

**RECENT DEVELOPMENTS IN THE LAW AND PRACTICE OF AMICUS BRIEFS IN INVESTOR-STATE ARBITRATION**

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**Abstract**

*This article considers recent developments in treaties, arbitral rules and tribunal decisions in order to make certain observations about the law and practice of amicus briefs. The article concludes, inter alia, that there continues to be increasing receptiveness towards amicus briefs in investor-state arbitration, albeit that tribunals are actively balancing the desire for greater transparency with other important objectives including arbitral efficiency and proportionality. The article suggests that these developments are motivated by a desire to further enhance the legitimacy of investor-state arbitration.*

**I. Introduction**

An amicus is a “friend of the court”, a person or organisation not party to the dispute but with a perspective or an interest in interjecting from which a court or tribunal might benefit. Given that arbitration is based on the consent of the disputing parties, the emergence of amicus intervention into the system of investor-state arbitration might on its face appear to be a surprising development. However, arbitral rules have been interpreted as permitting such intervention, and over time, and in response to demands for greater transparency, have been modified expressly to envisage amicus intervention. Lawmakers too have begun to consider and expand the potential role of amici in their treaties.

In the fifteen years since amicus briefs were first admitted in investor-state arbitrations, they have emerged as the principal means through which non-governmental organisations [“**NGOs**”], regulatory bodies, industry associations, individuals and other third parties have been able to participate formally in arbitral proceedings. This paper analyses the current law and practice of amicus briefs in investor-state arbitration, with a particular focus on recent developments in international legal instruments and tribunal determinations.<sup>1</sup>

Section I of this article analyses the history, current status and possible future development of amicus provisions contained within key free trade agreements [“**FTAs**”], investment treaties and the rules of arbitral institutions. With a focus on recent cases, Sections II and III study how tribunals have treated applications to file amicus briefs and how the determinations of tribunals have been affected by amicus briefs, respectively. Section IV draws conclusions about the recent law and practice and discusses possible causes of these phenomena. Finally, Section V considers other types of amicus intervention, as well as the relationship between amicus intervention and transparency generally.

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<sup>1</sup> Briefs submitted by non-disputing *treaty* parties, whose participation in proceedings is often enshrined in the relevant investment treaty as an unconditional right, are beyond the scope of this article.

## II. Amicus Provisions in International Legal Instruments

Amicus provisions can be found in: (A.) FTAs and investment treaties; and (B.) the rules of arbitral institutions. This section considers how these provisions have developed over time.

### A. FTAs and Investment Treaties

The United Nations Conference on Trade and Development [“**UNCTAD**”] reports that 2,621 international investment agreements are currently in force, comprising bilateral investment treaties [“**BITs**”] and other treaties with investment provisions, such as FTAs.<sup>2</sup> As illustrated below, the amicus provisions among these agreements are tremendously diverse.

#### i. NAFTA and CAFTA-DR

The diversity of amicus provisions is exemplified by the different approaches taken in two prominent FTAs: the North American FTA [“**NAFTA**”] and the Dominican Republic – Central America – US FTA [“**CAFTA-DR**”].

NAFTA, which entered into force in 1994, does not contain express amicus provisions. However, following applications to file amicus briefs in two NAFTA disputes in 2001,<sup>3</sup> the NAFTA Free Trade Commission issued a non-binding Statement in 2003 [the “**FTC Statement**”] to clarify that NAFTA does not limit a tribunal’s discretion to accept amicus briefs.<sup>4</sup> The FTC Statement recommends that tribunals adopt certain procedures when deciding whether to admit amicus briefs. In particular, Paragraph B6 provides that a tribunal “will” consider, among other things, the extent to which:

- a) the amicus brief would assist the tribunal in determining a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight which is different from that of the disputing parties;
- b) the amicus brief would address matters within the scope of the dispute;
- c) the potential amicus has a significant interest in the arbitration; and
- d) there is a public interest in the subject-matter of the arbitration.

Paragraph B7 further provides that the tribunal “will” ensure that the amicus brief does not disrupt proceedings or unduly burden or unfairly prejudice either disputing party. Amicus brief applications and the amicus briefs themselves must also adhere to various formal requirements.<sup>5</sup>

The FTC Statement was a major development in investor-state arbitration. In addition to being regularly cited by NAFTA tribunals, the FTC Statement has powerfully influenced amicus

<sup>2</sup> UNCTAD, Investment Policy Hub, *available at* <http://investmentpolicyhub.unctad.org/IIA>.

<sup>3</sup> *Methanex Corporation v. United States of America*, (2005) 44 I.L.M. 1345 [*hereinafter* “*Methanex*”]; *United Parcel Service of America, Inc. v. Government of Canada*, ICSID Case No. UNCT/02/01 (2007) (both discussed below).

<sup>4</sup> Statement of the Free Trade Commission on Non-Disputing Party Participation, *available at* <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Nondisputing-en.pdf> [*hereinafter* “*FTC Statement*”]. The Free Trade Commission “is the central institution of the NAFTA” and consists of “ministerial-level representatives” from the parties to the Agreement. It “supervises the implementation and further elaboration of the Agreement, and helps to resolve disputes arising from its interpretation” *available at* <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/celeb2.aspx?lang=eng>.

<sup>5</sup> These include stipulations as to length and language; details and a description of the applicant and its submission; and disclosures of whether the applicant is affiliated with a disputing party and of any assistance it has received (financial or otherwise).

provisions in a range of other FTAs, investment treaties and arbitral rules.<sup>6</sup> In particular, many of these instruments contain similar criteria to those set out in Paragraphs B6 and B7 of the FTC Statement.

CAFTA-DR entered into force one year after the FTC Statement. Both contain provisions acknowledging the possibility of amicus briefs. However, CAFTA-DR's provision is much briefer. Article 10.20(3) simply provides that a tribunal shall have the authority to accept and consider briefs from amici.

*ii. Other Current Investment Treaties*

Express amicus provisions also appear in the model investment treaties of certain states, including:

1. Article 39(1) of the 2004 Canadian model Foreign Investment Promotion and Protection Agreement [**"FIPPA"**], which allows applications to submit briefs from amici who are persons of, or have a significant presence in, either Canada or the other state party to FIPPA. Article 39(4) further provides that, in determining whether to allow such applications, tribunals shall consider the same factors as set out in the FTC Statement and may take other matters into consideration; and
2. Article 28(3) of the 2012 US model BIT, which provides tribunals with the authority to accept and consider amicus briefs.

Many investment agreements do not contain express amicus provisions, including the 2003 or 2016 Indian model BIT; the Chinese, Russian and Singaporean model BITs; the Energy Charter Treaty [**"ECT"**]; and the ASEAN Comprehensive Investment Agreement.<sup>7</sup> However, the absence of an express provision in an investment agreement does not preclude the admission of amicus briefs since a dispute under the agreement may be governed by arbitral rules that do permit amicus briefs. Arbitral rules are discussed further below.

*iii. Possible Future FTAs and Investment Treaties*

The proposed Transatlantic Trade and Investment Partnership [**"TTIP"**], the Trans-Pacific Partnership Agreement [**"TPPA"**] and the EU-Canada Comprehensive Economic and Trade Agreement [**"CETA"**] all contain amicus provisions either directly or indirectly (although it remains to be seen what effect the new US administration entering power in 2017 will have on the TTIP and the TPPA).

The current draft text of the TTIP contains amicus provisions in Article 23 of Section 3 of Chapter II.<sup>8</sup> Article 23(1) obliges tribunals to permit a potential amicus to "intervene", provided

<sup>6</sup> See, e.g., UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-third session*, ¶ 47, U.N. Doc. A/CN.9/712 (2010); see also ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration*, in ICSID SECRETARIAT DISCUSSION PAPER (Oct. 22, 2004), ¶¶ 5 and 13, available at <https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf>.

<sup>7</sup> See further CHESTER BROWN, COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES (2013).

<sup>8</sup> Unlike the TPPA and CETA, the texts of which have been finalised, the TTIP is still being negotiated. Only the EU's proposed text of TTIP is currently available at [http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc\\_153955.pdf](http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf).

that the amicus can establish a “direct and present interest in the result of the dispute”. Article 23(3) provides that “intervention” includes not only the submission of an amicus brief, but also access to procedural documents, attendance at hearings and the ability to make oral submissions during hearings. Any such intervention would be limited to supporting the award sought by one of the disputing parties, which arguably requires an amicus to “take sides” openly. Article 23(4) entitles an amicus, which intervened in the initial proceedings, to intervene in an appeal. Article 23(5) provides that the right to intervene under the TTIP is without prejudice to a tribunal’s ability to accept amicus briefs under the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration [“**UNCITRAL Transparency Rules**”]; the UNCITRAL Transparency Rules shall apply to all TTIP investor-state arbitrations and are discussed further below.

