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Report and recommendations on third-party participation in investment arbitration

IBA Investment Arbitration Subcommittee

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INTRODUCTION

1. Third-party participation (TPP) is an increasingly common feature in investor-state dispute settlement (ISDS). This report ('Report'), authored by the IBA Investment Arbitration Subcommittee ('IA Subcommittee'), provides recommendations that aim to promote clarity and consistency in managing TPP in ISDS ('Recommendations').[1]

2. For the purposes of this Report, TPP refers both to participation by a party that, while not a party to the underlying arbitration, seeks to participate in the arbitration as an *amicus curiae*,[2] and to participation by a non-disputing treaty party (NDTP).[3]

3. TPP in ISDS has been lauded and criticised,[4] including by third-party participants:

   (i) Those in favour of TPP consider that it increases the legitimacy of ISDS by, for instance: leaving greater room for the public interest and policy considerations (eg, on environment, human rights, investor obligations); increasing transparency *inter alia* through the publication of awards; and providing assistance to the decision-maker(s) by promoting the correct interpretation and application of all relevant legal norms, thus avoiding potentially conflicting decisions and the fragmentation of international law.[5]

   (ii) Those critical of TPP consider that its shortcomings include: engendering conflicts of interest or bias, as well as undue political interference; compromising the confidentiality of business and governmental information; increasing costs and delay, including by unnecessarily broadening the scope of the dispute; and undermining party consent.[6]

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1 The Report was initiated and completed under the leadership of the co-chairs of the IBA Investment Arbitration Subcommittee for 2024–2025, Erica Stein (Stein Arbitration) and Xavier Andrade Cadena (AVL Abogados). The drafting of the Report was undertaken by the co-chairs and Diora Ziyaeva (Dentons), Can Yeğinsu (3 Verulam Buildings), Ana María Ordoñez with Camilo Valdivieso (MQMGLD), Tunde Fagbohunlu and Tochukwu Anaenugwu (Aluko & Oyebode ALN), Gabriele Ruscalla (Le 16 Law), and Tatiana Sainati (Wiley). The underlying research was compiled by Gabriele Ruscalla, Tatiana Sainati, and Tunde Fagbohunlu, Tochukwu Anaenugwu, and Tom Snider (Charles Russell Speechlys) with input from Caroline Falconer (SCC Arbitration Institute) and Marisa Planells-Valero (ICSID). The data and analysis in Section I were researched and developed by Tunde Fagbohunlu and Tochukwu Anaenugwu (Aluko & Oyebode ALN), who collaborated closely with Tom Snider, Ana María Ordoñez, and Camilo Valdivieso. They were assisted by Joy Mgbado, Adaobi Okafor, Fountain Olusanya, and Fawaz Sanni (Aluko & Oyebode ALN). Additional research, drafting, and editing were provided by: Can Yeğinsu's team, Richard Wagenlander, Alexandra Kosta-Foti, Jake Jerogin, and Taha Almasri, as well as Ian Kysel and his students in the Transnational Disputes Clinic at Cornell Law School.

2 *Amicus curiae*, a Latin term that can be translated as 'friend of the court', is commonly referred to a person (either an individual or an organisation) that, despite not being a party to a dispute, intervenes before the decision-maker regarding some aspect of the case. See, eg, Flavia Marisi, 'Rethinking Investor-State Arbitration' (2023) 27 *Studies in European Economic Law and Regulation* 148. For the purposes of this Report, 'intervention' or 'intervene' are used in this sense of limited third-party participation, rather than admission as a full disputing party. The joining of a case as an actual party to the dispute does not fall within the scope of this Report.

3 NDTP submissions are, by definition, only available to states as treaty parties that are not a respondent in a particular case. NDTP provisions can be found both in treaties and arbitration rules. In this Report, reference to NDTP participation or submissions denotes non-disputing treaty parties participating in proceedings pursuant to express provisions in the respectively applicable treaty or rules (*see* Section II). Where a non-disputing treaty party seeks to intervene outside such provisions, the general framework and considerations as relevant to *amici curiae* in general apply (*see* Section II).

4 *See, eg*, Niccolò Ridi, 'What are amicus interventions for? Some provocations on non-disputing party submissions in international arbitration' (2023) 100 *QIL* 37.

5 Eugenia Levine, '*Amicus Curiae* in International Investment Arbitration: The Implications of an Increase in Third-Party Participation' (2011) 29(1) *Berkeley Journal of International Law* 200, 205–6; F. Francioni, 'Access to Justice, Denial of Justice and International Investment Law' 20 *European Journal of International Law* 729, 742; Marisi, see n2 at 148; Also, see J. Delaney and DB Jr Magraw, 'Transparency and Public Interest' in P Muchlinski, F Ortino, C Schreuer (eds.) *The Oxford Handbook of International Investment Law*, 763; Columbia Center on Sustainable Investment, International Institute for Environment and Development, and International Institute for Sustainable Development, Submission to UNCITRAL Working Group III on ISDS Reform: How Cross-Cutting Issues Reshape Reform Options, 5 (15 July 2019).

6 Niccolò Ridi, 'What are amicus interventions for? Some provocations on non-disputing party submissions in international arbitration' (2023) 100 *QIL* 37, 55–6. *See also*, the discussion in Gary Born and Stephanie Forrest, 'Amicus curiae Participation in Investment Arbitration' (2019) 34 *ICSID Review* 626.

4. The Report does not take a position on the advantages or disadvantages of TPP. Rather, it is premised on the fact that TPP exists and is increasingly used yet is dealt with inconsistently by investment tribunals.

5. The purpose of this Report is to put forward recommendations that balance the interests of parties, counsel, third-party participants and tribunals. This report aims to provide guidance to stakeholders and improve practice for all.

6. To this end, **Section I** of this Report confirms the growing prevalence of third-party participation empirically, assessing the number of TPP applications and the identity and number of TPP applicants in ISDS proceedings. This section further outlines the total number of TPP applications granted and denied in ISDS proceedings. The upward trend in such applications underscores the importance of harmonisation in this field.

7. **Section II** then sets forth the legal framework relating to the participation of *amicus curiae* and NDTPs in investment arbitration.

8. **Section III** proceeds to examine the procedural and substantive requirements that govern TPP applications, before analysing the procedural safeguards imposed on TPP to ensure the fairness and efficiency of the proceedings. Throughout Section III, the Report identifies divergences in approaches to TPP that could benefit from harmonisation or clarification, in respect of which the IA Subcommittee sets forth its **Recommendations**.

9. **Section IV** identifies issues arising from the treatment given to TPP submissions by tribunals and *ad hoc* committees in their decisions. The IA Subcommittee has identified these issues for the sake of completeness, without making any recommendations in this respect.

10. Finally, **Section V** of the Report summarises the IA Subcommittee's **Recommendations** on the basis of the analysis in the preceding Sections.

I. INCREASE OF THIRD-PARTY PARTICIPATION

11. This section presents empirical data on TPP in ISDS, gathered from those arbitral institutions that collectively administer the majority of investment arbitrations – the International Centre for Settlement of Investment Disputes (ICSID), Permanent Court of Arbitration (PCA), Stockholm Chamber of Commerce (SCC), International Chamber of Commerce (ICC) – and from publicly available information in other *ad hoc* arbitrations. This section also presents empirical data on TPP in annulment proceedings arising from investment arbitrations administered by ICSID.[7]

12. The purpose of the empirical analysis in this section is to confirm the increase and prevalence of TPP, and to identify trends in TPP applications and their treatment by tribunals. Any reference to 'TPP applications' in this section means *amicus curiae* applications.

13. With this in mind, this section presents the number of TPP applications found in available data (A); identity and number of TPP applicants (B); number of TPP applications granted (C); and number of TPP applications denied (D). This section then concludes with the empirical findings derived from the figures set forth (E).[8]

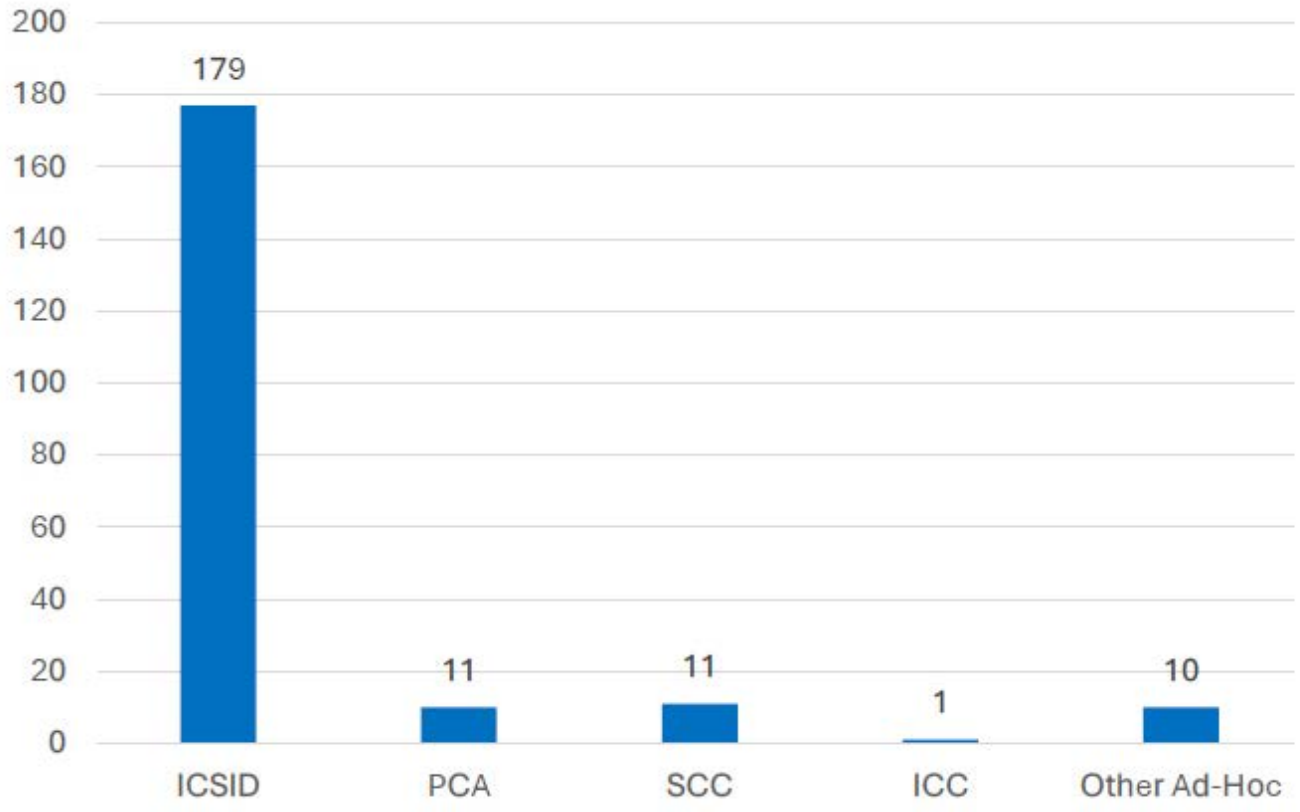

Figure 1 – Cumulative representation of TPP applications

7 Data concerning annulment proceedings administered by ICSID was received on 11 December 2024. Unless otherwise specified, all institutional data cited in this report comprises investment arbitrations containing TPP applications, registered and concluded during the relevant time period, regardless of their jurisdictional basis. The dataset relied on can be found at Annex 1 to this Report.

8 The analysis in each sub-section also includes annulment proceedings.

A. Number of TPP applications

14. As set out in Figure 1, there have been a total of 212 TPP applications in investment arbitrations to date.[9]

15. Figure 1 above shows the spread of TPP applications across institutions, indicating that:

- A hundred and seventy-nine applications (about 84.4 percent) were made in ICSID arbitrations.[10]
- Eleven applications (about 5.2 percent) were made in SCC arbitrations.[11]
- Eleven applications (about 5.2 percent) were made in PCA arbitrations.[12]
- Ten applications (about 4.7 percent) were made in other *ad hoc* arbitrations.[13]
- One application (about 0.5 percent) was made in an ICC arbitration.[14]

16. Notably, these 212 TPP applications were made in 135 investment arbitrations. The disparity in the total number of TPP applications *vis-à-vis* the total number of arbitrations is largely influenced by multiple TPP applications in individual arbitrations. Key reasons for these multiple applications include separate applications filed by more than one interested participant, repeated applications by a single applicant (especially when such applicant is first denied), or new factual or legal contexts.

