Third-Party Participation in Investment Arbitration Proceedings

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Abstract
This article examines the development of thirdparty participation in investment arbitration**,** particularly through amicus curiae submissions, as a significant manifestation of increased transparency in investor–State dispute settlement. It analyzes the legal foundations and codification of such participation in international procedural rules and investment agreements, highlighting UNCITRAL, ICSID, and U.S. and Canadian models. It also reviews arbitral practice through landmark cases such as *Methanex*, *UPS*, and *Biwater Gauff*. The article concludes that thirdparty participation has brought investment arbitration closer to judicial adjudication and strengthened consideration of the public interest, while raising challenges concerning confidentiality, party autonomy, and procedural rights.

Keywords:
Investment Arbitration, ThirdParty Participation, Amicus Curiae, Transparency, Arbitral Confidentiality, NonDisputing Party.

Introduction

As a general principle, proceedings belong to the parties to them. Nevertheless, proceedings may be extended to other persons through intervention or joinder, and most procedural laws, notwithstanding differences in their legal systems and sources, regulate thirdparty intervention and joinder in litigation. *(Algerian Law No. 0809 of 25 February 2008, Arts. 194206)*

Arbitral proceedings, by contrast, are ordinarily confined to the parties who have chosen arbitration rather than court litigation, particularly in order to preserve confidentiality. It would therefore appear, at first sight, inconceivable to allow outsiders to intervene in arbitral proceedings. Yet, over the last two decades, several international arbitral institutions have received applications from nongovernmental organizations, especially those active in environmental protection, consumer protection and tradeunion affairs, seeking to participate in pending arbitral proceedings as amici

curiae in order to present their views or defend interests falling within their fields of activity. This procedural device developed by analogy with domestic judicial practice. *(Menetrey, 2009, pp. 34)*

Thirdparty participation in investment arbitration is principally grounded in considerations of transparency. That rationale conflicts, on the one hand, with the longestablished principle of confidentiality in arbitration and, on the other hand, with the parties' desire to retain control over the conduct of the proceedings. *(Grisel & Vinuales, 2008)*

Thirdparty intervention in arbitration has thus become a point of confrontation between the more recently developed logic of transparencywhich, according to its proponents, is intended to strengthen the legitimacy of investment arbitrationand the classical conception of arbitration, which derives from respect for party autonomy. *(Grisel & Vinuales, 2008)*

This article seeks to explain what is meant by thirdparty intervention in arbitration, identify its legal basis, examine the current trend toward codification, and review arbitral practice in order to show how arbitral tribunals have dealt with applications for intervention. The study is divided into two principal parts: the first considers the modern trend toward codifying rules on thirdparty participation in arbitration, while the second examines the practical treatment of intervention requests by international arbitral tribunals.

PART I: THE CODIFICATION OF THIRDPARTY PARTICIPATION IN INVESTMENT ARBITRATION

This Part examines attempts to codify and internationalize thirdparty participation in arbitral proceedings. The first section addresses its codification in international softlaw instruments, while the second concerns its incorporation into international agreements, particularly investment agreements.

Section 1: Codification of ThirdParty Intervention in International SoftLaw Instruments

I. The ALI/UNIDROIT Principles of Transnational Civil Procedure

The Principles adopted by the American Law Institute and the International Institute for the Unification of Private Law (ALI/UNIDROIT Principles) were approved by the two institutions in 2004 after several years of discussion among experts from different legal cultures. The project ultimately sought a compromise between the commonlaw tradition and the RomanoGermanic civillaw tradition. The Principles aim to give the procedural rules they contain a transnational and potentially universal character, particularly because they are directed to methods of resolving transnational commercial disputes and may serve as a basis for future reforms of national procedural law. *(Grisel & Vinuales, 2007, p. 403)*

The Principles devote significant attention to the possibility of thirdparty participation. Article 13, entitled "Amicus Curiae Submission," provides, in substance, that after consultation with the parties, the court may accept written submissions from third persons on important legal issues in the case and information concerning the general context of the dispute. The court may also invite such a submission. Before taking the amicus submission into account, the parties must be given an opportunity to submit written observations on its content. *(ALI/UNIDROIT Principles of Transnational Civil Procedure, Art. 13, 2004)*

Through these Principles, the possibility of thirdparty participation was recognized beyond its AngloSaxon origins and acquired a broader transnational dimension as procedural rules became increasingly internationalized and globalized, particularly in the field of dispute settlement. *(Grisel & Vinuales, 2007, p. 403)*