The TPPA adopts a different approach. Article 9.23(3) provides that a tribunal may accept and consider amicus briefs, regarding a matter of fact or law within the scope of the dispute that may assist the tribunal in evaluating the disputing parties’ submissions and arguments. The article requires that the would-be amicus has a significant interest in the proceedings. In addition, the tribunal must ensure that the amicus brief does not disrupt or unduly burden the proceedings, or unfairly prejudice any disputing party. Article 9.23(3) contains various formal requirements in relation to the brief.<sup>9</sup> Disputes under the TPPA may be governed by, *inter alia*, the UNCITRAL Arbitration Rules (incorporating the UNCITRAL Transparency Rules) or the ICSID Arbitration Rules. The ICSID Arbitration Rules also have amicus provisions and are discussed further below.

In contrast to the express amicus provisions of the TTIP and TPPA, Article 8.6 of CETA simply states that the UNCITRAL Transparency Rules shall apply to all investor-state arbitrations and thereby indirectly permits tribunals to accept amicus briefs.

## B. Arbitral Rules

According to UNCTAD, more than 85% of investor-state arbitrations have been initiated under either the 2013 ICSID Arbitration Rules (including the ICSID Additional Facility Rules) or the 2014 UNCITRAL Arbitration Rules.<sup>10</sup> Each contains express amicus provisions, although this has not always been the case.

### i. ICSID Arbitration Rules

In 2006, both the ICSID Arbitration Rules and the ICSID Additional Facility Rules were amended to include express amicus provisions. These amendments followed a Discussion Paper in which the ICSID Secretariat acknowledged that “[t]here may well be cases where the process could be strengthened by submissions of third parties, not only civil society organizations but also for instance business groups or, in investment treaty arbitrations, the other States parties to the treaties concerned”.<sup>11</sup>

<sup>9</sup> These are similar to the requirements in the NAFTA FTC Statement outlined above at n.5. However, Article 9.23(3) does not contain any stipulations on the length of an amicus brief.

<sup>10</sup> As of October 11, 2016, 684 of the 739 investor-state arbitrations record by UNCTAD have been administered under either the ICSID Arbitration Rules or the UNCITRAL Arbitration Rules – <http://investmentpolicyhub.unctad.org/ISDS/FilterByRulesAndInstitution>.

<sup>11</sup> ICSID Secretariat, *supra* note 6, ¶ 13.

Article 37(2) of the ICSID Arbitration Rules 2006 and Article 41(3) of the ICSID Additional Facility Rules 2006 empower tribunals to allow amicus briefs “regarding a matter within the scope of the dispute”. In deciding whether to do so, the tribunal is required to consider, among other things, the extent to which:

1. the amicus brief would assist the tribunal in determining a factual or legal issue related to the proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
2. the amicus brief would address a matter within the scope of the dispute; and
3. the potential amicus has a significant interest in the proceedings.

This wording is very similar to the FTC Statement, save that it does not require tribunals to consider whether there is a public interest in the subject-matter of the arbitration. However, in practice, ICSID tribunals usually consider that question in determining an application.<sup>12</sup> In line with the FTC Statement, ICSID tribunals must ensure that the amicus brief does not disrupt the proceedings or unduly burden or unfairly prejudice either disputing party.

*ii. UNCITRAL Arbitration Rules*

The UNCITRAL Arbitration Rules contain express amicus provisions as a result of their incorporation of the UNCITRAL Transparency Rules in 2013. The UNCITRAL Transparency Rules are designed to “provide for transparency and accessibility to the public of treaty-based investor-State arbitration”.<sup>13</sup>

The UNCITRAL Transparency Rules are the culmination of several years of work by UNCITRAL’s Working Group II (Arbitration and Conciliation) [the “**Working Group**”]. The Working Group commenced debate on transparency in 2008, in the wider context of revisions to the UNCITRAL Arbitration Rules that had been afoot since 2006. Faced with some opposition, the Working Group ultimately decided in favour of enhancing transparency provisions in the UNCITRAL Arbitration Rules. John Ruggie, the UN Secretary General’s Special Representative for Business and Human Rights, played a significant role in expediting the Working Group’s consideration of transparency measures by highlighting “the significant effect on human rights of rules governing global business, especially private investment agreements between investors and host States”.<sup>14</sup> The Working Group noted its “[g]eneral agreement regarding the desirability of dealing with transparency in investor-State arbitration [...] [and that] [...] [a]ccording to principles of good governance, government activities might be subject to basic requirements of transparency and public participation”.<sup>15</sup>

In relation to amicus briefs, the Working Group reflected in a subsequent report that such interventions “could be useful for the arbitral tribunal in resolving the dispute and promoted legitimacy of the

<sup>12</sup> Mariel Dimsey, *Article 4. Submission by a third person, in* TRANSPARENCY IN INTERNATIONAL ARBITRATION 128-195 (Dimitrij Euler et al. eds., 2015) ¶ 31.

<sup>13</sup> UNCITRAL, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective date: Apr. 1, 2014), available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2014Transparency.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html) [hereinafter “UNCITRAL Transparency Rules”].

<sup>14</sup> UNCITRAL, *Report of the Working Group on Arbitration and Conciliation on the work of its forty-eighth session*, ¶ 56, U.N. Doc. A/CN.9/646 (2008). See also Markus Gehring & Dimitrij Euler, *Public Interest in Investment Arbitration, in* TRANSPARENCY IN INTERNATIONAL ARBITRATION 7-27 (Dimitrij Euler et al. eds., 2015).

<sup>15</sup> *Id.* ¶ 57.

*arbitration process*”. At the same time, the Working Group proposed “*certain restricting criteria*” on amicus briefs, and stated that the tribunal should be responsible for “*gate-keeping*” access to proceedings.<sup>16</sup>

Article 4(1) of the UNCITRAL Transparency Rules 2013 provides that a tribunal may allow amicus briefs regarding a matter within the scope of the dispute. Article 4(3) sets out the factors that the tribunal must consider, namely:

1. the extent to which the amicus brief would assist the tribunal in determining a factual or legal issue related to the proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; and
2. whether the potential amicus has a significant interest in the proceedings.

Articles 4(1) and (3) are therefore similar to Article 37(2) of the ICSID Arbitration Rules and, to a lesser degree, the FTC Statement. Article 4(5) of the UNCITRAL Transparency Rules requires the tribunal to ensure that an amicus brief does not disrupt or “unduly burden the proceedings” (emphasis added) or unfairly prejudice any disputing party. This differs slightly from the ICSID Arbitration Rules and the FTC Statement, which require that the proceedings are not disrupted and that “the disputing parties are neither unduly burdened” (emphasis added), nor unfairly prejudiced. Whether UNCITRAL tribunals will admit amicus briefs, notwithstanding that doing so may unduly burden a disputing party, remains to be seen. Lastly, Articles 4(2) and 4(4) of the UNCITRAL Transparency Rules impose various formal requirements on amicus brief applications and the amicus briefs themselves.<sup>17</sup>

The UNCITRAL Transparency Rules apply only to investor-state arbitrations initiated under the UNCITRAL Arbitration Rules, pursuant to an instrument concluded on or after April 1, 2014, unless the parties to the dispute or state parties to the instrument have agreed otherwise.<sup>18</sup> The 2014 Convention on Transparency in Treaty-Based Investor-State Arbitration [**Mauritius Convention**] is designed to provide a means through which state parties may provide the agreement necessary for retroactive application of the UNCITRAL Transparency Rules. To date, the Mauritius Convention has been signed by seventeen states and ratified by two (it has not entered into force in any state). This uptake can be viewed as encouraging given that the Mauritius Convention was only opened for signature in March 2015.

### *iii. SCC Arbitration Rules*

In January 2017, the Stockholm Chamber of Commerce [**SCC**] Arbitration Rules 2017 entered into force. Unlike the previous version, the new SCC Arbitration Rules include articles specifically applicable to investor-state arbitrations (in Appendix III) and contain comprehensive amicus provisions. Pursuant to Article 3(3), potential amici may apply for permission to submit a brief and, in determining whether to allow the application, a tribunal shall have regard to:

<sup>16</sup> UNCITRAL, *supra* note 6, ¶¶ 46-51.