17. The data also reveals a notable increase in the number of TPP applications over the years. Figure 2 reflects the upward trend in the number of TPP applications, in five-year increments.[15]

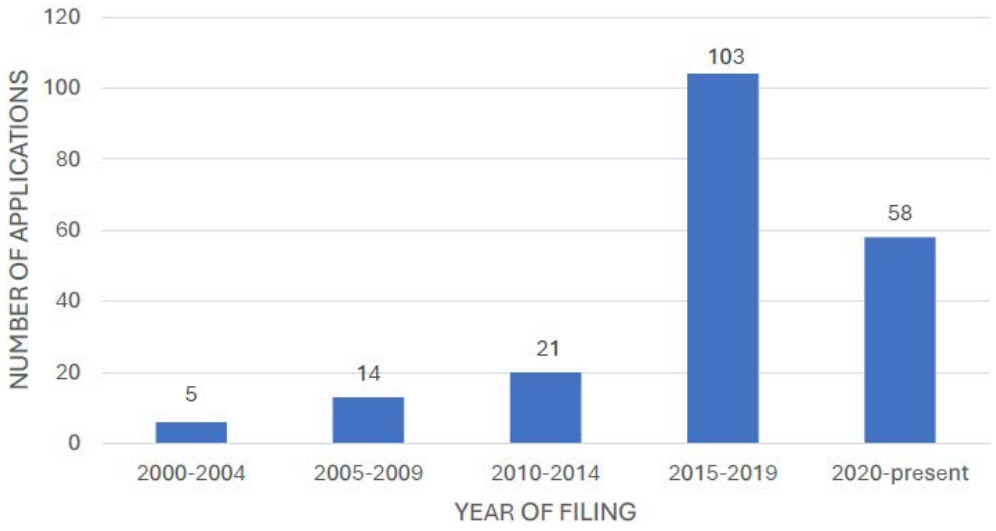

Figure 2 – Growth rate of TPP applications applying five-year increments

9 Annex 1, 3, 11, 19, 162, 170. Data has been collected until 11 December 2024. The statistics and the resulting chart are representative of the dataset, but there may be a margin of error.

10 Data from ICSID was received on 11 December 2024.

11 Data from SCC was received on 4 September 2024.

12 Data from PCA was received on 11 December 2024. We note that PCA arbitrations are typically *ad hoc* arbitrations conducted under the UNCITRAL Arbitration Rules. Therefore, 'other *ad hoc* arbitrations' in this Report refers to non-PCA *ad hoc* arbitrations.

13 Data from other *ad hoc* arbitrations was collected by IA Reporter and ITA Law as of 11 December 2024.

14 Data from ICC was received on 11 October 2024.

15 Annex 1, 3–170. Data has been collected until 11 December 2024. The statistics and the resulting chart are representative of the dataset, but there may be a margin of error.

18. Figure 2 indicates that TPP applications have witnessed remarkable growth in the past two decades, with the highest growth rate occurring between 2015 and 2019. A computation of the data (without accounting for cases whose TPP application dates are unknown) also reveals that TPP applications have grown by over 4,000 per cent[16] since the first known set of applications – about five as of 2004 – and by about 400 per cent[17] in the periods between 2010 and 2014, and 2015 and 2019. This amounts to a collective annual growth of approximately 17 per cent each year since 2000.[18]

19. As against the other institutions considered, ICSID arbitrations have witnessed the fastest growth rate of known TPP applications, consistent with ICSID having the highest number of known TPP applications to date. This is followed by SCC and PCA arbitrations. Data suggests that other ad hoc arbitrations have not witnessed a significant increase in TPP applications over the years.[19]

20. Figure 3 shows the trend in the number of TPP applications that were filed per forum relative to other fora, in five-year increments.[20]

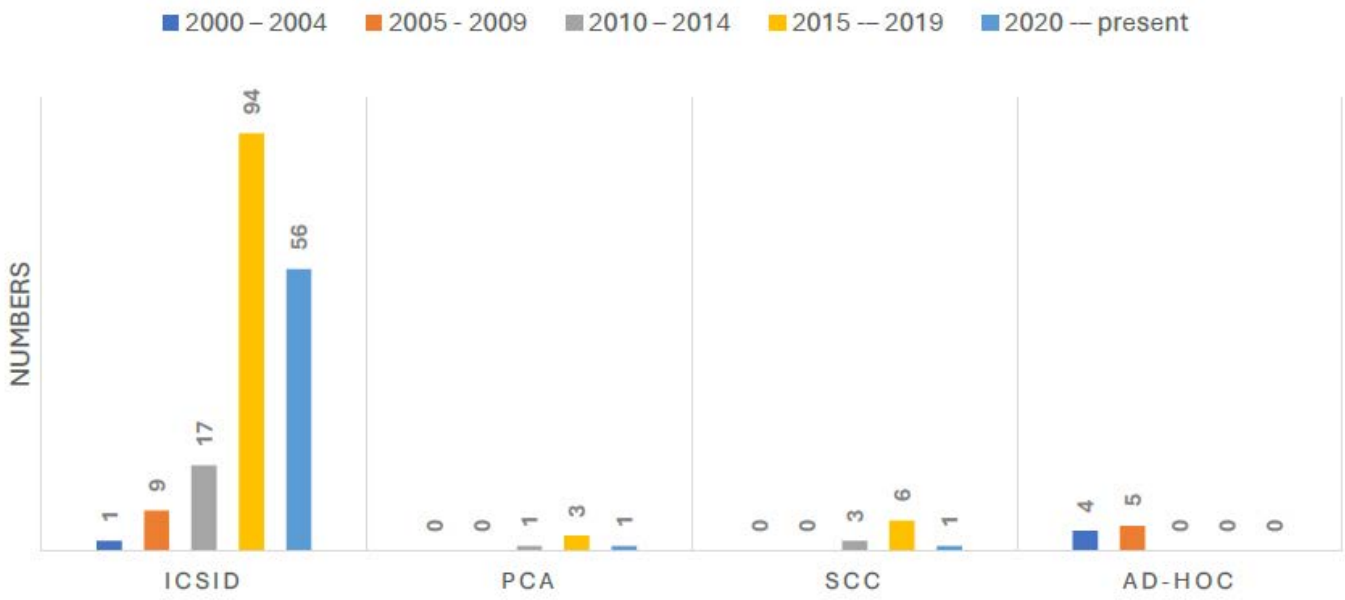

Figure 3 - Comparative trend of TPP applications per fora

21. There has also been a growing trend of TPP applications in annulment proceedings over the years. From the first reported TPP application in annulment proceedings in 2014, TPP applications in annulment proceedings have grown by over 300 per cent, returning a total of 37 TPP applications in annulment proceedings to date.

16 The percentage increase is 4,140 per cent.

17 The percentage increase is 390.5 per cent.

18 The percentage increase is 16.9 per cent.

19 This is likely because investment arbitrations are typically conducted under the auspices of an arbitral institution and *ad hoc* arbitrations are largely unreported.

20 Annex 1, 3–170. Data has been collected until 11 December 2024. The statistics and the resulting chart are representative of the dataset, but there may be a margin of error.

22. Figure 4 shows an upward trend of TPP applications in ICSID annulment proceedings, in terms of filings over five-year increments.[21]

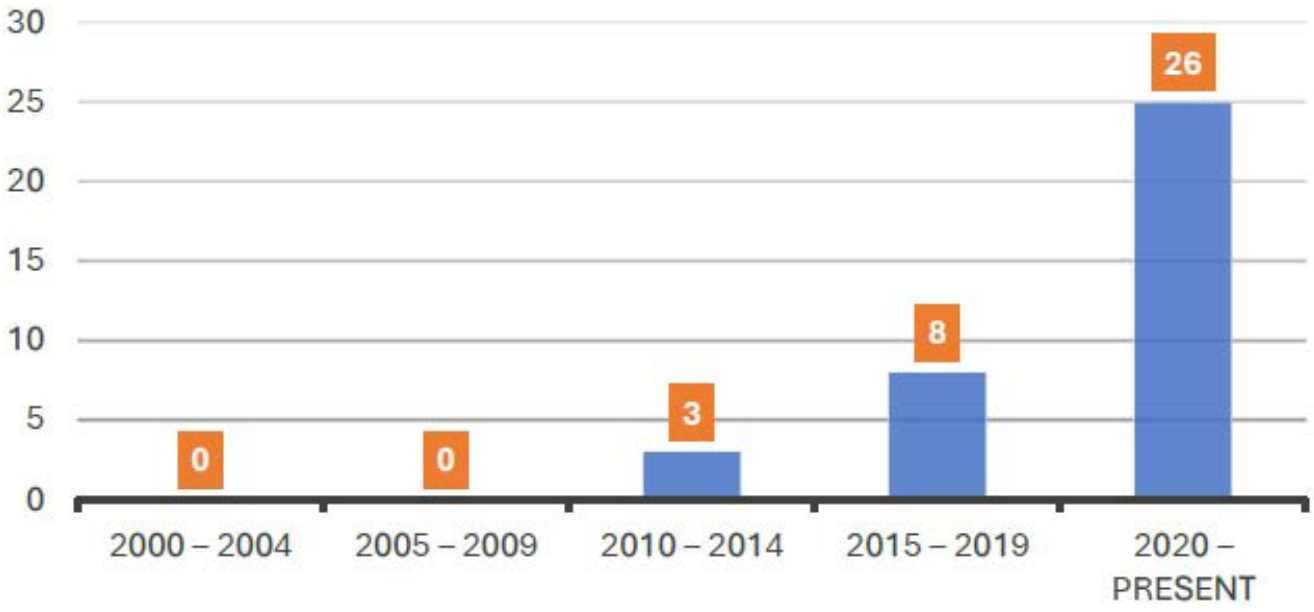

Figure 4 – Upward trend of TPP applications in ICSID annulment proceedings

B. Identity and number of TPP applicants

23. The data reveals that TPP applications were brought by a total of 73 known applicants, comprising non-governmental organisations (NGOs), supranational bodies (primarily the European Commission), sovereigns, indigenous communities, corporate entities, professional associations, private organisations, and private individuals.[22] This sub-section focuses on the identity of the applicants over the frequency of applications they filed. Thus, even where some applicants filed multiple applications over multiple cases, for the purpose of the analysis in this sub-section, each applicant is counted just once.[23] Of the total number of TPP applications, and as shown in Figure 5:[24]

- thirty-nine applicants were NGOs;
- eleven applicants were private individuals;
- five applicants were indigenous communities;
- four applicants were sovereign states;
- four applicants were professional associations;
- four applicants were private organisations;

21 Annex 1, 135–162. Data has been collected until 11 December 2024. The statistics and the resulting chart are representative of the dataset, but there may be a margin of error.

22 Annex 1, 3–170. Data has been collected until 11 December 2024. The statistics and the resulting chart are representative of the dataset, but there may be a margin of error.

23 Due to the fact that certain case details are not publicly available, the identities of the applicants in some proceedings remain unknown and have therefore not been included in the chart.

24 Annex 1, 3–170. Data has been collected until 11 December 2024. The statistics and the resulting chart are representative of the dataset, but there may be a margin of error.

- two applicants were international organisations;
- two applicants were public unions;
- one applicant was a supranational body (the European Commission); and
- one applicant was a corporate entity.