II. Studies and Statements of the Organisation for Economic Cooperation and Development (OECD)

In 2005, the OECD produced a study entitled "Transparency and Third Party Participation in InvestorState Dispute Settlement Procedures." The study reviewed arbitral practice concerning thirdparty participation and public access to arbitral proceedings. It reported the general view of members of the Investment Committee that additional transparencyparticularly publication of arbitral awards, subject to appropriate safeguards for confidential governmental information and commercially sensitive datawas desirable in order to improve the operation and public acceptance of international investment arbitration and contribute to the continuing development of public jurisprudence. The Committee also generally considered that, where proceedings raise important questions of public interest, thirdparty participation may be desirable, subject to clear and precise guidelines. *(OECD, 2005)*

In light of this study, the OECD issued a statement in June 2005 calling for greater transparency in investment arbitration. Although the statement was not legally binding, it represented an international policy position encouraging thirdparty participation, particularly where the dispute concerns the public interest. In that respect, the statement supported the acceptance of amicus curiae submissions during arbitral proceedings. *(OECD Investment Committee Statement, June 2005)*

The OECD position also represented a significant development when compared with the negotiating text of the Multilateral Agreement on Investment (MAI), in its version of 24 April 1998. The MAI text did not contemplate intervention by nongovernmental entities. Instead, it limited participation to the contracting parties to the agreement, allowing them to express views to the arbitral tribunal on legal questions relating to the dispute, subject to the requirement that such participation not be used as a pretext for unjustified delay. *(Multilateral Agreement on Investment, Consolidated Negotiating Text, 24 Apr. 1998, pp. 70, 79)*

It should also be noted that the OECD statement reflected the orientation of its drafters in its presentation of arbitral practice. In its discussion of The Loewen Group, for example, it emphasized the tribunal's rejection of the argument that an implied duty of confidentiality existed and referred to publication of documents, without equally stressing that the tribunal had refused publication while the proceedings were pending and that disclosure occurred only after final disposition of the dispute. *(OECD, 2005; The Loewen Group, Decision on Jurisdiction, 5 Jan. 2001, paras. 2426)*

III. The Project for Revision of the UNCITRAL Arbitration Rules

In July and September 2006 and again in February 2007, a working group began revising the UNCITRAL Arbitration Rules, meeting in Vienna and New York. One of the issues that attracted particular attention was whether third parties should be allowed to participate in UNCITRAL

arbitration, especially in arbitrations arising under investment treaties. *(Grisel & Vinuales, 2007, p. 26)*

The Secretariat noted that third parties, such as nongovernmental organizations, may seek an opportunity to explain their positions, particularly in investmenttreaty arbitration. Article 15(1) of the then UNCITRAL Arbitration Rules, which provided that the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, could be interpreted as empowering the tribunal to accept such interventions in the form of submissions intended to assist the tribunal, including amicus curiae briefs. The Swiss Rules were cited by way of comparison: they expressly contemplated a third party seeking to participate in pending arbitration and required the tribunal to decide the request after consulting all parties and considering the circumstances it deemed relevant. *(UNCITRAL Secretariat, A/CN.9/WG.II/WP.143, 2006)*

The idea received more explicit support in a report prepared by Jan Paulsson and Georgios Petrochilos. They proposed amending Article 15 by adding a provision under which, unless the parties agreed otherwise, the tribunal couldafter consultation with the parties and especially in cases raising issues of public interestallow a nonparty to present one or more written statements, provided the tribunal was satisfied that the statements were likely to assist it in determining a factual or legal issue by offering a perspective, particular knowledge or insight unavailable from the parties. The tribunal would determine the form and number of such statements after consultation with the parties. *(Paulsson & Petrochilos, Revision of the UNCITRAL Arbitration Rules, p. 72)*

At the fortyfifth session of the Working Group on Arbitration and Conciliation in Vienna in September 2006, the Group considered whether a revised version of the UNCITRAL Arbitration Rules should contain an express provision on thirdparty participation. It distinguished between two situations: one in which a person wished to make a submission in the arbitration, for example by filing an amicus brief, and another in which a person sought joinder as a party to the proceedings. *(UNCITRAL Working Group II, A/CN.9/614, 2006, p. 22)*

The Working Group considered that Article 15(1), by empowering the tribunal to conduct proceedings as it considered appropriate, could be interpreted as granting authority to receive thirdparty submissions. Practice under the UNCITRAL Rules was also said to show that third parties could participate in arbitration. The Working Group therefore concluded that an express provision might not be necessary in the revised Rules. It is noteworthy, however, that the Secretariat's note for the following session in New York in February 2007 did not refer to the previous report. *(UNCITRAL Working Group II, A/CN.9/614, 2006, pp. 2223; A/CN.9/WG.II/WP.145, 2007, pp. 23)*