<sup>17</sup> These are similar to the requirements in the NAFTA FTC Statement outlined above at *supra* note 5. However, Article 4 does not contain any stipulations as to length, save for the need to be “concise” and no longer than “as authorized by the arbitral tribunal”.

<sup>18</sup> UNCITRAL Transparency Rules, *supra* note 13, art. 1, at 5.

1. the *nature* and significance of the potential amicus' interest in the arbitration;
2. whether the amicus brief would assist the tribunal in determining a *material* factual or legal issue in the arbitration by bringing a perspective, particular knowledge or insight that is distinct from *or broader than* that of the disputing parties; and
3. *any other relevant circumstances*.

Article 3(9) provides that the tribunal must ensure that an amicus brief does not disrupt or unduly burden the proceedings or unfairly prejudice any disputing party (as in the UNCITRAL Transparency Rules). Applications to file amicus briefs and the amicus briefs themselves must also adhere to various formal requirements.<sup>19</sup>

The SCC Arbitration Rules depart from the FTC Statement, the ICSID Arbitration Rules and the UNCITRAL Arbitration Rules in a number of ways. The novel wording in the SCC Arbitration Rules appears to pull in different directions. The addition of the word “*nature*” to paragraph (a) could narrow or widen the scope for admission of amicus briefs, since the insignificance of a party's interest in proceedings may be offset by the nature of its interests, for example, in the case of an expert. Conversely, the party whose interest in the case is obvious may find its standing diminished in the event that it is seeking to subvert the arbitral process. In contrast, the addition of the word “*material*” to paragraph (b) constitutes a restriction on the content of an amicus brief, thereby narrowing the scope for admission. However, the addition of the words “*or broader than*” to the same paragraph recognises that an amicus' perspective, knowledge or insight can legitimately overlap with that of a disputing party. Meanwhile, the main effect of paragraph (c) will likely be to emphasise tribunals' ability to take other factors into consideration.

Under the SCC Arbitration Rules, an amicus is expressly permitted to apply for “*access to submissions and evidence filed in the arbitration*”. The tribunal must consult the disputing parties before making its decision and “*shall take into account, and where appropriate safeguard, any confidentiality of the information in question*”. The SCC Arbitration Rules also allow a tribunal to “*require*” an amicus to attend hearings or to be examined, either at the initiative of the tribunal or at the request of a disputing party. These powers could result in an increase to the breadth and depth of amicus participation, as well as the time and cost of proceedings. As regards this latter issue, the SCC Arbitration Rules permit a tribunal to require an amicus to provide security for reasonable legal or other costs expected to be incurred by the disputing parties as a result of the amicus brief.<sup>20</sup>

#### *iv. SIAC Investment Arbitration Rules*

In January 2017, the Singapore International Arbitration Centre [“**SIAC**”] Investment Arbitration Rules entered into force. This marked the first time the SIAC released rules tailored specifically for investor-state arbitration.

Rule 29.2 of the SIAC Investment Arbitration Rules provides that potential amici may apply to the tribunal for the right to submit a brief. Rule 29.3 states that in determining whether to allow

<sup>19</sup> These are similar to the requirements in the NAFTA FTC Statement outlined above, *see supra* note 5. However, Article 3 does not contain any stipulations as to the length of an application; amicus briefs themselves need only be “precise” and no longer than “as authorized by the Arbitral Tribunal”.

<sup>20</sup> This provision reflects the tribunal's decisions in *Philip Morris* to reserve the right to impose costs on amici.

such an application to proceed, the tribunal shall consider the views of the disputing parties and, among other things, the extent to which:

1. the amicus brief would assist the tribunal in determining a factual or legal issue related to the proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
2. the amicus brief would *only* address a matter within the scope of the dispute;
3. the potential amicus has a sufficient interest in proceedings *and/or any other related proceedings*; and
4. *allowing the written submissions would violate the disputing parties' right to confidentiality.*

In addition, Rule 29.2 provides that a tribunal may invite a brief from an amicus. Where an amicus is permitted to submit a brief or invited to do so, Rule 29.9 provides that the tribunal shall take “reasonable steps” to ensure that the brief does not “unreasonably disrupt” proceedings or unduly burden or unfairly prejudice any of the disputing parties. Under Rule 29.5, the tribunal may determine the form and content of an amicus brief.

Notably, Rule 29.3 of the SIAC Investment Arbitration Rules contains novel wording which departs from the FTC Statement, the ICSID Arbitration Rules and the UNCITRAL Arbitration Rules. This wording is likely to have a mixed effect. On the one hand, the inclusion of the word “*only*” in paragraph (b) reminds potential amici that their briefs should not stray from the matters within the scope of the dispute, for example, by addressing broader political issues. Meanwhile, paragraph (d) restrains potential amici by referring to the disputing parties’ right to confidentiality. In contrast, the addition of “*and/or any other related proceedings*” in paragraph (c) expands the pool of potential amici. What types of amici this wording actually attracts will be of interest to practitioners.

The SIAC Investment Arbitration Rules permit a tribunal, either on its own accord or at the request of a disputing party, to hold a hearing for an amicus “*to elaborate on or be examined on*” its brief (Rule 29.7). In addition, a tribunal may order that an amicus be provided with access to documents related to the proceedings “*as may be necessary for its participation in the arbitration*” (although the tribunal must take appropriate measures to safeguard the confidentiality of information related to the proceedings) (Rule 29.8). Furthermore, tribunals are expressly permitted to refer to and rely on amicus briefs in their orders, decisions and awards (Rule 29.10). As with the SCC Arbitration Rules, these provisions could see an increase in amicus participation.

*v. Other Arbitral Rules Applicable to Investor-State Cases*

The approach to amicus briefs in other relevant arbitral rules as currently drafted is more generic and largely untested. The most prominent example is Article 25(3) of the International Chamber of Commerce [“ICC”] Arbitration Rules 2012, which permits tribunals to hear “*any other person*” in establishing the facts of a case.

### III. Tribunals' Treatment of Applications to File Amicus Briefs

This section considers the treatment of applications to file amicus briefs by tribunals, focusing on recent arbitral awards.<sup>21</sup>

#### A. Historical Practice

In 2001, in the NAFTA case of *Methanex v. USA* [*"Methanex"*], an investment-arbitration tribunal acknowledged for the first time that it had the authority to admit an amicus brief (although it did not actually admit the brief at that point). The tribunal relied upon its broad authority in Article 15(1) of the applicable UNCITRAL Arbitration Rules 1976 to “conduct the arbitration in such manner as it considers appropriate”.<sup>22</sup> Later that year, an UNCITRAL tribunal in another NAFTA case, *UPS v. Canada*, relied upon the same broad authority in Article 15(1) to go one step further than the *Methanex* tribunal by admitting an amicus brief. The *Methanex* tribunal eventually admitted an amicus brief in 2004, after the issuance of the FTC Statement.<sup>23</sup>

Since 2003, tribunals in NAFTA disputes governed by UNCITRAL Arbitration Rules have consistently decided the admissibility of amicus briefs in accordance with the terms of the FTC Statement.<sup>24</sup> This practice has resulted in tribunals admitting amicus briefs in two cases (*Merrill and Ring Forestry v. Canada* and *Glamis Gold v. USA*<sup>25</sup>) and denying admission in one case (*Apotex v. USA*<sup>26</sup>). *Glamis Gold* is particularly noteworthy due to its emphasis on the need for amicus briefs to bring some sort of perspective, knowledge or insight that is different from that of the disputing parties.