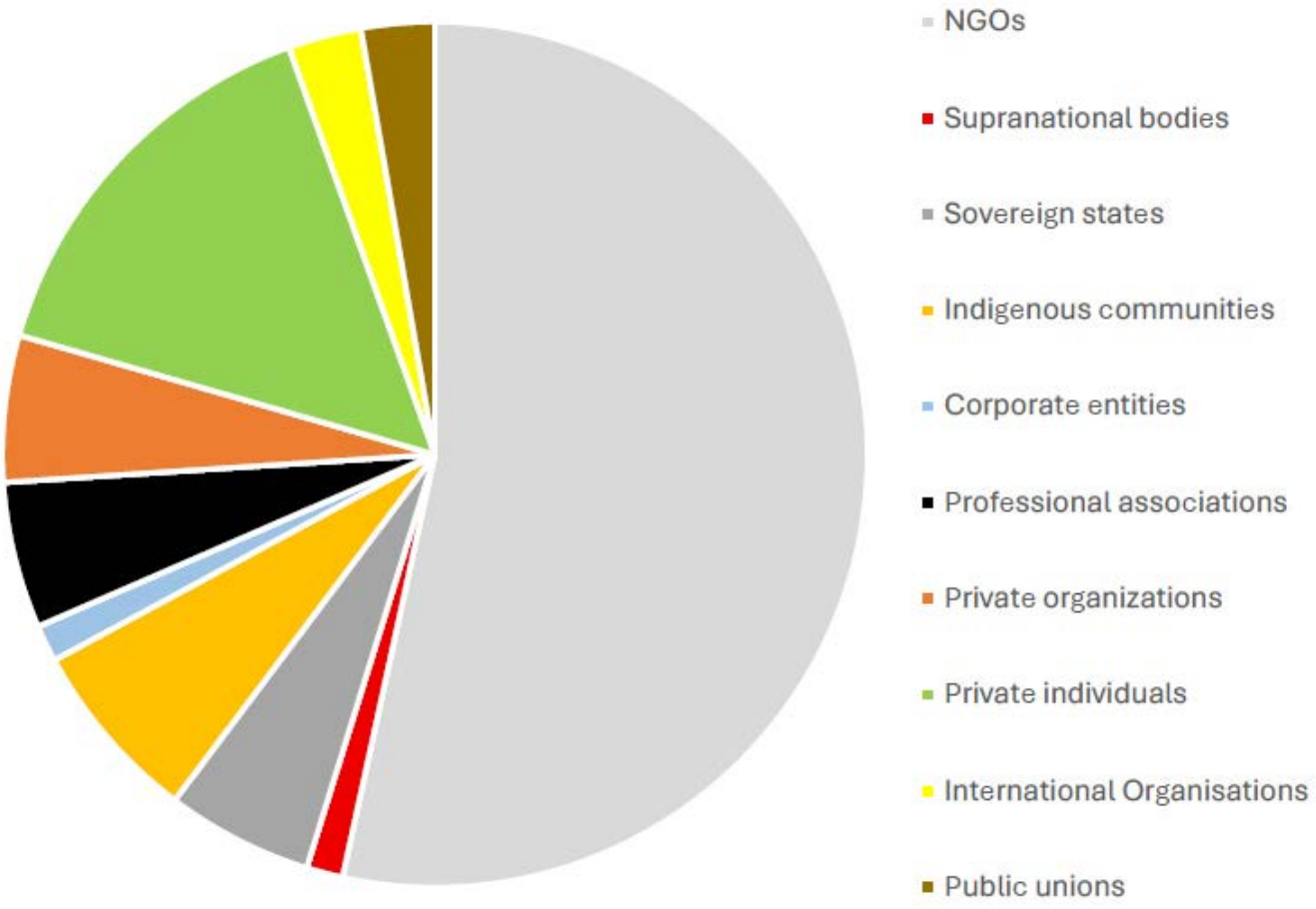

Figure 5 – Spread of TPP applicants

24. NGOs comprise the majority of applicants by identity (about 54 per cent) with the other categories of applicants cumulatively making up the minority (about 46 per cent).

25. Notably, the total number of TPP applicants is significantly lower than the total number of TPP applications for the period under review. This discrepancy is largely due to repeated applications by the European Commission (alone or supported by other categories of applicants) across a number of cases. Thus, even though NGOs comprise the majority of applicants by identity, the applicant who filed the most applications is the European Commission, accounting for almost 50 per cent of the total number of applications.[25]

26. Furthermore, in respect of ICSID annulment proceedings, the European Commission is the only known applicant.[26]

25 The European Commission (EC) submitted many TPP applications to present the European Union's position on, among other things, the compatibility of investment arbitration and EU law in matters between EU investors and EU Member States.

26 Annex 1, 135–162. Data has been collected until 11 December 2024. The statistics and the resulting chart are representative of the dataset, but there may be a margin of error.

C. Number of TPP applications granted

27. The data reveals that a total of 121 TPP applications are known to have been granted to date.[27] Of this number, 111 were full grants (91.7 per cent) and ten were partial grants (8.3 per cent), as shown in Figure 6:[28]

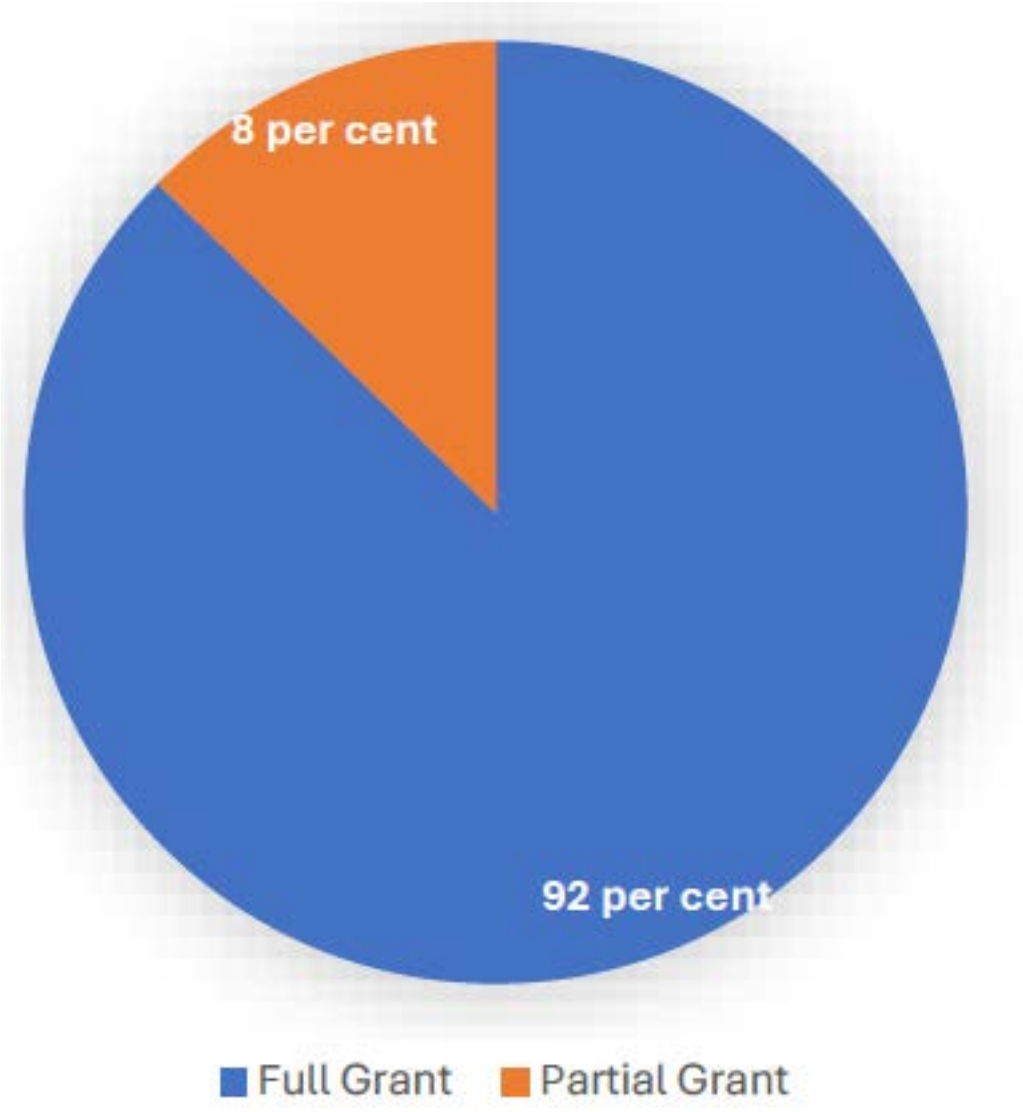

Figure 6 – Granted TPP applications: full grants vis-à-vis partial grants

28. For context, partial grants refer to instances where the tribunal refuses certain elements of a TPP application, even if ultimately the applicant is allowed to participate to some extent in the proceedings. This is in contrast with full grants, where the tribunal grants the TPP application in its entirety. Out of the total number of granted applications, that is both full and partial grants:

27 Annex 1, 3, 11, 19, 134, 162, 170. Data has been collected until 11 December 2024. The statistics and the resulting chart are representative of the dataset, but there may be a margin of error.

28 *Ibid.* The statistics and the resulting chart are representative of the dataset, but there may be a margin of error.

- ninety-three applications were granted in ICSID arbitrations;
- eleven applications were granted in SCC arbitrations;
- nine applications were granted in other *ad hoc* arbitrations;
- seven applications were granted in PCA arbitrations; and
- one application was granted in an ICC arbitration.

29. Figure 7 shows the spread of granted TPP applications across the various fora.[29]

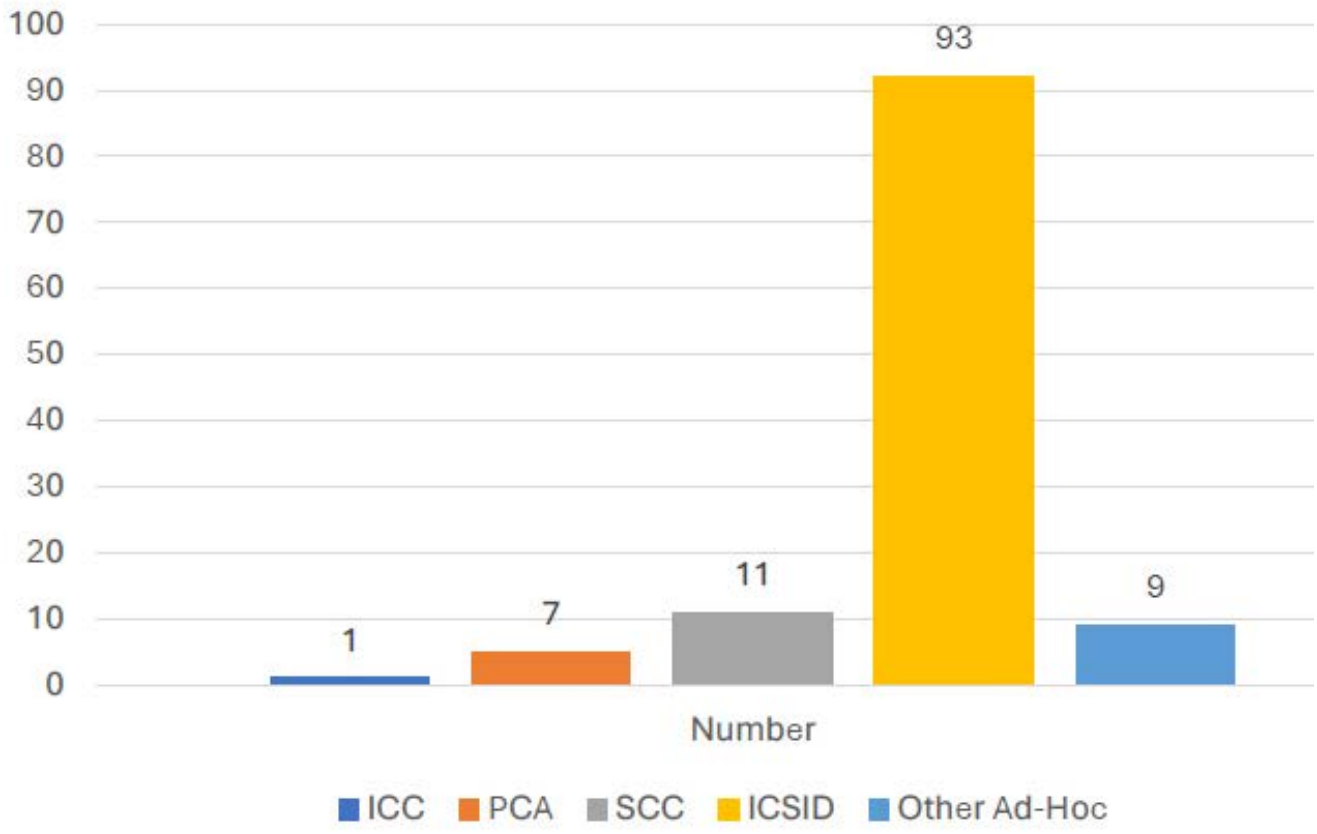

Figure 7 – Total number of granted TPP applications across different fora

30. Overall, the number of granted TPP applications has grown by more than 2,900 per cent over the years, increasing from four granted applications as of 2004 to about[30] 121 granted applications presently. Figure 8 tracks the periodic growth of TPP applications granted over the years, applying five-year increments.[31]

29 *Ibid.* The statistics and the resulting chart are representative of the dataset, but there may be a margin of error.

30 We note that the number of granted TPP applications may exceed 121, as the details of certain cases involving TPP applications remain confidential.

31 Annex 1, 3–170. Data has been collected until 11 December 2024. The statistics and the resulting chart are representative of the dataset, but there may be a margin of error.