International civil society also moved in the same direction. The Center for International Environmental Law (CIEL) and the International Institute for Sustainable Development (IISD) proposed inserting a new paragraph into Article 15 of the UNCITRAL Rules. Their proposal would allow a tribunal, in treatybased investorState arbitration, to permit a nondisputing person or entity to make a written submission where the submission could assist the tribunal in determining a factual or legal issue by bringing a particular perspective, knowledge or insight, or where it addressed a matter

within the scope of the dispute. At the same time, the tribunal would be required to ensure that such submissions did not disrupt the proceedings, impose an undue burden, or unfairly prejudice either disputing party, and that both parties had an opportunity to comment on the submission. *(CIEL & IISD, 2007, pp. 1215)*

Section 2: Codification of ThirdParty Intervention in International Agreements

This section first considers the introduction of thirdparty participation in bilateral agreements for the promotion and reciprocal protection of investments, and then its treatment in multilateral agreements.

I. Bilateral Investment Agreements: The United States and Canadian Models

The inclusion of provisions allowing thirdparty participation in arbitration under bilateral and multilateral investment agreements gained particular acceptance in North America, where the political environment was favorable to greater openness, especially in the United States and Canada. *(Grisel & Vinuales, 2007, p. 28)*

The initiative in the United States may be traced to the U.S. Congress through the Trade Act of 2002, which instructed the executive branch in negotiating freetrade and investment agreements. Among the negotiating objectives, the legislation identified the need to ensure the fullest practicable measure of transparency in disputesettlement mechanisms, consistent with the protection of classified and businessconfidential information, and expressly called for a mechanism allowing the acceptance of amicus curiae submissions from businesses, trade unions and nongovernmental organizations. *(Trade Act of 2002, Pub. L. No. 107210, Sec. 2102(b)(3)(H))*

These legislative directions directly influenced the negotiation of international investment instruments. The U.S. Model Bilateral Investment Treaty consequently provided that an arbitral tribunal "shall have the authority to accept and consider amicus curiae submissions from a person or entity that is not a disputing party." Comparable provisions were incorporated into U.S. investment treaties and freetrade agreements with Uruguay, the Dominican Republic and Central American States, Morocco, Chile, Colombia, Singapore, Peru and Korea, among others. *(U.S. Model BIT, Art. 28(3); CAFTADR, Art. 10.20(3); U.S.Morocco FTA, Art. 10.19(3); U.S.Chile FTA, Art. 10.19(3); U.S.Colombia FTA, Art. 10.20(3); U.S.Singapore FTA, Art. 15.19(3); U.S.Peru TPA, Art. 10.20(3); KORUS FTA, Art. 11.20(5))*

Following the same trend, Canada's Model Foreign Investment Promotion and Protection Agreement provided a detailed procedure for submissions by nondisputing parties. A nondisputing party that was a national of a Party, or had a significant presence in the territory of a Party, could apply to make a written submission. The tribunal was to consider, among other factors, whether the submission would assist in determining a factual or legal issue by providing a distinct perspective, knowledge or insight; whether it addressed a matter within the scope of the dispute; whether the applicant had a significant interest in the arbitration; and whether the arbitration raised a question of public interest. The tribunal was also to ensure that the submission did not disrupt the proceedings, impose an excessive burden, or unfairly prejudice either disputing party, and the disputing parties were to be given an opportunity to respond. *(Canada Model FIPA 2004, Art. 39)*

The principle was then implemented in bilateral agreements concluded by Canada following adoption of its 2004 model. For example, Article 29 of the Canada–China investment agreement permits a tribunal, after consultation with the disputing parties, to accept written submissions from a person or entity that is not a disputing party where that nondisputing party has a significant interest in the arbitration. The tribunal must ensure that the submission does not disrupt the proceedings and that neither disputing party is unduly burdened or unfairly prejudiced. *(CanadaChina FIPA, Art. 29)*

Likewise, the Canada–Peru investment agreement contemplated thirdparty participation. Unlike the more detailed model provision, however, its relevant provision did not make participation dependent upon the parties' consent and confined the nondisputing Party's intervention to questions concerning interpretation of the agreement. It also recognized a right to attend hearings even without a separate application for intervention. Comparable provisions appeared in Canada's investment agreements with Jordan and Kuwait, among others. *(CanadaPeru FIPA, Art. 35; CanadaJordan FIPA, Art. 35; CanadaKuwait FIPA, Art. 31)*

