The Participation of Amici Curiae in NAFTA Chapter Eleven Cases

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Public attention to cases brought under NAFTA Chapter Eleven has grown commensurately with the increased numbers of those cases. While media coverage has increased, most of that attention stems from particular interest groups. Many of these groups are not satisfied with newspaper reports or government-supplied information available on the internet, but wish to participate more directly in the cases as amici curiae. These petitioners have brought to the fore the question of whether amici should be permitted to participate in NAFTA Chapter Eleven cases.[1] Answering this question in the affirmative raises various corollary questions, including what rules or procedures should govern amicus participation and what effect, if any, amicus participation should have on confidentiality in arbitration.

Do Chapter Eleven tribunals have the authority to permit amicus participation?

Two NAFTA Chapter Eleven tribunals convened under the UNCITRAL rules have considered applications by NGOs for amicus status.[2] While the NAFTA and the applicable arbitration rules are silent as to the participation of amici, each tribunal to have considered the issue determined that it had the discretion to accept written briefs by amici, but that amici had no right to participate. These decisions were both grounded in Article 15(1) of the UNCITRAL Arbitration Rules, which gives the tribunal the power to "conduct the arbitration in such manner as it considers appropriate, [] provided that the parties are treated with equality and that at any stage in the proceedings each party is given a full opportunity of presenting its case." As the *Methanex* tribunal stated, "Article 15(1) is intended to provide the broadest procedural flexibility within fundamental safeguards, to be applied by the arbitration tribunal to fit the particular needs of the particular arbitration."[3] The *UPS* tribunal also found that the power conferred by Article

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[1] Throughout this paper, I will use the term NGO to refer generally to those parties wishing to participate as amici; in some instances those parties may not fit the traditional concept of a non-governmental organization.

[2] In the UPS case, the NGOs requested leave to intervene as parties, and in the alternative requested amicus status. The UPS tribunal determined it did not have the authority to permit their intervention as full parties. United Parcel Service of America Inc. v. Government of Canada, Decision of the Tribunal on Petitions for Intervention and participation as Amici Curiae (17 October 2001) ¶¶ 35-43 [hereinafter "UPS Decision"]. This decision was probably correct, but is beyond the scope of this paper and will not be discussed here. In addition, the Sierra Club, the Council of Canadians, and Greenpeace sought to intervene in Canadian federal court proceedings instituted by Canada to set aside the award in the Chapter Eleven case of *S.D. Myers, Inc. v. Government of Canada*. Both the trial division and the federal court of appeal rejected the petitions. Attorney General of Canada v. S.D. Myers, Inc., 2001 F.C.T. 317 (11 April 2001); Attorney General of Canada v. S.D. Myers, Inc., 2002 F.C.A. 39 (28 January 2002).

[3] Methanex Corp. v. United States of America, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae" (15 January 2001) ¶ 27 [hereinafter "Methanex Decision"]. The *Methanex* tribunal found further support for finding such a power in Note 5 to the Iran-U.S. Claim's Tribunal notes to Article 15(1). "The arbitral tribunal may, having satisfied itself that the statement of one of the two Governments – or, under special circumstances, any other person – who is not an arbitrating

15(1) "is to be used not only to protect those rights of the parties, but also to investigate and determine the matter subject to arbitration in a just, efficient and expeditious manner."[4]

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party in a particular case is likely to assist the arbitral tribunal in carrying out its task, permits such Government or person to assist the arbitral tribunal by presenting written and [or] oral statements." *Id*. ¶ 32.

[4] UPS Decision ¶ 69.

The WTO appellate body in the *Shrimp/Turtle* case, which first determined that it had the discretion to consider submissions by amici, also grounded that authority in the powers of the tribunal to conduct the proceedings before it,[5] although it referred additionally to Article 13.2, which permit panels "to seek information from any relevant source and [] consult experts to obtain their opinion on certain aspects of the matter."[6] Many members of the WTO have criticized this broad definition of "seek," but subsequent panels and appellate bodies have followed the lead of the Shrimp/Turtle appellate body in substance.[7] Neither the *Methanex* tribunal nor the *UPS* tribunal grounded its authority in Article 1133, which permits a tribunal to appoint experts, with the consent of parties, if those experts might help the tribunal make its decision.

Permitting amicus submissions is consistent with the practice of other international tribunals. Several international tribunals, notably the European Court of Human Rights and the Interamerican Court of Human Rights frequently exercise their power to accept amicus briefs.[8] On the other hand, the International Court of Justice does not permit NGOs to submit amicus briefs in contentious cases, although non-party States may request intervention.[9] The ICJ has accepted an amicus submission in an advisory proceeding, though it has not done so since 1950.[10]

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[5] The appellate body in *Shrimp/Turtle* cited several sources for such authority, including Articles 11 ("panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case") and 12 ("Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process"). Appellate Body Report, United States -- Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (12 October 1998) ¶¶ 103-07 [hereinafter "Shrimp/Turtle Appellate Body Rep."].