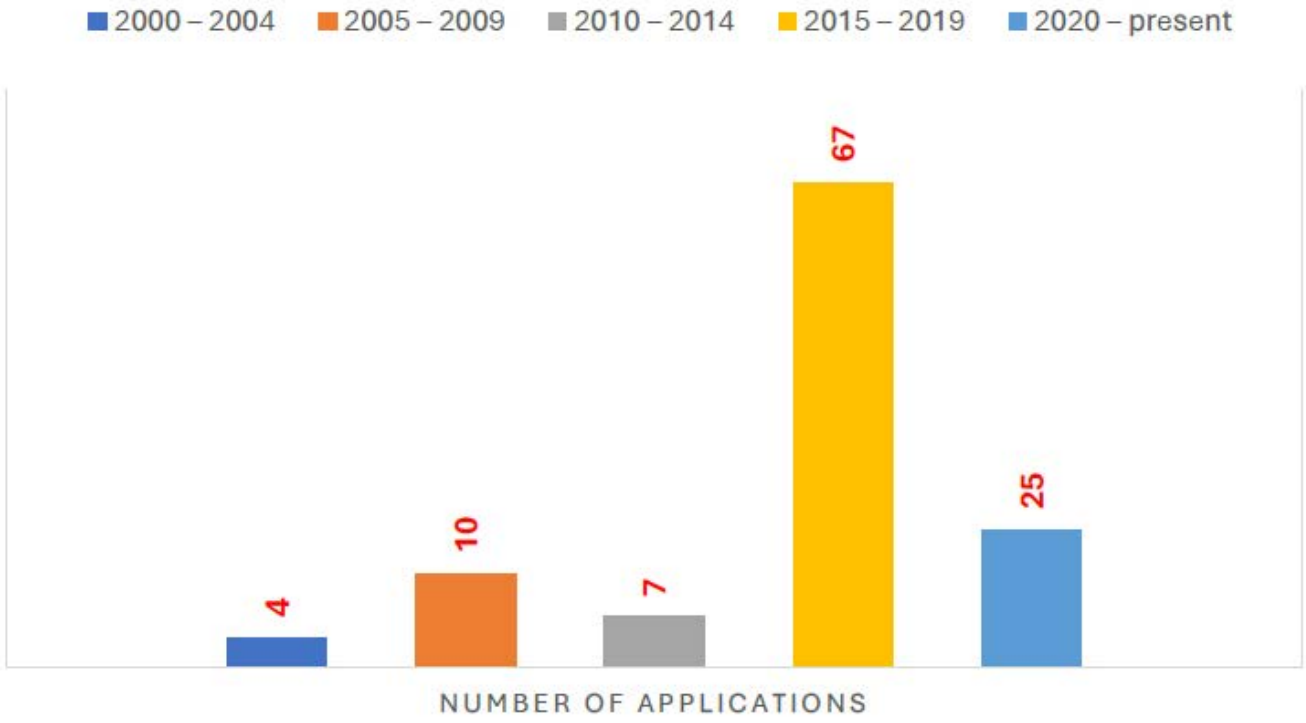

Figure 8 – Growth rate of granted TPP applications

31. Notably, applications filed by the European Commission – included in the chart under 'supranational body' – have witnessed the highest grant rate, followed by applications filed by NGOs as shown in Figure 9.[32]

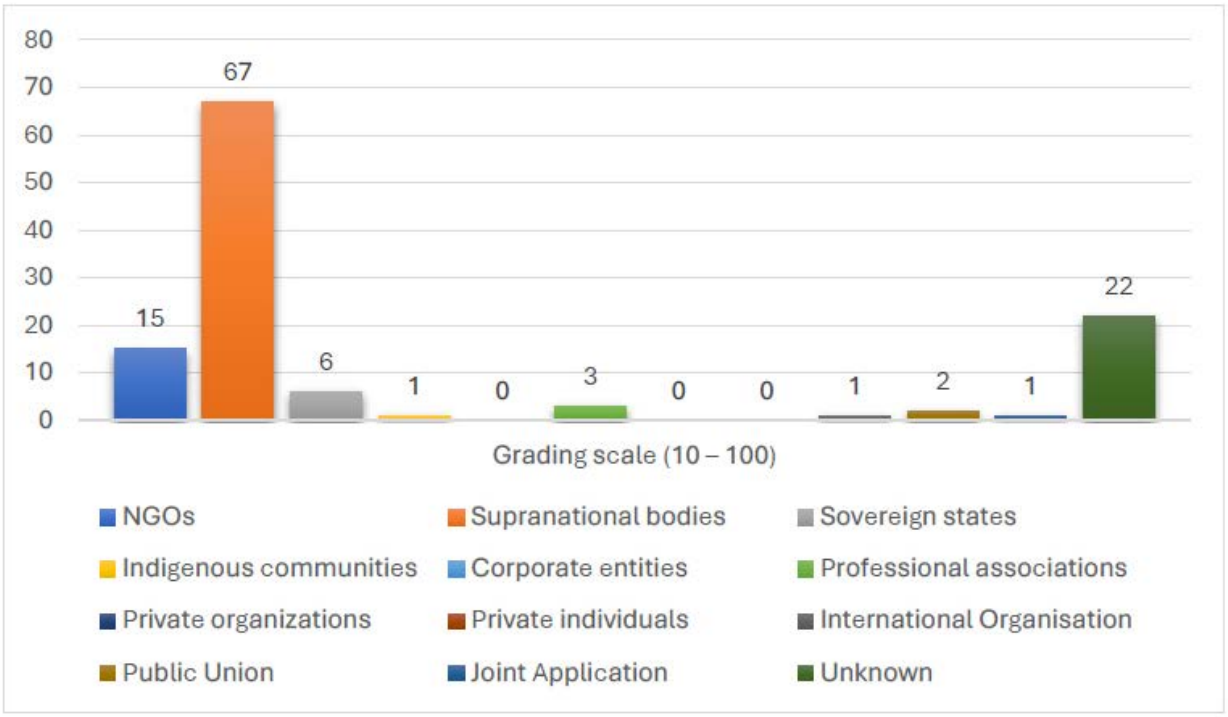

Figure 9 – Comparative data on grant rate across various categories of applicants

32 Annex 1, 3–170. Data has been collected until 11 December 2024. The statistics and the resulting chart are representative of the dataset, but there may be a margin of error.

32. There has also been a steady growth of granted TPP applications in annulment proceedings, as shown in Figure 10.[33]

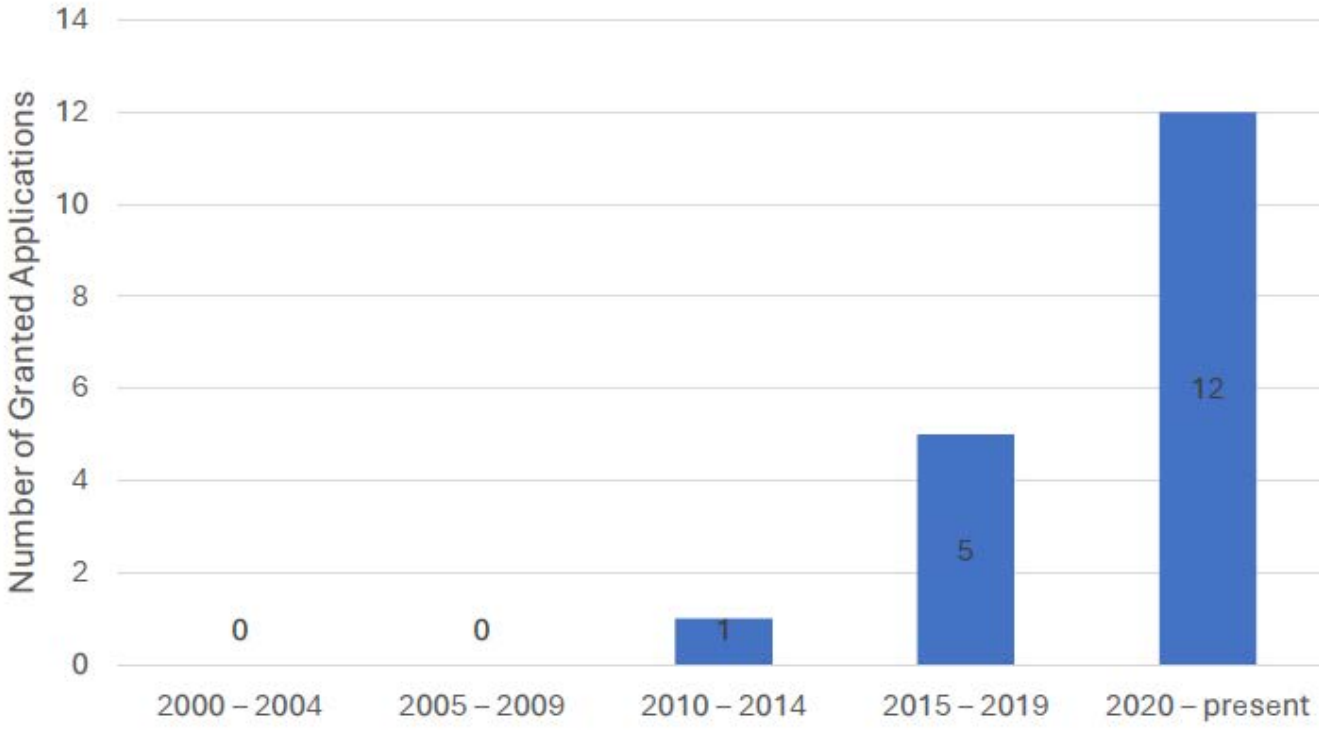

Figure 10 – Trend of granted TPP applications in annulment proceedings

D. Number of TPP applications denied

33. The data reveals that a total number of 57 TPP applications were denied. These denials featured across ICSID and PCA proceedings, with 53 denials recorded in ICSID proceedings and four denials recorded in PCA proceedings, as shown in Figure 11.[34]

33 Annex 1, 135–162. Data has been collected until 11 December 2024. The statistics and the resulting chart are representative of the dataset, but there may be a margin of error.

34 Annex 1, 3, 11, 19, 162, 170. Data has been collected until 11 December 2024. The statistics and the resulting chart are representative of the dataset, but there may be a margin of error.

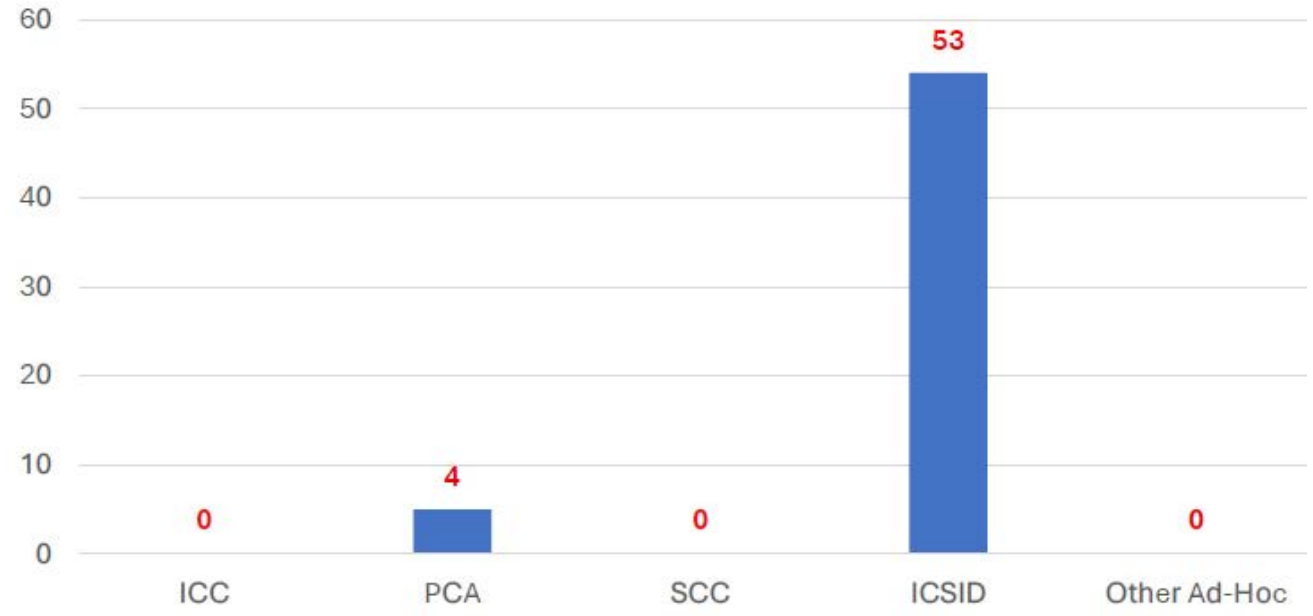

Figure 11 – Total number of denied TPP applications

34. Applications from the European Commission witnessed the highest denial rates (denoted below under the category 'supranational bodies', aligning with its record as having filed the highest number of applications overall) followed by NGOs. This was followed by a tie between applications filed by sovereign states and private individuals, joint applications, and a tie between applications filed by corporate entities and professional associations, as shown in Figure 12.[35]