II. Multilateral Agreements

A. The North American Free Trade Agreement (NAFTA)

NAFTA was among the first multilateral instruments to contain an express provision permitting a nondisputing Party to make submissions in investment arbitration. Article 1128 provided that, upon written notice to the disputing parties, a Party could make submissions to the tribunal on a question of interpretation of the Agreement. *(NAFTA, Art. 1128)*

NAFTA Chapter Eleven, which governs investment and sets out methods for resolving investment disputes, thus acknowledged a form of participation by an entity that was not one of the disputing parties, particularly in relation to interpretation of the treaty. Arbitral practice subsequently demonstrated that amicus participation under NAFTA was not confined solely to interpretive submissions by treaty Parties, as discussed in Part II below.

B. Amendment of the ICSID Arbitration Rules: Introduction of Rule 37(2)

The amendment of the ICSID Arbitration Rules and the Additional Facility Rules confirmed the broader movement toward modernizing arbitral procedure and making it more responsive to contemporary expectations, including by recognizing the possibility of participation by nondisputing parties.

The process began with work undertaken by the ICSID Secretariat. On 22 October 2004, it issued a discussion paper entitled "Possible Improvements of the Framework for ICSID Arbitration." The Secretariat observed that the arbitral process could in appropriate cases be strengthened through submissions from third parties, including not only civilsociety organizations but also business groups and, in investmenttreaty arbitration, other States parties to the treaties concerned. It therefore suggested clarifying that tribunals had authority to accept and consider thirdparty submissions, including through amendment of the ICSID Arbitration Rules and the Additional Facility Rules. *(ICSID Secretariat, Possible Improvements of the Framework for ICSID Arbitration, 22 Oct. 2004, para. 13)*

In the Secretariat's final proposal of 12 May 2005, it suggested a provision under which, after consultation with the parties, a tribunal could allow a person or State that was not a party to the dispute the "nondisputing party" to file a written submission. In deciding whether to permit the filing, the tribunal would consider whether the submission could assist in determining a factual or legal issue by bringing a perspective, particular knowledge or insight different from that of the disputing parties; whether it addressed a matter within the scope of the dispute; and whether the nondisputing party had a significant interest in the proceeding. The tribunal would also ensure that the filing did not disrupt the proceedings, unduly burden or unfairly prejudice either party, and that both parties had an opportunity to comment. *(ICSID Secretariat, Suggested Changes to the ICSID Rules and Regulations, 12 May 2005)*

The final version adopted by the ICSID Administrative Council made several modest changes. Rule 37(2) referred more broadly to a "person or entity," rather than a "person or State," thereby covering the various civilsociety organizations envisaged in the Secretariat's earlier study. The final text also omitted the phrase "as far as possible" in relation to consultation and simply required consultation with the parties. Finally, it emphasized twice that the nondisputing party submission must concern a matter within the scope of the dispute, whereas the earlier proposal referred to that requirement only once. *(ICSID Arbitration Rule 37(2), 2006; Grisel & Vinuales, 2007, p. 33)*

Article 41(3) of the Additional Facility Arbitration Rules reproduced substantially the same regime. Through these provisions, thirdparty participation became formally codified in the procedural rules of the principal institutional framework for investment arbitration, a forum frequently used by foreign investors in disputes with host States. *(ICSID Additional Facility Arbitration Rules, Art. 41(3), Annex C)*

PART II: ARBITRAL PRACTICE ON AMICUS CURIAE APPLICATIONS

Thirdparty participation in arbitral proceedings has expanded markedly over the last two decades, particularly in arbitration under NAFTA and in arbitration administered by ICSID. This Part reviews representative decisions illustrating how tribunals have dealt with applications for amicus curiae participation.

Section 1: NAFTA Arbitral Practice under the UNCITRAL Rules

Arbitration under NAFTA Chapter Eleven was not only among the earliest investmentarbitration regimes to encourage greater transparency; it was also at the forefront of allowing thirdparty participation. Tribunals constituted under Chapter Eleven treated themselves as empowered to receive submissions from nondisputing parties, as the following cases demonstrate.