In disputes under the ICSID Arbitration Rules, the issue of amicus briefs was broached for the first time in *Aguas del Tunari v. Bolivia*, a dispute arising out of the Bolivia-Netherlands BIT. In 2003, the tribunal rejected requests from various NGOs and individuals to file amicus briefs because the disputing parties had not consented, the amicus briefs were unnecessary and the requests were beyond the tribunal's power and authority to grant.<sup>27</sup>

*Aguas del Tunari* came before the above-mentioned amendments to the ICSID Arbitration Rules in 2006, which provided for the submission of amicus briefs. However, another ICSID tribunal

<sup>21</sup> For further discussion of the historical treatment of amicus brief applications, see, *inter alia*, Eugenia Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 29(1) Berkeley J. Int'l. L. 200 (2011); Tomoko Ishikawa, *Third Party Participation in Investment Treaty Arbitration*, 59(2) Int'l. & Comp. L. Q. (2010); Lucas Bastin, *The Amicus Curiae in Investor-State Arbitration*, 1 Cambridge J. Int'l. & Comp. L. 373 (2012); Lucas Bastin, *Amici Curiae in Investor-State Arbitrations: Two Recent Decisions*, 20 Australian Int'l. L. J. 95 (2013) [*hereinafter* “Two Recent Decisions”]; Lucas Bastin, *Amici Curiae in Investor-State Arbitration: Eight Recent Trends*, 30(1) Arb. Int'l. 125 (2014); Mariel Dimsey, *supra* note 12.

<sup>22</sup> *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions from Third Persons to Intervene as “Amici Curiae”, (2005) 44 I.L.M. 1345 (Jan. 15, 2001) (The NGOs eventually submitted amicus briefs on the basis of the NAFTA FTC Statement – Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, paras 26 to 30, Part II, Chapter C).

<sup>23</sup> *United Parcel Service of America, Inc. v. Government of Canada*, ICSID Case No. UNCT/02/01, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae (Oct. 17, 2001).

<sup>24</sup> The only real deviation from this pattern was in *Grand River Enterprises v. USA* (no case number available) in which the claimant exhibited in its submissions a letter from a would-be amicus' to the tribunal, thereby circumventing the need for the tribunal to make a determination.

<sup>25</sup> *Merrill and Ring Forestry v. Canada*, ICSID Case No. UNCT/07/1; *Glamis Gold v. USA*, [2009] 48 I.L.M. 1039.

<sup>26</sup> *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility (June 14, 2013).

<sup>27</sup> *Aguas del Tunari v. Bolivia*, ICSID Case No. ARB/02/03, Letter from the Tribunal to Earth Justice (Jan. 29, 2003).

came to a different conclusion. In *Suez/Vivendi v. Argentina*, the tribunal decided that it did have the authority to admit an amicus brief in a dispute arising out of Argentina's BITs with Spain and France. The tribunal founded its authority on Article 44 of the ICSID Convention, which enabled the tribunal to decide "any question of procedure" not covered by the arbitral rules. The tribunal also held that the admissibility of an application to submit an amicus brief would depend on the appropriateness of the subject matter of the case, the suitability of the applicants and the procedure applicable to the submission.<sup>28</sup> In 2007, the tribunal in that case eventually admitted a joint amicus brief from five NGOs on the basis of those criteria.<sup>29</sup>

In the years following the 2006 release of the ICSID Arbitration Rules and the ICSID Additional Facility Rules,<sup>30</sup> tribunals have allowed amicus briefs in six cases (*Biwater Gauff v. Tanzania*,<sup>31</sup> *AES v. Hungary*,<sup>32</sup> *Electrabel v. Hungary*,<sup>33</sup> [*"Electrabel"*] the initial and annulment proceedings in *Micula v. Romania*<sup>34</sup> [*"Micula"*] and *Piero Foresti v. South Africa*<sup>35</sup> [*"Piero Foresti"*] and refused amicus briefs in four cases (*Caratube International Oil Company v. Kazakhstan*,<sup>36</sup> *Von Pezold/Border v. Zimbabwe*,<sup>37</sup> *Apotex v. USA*<sup>38</sup> and the annulment proceedings in *Iberdrola Energia v. Guatemala*<sup>39</sup>). In each of these cases, the tribunal referred to various criteria within the amicus provisions of the ICSID Arbitration Rules or the ICSID Additional Facility Rules when accepting or denying applications to file amicus briefs.<sup>40</sup> Two of the cases warrant specific attention.

First, in the initial *Micula* proceedings, the tribunal focused on the identity of the applicant, the European Commission [the "EC"]. The tribunal was "particularly sensitive" to the possibility that the EC would be able to bring a factual or legal perspective that might be of assistance.<sup>41</sup> The EC was also allowed to submit an amicus brief in the subsequent annulment proceedings, although the Annulment Committee noted that "due to the limited scope of annulment proceedings, a

<sup>28</sup> *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 and Participation as Amicus Curia (May 19, 2005) [*hereinafter* "Suez"].

<sup>29</sup> *Suez*, 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 (Feb. 12, 2007). This decision came after the very same tribunal, sitting in the similar case of *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, rejected applications by an NGO and three individuals for failing to meet the criteria.

<sup>30</sup> Containing the amended art. 37(2) and art. 41(3), respectively.

<sup>31</sup> *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22.

<sup>32</sup> *Generation Limited & AES-Tisza Erömu Kft v Hungary*, ICSID Case No. ARB/07/22.

<sup>33</sup> *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19 [*hereinafter* "Electrabel"].

<sup>34</sup> *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20 [*hereinafter* "Micula"].

<sup>35</sup> *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/1 [*hereinafter* "Piero Foresti"].

<sup>36</sup> *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12.

<sup>37</sup> *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23.

<sup>38</sup> *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1.

<sup>39</sup> *Iberdrola Energía S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5.

<sup>40</sup> It is not possible to draw any conclusions regarding the tribunals' reasoning in *AES* at *supra* note 32, and *Caratube International Oil Company* at *supra* note 36, because the reasoning is not publicly available.

<sup>41</sup> *Micula*, ICSID Case No. ARB/05/20, Award (Dec. 11, 2013), ¶ 27.

*request for leave by a non-disputing party [i.e. a potential amicus] must be dealt with in a more restrictive and circumscribed manner?*<sup>42</sup>

Second, in *Von Pezold/Border*, the tribunal found that the “independence” of an applicant was an “implicit” criterion of admissibility under Article 37(2). As observed in previous scholarship, this implicit criterion is potentially burdensome for an applicant to discharge and arguably inconsistent with the criterion in Article 37(2)(c) that an amicus must demonstrate a “significant interest” in the proceedings, which often entails the amicus aligning itself with one of the parties’ positions. Furthermore, this implicit requirement for independence may also undermine the apparent intention of Article 37(2) to bring greater specificity to the issue of admissibility of amicus briefs.<sup>43</sup> The issue of amicus independence has arisen in two recent investor-state cases, which are discussed below (*Eli Lilly v. Canada*<sup>44</sup> [“**Eli Lilly**”] and *Philip Morris v. Uruguay*<sup>45</sup> [“**Philip Morris**”]).

Tribunals have dealt with three applications outside the usual context of either NAFTA disputes applying UNCITRAL Arbitration Rules or investment treaty disputes applying ICSID Arbitration Rules. In one of the cases (*Eureko v. Slovak Republic*<sup>46</sup>), the tribunal invited amici to make written submissions. The other two cases resulted in the acceptance of one amicus brief (*Pac Rim Cayman v. El Salvador*<sup>47</sup>) and the rejection of another (*Chevron v. Ecuador*<sup>48</sup>). In *Chevron*, the disputing parties did not support the amicus application on the basis that an amicus submission would not help determine the relevant jurisdictional issues.<sup>49</sup>

#### B. Recent Cases

Since the end of 2014, tribunals have made several interesting decisions on applications to file amicus briefs.

##### *i. Eli Lilly v. Canada (NAFTA Dispute Governed by UNCITRAL Arbitration Rules)*

In February 2016, the tribunal in *Eli Lilly*, a patent dispute, made decisions on nine applications to file amicus briefs submitted by a total of twenty-five parties.<sup>50</sup> These parties included NGOs, individuals and industry associations. The six briefs that were eventually accepted focussed on the legality of certain Canadian patent laws, which was in dispute.

Canada complained to the tribunal that the claimant was a member of two industry associations that had applied to file amicus briefs.<sup>51</sup> In its subsequent order, the tribunal referred to the FTC Statement’s stipulation that an amicus brief application “*will disclose whether or not the applicant has any affiliation, direct or indirect, with any disputing party*” to infer that an amicus “*needs to be independent*

<sup>42</sup> Micula, ICSID Case No. ARB/05/20, Decision on Annulment (Feb. 26, 2016), ¶ 63.

<sup>43</sup> Two Recent Decisions, *supra* note 21, at 102-104.

<sup>44</sup> *Eli Lilly and Company v. Canada*, ICSID Case No. UNCT/14/2 [*hereinafter* “**Eli Lilly**”].

<sup>45</sup> *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 [*hereinafter* “**Philip Morris**”].