[6] Shrimp/Turtle Appellate Body Rep. ¶¶ 103-04. The *Shrimp/Turtle* panel had rejected such an interpretation. Report of the Panel, Untied States, Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/R (15 May 1998) ¶ 3.129 [hereinafter Shrimp/Turtle Panel Rep."].

[7] The *British Steel* panel grounded its power in Article 17.9 of the Dispute Settlement Understanding ("DSU"), which authorizes the panel to draw up working procedures. Appellate Body Report, United States -- Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, WT/DS138/AB/R (10 May 2000) ¶¶ 39-40 [hereinafter "British Steel Appellate Body Rep."]. Incidentally, the Methanex tribunal considered those powers "significantly less broad" than the powers accorded under Article 15(1). Methanex Decision ¶ 33. Article 16.1 of the DSU makes clear that any ruling under that provision sets forth procedures for that case only; a majority of WTO members have yet to acquiesce in the panel and appellate body rulings permitting amicus submissions. Minutes of the General CouncilMeeting (22 November 2000), WT/GC/M/60.

[8] *See* Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L. 611, 629-30, 632-37 (1994).

[9] *Id.* at 620-24.

[10] Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183, 279 (1997).

Both the *Methanex* and *UPS* tribunals were convened under the UNCITRAL rules. Their decisions do not directly answer the question whether ICSID Convention or ICSID Additional Facility tribunals would have like powers.[11] Each of those regimes is also silent with respect to the submission of amicus briefs. However, Article 35 of the Additional Facility Rules provides that "[i]f any question of procedure arises which is not covered by these Rules or any rules agreed by the parties, the Tribunal shall decide the question." Article 44 of the ICSID Convention is virtually identical. This provision is similar enough to Article 15(1) of the UNCITRAL Rules to support the same interpretation.

The applicable arbitration rules, as well as similar practice in most other international bodies, support the discretion of Chapter Eleven tribunals to accept and consider amicus briefs.[12] There are limits to that discretion, however.

Limits on the Exercise of Authority

The NAFTA tribunals and the WTO panel and appellate body decisions permitting the submission of amicus briefs were predicated on the assumption (whether explicit or implicit) that the decision was procedural only and did not affect the substantive rights of the parties. Much of the criticism by WTO members of the decisions to accept amicus briefs stemmed from their conviction that the decision was in fact a substantive one that affected the balance of powers in the WTO and was therefore not an appropriate decision for a tribunal to make.[13] Mexico made a similar argument before both NAFTA tribunals when it asserted that permitting amicus submissions would result in favoring the court processes of Canada and the US over Mexico because Mexican courts do not have amicus submissions

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[11] The NAFTA theoretically permits arbitration under the ICSID Convention, but because neither Mexico nor Canada is a signatory that option is not currently possible. For the sake of thoroughness, however, I will consider whether either the Convention or the Additional Facility Arbitration Rules (which are very similar in certain respects) permit amicus participation.

[12] Permitting submission of amicus briefs would be difficult to stop; during the Uruguay Round negotiations members discussed but could not agree on whether NGOs should be permitted to participate in dispute settlement, Minutes of General Council Meeting (22 November 2000), WT/GC/M/60, ¶ 38, yet despite this negative diplomatic history panels and appellate bodies have permitted such submissions. "Members were not faced with a situation where they had accidentally created a legal lacuna as a result of not having foreseen that this kind of problem might arise in the future." *Id.* ¶ 50 (comment of Mexico). NAFTA tribunals are not even faced with such adverse diplomatic history.

[13] *See, e.g.*, Minutes of General Council Meeting (22 November 2000), WT/GC/M/60, ¶ 7 ("practical effect [of permitting submission of amicus briefs] had been to grant individuals and institutions outside of the WTO a right that Members themselves did not possess") (comment of Uruguay); ¶ 12 ("decision by appellate body in *Asbestos* case "went far beyond the Appellate Body's mandate and powers") (comment of Informal Group of Developing Countries); ¶ 52 ("the panels and the Appellate Body could not add to or diminish the rights and obligations provided in the covered agreements") (comment of Mexico).

and that Chapter 11 was a delicately balanced compromise between Mexico's civil law system and the common law legal systems of Canada and the United States.[14]