I. Methanex Corporation v. United States of America

Methanex Corporation, a Canadian company and a major global producer of methanol, supplied a principal component used in the manufacture of methyl tertiarybutyl ether (MTBE), a gasoline additive. In March 1999, the State of California ordered a ban on the sale and use of MTBE, to take effect on 31 December 2002, on the ground that contamination involving the additive posed serious

risks to human health and the environment. *(Methanex Corp. v. United States, Final Award, 3 Aug. 2005; French Chemical Society, MTBE reference)*

On 3 December 1999, Methanex commenced arbitration against the United States under NAFTA Chapter Eleven, relying in particular on Article 1116(1). It alleged violations including expropriation and compensation obligations under Article 1110(1), the minimum standard of fair and equitable treatment under Article 1105(1), and national treatment under Article 1102. Methanex sought approximately USD 970 million in compensation for the losses it claimed to have suffered. *(Methanex Corp. v. United States, Final Award, 3 Aug. 2005, paras. 12)*

During the proceedings, three nongovernmental organizations sought access to documents filed by the parties, permission to attend hearings, leave to intervene through written submissions, and an opportunity to make oral presentations. The International Institute for Sustainable Development filed a petition on 25 August 2000, and on 6 September 2000 a joint petition was filed by Communities for a Better Environment and the Earth Island Institute. They sought permission to participate as amici curiae. *(Methanex, Decision on Petitions from Third Persons to Intervene as Amici Curiae, paras. 1, 5)*

The NGOs relied on Article 15(1) of the UNCITRAL Arbitration Rules, arguing that it conferred broad procedural powers on the tribunal and that nothing in NAFTA Chapter Eleven prohibited thirdparty participation. They also emphasized the public character of the dispute and the importance of opening the proceedings to amicus participation. The petitioners argued that their intervention enjoyed broad public support and that the dispute raised constitutional and policy issues concerning the balance between governmental authority to implement environmental regulation and property rights. They further contended that the outcome could affect the willingness of governments throughout the NAFTA region, including California, to adopt measures protecting the environment and human health. *(UNCITRAL Arbitration Rules, Art. 15(1); Methanex Amicus Decision, paras. 5, 8)*

Methanex opposed the requests, arguing that participation would undermine the confidentiality of the arbitration and exceed the tribunal's powers. It relied on Article 25(4) of the UNCITRAL Rules, under which hearings were to be held in camera unless the parties agreed otherwise, and argued that documents submitted in the arbitration should therefore remain confidential. It also referred to the parties' agreement concerning confidentiality at their second procedural meeting. Methanex further maintained that the tribunal could not allow outsiders to intervene without the consent of the disputing parties, and that Article 15 concerned procedural management rather than the addition of participants on the merits. *(UNCITRAL Arbitration Rules, Art. 25(4); Methanex Amicus Decision, paras. 1113; Second Procedural Meeting Minutes, 7 Sept. 2000)*

In its decision of 15 January 2001, the tribunal held that Article 15(1) of the UNCITRAL Rules gave it authority to receive written amicus submissions. It deferred the question of the weight or substantive relevance to be accorded to any such submissions until consideration of the merits. The

decision became an important precedent and was relied upon later that year in United Parcel Service of America Inc. v. Government of Canada. *(Methanex Amicus Decision, para. 53)*

II. United Parcel Service of America Inc. v. Government of Canada

In April 2000, United Parcel Service of America Inc. (UPS), a U.S. parceldelivery company, initiated proceedings against Canada alleging breaches of NAFTA. UPS argued that Canada Post enjoyed monopoly advantages in the distribution of mail and engaged in anticompetitive practices by using facilities and privileges associated with that monopoly. It also alleged that the Canadian border authorities accorded UPS treatment less favorable than that accorded to Canadian courier services. UPS claimed, among other things, failures relating to State monopolies and State enterprises under Articles 1502 and 1503, national treatment under Article 1102, and fair and equitable treatment under Article 1105. It sought approximately USD 160 million in damages. *(UPS v. Canada, Statement of Claim, 19 Apr. 2000, paras. 1139)*

On 8 November 2000, the Canadian Union of Postal Workers and the Council of Canadians applied to intervene, asserting that they were directly affected by the subject matter of the dispute, especially its potential consequences for public policy. They argued that the dispute affected not only Canada Post but also a wide range of other public services. They therefore asked to participate throughout the proceedings as parties; alternatively, if party status were refused, they sought leave to intervene as amici curiae on grounds of fairness, equality and justice. They also sought disclosure of pleadings, memorials, countermemorials, prehearing submissions, witness statements, expert reports, exhibits, and other filings, as well as opportunities to make submissions concerning the place of arbitration, jurisdiction and related matters, and to amend their requests should further information become available. *(UPS v. Canada, Decision on Petitions for Intervention and Participation as Amici Curiae, paras. 13)*