<sup>46</sup> *Eureko B.V. v. Slovak Republic*, PCA Case No. 2008-13.

<sup>47</sup> *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12.

<sup>48</sup> *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, PCA Case No. 2009-23.

<sup>49</sup> *Id.* Procedural Order No. 8 (Apr. 18, 2011).

<sup>50</sup> *Eli Lilly*, ICSID Case No. UNCT/14/2, Procedural Order No. 4 (Feb. 23, 2016).

<sup>51</sup> *Eli Lilly*, ICSID Case No. UNCT/14/2, Letter from the Canadian Trade Law Bureau to the Tribunal (Feb. 19, 2016).

from the disputing parties”. However, the tribunal also found that a disputing party’s membership of an entity which applies to submit an amicus brief “does not mean a lack of independence of the [amicus] per se”. Instead, such membership should be viewed in relation to the tribunal’s consideration of the extent to which the amicus brief would assist the tribunal in determining a factual or legal issue related to the arbitration by bringing fresh perspective, knowledge or insight. The tribunal proceeded to admit the briefs of the two amici.

ii. *Philip Morris v. Uruguay (Investment Treaty Dispute Governed by ICSID Arbitration Rules)*

This case concerned the legality of Uruguay’s regulations on cigarette packaging under the Switzerland-Uruguay BIT. In February and March 2015, the tribunal in *Philip Morris* accepted one application each from the World Health Organisation and the World Health Organisation’s Framework Convention on Tobacco Control [“WHO”], acting jointly, and the Pan American Health Organisation [“PAHO”].

The WHO’s brief provided an overview of tobacco control, as well as evidence on the effectiveness of health warnings on cigarette packaging and bans on misleading branding practices. PAHO submitted that it would offer “technical information and evidence” on marketing and tobacco consumption in the region and the effect of tobacco regulation on such behaviour.

The tribunal’s decisions on the two applications were based on substantially similar grounds.<sup>52</sup> The tribunal stated that, “in view of the public interest in the case, granting the [applications] would support the transparency of the proceeding and its acceptability by users at large”.<sup>53</sup> In addition, the tribunal emphasised that the amicus briefs could be beneficial to its decision-making process given the “particular knowledge and expertise of [...] qualified entities” such as the WHO and PAHO.

In a novel move, the tribunal also reserved the right to make an order for costs against the applicants should either of the disputing parties request the reimbursement of costs incurred by reason of the amicus briefs.

The tribunal rejected applications from two other NGOs, whose briefs are not publicly available. It held that one of the NGOs would not be able to bring a fresh perspective, knowledge or insight relevant to the case, while the other NGO lacked independence due to its close connection with the claimant. In addition, the tribunal found that the applications had been submitted late in the proceedings: after a disputing party had presented all of its written pleadings in one case, and a month before the start of the merits hearing in the other. According to the

<sup>52</sup> Philip Morris, ICSID Case No. ARB/10/7, Procedural Order No. 3 (Feb. 17, 2015) and Procedural Order No. 4, (March 24, 2015).

<sup>53</sup> The tribunal cited the now-famous passage from *Methanex* at *supra* note 3: “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 interest in this arbitration than a dispute between private persons. The public interest in this arbitration arises from its subject-matter, as powerfully suggested in the Petitions. There is also a broader process argument, as suggested by the Respondents and Canada: the [...] arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal’s willingness to receive amicus submissions might support the process in general and this arbitration in particular, whereas a blanket refusal could do positive harm”.

tribunal, accepting the applications under these circumstances would disrupt the proceedings and potentially unduly burden and unfairly prejudice at least one of the disputing parties.<sup>54</sup>

*iii. LSF-KEB v. Republic of Korea (Investment Treaty Dispute Governed by ICSID Arbitration Rules)*  
*LSF-KEB v. Republic of Korea*<sup>55</sup> is an on-going dispute under the Belgium-Luxembourg-Korea investment treaty. The dispute concerns alleged delays by the Korean banking regulator in approving a corporate transaction and certain tax measures imposed by the Korean tax authorities.

In December 2015, the tribunal rejected an amicus application in which a Korean NGO sought to file a brief contending that the claimant had failed to comply with Korean banking law and had waived the right to initiate proceedings in Korea. The tribunal noted that the application had been made approximately one-and-a-half months before the “*third and final phase of the Hearing*”. This was “*very late in [...] proceedings, in circumstances where it could have been made a long time ago*”. The tribunal further stated that accepting the brief “*would likely cause significant difficulties for both Disputing Parties [...] [and that] it would most probably cause the third phase to be adjourned or, at least, to require a new fourth phase, with significant extra costs for the Disputing Parties and loss of time*”. According to the tribunal, this would constitute a significant disruption in the proceedings and an undue burden or unfair prejudice for one or more of the disputing parties. Neither the claimant nor the respondent-state supported the NGO’s application.<sup>56</sup>

*iv. Infinito Gold v. Costa Rica (Investment Treaty Dispute Governed by ICSID Arbitration Rules)*  
 Another on-going case is *Infinito Gold v. Costa Rica*,<sup>57</sup> [“**Infinito Gold**”] which concerns a dispute between a Canadian investor and Costa Rica over the revocation of a mining concession. In June 2016, the tribunal allowed an amicus brief from a Costa Rican environmental NGO on the grounds that it had fulfilled the criteria in Article 37(2) of the ICSID Arbitration Rules, noting in particular that the revocation of the mining concession had been caused by domestic court proceedings taken by the NGO against both the investor and Costa Rica. The tribunal reminded the NGO of its role as a “*friend*” to the tribunal and restrained the amicus brief to 10,000 words on jurisdictional issues only.<sup>58</sup> The NGO’s amicus brief is not publicly available.

*v. Bear Creek Mining v. Peru (Investment Treaty Dispute Governed by ICSID Arbitration Rules)*  
*Bear Creek Mining v. Peru*<sup>59</sup> is a dispute between a Canadian investor and Peru over the revocation of a mining concession. In July 2016, the tribunal allowed a joint amicus brief from a Peruvian NGO and a lawyer on the factual and legal relationship between an indigenous people and the investor. The tribunal also refused an amicus brief from the Columbia Centre on Sustainable Investment on international law and public policy considerations relevant to investments in the extractive industry.

<sup>54</sup> Philip Morris, ICSID Case No. ARB/10/7, Award (July 8, 2016), ¶¶ 49-55.

<sup>55</sup> LSF-KEB Holdings SCA and others v. Republic of Korea, ICSID Case No. ARB/12/37.

<sup>56</sup> *Id.* Procedural Order No. 15 (Dec. 21, 2015).

<sup>57</sup> Infinito Gold Ltd. v. Costa Rica, ICSID Case No. ARB/14/5 [*hereinafter* “Infinito Gold”].

<sup>58</sup> *Id.* Procedural Order No. 2 (June 1, 2016).

<sup>59</sup> Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21.

Notably in this case, the tribunal concentrated on the amicus provisions in the Canada-Peru FTA, which are similar to the FTC Statement. The tribunal stated that “*the most important criteria is [...] whether the applicant’s submission would assist the Tribunal*” and pointed out that the amicus provisions contained only non-exhaustive “*criteria*” and not “*conditions*”. This meant that an applicant may fail to meet some of the criteria and still be permitted to submit an amicus brief, as with the Peruvian NGO and lawyer.<sup>60</sup>

*vi. ECT Arbitrations*

The EC has sought to intervene as amicus in a number of recent cases under the ECT.<sup>61</sup> Although little information is publicly available on these cases, the EC’s experience appears to have been mixed, with tribunals rejecting its applications as premature on at least two occasions.<sup>62</sup> How the tribunals’ reasoning in these cases affects, or is affected by, the law and practice elsewhere will be of interest to practitioners.

**IV. The Influence of Amicus Briefs**

It is difficult to measure directly the influence of amicus briefs on the determinations of tribunals. No tribunal has expressly stated the amount of influence (or lack thereof) that an amicus brief has had on the tribunal’s reasoning. However, it is possible to draw some cautious conclusions based on other factors, such as how often, where and in what ways a tribunal refers to an amicus brief in an award. We explore this influence below in the context of historical practice and more recent cases.

A. Historical Practice

Most tribunals have recorded the fact of amicus participation in their awards, usually in the section containing the procedural history. Some tribunals have also summarised the contents of the amicus briefs before them. However, tribunals have been much more selective when referring to amicus briefs in their substantive reasoning.