Chapter Eleven is similar in many respects to the bilateral investment treaties concluded by the United States, Canada, and many other countries; these treaties may well have attempted to reconcile competing facets of civil and common law jurisprudence. A separate, though somewhat related argument, carries yet more weight. Because Mexican courts do not have an amicus-type practice, Mexican NGOs are likely less familiar with the procedures and strategies involved in filing such documents. This ties in to the frequently repeated argument made by developing countries in the WTO that permitting greater NGO participation effectively disadvantages the developing countries because the NGO sector in the developed world is better organized, more experienced, and better funded.[15] While so far the aspiring amici in NAFTA cases would presumably have supported the respondent governments, permitting formal participation would likely galvanize action from pro-investor groups as well, so that inequity will not always be the case. In the *British Steel* case at the WTO, two U.S. industry groups filed briefs separate from the U.S. Government submission.[16] Furthermore, to the extent that having developed-world NGOs make arguments supporting developing countries gives rise to accusations of paternalism and unwarranted interference with developing world affairs, criticism would likely ensue.[17]

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[14] Methanex Corp. v. United States of America, 1128 Submission of the Government of Mexico (11 October 2000) ¶¶ 11-14; UPS Decision ¶¶ 56-57.

[15] *See, e.g.*, Charnovitz, *supra* note 10, at 275 ("NGOs from developing countries may also be less well financed than their industrial country counterparts and therefore less able to participate effectively."); *cf.* Philip M. Nichols, *Participation of Nongovernmental Parties in the World Trade Organization: Extension of Standing In World Trade Organization Disputes to Nongovernment Parties*, 17 U. PA. J. INT'L ECON. L. 295, 318-19 (1996) (because NGOs are likely to spend time and money lobbying their own governments, only those NGOs whose resources were not exhausted at the national level would be able to engage in international policymaking; thus "expansion of standing [before WTO tribunals] might instead be a boon to a select group of well-monied interest groups."); WTO Minutes of General Council Meeting (22 November 2000) , WT/GC/M/60, ¶ 38 ([T]he Appellate Body's approach would also have the implication of putting the developing countries at an even greater disadvantage in view of the relative unpreparedness of their NGOs who had much less resources and wherewithal either to send briefs without being solicited or to respond to invitations for sending such briefs.") (comment of India).

[16] British Steel Appellate Body Rep. ¶ 36. Although the appellate body found that it had the authority to accept the briefs, in the end it did not consider it necessary to take the two briefs into account in rendering its decision. *Id.* at ¶ 42. In addition, the panel in *Australian Salmon* accepted briefs from two Australian fishermen. Panel Report on Australia -- Measures Affecting Importation of Salmon, WT/DS18/R (12 June 1998), *cited in* Andrea Kupfer Schneider, *Institutional Concerns of an Expanded Trade Regime: Where Should Global Social and Regulatory Policy Be Made?: Unfriendly Actions: The Amicus Brief Battle at the WTO*, 7 WID. L. SYMP. J. 87, 97 (2001).

[17] *See* Charnovitz, *supra* note 10, at 275 ("because many NGOs are from industrial countries, they amplify certain views -- for example, on human rights or the environment -- that may not be reflective of the views of developing countries.").

Another substantive concern is whether amici will attempt, or will be permitted by the court, to widen the dispute between the parties. Canadian courts considering proposed intervention repeatedly emphasize that the proposed intervention not be permitted to broaden the *lis* between the parties.[18] This concern underlay some of the WTO members' comments on amici as well, although by far the majority of commentary centered on the balance of power between branches of the WTO government. Thus, limiting amici to issues on which they may be presumed to have specialized information, but only in the context of the merits of the case as presented by the parties, is essential.[19]

Permitting the filing of amicus briefs will add to the burdens of the parties, both in terms of attorney time and cost. The tight deadlines in NAFTA cases already test the limits of attorney time and resources, particularly for government parties who are obliged to obtain acceptance of arguments within different spheres of the government. In terms of pure cost, the arbitrators will need to be paid for the time they spend reading the briefs and the parties' responses. While one could attempt to pass that cost on to the NGOs attempting to file briefs, the NAFTA does not give Chapter Eleven tribunals the authority to assess such costs, and the more likely result is that the parties will pay for that arbitrator time.[20] Moreover, at least to date, the amici have tended to support one side. While that imbalance may diminish, tribunals will need to consider the inherent inequality injected into the proceedings should it permit several amici to submit briefs, all of which add to the arguments to which one side must respond.

Thus, any procedures developed to govern the acceptance of amicus briefs must attempt to mitigate those burdens and to ensure that the amicus submissions do not expand the dispute between the parties.

Formulating Procedures for Amicus Participation

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[18] Clark v. Attorney General of Canada, 81 D. L. R. 3d 33, 38 (Ontario High Ct. 1977) ("Where the intervention would only serve to widen the lis between the parties or introduce a new cause of action, the intervention should not be allowed.")

[19] For example, the UPS tribunal refused to permit amici to participate in the jurisdictional phase of the proceedings as they could not be presumed to have any expertise on jurisdictional issues. *See* UPS Decision ¶ 71.