UPS responded that the tribunal lacked jurisdiction to grant the petitioners the status of parties to the arbitration. It acknowledged that a tribunal might, in appropriate circumstances, possess power to receive thirdparty amicus submissions, but argued that the petition did not establish a sufficient basis for granting such participation. UPS also opposed attendance at hearings and access to tribunal documents. *(UPS v. Canada, Amici Decision, paras. 56)*

Canada's position on the tribunal's jurisdiction was similar, while adding that the tribunal should consider whether the arbitration concerned a matter of public interest and whether the applicants had a genuine interest in the dispute without causing prejudice to the disputing parties. The United States and Mexico, as NAFTA Parties, generally supported Canada's approach, although Mexico maintained that the tribunal did not possess authority to receive submissions from third parties or confer amicus status. *(UPS v. Canada, Amici Decision, paras. 711)*

Relying in particular on Methanex, the tribunal concluded that Article 15(1) of the UNCITRAL Rules empowered it to receive submissions from third parties that might assist it during the arbitration. It observed that the petitioners' principal interests did not concern the place of arbitration, the arbitrators' jurisdiction or purely procedural matters. The tribunal therefore accepted the petitioners'

written amicus submissions for later consideration on the merits, while refusing the remainder of their requests. *(UPS v. Canada, Amici Decision, paras. 5973)*

It is also noteworthy that, during the hearing on jurisdictional objections, the disputing parties agreed that the proceedings should be open to the public. As a result, the hearing was transmitted live to a room at the World Bank, although audio and video recording equipment was not permitted. *(ICSID Press Release concerning public access to the UPS hearing)*

III. Glamis Gold Ltd. v. United States of America

Glamis Gold Ltd., a Canadian public company engaged in the exploration, development and extraction of precious metals in the United States and Latin America, was incorporated under the laws of British Columbia. Between 1994 and 2002 it pursued development of the Imperial Project on federal land in southeastern California using mining rights it held. *(Glamis Gold Ltd. v. United States, Award, 8 June 2009, para. 10)*

The company commenced arbitration against the United States alleging violations of NAFTA Chapter Eleven. It claimed that federal authorities had arbitrarily delayed consideration of its proposed project and that, once federal approval appeared possible, California enacted legislation and regulations that rendered the project economically unviable. Glamis alleged that federal and State measures had effectively expropriated its mining rights and violated the obligations of fair and equitable treatment and protection against expropriation under Articles 1105 and 1110 of NAFTA. *(Glamis Gold Award, para. 11)*

By letter dated 24 February 2005, the Quechan Indian Nation applied to participate as amicus curiae. The Nation is an Indigenous tribe whose sacred places were located at the site of one of the proposed mines. The United States supported the application and considered it consistent with the criteria developed by the NAFTA Free Trade Commission. *(Glamis Gold, Decision on Application and Submission by Quechan Indian Nation, 16 Sept. 2005, paras. 17)*

The tribunal considered it unnecessary to decide, in the abstract, whether its discretion under Article 15(1) of the UNCITRAL Rules independently extended to receiving substantive material from nonparties. The Free Trade Commission's statement on nondisputing party participation indicated that all three NAFTA Parties accepted such submissions, and the disputing parties before the tribunal did not object where the application was considered in accordance with that statement. The tribunal therefore found that the Quechan application satisfied the applicable criteria and granted leave to participate. *(Glamis Gold, Quechan Decision, paras. 915)*

Section 2: ICSID Arbitral Practice

In recent years, applications for intervention in ICSID proceedings increased significantly. Several procedural orders issued by ICSID tribunals recognized the possibility of accepting thirdparty participation and contributed to the evolution that culminated in the amendment of ICSID Arbitration Rule 37(2). The following cases illustrate that development.

I. Aguas Argentinas / Suez / Vivendi v. Argentine Republic Orders of 19 May 2005 and 12 February 2007

The dispute arose from concession contracts for water distribution and sewerage systems serving the Buenos Aires metropolitan area and surrounding municipalities, systems that provided essential public services to millions of people. In light of the environmental and publicservice consequences of the dispute, several nongovernmental organizations considered that its resolution could have implications extending well beyond the immediate interests of the disputing parties. They therefore submitted requests seeking access to hearings, permission to file written submissions, and unrestricted access to the parties' written pleadings. *(Aguas Argentinas / Suez / Vivendi v. Argentina, Order on Transparency and Amicus Participation, 19 May 2005, paras. 17)*