This has led some commentators to conclude that amici have had little influence on tribunals. For example, in relation to amicus briefs on human rights issues submitted between 2001 (*Methanex*) and 2012 (*Pac Rim Cayman*), previous scholarship has suggested that “[h]uman rights arguments provided by amici, sometimes detailed and well-founded were not observably employed by the tribunals in support of their findings and sometimes even explicitly ignored”.<sup>63</sup> This is a strong criticism, especially given the criteria that tribunals will have applied when deciding whether to accept an amicus’ application to file a brief in the first place.<sup>64</sup> As discussed above, these criteria include whether a

<sup>60</sup> *Id.* Procedural Order Nos. 5 and 6 (July 21, 2016).

<sup>61</sup> Charles Patrizia et al., *Investment Disputes Involving the Renewable Energy Industry Under the Energy Charter Treaty*, in GLOBAL ARBITRATION REVIEW: GUIDE TO ENERGY ARBITRATIONS (2015).

<sup>62</sup> Carlos Gonzalez-Bueno & Laura Lozano, *More than a Friend of the Court: The Evolving Role of the European Commission in Investor-State Arbitration*, KLUWER ARB. BLOG (Jan. 26, 2015), available at <http://kluwerarbitrationblog.com/2015/01/26/more-than-a-friend-of-the-court-the-evolving-role-of-the-european-commission-in-investor-state-arbitration/>.

<sup>63</sup> Sarah Schadendorf, *Human Rights Arguments in Amicus Curiae Submissions: Analysis of ICSID and NAFTA Investor-State Arbitrations*, 10(1) *Transnational Dispute Management* (2013). See also Eric De Brabandere, *Human Rights Considerations in International Investment Arbitration*, in THE INTERPRETATION AND APPLICATION OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS: LEGAL AND PRACTICAL IMPLICATIONS 183-215 (Malgosia Fitzmaurice & Panos Merkouris eds., 2012).

<sup>64</sup> Tomoko Ishikawa, *supra* note 21, at 409-11.

brief will assist the tribunal and remain within the scope of the dispute (there is arguably even less scope for error in NAFTA disputes in which potential amici attach their brief to the application).<sup>65</sup>

A more optimistic view is that tribunals have been influenced to some degree by amicus briefs, but that they have refrained from making express reference to amicus briefs in their awards. Support for this view may be derived from tribunals' comments on the utility of a brief. For example, in *Bivater Gauff*, the tribunal stated that it “found the Amici’s observations useful” and that “[t]heir submissions have informed the analysis of claims set out below, and where relevant, specific points arising from the Amici’s submission are returned to in that context”.<sup>66</sup>

An alternative view is that tribunals only permit influence where there is something “special” either about the points made or the amicus itself. This view may explain the greater degree of attention tribunals seem to have accorded to the EC in cases involving intra-EU BITs and the ECT.<sup>67</sup> In these cases, the EC is somewhat distinguishable from traditional amici comprising NGOs in that the EC is the expert, as well as administrator, enforcer and a maker of, EU law. However, greater attention has not necessarily led to greater success from the EC’s point of view. Tribunals have rarely taken its points.<sup>68</sup>

#### B. Recent Cases

The recent cases of *Micula* and *Philip Morris* provide two very different perspectives on the influence of amicus briefs.

After losing the initial arbitration in *Micula*, Romania commenced annulment proceedings following an EC order which prevented Romania from paying the original award. The ICSID Annulment Committee granted the EC permission to file an amicus brief under Article 37(2) of the ICSID Arbitration Rules 2006. The EC raised three arguments in its amicus brief, namely that the tribunal: (i) failed to apply the applicable law; (ii) failed to address the question of enforceability of the award; and (iii) exercised a jurisdiction that it did not have. The first two arguments supported Romania’s positions, whereas the final argument was new and had not been advanced by Romania. Although the Annulment Committee set out these submissions in detail in its decision, it ultimately gave them little attention and upheld the original award.<sup>69</sup>

The case in which amicus briefs have been most influential is *Philip Morris*. The ICSID tribunal referred to the WHO’s and PAHO’s submissions throughout its award, including to support its

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<sup>65</sup> FTC Statement, *supra* note 4, ¶ B1.

<sup>66</sup> *Bivater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, (July 24, 2008) (However, the tribunal did not appear to then address any of the amici’s arguments). See also *Glamis Gold v. USA*, Award (June 8, 2009) [2009] 48 I.L.M. 1039 (ICSID) (the tribunal stated its appreciation for the amici’s “thoughtful submissions”, before going on to state that it would “not reach the particular issues addressed by [the amici’s] submissions”).

<sup>67</sup> Christopher Von Krause, *The European Commission’s Opposition to Intra-EU BITs and its Impact on Investment Arbitration*, KLUWER ARB. BLOG (Sept. 28, 2010), available at <http://kluwerarbitrationblog.com/2010/09/28/the-european-commissions-opposition-to-intra-eu-bits-and-its-impact-on-investment-arbitration>; Carlos Gonzalez-Bueno & Laura Lozano, *supra* note 62.

<sup>68</sup> See, for e.g., *Electrabel*, ICSID Case No. ARB/07/19; *Micula*, ICSID Case No. ARB/05/20.

<sup>69</sup> *Micula*, ICSID Case No. ARB/05/20, Decision on Annulment (Feb. 26, 2016), ¶¶ 308-339.

findings on the merits of the case.<sup>70</sup> However, the amici's submissions were mainly factual and focused on the efficacy of certain policies on public health issues. This contrasts with the submissions of amici in previous cases, which tended to comprise legal arguments. This distinction is of doubtless importance as it indicates that amicus interventions are more likely to be influential where they focus on matters falling outside of the expertise of the tribunal (or the expertise of the disputing parties).

#### V. Conclusions on the Recent Law and Practice of Amicus Briefs

Five observations flow from the recent developments in amicus provisions in legal instruments and the attitudes of tribunals in recent cases towards amicus applications and amicus briefs.

**First, the increasing receptiveness towards amicus briefs continues.**<sup>71</sup> Ever since the FTC Statement, amicus provisions have established themselves in the arbitral rules used most frequently in investor-state arbitrations (namely, the ICSID and UNCITRAL Arbitration Rules), as well as in the latest iterations of rules of certain arbitral institutions that have historically been less popular for investor-state arbitrations (namely, the SCC and SIAC). Clearly, neither the SCC nor SIAC is of the view that amicus provisions are likely to harm their attempts to attract a greater share of these disputes. The new SCC Arbitration Rules and SIAC Investment Arbitration Rules are particularly noteworthy given their potential to allow markedly increased amicus participation, such as the making of oral representations.

This observation is less clear in the context of FTAs and other investment agreements. However, comprehensive amicus provisions have been included in a number of significant instruments. Some such instruments, for example, the EU's TTIP proposal, are highly enterprising and go well beyond the amicus provisions of most treaties currently in force. Moreover, even in the absence of express provisions in FTAs and other investment agreements, amicus briefs may still be admitted in some disputes via the application of the ICSID or UNCITRAL Arbitration Rules (and this will increase significantly if the Mauritius Convention gains wider acceptance in the international community).

Recent tribunals have taken a flexible approach when applying amicus provisions and have repeatedly emphasised the importance of amicus briefs in ensuring transparency and the acceptability of investor-state arbitration to users at large. Furthermore, to the extent that the award in *Philip Morris* can be used as a bellwether, tribunals may start relying more heavily on amicus briefs in determining cases, provided that the briefs bring fresh insight to the proceedings.

The continued rise in the number of amicus applications also reflects the increasing receptiveness towards amicus briefs.<sup>72</sup> The same can be said of the diversity of amici, as

<sup>70</sup> See, e.g., Philip Morris, ICSID Case No. ARB/10/7, Award (July 8, 2016), ¶¶ 389-410.

<sup>71</sup> See previous scholarship mentioned above at *supra* note 21.

<sup>72</sup> The ratio of tribunal decisions on amicus applications to cases registered with ICSID was approximately 1:6 in 2015 and 1:7 in 2016 (January to September). These ratios stood at 1:31 in 2001 and 1:23 in 2006 (ICSID tribunals did not make any decisions on amicus applications between 2002 and 2005). See table 1 entitled "*Amicus Applications in ICSID Cases 2003 – 2016*" below.

demonstrated by *Eli Lilly*.<sup>73</sup> Given that amici have historically adopted positions similar to the respondent-state in disputes, that case would also suggest that claimants are getting better at using amicus provisions to their advantage.<sup>74</sup>

Second, amidst the increasing receptiveness, there is a notable countervailing concern about the potential effects such an approach may have on proceedings. These effects include increased costs to disputing parties and delay in proceedings caused by the need to deal with an amicus brief.