[20] NAFTA Article 1135 only gives tribunals the authority to award monetary damages and any applicable interest, or restitution of property, so long as Parties have the opportunity to pay monetary damages and applicable interest in lieu of restitution. The applicable arbitral rules deal with the question of costs themselves. The UNCITRAL Arbitration Rules provide that, in principle, "the costs of the arbitration shall be borne by the unsuccessful party," although if the tribunal considers it reasonable, "the arbitral tribunal may apportion [the costs] between the parties, if it determines that such apportionment is reasonable . . . ." UNCITRAL Arb. R. 40(1). The ICSID Additional Facility Arbitration Rules and the ICSID Convention Arbitration Rules presume the costs will be divided in some manner between the parties, although they do not explicitly so state. *See* ICSID AF Arb. R. 59(1); ICSID Conv. Arb. R. 28.

Any procedures the NAFTA Parties would institutionalize for amicus participation must take into account the limitations described above. Presumably the NAFTA Parties could issue such procedures under the "interpretation" authority of Article 1131, although precisely which provision would be the subject of the "interpretation" is unclear. General reference to Section B of Chapter Eleven might suffice to capture the procedural rules scattered throughout the Section without identifying too precisely any particular provision that might not be suited to be "interpreted" under Article 1131.

Following the WTO model would vest the arbitral tribunals with discretion as to whether any amicus participation was permitted at all. However, regularized principles would guide the tribunal decision. In municipal jurisprudence and in international jurisprudence, determining who can participate usually hinges largely on assessing two factors: what interest does the aspiring amicus have in the proceedings and what likely expertise can that organization put forward that is not already adequately represented by the parties to the proceedings?[21]

The Parties could follow U.S. court practice, which requires that amici first attempt to get the consent of the parties to file their briefs; if such consent is given, the amici may file their briefs without seeking leave of the court.[22] The normal practice, especially in cases before the U.S. Supreme Court, is that consent is given.[23] This practice effectively removes the court's discretion to accept or reject briefs, although practically speaking, a court may or may not give serious consideration to an amicus brief after it is filed. The Canadian rules do not allow parties to bypass seeking leave of the court to move to intervene.[24]

For the NAFTA cases, the WTO model is likely the better one to follow. State Parties to the proceedings would otherwise be subject to political pressures to accept or reject particular petitions in every case in which proposed amici sought to file.

Assessment of the Amici's Interest in the Case

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[21] This piece assumes that amici will fill the traditional modern role of advocate for their own interests; historical roles in which amici address the court to inform it of laws or cases with which it is unfamiliar or advance arguments for an absent or unrepresented third party are unlikely to be at issue in the NAFTA cases. *See, e.g.*, Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L. J. 694 (1963).

[22] U.S. Supreme Court Rule 37(3)(a); Fed. R. App. P. 29(a).

[23] The Supreme Court's practice in the last 50 years has been to grant nearly all motions for leave to file when the parties have withheld consent; parties ordinarily consent to such motions in order "to avoid burdening the Court with the need to rule on the motion." Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 762 (2000).

[24] Federal Court Rules (1998) 109(1).

The first question for a tribunal to consider are the bona fides of the aspiring amicus curiae. In many cases the proposed amicus will be a well known NGO. For example, in *Methanex* the proposed amici were the International Institute for Sustainable Development, Communities for a Better Environment, and the Earth Island Institute (the latter two petitioned jointly and were represented by the Earthjustice Legal Defense Fund). Traditional NGOs are not the only likely aspirants for amicus status; in two of the WTO cases industry groups attempted to submit amicus briefs.[25] In some cases, though, the proposed amicus might be an individual. Any rule set forth should consider the spectrum of proposed amici and be useful to assess the interest of any of the potential categories of interveners.

U.S. federal court rules, both at the Supreme Court and the Courts of Appeals, require the motion to appear as amicus to state "the nature of the movant's interest."[26] While the Canadian court rules require only that the proposed intervener identify itself and any solicitor acting for it, courts have required that the applicant show that it has an interest in the outcome of the case, that its rights will be seriously affected by the litigation, and that it will bring to the court a point of view different from that of the parties.[27] The *Methanex* tribunal also examined the credentials of the Petitioners (which it described as "impressive").[28] In the *Asbestos* case, the appellate body adopted procedures to govern the submission of appellate briefs which required proposed amici to include its address and other contact details; to "includ[e] a statement of the membership and legal status of the applicant, the general objectives pursued by the applicant, the nature of the activities of the applicant, and the sources of financing of the applicant"; and to "specify the nature of the interest the applicant has in this appeal."[29]

What Value Can The Proposed Amici Add

The question of the movant's interest must inevitably be bound up with the substantive knowledge or expertise the proposed amici can offer in a particular case. Amicus submissions may be on issues of fact or law on which the amicus can add information that the parties cannot. Judge Richard Posner, criticizing the duplicative and opinion-oriented nature of most amicus briefs, suggested in a strongly worded opinion that an amicus be permitted to participate in only three circumstances: "when a party is not

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[25] *See supra* note 16 and accompanying text.