Two important procedural orders were issued in the Aguas Argentinas arbitration, one on 19 May 2005 and another on 12 February 2007. They represented the first ICSID tribunal decisions expressly recognizing the possibility of amicus participation, and the first order predated the amendment of Rule 37(2). *(Aguas Argentinas, Orders of 19 May 2005 and 12 Feb. 2007)*

A. Order of 19 May 2005

The tribunal framed two preliminary questions: first, whether it had authority to accept participation by persons who were not parties to the dispute; and second, if it had such authority, what conditions should govern its exercise. Referring to Article 44 of the ICSID Convention and drawing guidance from other systems, particularly the Methanex decision, the tribunal considered the acceptance of amicus curiae participation to be a procedural matter within the meaning of Article 44. *(ICSID Convention, Art. 44; Aguas Argentinas, Order of 19 May 2005, paras. 1317)*

As to conditions, the tribunal considered the relevance of the subject matter of the case to the proposed submissions, the suitability of the third party to act as amicus, and the need for a procedure capable of balancing the interests of the proposed amici while protecting the substantive and procedural rights of the disputing parties in a fair, orderly and expeditious arbitration. *(Aguas Argentinas, Order of 19 May 2005, paras. 1317)*

After reviewing the petitions and the parties' observations, the tribunal unanimously refused the petitioners' request to attend hearings, allowed them an opportunity to apply for leave to submit amicus briefs subject to specified conditions, and deferred a decision on their request for access to documents. *(Aguas Argentinas, Order of 19 May 2005, para. 33)*

B. Order of 12 February 2007

In its later order, the tribunal reiterated the objective identified in its decision of 19 May 2005: enabling proposed amici to present their views while simultaneously protecting the substantive and procedural rights of the parties. By then, the ICSID Arbitration Rules had been amended in 2006. The tribunal noted that new Rule 37(2) required tribunals to ensure that a nondisputing party submission did not disrupt the proceeding, impose an undue burden, or unfairly prejudice either party, and that both parties had an opportunity to comment. *(Aguas Argentinas, Order of 12 Feb. 2007; ICSID Arbitration Rule 37(2))*

The tribunal therefore authorized the petitioners, subject to the deadlines and formal requirements specified in the order, to file their amicus submission electronically, while giving the disputing parties corresponding opportunities to submit observations within the prescribed time limits. *(Aguas Argentinas, Order of 12 Feb. 2007, para. 26)*

II. Aguas Provinciales de Santa Fe / Suez v. Argentine Republic Order of 17 March 2006

On 21 June 2005, the Foundation for the Development of Sustainable Policies, Professor Ricardo Ignacio Beltramino, Dr. Ana Maria Herrero and Dr. Omar Dario Heffes submitted an application for participation as amici curiae. Their petition contained three requests: permission to attend and present oral arguments at hearings; an opportunity to make submissions in written briefs; and access to documents and other information in the case. *(Aguas Provinciales de Santa Fe / Suez v. Argentina, Order of 17 Mar. 2006, para. 1)*

After the tribunal notified the disputing parties of the application, the parties opposed the petitioners' requests. With respect to attendance at oral hearings, the tribunal referred to Article 32(2) of the ICSID Arbitration Rules and rejected the request because the necessary consent of the disputing parties was absent. *(ICSID Arbitration Rule 32(2); Aguas Provinciales, Order of 17 Mar. 2006, paras. 28)*

As to the request to file amicus submissions, the claimants opposed it while Argentina expressed agreement. The tribunal observed that neither the Washington Convention nor the then ICSID Arbitration Rules expressly authorized or expressly prohibited submissions by nonparties. It also noted that, before the order of 19 May 2005 in the related Aguas Argentinas proceedings, no ICSID precedent had squarely addressed the issue. *(Aguas Provinciales, Order of 17 Mar. 2006, para. 9)*

The tribunal therefore considered the same two questions addressed in the earlier case: whether it had authority to accept and consider legal submissions by nonparties, and, if so, what conditions should apply. Relying on Article 44 of the ICSID Convention and relevant arbitral practice, it affirmed that the acceptance and consideration of amicus submissions constituted a procedural matter within its authority. *(ICSID Convention, Art. 44; Aguas Provinciales, Order of 17 Mar. 2006, paras. 1016)*

After reviewing the petition and the parties' observations, the tribunal refused the petitioners' request to attend hearings, permitted them to apply for leave to file a written submission containing persuasive information demonstrating their suitability to participate as amici curiae, and refused immediate access to documents, while leaving open the possibility of reconsidering access in principle if the petitioners later established sufficient grounds for intervention. *(Aguas Provinciales, Order of 17 Mar. 2006, para. 38)*

III. Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania Procedural Order No. 5

In 2003, the United Republic of Tanzania received approximately USD 140 million in financing from the World Bank, the African Development Bank and the European Investment Bank for a broad reform and modernization program, including water and sewerage infrastructure known as the Dar es Salaam Water Supply and Sanitation Project. Between 13 May and 1 June 2005, a series of events occurred, including termination of the lease contract by the Minister of Water and Livestock

Development and the calling of the full performance bond. The claimant regarded these events as an expropriation of its investment and as violations of Tanzania's international and domestic obligations, including fair and equitable treatment, full protection and security, and the free transfer of funds. It consequently commenced ICSID arbitration under the United Kingdom–Tanzania investment treaty signed in Dar es Salaam on 7 January 1994 and in force from 2 August 1996. *(Biwater Gauff (Tanzania) Ltd. v. Tanzania, Award, 24 July 2008, paras. 317)*

On 27 November 2006, five nongovernmental organizations applied to the ICSID Secretariat for permission to participate as amici curiae: the Lawyers' Environmental Action Team (LEAT), the Legal and Human Rights Centre (LHRC), the Tanzania Gender Networking Programme (TGNP), the Center for International Environmental Law (CIEL), and the International Institute for Sustainable Development (IISD). They sought leave to file written submissions, access to key arbitral documents, and access to oral hearings. *(Biwater Gauff, Procedural Order No. 5, 2 Feb. 2007, paras. 1, 11)*

The petitioners argued that the arbitration raised issues of vital importance to local communities in Tanzania as well as broader questions relevant to developing countries that had privatized, or were considering privatizing, water and other infrastructure services. They further submitted that the dispute raised wider sustainabledevelopment questions of concern to the international community. They referred to international commitments reflected in the United Nations Millennium Declaration to reduce by half, by 2015, the proportion of people unable to reach or afford safe drinking water. In their view, the arbitration was not merely a private commercial dispute but could significantly affect the ability of people to enjoy fundamental human rights. They argued that leading Tanzanian civilsociety organizations should therefore be heard and that their experience would enable them to identify and discuss interests not fully represented by the disputing parties and to inform the tribunal of implications extending beyond Tanzania, including the governance of foreign investment in major infrastructure projects and its significance for sustainable development. *(Biwater Gauff, Procedural Order No. 5, paras. 1215)*

The claimant objected to the applications, while the respondent did not express clear opposition. The tribunal carefully examined the requirements of Rule 37(2)(a), (b) and (c). It concluded that it could benefit from the proposed written submission and that the submission had a reasonable potential to assist by bringing perspectives, knowledge or insight different from those of the disputing parties. It stressed that the submission had to address matters within the scope of the dispute or risk being disregarded, and it found that each petitioner had a sufficient interest in the proceeding. *(Biwater Gauff, Procedural Order No. 5, paras. 3150)*

At the same time, the tribunal refused the requests for access to key arbitral documents and to oral hearings. Finally, given the publicinterest character of the issues addressed by the procedural order, it held that the order itself was not subject to confidentiality restrictions and could be freely disclosed to third parties. *(Biwater Gauff, Procedural Order No. 5, paras. 68, 71, 73)*

CONCLUSION

The preceding analysis shows that arbitration under investment agreements has undergone substantial development and renewal, producing a marked change in traditional conceptions. Arbitration, long regarded as a particularly attractive forum for foreign investors because of confidentiality and procedural speed, no longer displays those characteristics in the same form, at least in institutional investment arbitration.

The confidentiality traditionally associated with arbitral proceedings has visibly diminished with the emergence of applications by nonparties seeking to participate in arbitral proceedings. Such participants may now be permitted to file submissions containing arguments and requests relating to the subject matter of the dispute, a role in which nongovernmental organizations especially environmental organizations have become particularly prominent.

Investment arbitration has consequently moved closer in some respects to judicial adjudication and further away from the classical model of private arbitration. The globalization of international financial institutions and of the international economic and trading system, the internationalization of commercial and civil procedural rules, the proliferation of model investment treaties and international softlaw instruments, and the adoption of provisions allowing thirdparty participation have all contributed to the internationalization and globalization of arbitral procedure. One of the clearest manifestations of this movement is the emergence of thirdparty participation in arbitral proceedingsa procedural mechanism traditionally associated with judicial litigationdespite the confidentiality that historically distinguished arbitration and that is necessarily reduced when outsiders are permitted to participate.

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