This countervailing concern is demonstrated by tribunals' exercise of their broad procedural authority to reject applications for lateness, circumscribe the length and content of briefs, and reserve the right to impose costs upon amici. Outside the hearing room, this concern is reflected in provisions of draft treaties and recent iterations of arbitral rules. For example, the proposed TTIP text requires a potential amicus to demonstrate a "*direct and present interest in the result of the dispute*". Meanwhile, the SCC Arbitration Rules require tribunals to consider whether an amicus brief will be of assistance in determining a "*material*" legal or factual issue and empower tribunals to require amici to provide security for costs. Elsewhere, the SIAC Investment Arbitration Rules require tribunals to consider the extent to which an amicus brief would violate the disputing parties' right to confidentiality.

Despite these concerns, certain tribunals, treaty drafters and authors of arbitral rules are not averse to having more amicus briefs *per se*. Rather, the measures deployed seem to be aimed at ensuring proportionate intervention by providing some balance in proceedings that may otherwise be affected negatively by last minute interventions, multiple overlapping interventions, interventions offering limited new insight and/or breaches of confidentiality.

**Third, when considering an application to file an amicus brief, tribunals are guided predominantly by the question of whether the brief will assist the tribunal (by providing perspective, knowledge or insight that is different from that already before it).**<sup>75</sup> This is more straightforward in NAFTA disputes, in which potential amici attach their brief to the application; in other disputes, the application and submission of the brief are typically two separate processes. The ability of amici to convince the tribunal that they will be of assistance may depend, *inter alia*, on whether they are allowed to avail themselves of other "*transparency*" measures, such as access to documents and attendance at hearings. These measures, which have been very limited in practice, are discussed further below.

**Fourth, some uncertainty remains as to the extent to which an amicus should be "*independent*" and precisely what that term means.** This ambiguity was first raised in *Von Pezold/Border*. Since then, the NAFTA tribunal in *Eli Lilly* downplayed the importance of this factor by making it subsidiary to the issue of whether an amicus submission would assist the tribunal. In contrast, the ICSID tribunal in *Philip Morris* was unable to ignore "*detailed information*" demonstrating that the claimant's lawyers were on the management board and other committees

<sup>73</sup> See table 2 entitled "Amicus Participation".

<sup>74</sup> See Lucas Bastin, *Amici Curiae in Investor-State Arbitration: Eight Recent Trends*, 30(1) Arb. Int'l. 125, 135-37 (2014).

<sup>75</sup> See also Eric De Brabandere, *NGOs and the "Public Interest": The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes*, 12(1) Chi. J. Int'l. L. 107 (2011).

of a potential amicus. Whether future cases are able to reconcile these two positions will be of interest to practitioners.

**Fifth, the wording of amicus provisions is by no means settled.** Amicus provisions will continue to evolve, and possibly diverge, across a spectrum of legal instruments. This is evident from the way the wording in the first amicus provision (the FTC Statement) has been amended as legal and practical issues surrounding its application have arisen.

What has caused tribunals, treaty drafters and authors of arbitral rules to accommodate amicus interveners in this way? The most significant driver is a concern to further enhance the legitimacy of the investor-state system and to promote its acceptance by the greatest possible number of affected stakeholders.<sup>76</sup> The proliferation of FTAs, investment treaties and investor-state arbitrations in recent years means that the number and range of people potentially affected by events in the investor-state sphere has grown dramatically. The visibility and widespread consciousness of those events has been equally significant. Thus, legitimacy depends increasingly on the views of a wider public, which may not always accord with the views expressed by states.<sup>77</sup> The recent discontent of segments of the public over TTIP and CETA reflects this divergence (although the intensity and politicisation of the debate on investor-state dispute resolution under these proposed FTAs cannot be explained by that divergence alone). In this context, amicus intervention can be seen to appeal directly to this growing and diverse constituency.

Lastly, the lack of clarity as to the criteria of independence for amici and evolution in the wording of amicus provisions can be viewed as manifestations of the on-going tension within investor-state arbitration regarding how much weight to give to the concerns of the wider public, and how to balance those concerns with other significant factors including cost, expedition and efficiency, matters that affect private and state parties equally.

## VI. Other Forms of Amicus Participation and Transparency

Amicus briefs are one of a number of different forms of amicus participation. In principle, these include access to case materials, attendance at hearings and oral submissions.<sup>78</sup> Applications to file amicus briefs are often made in conjunction with requests for these other forms of amicus participation.

However, tribunals have been reluctant to expand the scope of amicus participation.<sup>79</sup> The only exceptions have been:

<sup>76</sup> See also Charles Brower & Stephen Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9(2) Chi. J. Int'l. L. 471 (2009); and Susan Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73(4) Fordham L. Rev., 1584 (2005) (discussing definitions of "legitimacy").

<sup>77</sup> Mariel Dimsey, *supra* note 12, ¶ 11.

<sup>78</sup> See, e.g., Joao Ribeiro & Michael Douglas, *Transparency in Investor-State Arbitration: The Way Forward*, 11(1) Asian Int'l. Arb. J. 49 (2015); and Loretta Malintoppi & Natalie Limbasan, *Living in Glass Houses? The Debate on Transparency in International Investment Arbitration*, 2(1) BCDR Int'l. Arb. Rev. 31 (2015).

<sup>79</sup> Lucas Bastin, *supra* note 21, Appendix I; and Lucas Bastin, *Amici Curiae in Investor-State Arbitration: Eight Recent Trends*, 30(1) Arb. Int'l. 125, 140 (2014).

1. the initial proceedings in *Micula*, in which an ICSID tribunal granted the amicus access to case materials and, where requested by the tribunal or the disputing parties, oral submissions;<sup>80</sup>
2. *Piero Foresti*, in which an ICSID tribunal granted the amicus access to case materials on the basis of Article 41(3) of the ICSID Arbitration (Additional Facility) Rules. In doing so, the tribunal referred to the need to “ensure that [amicus] participation is both effective and compatible with the rights of the Parties and the fairness and efficacy of the arbitral process”;<sup>81</sup> and
3. *Infinito Gold*, in which an ICSID tribunal exercised its residual powers to grant the amicus, APREFLOFAS, access to case materials. The tribunal stated that “whether APREFLOFAS should be granted access to the record and to what extent depends essentially on whether access is required to APREFLOFAS to effectively discharge its task, i.e. provide the Tribunal with a useful and particular insight on facts or legal questions relevant to its jurisdiction [(which was then in issue)]. In order for APREFLOFAS to adequately meet this objective, it is undoubtedly preferable that it knows what information has already been submitted to the Tribunal. Otherwise, there is a risk that the information that it may submit may be redundant and thus useless”.<sup>82</sup>

For now these cases are the exception. Looking forward, the UNCITRAL Transparency Rules contain more explicit provisions on wider public access to information, documents and hearings. Likewise, and as detailed above, the SCC Arbitration Rules, the SIAC Investment Arbitration Rules and the EU’s current proposal on TTIP also expressly contemplate the possibility of documentary access and oral submissions by an amicus.

Amicus participation is often referred to in the context of “transparency”, which also includes measures such as the publication of information on proceedings, documents and awards, as well as attendance at and broadcasting of hearings. There has been a broad movement towards transparency in recent years, as evidenced by the UNCITRAL Transparency Rules and, more subtly, by the initiatives of parties such as those in the on-going case of *Vattenfall v. Germany*<sup>83</sup> who have agreed to open their hearings to the public despite not being required to do so by the applicable treaty (the ECT) or arbitral rules (the ICSID Arbitration Rules).

However, a question remains about the frequent categorisation of amicus participation as a “transparency” measure. As one commentator has pointed out, amicus interventions “may or may not lead to any additional opening of the arbitral proceedings to public scrutiny”.<sup>84</sup> Indeed, amicus participation itself can often be a one-way affair; a brief is filed without the amicus learning anything new about the case. Therefore, describing amicus participation as a “transparency” measure may not be entirely appropriate. This conundrum has practical relevance since objections to amicus participation, such as inefficiency, are sometimes viewed as applicable to

<sup>80</sup> This was ascertained from the Award in the case; the relevant procedural order is not publicly available.