[26] U.S. Supreme Court Rule 37(3)(b); Fed. R. App. P. 29(b)(1).

[27] *See, e.g.*, Abbott v. Canada, 3 F.C. 482 ¶ 5 (2000); Attorney General of Canada v. S.D. Myers, Inc., 2001 F.C.T. 317 ¶ 18 (11 April 2001); *see also* Attorney General of Canada v. S.D. Myers, Inc., 2002 F.C.A. 39 ¶ 5 (28 January 2002) (jurisprudential interests alone insufficient to justify leave to intervene).

[28] Methanex Decision ¶ 48.

[29] European Communities -- Measures Affecting Asbestos and Asbestos-Containing Products, 8 November 2000 (Additional Procedure Under Rule 16(1) of the Working Procedures for Appellate Review) ¶ 3(a-c).

represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case . . ., or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide."[30] The latter circumstance, and perhaps in rare cases the second, is the most likely to be invoked to support amicus participation in Chapter Eleven proceedings.

The Methanex tribunal set forth an additional factor that might be at issue in several NAFTA cases: the public interest in the arbitration, including the substantive issues inherent in the subject matter of the arbitration and the benefit to the process as a whole of a public perception of greater openness and transparency. While reading this criterion too broadly would support opening all NAFTA tribunals to amicus submissions, "the substantive issues inherent in the subject matter of the arbitration" may dictate greater openness to amicus participation in cases involving environmental measures that may be viewed as having a widespread influence on the public good. Canadian courts have also cautioned against relying on a generalized public interest criterion to support intervention. "There are few, if any, actions which do not, to some degree, affect the public interest. A wish to further that interest does not justify an intervention in an action between others."[31]

The tribunal would also need take into account added burdens and costs on both disputing parties, and, in circumstances in which those would fall more heavily on the one party in the case, adopt appropriate procedures for diminishing that problem, such as requiring all amici to file a joint brief.

Miscellaneous Procedural Requirements

Any NAFTA procedures governing the submission of briefs should follow generally the same lines as those used in U.S. or Canadian courts. Proposed amici should have to identify themselves, their interest in the particular case, and what expertise they can offer, whether factual or legal, that will assist the tribunal to resolve the case. This information should be included in the motion to participate as amicus, if such a motion is required. In the event that the procedures permit amici to file without tribunal permission so long as they obtained the consent of the parties, the information should be included in the motion itself. Any procedures drawn up by the Parties should also require amici to disclose any affiliations they may have with parties in the cases or with other entities that are funding their attempt to participate in a particular arbitration. Finally, although they may not wish to use this privilege, the parties to the proceedings should be able to challenge the qualifications of proposed amicus.

The procedures should set forth timelines inviting the submission of amicus briefs at predictable stages in the proceedings, *e.g.* 10 or 20 days after the filing of the parties'

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[30] Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997).

[31] Borowski v. Minister for Justice of Canada, 1983 A.C.W.S.J. LEXIS 20168, **45 (24 February 1983) (quoting TAS Comm. Sys. Ltd. v. Newfoundland Tel. Co., 22 C.P.C. 97, 99 (1981)).

memorials in those cases including reply and rejoinder memorials. This would give each party the opportunity to respond to issues raised by amici in its reply or rejoinder, respectively, without the added burden of filing additional submissions. The procedures could oblige each tribunal to set forth a timetable for filings that would be conveyed to the public through some readily available media, like the NAFTA Secretariats' webpages.[32]

The submission should include a précis detailing the petitioner's interest in the case and why the proposed submission complements rather than replicates the arguments of the parties to the proceeding. This requirement assumes that amici will have access to the memorials of the parties; see "access to information," *infra*. Should the aspiring amici not have access to the memorials, strict enforcement of the nonduplication requirement would likely raise protests of unfairness. Furthermore, the amici's briefs should be of limited length.

Domestically, in courts that place page limits on their briefs, amici sometimes cooperate with the party whose side they support in order to effectively extend the pages of argument submitted to the court. In the NAFTA arbitrations, where there are generally no page limits, cooperation for this reason would be unlikely to occur. However, parties may still wish to cooperate with amici in order to maximize the effectiveness of their arguments; some positions may be more palatable to arbitrators coming from an ostensibly neutral or self-interested third party rather than from one of the arbitrating parties. In order to ensure that amici are not recruited allies, or at least to ensure that their status as such is clear, disclosure requirements such as those set forth in U.S. court practice would be helpful. The U.S. Supreme Court Rules require amici to indicate "whether counsel for a party authored the brief in whole or in part and [] identify every person or entity, other than the amicus curiae, its members, or its counsel, who made a monetary contribution to the preparation or submission of the brief."[33]

A more difficult issue is whether tribunal ought to be *required* to consider the arguments and positions raised in amicus briefs if the tribunal permits the submission of the briefs.[34] Courts in the United States, which accept amicus briefs if neither party objects, do not necessarily consider the positions set forth in them. In NAFTA proceedings, permitting the arbitral tribunals to accept submissions of amicus briefs but to ignore their contents would likely lead to charges of an empty process that does not truly take into account the

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[32] The *Asbestos* Appellate Body issued procedures inviting the submission of amicus briefs, but that invitation went only to those NGOs registered with the WTO. To forestall criticism, any such "invitation" should be more widely distributed. Potential channels for such distribution would include the NAFTA Parties' websites.