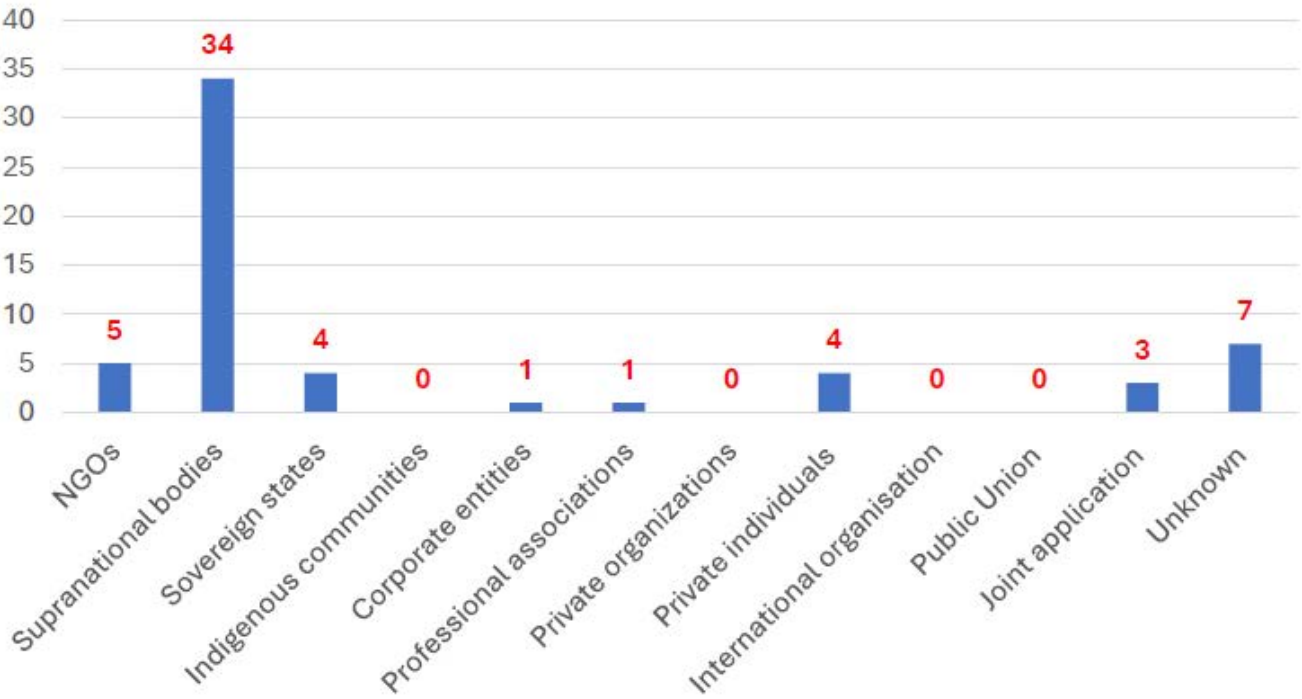

Figure 12 – Spread of denied TPP applications across various categories of applicants

35 Annex 1, 4–11; 20–162. Data has been collected until 11 December 2024. The statistics and the resulting chart are representative of the dataset, but there may be a margin of error.

35. As with granted applications, there has also been an overall increase in the number of denied TPP applications over the years, likely coinciding with the overall growth rate in TPP applications over the years. Figure 13 shows the growth rate of denials, applying five-year increments.[36]

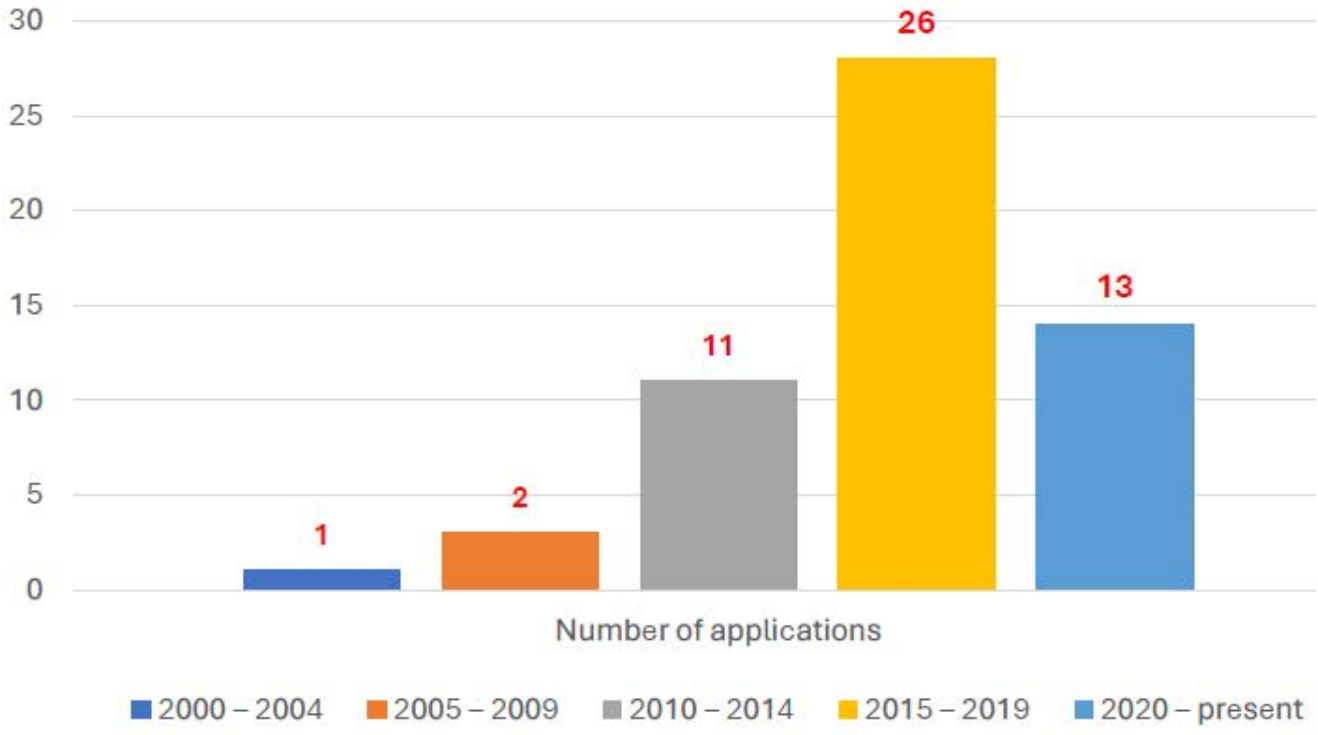

Figure 13 – Spread of denied TPP applications

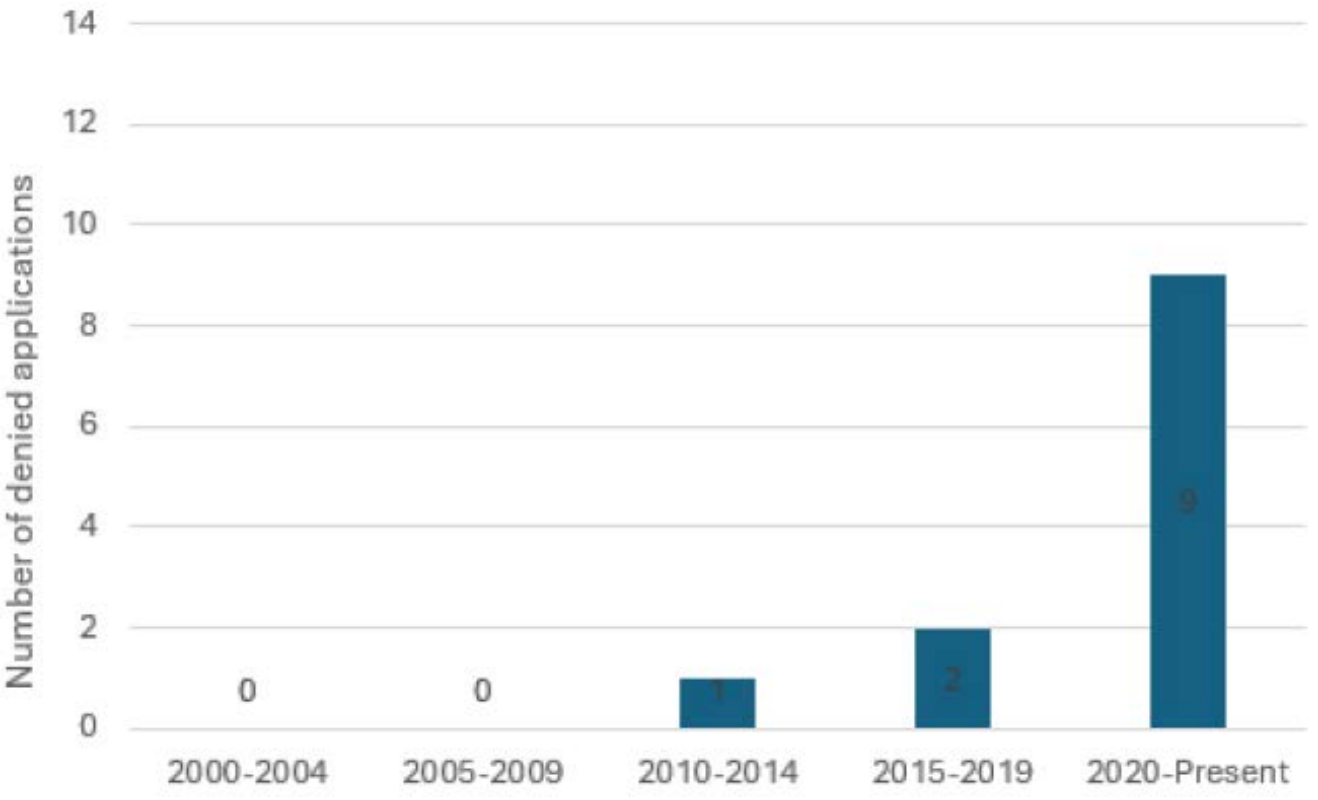

Figure 14 – Trend of denied TPP applications in annulment proceedings

36 *Ibid.* The statistics and the resulting chart are representative of the dataset, but there may be a margin of error.

36. There has also been a steady growth of denied TPP applications in annulment proceedings, as shown in Figure 14.[37]

E. Findings

37. The data reveals three trends in TPP applications: a marked increase in their number over time, a growing diversity of applicants, and a considerable success rate.

38. **Growth**: The number of TPP applications has substantially increased since 2000, demonstrating an approximate 17 per cent increase each year.[38] The data suggests that institutional arbitrations have witnessed the fastest growth of TPP applications – with ICSID arbitrations being the most popular – while *ad hoc* applications appear not to have witnessed any significant increase, based upon publicly available data.[39] Besides the merits stage in investment arbitration, annulment proceedings have also experienced a growth in TPP applications at over 300 per cent.[40]

39. **Diversity of applicants**: While NGOs comprise the majority of applicants (about 54 per cent), other applicants, including the European Commission, make up the other 46 per cent.[41] The European Commission is the only known applicant in relation to annulment proceedings.[42] There is thus a widespread makeup of applicants.

40. **Successful admissions**: The majority of applications have been successful – 57.1 per cent versus 26.9 per cent.[43] Of the total 121 TPP applications, 111 (91.7 per cent) were full grants and ten (8.3 per cent) were partial grants.[44] The most grants (whether full or partial) were granted in ICSID arbitrations, followed by SCC, *ad hoc*, PCA and ICC arbitrations.[45] The number of granted applications has grown by more than 2,900 per cent over the years.[46] Additionally, 93 per cent of denials featured in ICSID arbitrations, while 7 per cent were recorded in PCA proceedings.[47] Applications by the European Commission witness the highest denial rate, followed by NGOs.[48]

41. Taken together, these findings confirm that TPP has become a regular feature of investment arbitration. Against this backdrop, the following Sections examine the legal framework for TPP and assess how tribunals and *ad hoc* committees have applied it in practice.

