust that states and tribunals have with and in them. By making reasonable and targeted demands, which seek to augment by gradations the current structure of the system and not to overhaul it holistically, amici curiae will be more likely to achieve institutional reform granting them greater access.[210] As the participation of non-parties becomes more frequent, amici curiae may strive for tribunals to lessen current limits on access to documents and hearings. Alternatively, parties – namely, states – with an interest in hearing from a particular third party may request the tribunal to hear them a fact or expert witness. In this case they will have access to the record and their testimony will be subject to the same scrutiny at the oral hearing as that of any other witness.[211]

Civil society plays an increasing role in the debate surrounding the evolution of the international investment law and policy regime. This process will more and more involve, if not require, a multi-stakeholder process that takes into account the concerns of civil society, reflecting the pluralistic nature of modern societies.[212] It may be said that non-disputing parties are filling a gap in regulatory order by placing certain issues on the political agenda, and

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AUTONOMY 375, 396 (Meredith Lewis & Susy Frankel eds., 2010).

208 Christopher Kee & Mariel Dimsey, *Foreign Direct Investment and the Alleviation of Poverty. Is Investment Arbitration Falling Short of its Goals?, in* POVERTY AND THE INTERNATIONAL ECONOMIC LEGAL SYSTEM: DUTIES TO THE WORLD'S POOR 159, 168 (K. Schefer ed., 2013).

209 Dina Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 A.J.I.L 611, 612 (1994).

210 Lucas Bastin, *The Amicus Curiae in Investor-State Arbitration*, 1 CAMB. J. INT'L. & COMP. L. 208, 230 (2012).

211 Rahim Moloo, *10 Evidentiary Issues Arising in an Investment Arbitration, in* LITIGATING INTERNATIONAL INVESTMENT DISPUTES: A PRACTITIONER'S GUIDE 287, 315 (C. Giorgetti ed., 2014).

212 KARL P. SAUVANT & FREDERICO ORTINO, MINISTRY FOR FOREIGN AFFAIRS OF FIN., IMPROVING THE INTERNATIONAL INVESTMENT LAW AND POLICY REGIME: OPTIONS FOR THE FUTURE 45 (2013), http://ccsi.columbia.edu/files/2014/03/Improving-The-International-Investment-Law-and-Policy-Regime-Options-for-the-Future-Sept-2013.pdf [https://perma.cc/ZZL4-6S26].

contesting the very future of that regulatory order by their actions.[213] Overall, the nature of investor-state arbitration calls for a greater measure of public participation. When crucial public interests are involved, public interest groups and NGOs should be given a fair and adequate opportunity to voice their concerns about the possible impact of the arbitral award in the community at large. Greater public participation also adds a measure of accountability for the arbitrators, giving them greater incentive to consider the public's interest.

The ICSID Arbitration Rules, as they currently stand, are clearly unsatisfactory. The procedural flaws identified previously perpetuate a system and culture that is antagonistic to the proper consideration of public policy issues in investment disputes.[214] A reform is necessary so as to strike a proper balance between public policy concerns and investment promotion and protection. The principle of public participation should be, if not completely assimilated, at least better balanced against other rationales of the investor-state dispute settlement mechanism.[215] The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration Transparency elevated the principle of transparency into one of the global norms in international investment law.[216] NAFTA, the 2012 US Model BIT and similar BITs and Chapter 9 of the Trans-Pacific Partnership also set higher standards that turn public participation into a cornerstone of the investor-state arbitration system. After one decade of consolidation of the figure of amici curiae, the time is ripe for ICSID to endow non-disputing parties with the necessary tools to perform their function with greater benefit to the parties, the arbitration community, and the public at large.

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213 Peter Muchlinski, *Policy Issues*, *in* THE OXFORD HANDBOOK INTERNATIONAL INVESTMENT LAW 3, 8 (Peter Muchlinski et al. eds., 2008).

214 Kate Miles, *Reconceptualising International Investment Law: Bringing The Public Interest Into Private Business*, *in* INTERNATIONAL ECONOMIC LAW AND NATIONAL AUTONOMY 307 (Meredith Lewis & Susy Frankel eds., 2010).

215 Markus W. Gehring & Avidan Kent, *International Investment Agreements and the Emerging Green Economy: Rising to the Challenge*, *in* INVESTMENT LAW WITHIN INTERNATIONAL LAW: INTEGRATIONIST PERSPECTIVES 187, 201 (Freya Baetens ed., 2013).

216 *A Response to the Criticism Against ISDS*, EUR. FED'N FOR INV. L. & ARBITRATION 14 (May 17, 2015), http://efila.org/wp-content/uploads/2015/05/EFILA_in_response_to_the-criticism_of_ISDS_final_draft.pdf [https://perma.cc/QCJ8-LR4V].