[33] Sup. Ct. R. 37(6).

[34] The ICSID arbitral rules require that the tribunals decide all arguments raised before them, but these rules are addressed to arguments raised by the parties, not by amici. ICSID Additional Facility Arb. R. 53(1); ICSID Convention Arb. R. 47(1)(i). The UNCITRAL Rules contain no such requirement.

interests that aspiring amici have in the arbitration. Parties would also not know whether or not they had to address the arguments raised in the amicus briefs. The disputing parties, the NAFTA Parties, and the public interest would be best served by having tribunals accept only a limited number of briefs that fit rigorous criteria but requiring that the tribunals consider those briefs carefully.

Should a panel decline to exercise its discretion to accept amicus briefs, the disputing parties might consider retaining the ability to append the rejected submissions to their own memorials.[35] The United States did this before the *Shrimp/Turtle* panel. The appellate body, which had decided to consider the briefs at that stage of the proceeding, requested that the United States identify which, if any, portions of the briefs that it had appended to its panel submission. The United States declined to adopt specifically portions of the briefs, stating only that it agreed with them to the extent they concurred with the argument set out in the main submission.[36] However, the appellate body considered that attaching such material "renders that material at least prima facie an integral part of that participant's submission."[37]

Ways in Which Amici May Seek To Participate

In addition to deciding whom to permit to participate as amicus, any procedures should address the degree to which amici may participate. In NAFTA cases, amici are likely to seek varying levels of access to the tribunals and to information about the proceedings. In *Methanex*, the parties seeking amicus status sought permission (1) to file an amicus brief, (2) to read the parties' written pleadings, (3) to make oral submissions, and (4) to have observer status at oral hearings.[38] In other proceedings, amici may also seek to introduce evidence or to present and/or cross examine witnesses.[39]

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[35] While this procedure might be desirable as an alternative, establishing a regime that permitted NAFTA Parties, at their option, to attach certain amicus briefs to their submissions would be problematic. Parties would be under pressure to adopt all briefs submitted for their consideration, and might face adverse political consequences should they choose not to submit a certain NGOs brief. Furthermore, Parties might be obliged to set forth explicitly their views on the arguments contained in the briefs in order to satisfy a panel's questions about whether, because the briefs are attached to the Party's submission, they may be *de facto* presumed to represent the Party's views.

[36] Shrimp/Turtle Appellate Body Rep. ¶ 86.

[37] *Id*. ¶ 89.

[38] Methanex Decision ¶ 5.

[39] In the Canadian Federal Court, the proposed intervenors sought (1) to be served with all documents and evidence relevant to the proceedings; (2) to introduce evidence; (3) to conduct cross examination; (4) to make oral and written submissions; and (5) to have the right to appeal from any final decision. Attorney General of Canada v. S.D. Myers, Inc., 2001 F.C.T. 317 ¶ 1 (11 April 2001).

As discussed above, the request to file an amicus brief can be fairly easily accommodated, provided that certain limiting procedures are in place. Those limiting procedures would work better should the amici have the ability to read the parties' memorials, as discussed below. Making oral submissions and attending hearings are tied together; granting either of those privileges, even on an ad hoc basis, may raise certain problems.

First, the applicable arbitration rules specifically hold that hearings should be held *in camera*, unless the parties otherwise agree. While under the NAFTA the Parties may derogate from the applicable arbitration rules, it would be difficult to shoehorn such an explicit amendment into an "interpretation." Amici in *Methanex* and *UPS* also requested permission to attend the hearings in those cases. Both tribunals rejected those requests. The *Methanex* tribunal accepted that UNCITRAL Arbitration Rule 25(4) required that hearings be *in camera* and that therefore third parties could not attend.[40] The *Methanex* tribunal implicitly rejected arguments that conferring the status of amicus on a party took that party out of the "third-party" category.[41]

Second, keeping hearings *in camera* may help to protect participants in the hearings. While the World Bank has security measures in place, thereby protecting participants in proceedings occurring at its premises, many arbitrations are held in unsecure locations, such as hotels or attorneys' offices. Those latter options may be precluded should hearings be made public.