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37 Annex 1, 135–162. Data has been collected until 11 December 2024. The statistics and the resulting chart are representative of the dataset, but there may be a margin of error.

38 *See* Section I.A, Figure 2.

39 *See* Section I.A, Figure 3.

40 *See* Section I.A, Figure 4.

41 *See* Section I.B, Figure 5.

42 *See* Section I.B.

43 *See* Sections I.A; I.C.

44 *See* Section I.C.

45 *See* Section I.C., Figure 7.

46 *See* I.C, Figure 8.

47 *See* Section I.D.

48 *See* Section I.D, Figure 12.

II. LEGAL FRAMEWORK FOR THIRD-PARTY PARTICIPATION

42. To assess the legal framework for TPP in ISDS, the IA Subcommittee analysed various IIAs[49] and the following rules referring to TPP (together the 'Rules'):[50] the ICSID Arbitration Rules of 2022 ('ICSID Rules');[51] the United Nations Commission on International Trade Law Rules on Transparency in Treaty-Based Investor State Arbitration of 2021 ('UNCITRAL Transparency Rules'); the Singapore International Arbitration Centre Investment Arbitration Rules of 2017 ('SIAC Investment Rules'); and the Arbitration Institute of the Stockholm Chamber of Commerce Arbitration Rules of 2017 ('SCC Rules').[52]

43. This section examines the legal basis for the participation of *amicus curiae*[53] (A) and NTDP (B) in investment arbitration.

A. Legal basis for participation by amicus curiae

44. The starting point in considering *amicus curiae* participation in ISDS is the legal basis of a tribunal's authority to permit such participation. Historically, procedural rules were silent on the matter. As a result, when first faced with *amicus* applications in the early 2000s, investment tribunals relied on their inherent authority to conduct the arbitral proceedings as they deemed appropriate to accept TPP submissions.[54]

45. In this regard, *Methanex Corp v United States*, a NAFTA case under the UNCITRAL Rules,[55] is often considered in literature as a touchstone decision.[56] There, two environmental groups sought to file *amicus* briefs in a dispute challenging California's ban on a gasoline additive. The United States supported the application, citing the public interest at stake and urging a broad interpretation of the tribunal's procedural authority under Article 15(1). The claimant objected and argued that neither NAFTA nor the UNCITRAL Rules permitted such participation and that admitting the *amicus* submissions would raise concerns about confidentiality and fairness.

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49 The IIAs examined are set forth in Annex 3.

50 For completeness, the IA Subcommittee also analysed the TPP rules of other international adjudicatory bodies and certain domestic jurisdictions, but considered them of limited relevance, for present purposes. See Annexes 4 and 5 of this Report, respectively.

51 Albeit with due consideration of the predecessor ICSID Rules of 2006, where relevant.

52 For completeness, the IA Subcommittee also reviewed other institutional rules and frameworks, including, for instance, the LCIA Arbitration Rules (2020) and the ICC Arbitration Rules (2021), but considered them of limited relevance, for present purposes. All rules examined are set out in Annex 2.

53 Any reference in this Section to *amicus curiae* denotes applications by non-parties to the dispute, with exception of NDTP submissions made as of right under treaty provisions, which are addressed separately.

54 *See, eg, Piero Foresti, Laura de Carli and others v Republic of South Africa*, ICSID Case No. ARB(AF)/07/01, Letter Regarding Non Disputing Parties, 5 October 2009, 1 (asserting the tribunal's discretion to accept TPP under Rule 41(3) of the ICSID Arbitration Additional Facility Rules); *SunReserve Luxco Holdings SRL v Italian Republic*, SCC Case No. 132/2016, Award, 25 March 2020, para 20 (finding authority to accept TPPs under the general procedural power of Art 19 of the SCC Rules).

55 *Methanex Corp. v United States of America*, UNCITRAL, Decision of the tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae', 15 January 2001 (hereinafter '*Methanex*').

56 Jeffrey Commission & Rahim Moloo, *Procedural Issues in International Investment Arbitration* (Oxford University Press, 2018). paras 6.01, 6.05, 86–122; Dimitrij Euler, Markus Gehring & Maxi Scherer, 'Introduction' in Dimitrij Euler et al eds, *International Investment Arbitration A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* 3-4 (Cambridge University Press, 2015); Organisation for Economic Co-operation and Development, 'Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures: Statement by the OECD Investment Committee' 7 (Report, 2005).

The NAFTA State parties also weighed in: Mexico opposed the *amicus* submissions, while Canada indicated greater openness to TPP.[57]

46. In its Decision of 15 January 2001, the tribunal found the UNCITRAL Rules to be silent on its powers to accept *amicus* submissions and reasoned that such powers must be inferred, if at all, from its more general procedural powers afforded by Article 15(1) of the UNCITRAL Rules.[58] The tribunal considered the text of Article 15(1), sub-paragraph 2, alone, sufficient to support a procedural power to accept *amicus* submissions.[59] Additionally, the tribunal held that the practice of the Iran–US Claims Tribunal and the World Trade Organisation (WTO) supported its approach,[60] and that there was 'no immediate risk of unfair or unequal treatment for any Disputing Party or Party'.[61] Accordingly, the tribunal concluded – pursuant to Article 15(1) – that it had the power to accept *amicus* submissions and it remained within the tribunal's discretion to determine whether admission of *amicus* submissions in the proceedings was 'appropriate', including, as was the case in *Methanex*, on public interest grounds.[62]

47. Later that year, an UNCITRAL tribunal in another NAFTA case, *UPS v Canada*, also relied on Article 15(1) holding that, while it was not required to permit *amicus curiae* participation, it could do so as a procedural matter.

48. Literature suggests that these decisions laid the foundation for broader TPP in investment arbitration,[63] which allowed the tribunal in *Vivendi v Argentina* to follow suit and mark a change in ICSID practice.[64] Although the tribunal found that the ICSID Convention and the Arbitration Rules were silent on the admission of third-party submissions,[65] it concluded that Article 44 of the ICSID Convention, which empowers tribunals to decide 'any question of procedure' not addressed by the arbitration Rules, had a similar effect to Article 15(1) of the UNCITRAL Rules.[66] The tribunal drew on the reasoning in the *Methanex* decision that 'acceptance of amicus submissions is a procedural question that does not affect a disputing party's substantive rights' as well as the practice of NAFTA, the Iran–US Claims Tribunal and the WTO.[67] The tribunal also held that the admissibility of *amicus* submissions would depend on the relevance of the subject matter, the appropriateness of the applicant, and the procedure for submission. *Vivendi* thus became the first ICSID case to formally accept an

57 *Methanex*, *see n* 55, paras 9–10.

58 *Ibid*, paras 24, 39–40.

59 *Ibid*, paras 31.

60 *Ibid*, paras 31–33.

61 *Ibid*, paras 37.

62 *Ibid*, paras 49–52.

63 Commission & Moloo, *see n* 60 at para 6.05 ('[i]t was following the tribunal decisions in those two arbitrations that the NAFTA Free Trade Commission issued the NAFTA Statement.').

64 Li Qingyuan, 'Amicus Curiae Participation in ICSID Arbitration: Evolution and Refinement' (2024) 21(4) *US-China Law Review* 171, 173; Tomoko Ishikawa, 'Third Party Participation in Investment Treaty Arbitration' (2010) 59(2) *International and Comparative Law Quarterly* 373, 382; Nicolette Butler, 'Non-Disputing Party Participation in ICSID Disputes: Faux Amici?' (2019) 66 *Netherlands International Law Review* 143, 147, 152: 'There is some evidence to suggest that since the first acceptance of amici curiae by an ICSID tribunal in Vivendi... ICSID tribunals appear to have become more open to accepting *amicus* submissions'. Further, it is noted that the subsequent inconsistency created between the approach adopted in *Suez/Vivendi* and *Suez/InteAguas* is what led to the amendments of ICSID Arbitration Rules 32 and 37: ICSID Senior Counsel, 'Introductory note to the *Aguas del Tunari SA v Republic of Bolivia* case' available at https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C210/DC628.pdf, cited in Ishikawa at 384.

65 Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic, ICSID Case No. ARB/03/19, Order in Response to a Petition for Participation as Amicus Curiae (19 May 2005) (hereinafter *Vivendi*), para 9.

66 *Ibid*, para 10.

67 *Ibid*, paras 14–15.

amicus submission. The tribunal in *Suez v Argentina* followed suit, admitting *amicus* submissions pursuant to Article 44 of the ICSID Convention.[68]

49. These developments, together with proposals for improvement of the TPP rules for ICSID arbitration,[69] provided the impetus for the amendment of ICSID Rule 37.[70] Other arbitral rules were similarly amended to introduce formal procedures governing TPP.[71]

50. Following these amendments, the Rules examined in this Report generally establish a four-step process for handling *amicus* submissions.[72] This process is consistent with that provided for in a range of IIAs,[73] and is as follows:

    (i) **Application for leave**: The applicant must formally request permission from the tribunal to submit an *amicus* brief, in the language of the arbitral proceedings, adhering to specified formal criteria detailed in the treaty;[74]

    (ii) **Opportunity to respond**: The disputing parties are granted an opportunity to present observations on the applicant's request;

    (iii) **Tribunal decision**: The tribunal has the discretion to determine whether to admit the *amicus curiae* submission and whether to impose any conditions (ie, confidentiality safeguards, deadlines, page limits, etc); and

    (iv) **Submission of the brief**: If the tribunal decides to admit the *amicus curiae* submission, it may submit a brief that complies with various procedural requirements. The tribunal may then consider the brief in its deliberations, subject to its discretion on the weight to be accorded to it.

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68 *Suez, Sociedad General de Aguas de Barcelona SA and Interagua Servicios Integrales de Agua SA v Argentine Republic*, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae (17 March 2006) para 16. The tribunal was comprised of the same arbitrators as in *Vivendi*.

69 'Possible Improvements of the Framework for ICSID Arbitration' (ICSID Secretariat, 22 October 2004) para 13.

70 Ishikawa, *see n* 65 at 384.

71 UNCITRAL Arbitration Rules (2021), Art 1(4). For investor-state arbitration initiated pursuant to a treaty providing for the protection of investments or investors, these Rules include the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration ('Rules on Transparency'), subject to Art 1 of the Rules on Transparency) and Arts 4 and 5 of the Rules on Transparency; ICSID Convention Arbitration (2006 Rules), Rule 37(2); ICSID Convention Arbitration (2022 Rules), Chapter X, Rule 67; SIAC Investment Rules (2017), Rule 29. Though, as noted, where rules are silent as to TPP, a tribunal's power to consider and admit TPP on the basis of general powers to manage the proceedings remains: *see, for instance*, Art 15 of the UNCITRAL Rules (1976).

72 ICSID Rules (2022), Rules 67–68; UNCITRAL Transparency Rules (2013), Art 5; SIAC Investment Rules (2017), Rule 29; SCC Rules (2023), Appendix III, Arts 3–4.

73 EU–Singapore Investment Protection Agreement, Art 3.41(2), Annexes 8 and 9; Canada–Korea FTA, Art 8.36 and Annex 8–D; Canada–Burkina Faso BIT, Art 33 and Annex IV; Canada–Colombia FTA, Art 831 and Annex 831; Peru–Colombia BIT, Art 25(2) and Annex G; Honduras–Peru FTA, Art 1221(2) and Annex 12.21; Colombia–Panama FTA, Art 14.30(1) and Annex 14-C; Colombia-Costa Rica FTA, Art 12.22(2) and Annex 12-D; Guatemala-Peru FTA, Art 12.21(2) and Annex 12.21; Costa Rica–Peru FTA, Art 12.21(2) and Annex 12.21; Peru–Panama FTA, Art 12.21(2) and Annex 12.21.

74 Many IIAs provide only formal requirements for submissions, without addressing substantive or procedural factors. Formal requirements may include deadlines for submission, page limits, language specifications, and mandatory dates and signatures. *See, eg,* EU–New Zealand FTA, Art 26.21 and Annex 26-A, Art XII; CETA, Annex 29-A, Arts 43-46; Australia–Chile FTA, Art 10.20(2); Investment Agreement for COMESA Common Investment Area, Art 28(8) and Annex A, Art 8; US–Chile FTA, Art 10.19(3); Peru–US TPA, Art 10.20(3); Trans–Pacific Strategic Economic Partnership, Annex 15.B, Arts 33-36; Chile–Colombia FTA, Art 9.20(3); Colombia–Spain BIT, Art 32(1); Pacific Alliance Additional Protocol, Art 10.20(3); Mexico–Panama FTA, Art 10.21(3); Korea–New Zealand FTA, Art 10.26(1); Canada–Serbia BIT, Art 32; ASEAN–Australia–New Zealand FTA, Chapter 20, Art 10.