<sup>81</sup> Piero Foresti, ICSID Case No. ARB(AF)/07/1, Letter from ICSID to The Legal Resource Centre and the International Commission of Jurists (Oct. 5, 2009).

<sup>82</sup> Infinito Gold, ICSID Case No. ARB/14/5, Procedural Order No. 2 (June 1, 2016).

<sup>83</sup> *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12 (in September 2016, two other hearings were made open to the public. However, this was pursuant to the terms of the applicable investment agreements (both of which involved Canada) that laid down a requirement for public hearings).

<sup>84</sup> Luke Peterson, *Amicus Curiae Interventions: The Tail That Wags the Transparency Dog*, KLUWER ARB. BLOG (Apr. 27, 2010), available at <http://kluwarbitrationblog.com/2010/04/27/amicus-curiae-interventions-the-tail-that-wags-the-transparency-dog/>.

transparency in general. However, if the two concepts are decoupled and recognised as related but ultimately separate, then it may be possible to remove a number of obstacles to the transparency agenda.<sup>85</sup>

Another interesting issue is whether transparency measures in investor-state arbitration might spill over into international commercial arbitration. The transparency debate certainly is not new to commercial arbitration.<sup>86</sup> However, transparency has not gained the same amount of traction in this sphere owing largely to the notion that commercial arbitration is a matter between private parties and therefore should not be subject to public scrutiny.<sup>87</sup> Although a comprehensive discussion is beyond the scope of this article, this is certainly something to watch given the apparent present appetite for institutional and legislative reform.<sup>88</sup>

## VII. Conclusion

These observations are interesting both for what they mean for the law and practice of amicus briefs specifically and investor-state arbitration as a whole. Most significant among the observations is the increasing receptiveness towards amicus briefs, albeit that amicus intervention has not (for now at least) extended materially beyond the submission of such briefs. The pursuit of enhanced legitimacy in the system of investor-state dispute resolution necessarily involves consideration of transparency measures including amicus intervention. However, the system must also deliver proportionate and efficient dispute resolution, and do so within a timeframe and at a cost that is acceptable to private parties, to the public purse and in the eyes of the wider public. Present indications are that tribunals are acutely aware of the need for balance between these considerations and between the diverse interests of these various constituencies. In principle, there is scope for more expansive amicus intervention. Whether more intense intervention will materialise in all the circumstances is far less clear.

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<sup>85</sup> *Id.*

<sup>86</sup> *See, e.g.,* Catherine Rogers, *Transparency in International Commercial Arbitration*, 54 U. Kan. L. Rev. 1301 (2006).

<sup>87</sup> *See, e.g.,* James Hope, *Transparency in International Arbitration*, COMMERCIAL DISPUTE RESOLUTION (2016), available at <https://www.cdr-news.com/categories/expert-views/6376-transparency-in-international-arbitration>.

<sup>88</sup> For instance, in 2016, the ICC Court started to publish certain details of arbitrators sitting in ICC cases, while the UK's Law Commission has announced arbitration law as a potential topic as part of its 13<sup>th</sup> Programme of law reform.

APPENDIX – AMICUS BRIEFS ILLUSTRATED

Table 1

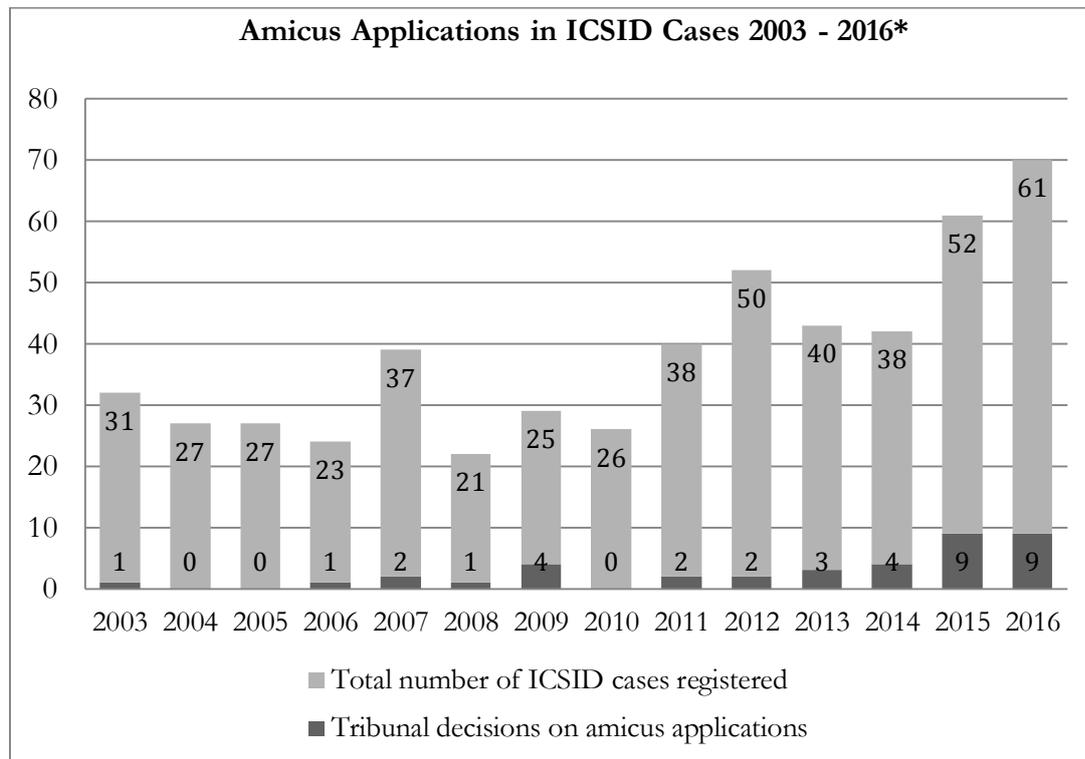
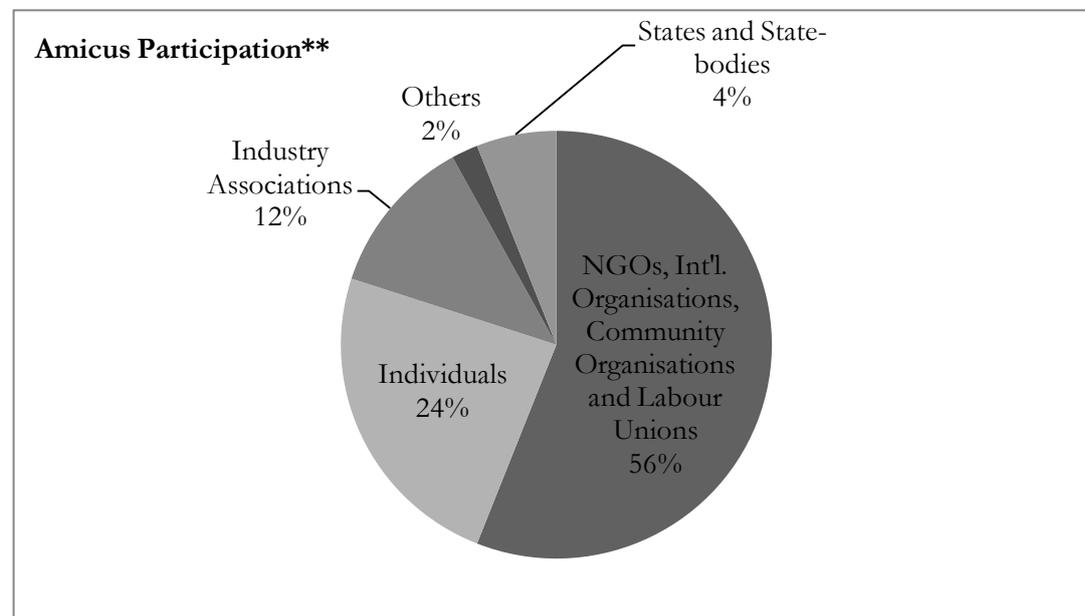


Table 2



\*Figures derived from ICSID, The ICSID Caseload – Statistics (Issue 2016-1) (2016) and <https://icsid.worldbank.org/apps/ICSIDWEB/process/Pages/Decisions-on-Non-Disputing-Party-Participation.aspx> (last visited Jan. 10, 2017).

\*\* Owing to a lack of publicly available information, these figures do not include recent ECT cases in which the EC has frequently sought to intervene.