Third, inserting oral presentations by amici into the hearings would conceivably affect the orderly running of the hearing and add to the cost. Either parties would have to give up some of their time to the amici, which often happens in U.S. court, or the tribunal would have to add extra time to the hearing in order to consider the arguments posed by amici.

Notwithstanding these concerns, should the Parties wish to maintain the *in camera* rule, but leave open the possibility that amici could testify, the procedures could permit the tribunal to set aside one day of public hearings at which NGOs could testify.[42]

Access to Information

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[40] Methanex Decision ¶ 42; UPS Decision ¶ 67 (without discussion). The ICSID Convention Rules and the Additional Facility Rules also restrict attendance at oral hearings. ICSID Additional Facility Arb. R. 39(2); ICSID Convention Arb. R. 32(2).

[41] Methanex Corp. v. United States of America, Final Submissions of The International Institute for Sustainable Development (16 October 2000) ¶ 24 (arguing that "[t]he scope of who can be *in camera* depends on who has been authorized by the Tribunal to be in the room in an *in camera* session.").

[42] *See* Steve Charnovitz, *Participation of Nongovernmental Parties in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331, 355 (1996) (suggesting same procedure in WTO).

An inescapable corollary issue to the participation of amici is the extent to which they have access to information in the proceedings. Permitting amicus participation, but limiting amici's access to the parties' arguments, will not allay criticism of the "secrecy" of the proceedings, nor will it enhance the probability of effective amicus participation that complements, rather than duplicates, the efforts of the parties.

Thus, access to information will be a key part of any institutionalized procedures for accepting amicus participation. In virtually all recent cases, the Statements of Claim and Defense have been public, or at least a public version has been made available. Access to these documents, however, is unlikely to be sufficient to permit informed amicus participation in the cases. First, the Statements of Claim and Defense do not always contain legal argument. Moreover, in ICSID Additional Facility cases, there is no statement of defense; thus, aspiring amici would not even have the benefit of knowing the respondent's initial submissions on that issue. Second, parties' arguments often change, sometimes subtly but sometimes more overtly, over the course of the proceedings. Access only to a Statement of Claim that was likely written at least six months before any memorial is filed would not give amici an up-to-date knowledge of the legal and factual issues currently relevant in the arbitration.

The NAFTA tribunals to have considered amicus participation have not authorized any special access to information for amici. The *Methanex* tribunal held that the amici would have no rights to receive any materials generated in the arbitration, except insofar as a member of the public might gain access according to the Consent Order regarding disclosure and confidentiality.[43] The *Methanex* tribunal acknowledged that the question of whether Article 25(4) or some obligation of confidentiality implicit in arbitration required documents to be held in camera was a difficult one that it did not have to address given the consent order on confidentiality agreed to by the parties in that case.[44] Similarly, the *UPS* tribunal declined to address the issue at the time of its order on amicus participation, although it acknowledged that a distinction might be drawn between the privacy of the hearings and "the confidentiality or availability of documents."[45]

Aside from the *in camera* rule as to hearings discussed above, neither the UNCITRAL nor the ICSID Convention nor the Additional Facility Rules explicitly require confidentiality in arbitral proceedings.[46] Whether or not there is an obligation of

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[43] The *Methanex* tribunal did not have to grapple with the ramifications of this decision, as nearly all materials in the *Methanex* case have been promptly released to the public.

[44] Methanex Decision ¶¶ 43-46.

[45] UPS Decision ¶ 68.

[46] In fact, the commentary accompanying the original ICSID Rules makes clear that no obligation of confidentiality is imposed on the parties, as distinguished from the arbitrators. *See* ICSID Regulations and Rules Rule 30 cmt. F (1975) ("The parties are not prohibited from publishing their pleadings. They may, however, come to an understanding to refrain from doing so, particularly if they feel that publication may exacerbate the dispute."). The language in the current counterparts to

confidentiality inherent in arbitration is one of the most discussed issues in international arbitration. Because the applicable rules are silent on the issue, and the emerging trend in arbitration practice generally is that no inherent obligation of confidentiality exists, particularly not in arbitrations involving sovereign entities,[47] issuing an "interpretation" that the NAFTA Parties did not expect all memorials to remain secret throughout the pendency of the proceedings would be easier to justify than issuing an "interpretation" that permits attendance at hearings in the face of an explicit rule to the contrary.

Benefits and Drawbacks to permitting submission of amicus briefs

The benefits of a more institutionalized structure are manifold. NAFTA Parties would allay the criticism that they condoned "undemocratic" and "secret" processes that undermine the public welfare.[48] Parties to arbitrations would not have to litigate the admissibility of amicus petitions in every case (although this benefit may be tempered to the extent parties choose to oppose the filing of a particular petition). Finally, NGOs may offer valuable perspectives and information to tribunals who otherwise would not be privy to those facts or arguments, and may be better positioned to make stronger arguments unhampered by domestic political or interest-balancing considerations.[49]

More negative ramifications may also result. Once such procedures were put into place, rescinding them would be extraordinarily difficult. The Parties might also face pressure to grant more concessions. Furthermore, the potential for inequality between NGOs representing developed and developing countries, mentioned above, is very real.