B. Legal basis for participation of NDTPs

51. Non-disputing treaty parties are state parties to the IIA under which an arbitration is brought in which they are not a disputing party.[75] In the context of a bilateral investment treaty, the NDTP is the investor's home state. Many IIAs and Rules provide for participation by NDTPs in an arbitration, as a matter of right, on issues of treaty interpretation only.[76] The ICSID Rules and UNCITRAL Transparency Rules likewise provide for such submissions as a matter of right. Without such mandatory provisions in a treaty or rule, admission of a NDTP submission is left to the discretion of the tribunal, similar to a general *amicus* submission, although it is worth noting that specific considerations applying to the discretionary admission of NDTP submissions are addressed in some institutional rules. Provisions for both mandatory and discretionary NDTPs are addressed in this section.

52. The primary difference between NDTP participation and other types of TPP is that NDTPs are permitted to participate in the proceedings as a consequence of their status as a treaty party. In many cases, their participation does not require a grant of leave from the tribunal. Generally, this results in a more limited scope for NDTP submissions, with a focus solely on issues of treaty interpretation, which is provided explicitly within IIAs.[77] The ICSID Rules follow the same approach.[78]

53. Only very few IIAs broaden this scope by providing for the possibility for NDTPs to make written submissions on matters beyond treaty interpretation.[79] For their part, the UNCITRAL Transparency Rules allow submissions from an NDTP on matters beyond treaty interpretation, but only those that fall within the scope of the dispute.[80] In such cases, discretion remains with the tribunal to admit or deny the submission. In particular, the UNCITRAL Transparency Rules and SCC Rules state that the submission might be rejected where, among other factors, the submission would 'support the claim of the investor in a manner tantamount to diplomatic protection'.[81]

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75 As before, any reference in this Section to NDTP participation denotes submissions made by non-disputing treaty parties pursuant to express provisions in the respectively applicable treaty or rules. Where a treaty party seeks to intervene outside such provisions, the general framework and considerations as outlined in Section II apply.

76 ICSID Rules (2022), Rule 68; SIAC Investment Rules, Art 29; UNCITRAL Transparency Rules, Art 5.

77 *See, eg,* China–Angola BIT, Art 28(2); China and Nicaragua FTA, Art 11.22(2); Pacific Alliance–Singapore FTA, Art 8.25(2); Israel–South Korea FTI, Art 9.23(2); China–Mauritius FTA, Art 8.28(2); Australia–Hong Kong Investment Agreement, Art 29(2); Argentina–Japan BIT, Art 25(13); CUSMA, Art 14.D.7.3; CPTPP, Art 9.23(2); Central America–Korea FTA, Art 9.21(2); Australia–Peru FTA, Art 8.24(2); Chile–Hong Kong BIT, Art 27(2); TPP, Art 9.23(2); Australia–China FTA, Art 9.16(2); Korea–New Zealand FTA, Art 10.25(3); Canada–Korea FTA, Art 8.31; Australia–Korea FTA; Art 11.20(4); Canada–Honduras FTA, Art 10.31; New Zealand–Taiwan ECA, Art 24(3); Canada–China BIT, Art 27(2); China–Japan–Korea Trilateral Investment Agreement, Art 17.2(c); Canada–Kuwait BIT, Art 28(2); Canada–Jordan BIT, Art 35(1); Canada–Romania BIT, Annex C, Part II; Canada–Ukraine FTA of 2023, Art 17.33(4); EU–Singapore Investment Protection Agreement, Art 3.17(1); Canada–Czech Republic BIT, Annex B, Art II; Canada–Latvia BIT, Annex C, Art II; Canada–Korea FTA, Art 8.31; Japan–Switzerland EPA, Art 94(10); Canada–Colombia FTA, Art 827(2); Australia–Chile FTA, Art 10.21(2); Canada–Peru FTA, Art 832(1); US–Rwanda BIT, Art 28(2); Korea–US FTA, Art 11.20(4); Panama–US FTA, Art 10.20(2); Investment Agreement for COMESA Common Investment Area, Annex A, Art 7; Peru–US FTA, Art 10.20(2); Oman–US FTA, Art 10.19(2); Japan–Malaysia EPA, Art 85(13); US–Uruguay BIT, Art 28(2); Japan–Mexico EPA, Art 86; CAFTA–DR FTA, Art 10.20(2); Morocco–US FTA, Art 10.19(2); Panama–Taiwan FTA, Art 10.29; Chile–US FTA, Art 10.19(2); Singapore–US FTA, Art 15.19(2); NAFTA, Art 1128; Colombia–El Salvador–Guatemala–Honduras FTA, Art 12.23(2); Chile–Colombia FTA, Art 9.20(2); Chile–Peru FTA, Art 11.20(2); Colombia–Spain BIT, Art 32(2); Mexico–Panama FTA, Art 10.21(2); Pacific Alliance Additional Protocol, Art 10.20(2); Central America–Mexico FTA, Art 11.24(2); Mexico–Peru FTA, Art 11.25; Canada–Peru BIT, Art 35(1).

78 ICSID Rules (2022), Rule 68(1) ('The Tribunal shall permit a Party to a treaty that is not a party to the dispute ("non-disputing Treaty Party") to make a submission on the interpretation of the treaty at issue in the dispute and upon which consent to arbitration is based').

79 *See, eg,* GCC–EFTA FTA, Art 8.4.

80 UNCITRAL Transparency Rules (2014), Art 5(2) ('The arbitral tribunal, after consultation with the disputing parties, may allow submissions on further matters within the scope of the dispute from a non-disputing Party to the treaty').

81 UNCITRAL Transparency Rules (2014), Art 5(2); SCC Rules (2023), Appendix III, Art 4(2)(ii).

54. The SIAC Investment Rules adopt a hybrid approach. Article 29(1) of the SIAC Investment Rules provides that a tribunal may allow or invite submissions from an NDTP 'but only on a question of treaty interpretation that is directly relevant to the dispute'. Thus, in contrast to the ICSID Rules and the UNCITRAL Transparency Rules, this provision permits submissions solely on issues of treaty interpretation that are directly relevant to the dispute, rather than allowing submissions on broader matters of interpretation. Further, the SIAC Investment Rules give the power to a tribunal to allow or invite submissions from an NDTP regarding a matter within the scope of the dispute, ie, beyond questions of treaty interpretation.

55. Similarly, Article 4 of Appendix III to the SCC Rules establishes that a tribunal may allow or invite submissions from an NDTP on 'issues of treaty interpretation that are material to the outcome of the case'. Accordingly, similar to the SIAC Investment Rules, the SCC Rules provide for a narrower scope for an NDTP's participation and grants a tribunal the authority to permit or invite (after consulting the disputing parties) submissions from an NDTP on other material issues in the arbitration, ie, beyond questions of treaty interpretation.[82]

56. In addition to limits on scope, many IIAs often contain procedural provisions specific to NDTP participation. For example, some IIAs, especially those negotiated and entered into by Canada, include provisions allowing NDTPs to attend the hearing, whether or not they make submissions to the tribunal.[83] Certain IIAs also provide that the tribunal shall not draw any inference from the absence of any submission or response to any invitation to an NDTP to provide its views on the interpretation of the IIA in question.[84] Some IIAs also allow NDTPs to address *sua sponte* any issues that an amicus curiae raises in its submissions regarding treaty interpretation.[85]

57. Transparency provisions further distinguish NDTP participation. Some IIAs provide that the responding party shall deliver a set of documents (eg, notice of intent, notice of arbitration, pleadings, memorials, briefs, minutes or transcripts of the hearing of the tribunal, orders, awards and decision, etc.) to the NDTP either automatically or upon request.[86] While this is the majority position, some IIAs do, however, limit the disclosure of protected information to NDTPs.[87] Some of these IIAs provide that the NDTP has the right to object to the publication of (parts of) documents that it submitted due to confidentiality reasons.[88]

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82 *See*, SCC Rules, Appendix III, Art 4.

83 *See, eg,* Canada–Honduras FTA, Art 10.31; Canada–China BIT, Art 27(2); Canada–Kuwait BIT, Art 28(2); Canada–Jordan BIT, Art 35(2); Canada–Romania BIT, Annex C, Part II; Canada–Latvia BIT, Annex C, Art II; Canada–Peru FTA, Art 832(2); Canada-Peru BIT, Art 35(2).

84 *See, eg,* EU–Singapore Investment Protection Agreement, Art 3.17(2).

85 *See, eg,* Canada–Honduras FTA, Art 10.36(6).

86 *See, eg,* Canada–Ukraine FTA, Art 17.33; Pacific Alliance–Singapore FTA, Art 8.26(1); Israel–South Korea FTA, Art 9.24(1); Australia–Hong Kong IA, Art 30(1); Argentina–Japan BIT, Art 25(12); CUSMA, Art 14.D.8(1); EU–Singapore Investment Protection Agreement, Annex 8, Art 1; CPTPP, Art 9.24(1); Central America–Korea FTA, Art 9.22(1); Australia–Peru FTA, Art 8.25(1); Chile–Hong Kong BIT, Art 27(1); TPP, Art 9.24(1); Australia–China FTA, Art 9.17(1); Korea–New Zealand FTA, Art 10.27(1); Australia–Korea FTA, Art 11.21(1); Canada–Honduras FTA, Art 10.30; New Zealand–Taiwan ECA, Art 26; Canada–China BIT, Art 27(1); Canada–Kuwait BIT, Art 28(1); Canada–Romania BIT, Annex C, Part II; Canada–Czech Republic BIT, Annex B, Art II; Canada–Latvia BIT, Annex C, Art II; Canada–Korea FTA, Arts 8.29-8.30 and 8.35; Japan–Switzerland EPA, Art 94(9); Canada–Colombia FTA, Art 827(1); Australia–Chile FTA, Art 10.21(1); Canada–Peru FTA, Art 831(1); US–Rwanda BIT, Art 29(1); Korea–US FTA, Art 11.21(1); Panama–US FTA, Art 10.21(1); Peru–US FTA, Art 10.21(1); Oman–US FTA, Art 10.20(1); US–Uruguay BIT, Art 29(1); CAFTA–DR FTA, Art 10.21(1); Morocco–US FTA, Art 10.20(1); Chile–US FTA, Art 10.20(1); Singapore–US FTA, Art 15.20(1); NAFTA, Art 1129; Colombia–El Salvador–Guatemala–Honduras FTA, Art 12.24(1); Chile–Colombia FTA, Art 9.21(1); Chile–Peru FTA, Art 11.21(1); Mexico–Panama FTA, Art 10.22(1); Pacific Alliance Additional Protocol, Art 10.21(1); Central America–Mexico FTA, Art 11.25(1); Canada–Peru BIT, Art 34(1).

87 *See, eg,* Australia–Hong Kong Investment Agreement, Art 30(4); CUSMA, Art 14.D.8(4); CPTPP, Art 9.24(4); Central America-Korea FTA, Art 9.22(4); Australia–Peru FTA, Art 8.25(4); Chile–Hong Kong BIT, Art 28(4); TPP, Art 9.24(4); Australia–China FTA, Art 9.17(5); Korea–New Zealand FTA, Art 10.27(4); Canada–Korea FTA, Art 8.35(4); Australia–Korea FTA, Art 11.21(4); Mexico–Panama FTA, Art 10.22(4); Pacific Alliance Additional Protocol, Art 10.21(4); Central America–Mexico FTA, Art 11.25(4).

88 *See, eg,* EU–Singapore Investment Protection Agreement, Annex 8 (Art 4).

III. REQUIREMENTS FOR THIRD-PARTY PARTICIPATION

58. This section will examine three requirements related to TPP in ISDS, namely: the procedural and substantive requirements that must be met for a third party to be granted leave to file a submission; and the procedural safeguards that apply once leave has been granted.

59. This section will, therefore, start by analysing the procedural requirements for TPP applications (A). Procedural requirements are threshold criteria that do not concern the potential substance, scope, or merits of the intended submission, but instead ensure that an applicant can formally be considered a third-party participant such that its application can be received by the tribunal — for example, by requiring that the applicant identify itself and its funding sources, or that the request be submitted in a timely manner and in accordance with the formalities specified in the applicable treaty or Rules.

60. This section then considers the substantive requirements for TPP participation. Substantive requirements relate to what the applicant must demonstrate to justify participation: in particular, the contribution or perspective it can bring that would assist the tribunal, and whether that contribution is sufficiently distinct from the arguments advanced by the disputing parties (B).