Another potential concern raised by giving NGOs the opportunity to participate as amicus is whether doing so effectively grants them more rights than the Parties. In one sense, it does not. NAFTA Parties have the *right* to make submissions under Article 1128 of the NAFTA, while amici are dependent on leave from the Tribunal. In another sense, however, permitting NGOs to submit amicus briefs on the merits would grant them a larger voice in the arbitrations, since Article 1128 submissions are limited to "issues of interpretation of the NAFTA." Thus, if a Party submission exceeded 1128's restriction to "issues of interpretation of the NAFTA," whether by suggesting preferred interpretations of

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Rule 30 (ICSID Conv. Arb. R. 31 and ICSID Additional Facility Arb. R. 38) is identical in all pertinent respects.

[47] *See* Esso/BHP v. Plowman, 183 C.L.R. 10 (1993); Commonwealth of Australia v. Cockatoo Dockyard Pty. Ltd., 36 N.S.W. L.R. 662 (1995).

[48] *See, e.g.*, Dierk Ullrich, *No Need for Secrecy? -- Public Participation in the Dispute Settlement System of the World Trade Organization*, 34 U. BRITISH COLUM. L. REV. 55 (2000) (noting benefits of more open proceedings, including the generation of public trust in the system and support of the WTO and its activities in general).

[49] *See* Charnovitz, *supra* note 42, at 352-53 (discussing benefits of NGO participation before the WTO). Charnovitz also notes that in some cases, given the separation of powers in governments, the executive branch may not mount a strong defense of a law of which it disapproves. *Id.* at 353.

international law or by advocating a certain outcome, a tribunal may be able to reject it. Moreover, the right to make 1128 submissions may not be absolute; there could be limitations inherent in 1128 such that if a State Party submitted a paper late in the proceedings so that the parties to the case had no time to respond, or simply after the time period set by the arbitrators to accept such submissions, the arbitrators could reject the submission.[50]

One way to solve this dilemma would be to permit NAFTA Parties to petition the tribunals to make amicus submissions in cases giving rise to issues in which the Parties have a specific interest and expertise beyond NAFTA interpretation. NAFTA Parties would thus be on a level playing field with NGOs insofar as filing amicus briefs were concerned. The problem with this solution is that it may effectively permit espousal in addition to the right of individuals to bring their own cases.[51]

Another cost to permitting amicus participation is that many amici will attempt to lobby their governments to take certain actions or positions domestically. If they are unsuccessful, permitting them to make another attempt before a different tribunal will require the government effectively to respond twice. Moreover, it may very well lead to domestic constituencies publicly opposing the positions of the governments who supposedly represent their interests.[52] This may be an anomalous position for governments that theoretically represent the public interest for the majority of their inhabitants.

Finally, NGOs may have varied goals in filing briefs -- they may wish to influence a tribunal's decision, be cited by the tribunal, or demonstrate to their members that the leadership is representing their interests.[53] Permitting NGOs to submit amicus briefs may give those organizations influence in developing NAFTA jurisprudence. Well-organized NGOs are likely to have a coherent and consistent position on many recurring NAFTA issues. In similar situations domestically, amicus briefs are often used as a policy-making

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[50] A similar issue has been raised by critics of the WTO panels' decision to accept amicus briefs; members must tell a panel within ten days of its establishment that they wish to participate as a third party, and members that did not participate at the panel stage may not participate in proceedings before the appellate body. Minutes of Dispute Settlement Body Meeting (27 July 2000) ¶ 74.

[51] Furthermore, to the extent that Article 1128 was meant to define the exclusive means by which other State Parties can participate in third-party proceedings, permitting States to assume amicus status effectively circumvents that provision's limitation.

[52] *Cf.* Philip M. Nichols, *supra* note 15, at 317 ("Allowing private parties that were not successful when values and goals were balanced at the national level to have standing before dispute settlement parties would create an irreconcilable dissonance for countries engaged in the delicate process of trade negotiation.").

[53] Kearney & Merrill, *supra* note 23, at 764-65.

tool by government agencies and by interest groups such as the ACLU in the United States.[54]

One final consideration is that, as noted *supra* at pages 2-3, amicus participation is also at issue in the World Trade Organization, both before the dispute settlement panels and the appellate body. Any approach to amicus participation taken in the NAFTA Chapter Eleven cases should be compatible with potential practices before the WTO.

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[54] *See, e.g.*, David S. Ruder, *The Development of Legal Doctrine Through Amicus Participation: The SEC Experience*, 1989 WISC. L. REV. 1167.