61. Finally, this section outlines the procedural safeguards that may apply once a third party has been granted leave to file a submission. These safeguards regulate issues such as confidentiality obligations, page limits, or deadlines, and are designed to ensure that the benefits of TPP do not come at the expense of fairness and efficiency, or the rights of the disputing parties (C).

62. Considering the legal framework applicable to NDTPs discussed in Section II.B above, many of the issues addressed in this section will only apply to *amicus* participation. Such participation will, accordingly, be the focus of this section, and references to NDTP-specific participation will be made only where relevant. This being said, as mentioned in paragraph 51 above, in the absence of mandatory treaty provisions or arbitration rules, an NDTP may be treated in a manner similar to an *amicus* when seeking to participate in an investment arbitration. For this reason, this section remains relevant to NDTP participation to that extent.

63. Further, it should be noted that the involvement of third parties has extended beyond the merits phase of investment arbitration, extending also to annulment proceedings before ICSID *ad hoc* committees.[89] Accordingly, this section is also relevant to annulment proceedings and will, therefore, also address annulment, where relevant.

89 *9REN Holding Sarl v Kingdom of Spain*, ICSID Case No. ARB/15/15, Decision on Annulment, (17 November 2022) 34–39. (The tribunal accepted the European Commission's application for leave to intervene as a non-disputing party pursuant to rule 37(2) and summarised the contents of the submission as well as the parties' observations thereon); *Hydro Energy 1 Sàrl and Hydroxana Sweden AB v Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on the Kingdom of Spain's Application for Annulment (20 March 2023) para 43.

A. Procedural requirements

64. This section will identify the applicable legal framework (1), tribunal practice (2), and the IA Subcommittee's findings (3) regarding the procedural requirements for *amicus* participation.

1. Legal framework

65. Procedural requirements aim to identify the third party seeking to intervene and its interest in a case. Such requirements vary across the Rules and IIAs. Nonetheless, two commonalities can be identified, namely: (1) the need to determine who the third parties actually are through disclosure obligations, particularly relating to the third party's identity, characteristics, and funding (a); and (2) the degree to which party consent is required to allow third parties to be considered as such for purposes of TPP (b).

a) Transparency and disclosure of funding sources

66. To identify third parties and their interest in a case, most IIAs require applicants to disclose the following information:[90]

    (i) The identity of the individual or entity filing the submission;

    (ii) Any controlling entity and the sources of significant financial assistance in recent years;

    (iii) Any connections with the disputing parties;

    (iv) The applicant's interest in the proceedings; and

    (v) The identification of any person, government, or entity providing financial assistance for the preparation of the submission.

67. These disclosure obligations are mirrored in half of the Rules analysed.[91] For example, both the ICSID and UNCITRAL Transparency Rules require disclosure of identity, ownership, direct or indirect affiliations, and any financial or other assistance.[92] While these Rules are prescriptive, others rely on tribunal discretion to mandate transparency requirements.[93]

68. However, the legal framework diverges with respect to the disclosure of an applicant's funding sources. While most IIAs examined mandate the disclosure of an applicant's funding sources and links to the parties, the Rules treat this matter in different ways.[94] Whereas the SIAC

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90 *See, eg,* Angola–China BIT, Art 28(3); China–Nicaragua FTA, Art 11.22(3); Pacific Alliance–Singapore FTA, Art 8.25(3); China-Mauritius FTA, Art 8.28(3); Australia-Hong Kong Investment Agreement, Art 29(3); Argentina–Japan BIT, Art 27(1); USMCA, Art 14.D.7(3) of Annex 14–D; EU–Singapore Investment Protection Agreement, Annex 9 (43); CPTPP, Art 9.23(3); Central America–Republic of Korea FTA, Annex 9-G; Australia–Peru FTA, Art 8.24(3); Canada–Guinea BIT, Annex IV; Canada–Panama FTA, Annex 9.31; Australia–Chile FTA, Art 10.20(2); India–Mexico BIT, Annex A–Art 8; Peru–US FTA, Art 10.20(3); Chile–US FTA, Art 10.19(3); Colombia, El Salvador, Guatemala and Honduras FTA, Art 12.23(3); Chile–Colombia FTA, Art 9.20(3); Chile–Peru FTA, Art 11.20(3); Honduras–Peru FTA, Annex 12.21(1); Colombia–Panama FTA, Annex 14–C; Colombia-Costa Rica FTA, Annex 12-D; Guatemala-Peru FTA, Annex 12.21(1); Costa Rica–Peru FTA, Annex 12.21(1); Peru–Panama FTA, Annex 12.21(1).

91 UNCITRAL Transparency Rules (2013), Art 4; SCC Rules (2023), Appendix III, Art 3(2); ICSID Rules (2022), Rule 67(2).

92 ICSID Rules (2022), Rule 67(2)(d); UNCITRAL Transparency Rules (2013), Art 4(3).

93 SIAC Investment Rules (2017). These Rules do not prescribe mandatory disclosure requirements akin to the ICSID, UNCITRAL and SCC Rules.

94 *Ibid.*

Investment Rules do not contain an express provision requiring financial disclosure,[95] the SCC Rules, UNCITRAL Transparency Rules, and ICSID Rules require the disclosure of an applicant's funding sources and financial affiliations.[96] However, even within the latter group of Rules, there exist differences in the required scope of disclosure. For example, the UNCITRAL Rules require disclosure of any direct or indirect relationship with the disputing parties only,[97] whereas the ICSID Rules require disclosure of affiliations with NDTPs as well.[98]

69. As noted in paragraph 52 above, issues of transparency and disclosure do not usually affect NDTPs, as they are permitted to participate in the proceedings, without leave from the tribunal, as a consequence of their status as a treaty party.

b) Party consent and *ex officio* powers

70. The Rules ascribe differing degrees of importance to party consent in allowing TPP, as reflected in two specific issues.

71. The first issue concerns whether a given IIA expressly requires written consent from the disputing parties before the tribunal can allow *amicus* participation. While some IIAs do have such a requirement,[99] others do not.[100] Party consent may still, however, play a role, as the Rules examined generally require tribunals to consult the disputing parties before considering the admissibility of *amicus* submissions.[101] It is important to note, though, given the broad discretion granted by most IIAs and the Rules, that tribunals would ordinarily be able to accept *amicus* submissions without agreement from the disputing parties.[102]

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95 SIAC Investment Rules (2017), Rule 29; *See also,* in respect of major regional rules: CIETAC Investment Arbitration Rules (2017), Art 44; VIAC Investment Arbitration Rules (2021), Art 14(a).

96 SCC Rules (2023), Appendix III, Art 3(2)(iv) ('identify any government, organisation or person that has directly or indirectly provided any financial or other assistance in preparing the submission'); ICSID Rules (2022), Rule 67(2)(d) – (e) ('the identity, activities, organisation and ownership of the non-disputing party, including any direct or indirect affiliation between the non-disputing party, a party or a non-disputing Treaty Party' and 'whether any person or entity will provide the non-disputing party with financial or other assistance to file the submission'); UNCITRAL Transparency Rules (2013), Art 4(2)(b) – (c) ('Disclosure any connection, direct or indirect, which the third person has with any disputing party' and 'Provide information on any government, person or organisation that has provided to the third person (i) any financial or other assistance in preparing the submission; or (ii) substantial assistance in either of the two years preceding the application by the third person under this article').

97 UNCITRAL Transparency Rules (2013), Art 4(2)(b).

98 ICSID Rules (2022), Rule 67(2)(d).

99 *See, eg,* Australia–China FTA, Art 9.16(3).

100 China–Angola BIT, Art 28(3); China–Nicaragua FTA, Art 11.22(3); Pacific Alliance–Singapore FTA, Art 8.25(3); Israel–Korea FTA, Art 9.23(3); China–Mauritius FTA, Art 8.28(3); Australia–Hong Kong BIT, Art 29(3); Argentina–Japan BIT, Art 27; CUSMA, Art 14.D.7(3); CPTPP, Art 9.23(3); Central America–Korea FTA, Art 9.21(3); Australia–Peru FTA, Art 8.24(3); TPP, Art 9.23(3); Korea–US FTA, Art 11.20(5); EU–Singapore IPA, Annex 8, Art 3; Colombia–Spain BIT, Art 32(1); Pacific Alliance Additional Protocol, Art 10.20(3).

101 ICSID Rules (2022), Rule 68(1) ('The Tribunal may, after consulting with the parties, invite a non-disputing Treaty Party to make such a submission'); UNCITRAL Transparency Rules (2013), Art 4(1) ('After consultation with the disputing parties, the arbitral tribunal may allow a person that is not a disputing party, and not a non-disputing Party to the treaty ("third person(s)"), to file a written submission with the arbitral tribunal'); SIAC Investment Rules (2017), Rule 29.1('The Tribunal may also, after considering the views of the Parties... invite written submissions from a Non-disputing Contracting Party'); SCC Rules (2023), Appendix III, Art 3(4) ('The Arbitral Tribunal may, after consulting the disputing parties, invite a Third Person to make a written submission').

102 *See, eg,* Canada–Burkina Faso BIT, Art 33; Panama–US FTA, Art 10.20(3); Hong Kong–Chile BIT, Art 26(2); COMESA Common Investment Area Investment Agreement, Annex A, Art 8(1); CAFTA–Dominical Republic FTA, Art 10.20(3); Morocco–US FTA, Art 10.19(3); US–Chile FTA, Art 10.19(3); US–Singapore FTA, Art 15.19(3); US–Rwanda BIT, Art 28(3); Peru–US FTA, Art 10.20(3); US–Uruguay BIT, Art 28(3); Transpacific Strategic Economic Partnership, Annex 15.B, Art 33; Colombia–El Salvador–Guatemala–Honduras FTA, Art 12.23(3); Chile–Colombia FTA, Art 9.20(3); Peru–Colombia BIT, Art 25(2); Mexico–Panama FTA, Art 10.21(3); Colombia–Panama FTA, Art 14.30(1); Colombia–Costa Rica FTA, Art 12.22(2); Guatemala–Peru FTA, Art 12.21(2); Central America–Mexico FTA, Art 11.24(3); Costa Rica–Peru FTA, Art 12.21(2); Peru–Panama FTA, Art 12.21(2); Unified Agreement for the Investment of Arab Capital in the Arab States, Art 33(2); Canada–Korea FTA, Art 8.36(1); China–Chile BIT, Art 26(2); CETA, Annex 29–A, Art 43; Australia–Chile FTA, Art 10.20(2); Korea–New Zealand FTA, Art 10.26(1); Canada–Serbia BIT, Art 32; Canada–Colombia FTA, Art 831(1); Honduras–Peru FTA, Art 12.21(2); EU–New Zealand FTA, Art 26.21(4).

72. A second issue relates to tribunals' power to invite *amicus* submissions *ex officio*, notwithstanding the lack of party consent. While a number of bilateral IIAs do not prohibit *ex officio* invitations to third parties, the vast majority of recent agreements now explicitly grant tribunals this authority.[103] According to commentary, this may reflect a trend of granting tribunals greater procedural powers with respect to TPP.[104] The Rules, however, are more fragmented. The SIAC Investment Rules and SCC Rules codify a tribunal's power to invite TPPs *ex officio* but make this power conditional on a mandatory consultation with the parties, giving some weight to party autonomy.[105] By contrast, the ICSID Rules and UNCITRAL Transparency Rules remain silent on the matter.

73. However, as noted in paragraphs 54–55 above, some Rules expressly foresee tribunals inviting NDTP submissions ex officio.

2. Practice

74. Tribunal practice principally addresses – and diverges – in relation to disclosure obligations.

75. In *Bear Creek Mining Corp v Republic of Peru*, the issue arose as to whether the TPP application of a non-governmental organisation (DHUMA) and a certain Dr Carlos Lopez had complied with the disclosure requirements of Annex 836.1 of the Canada–Peru FTA.[106] The claimant emphasised that DHUMA failed to disclose the identity of its members making it 'impossible to assess its independence and expertise', and that Dr Lopez – a Peruvian lawyer who was part of the staff of the International Commission of Jurists – did not provide further information on his ties to the respondent or his *curriculum vitae*.[107] The tribunal relied on Article 1(c) of Annex 836.1, which required the disclosure of information regarding membership and legal status 'where relevant'.[108] Applying this, the tribunal held that the information provided was sufficient, without, however, providing any supporting explanation on why that was the case.[109]

76. By contrast, in *Seda v Colombia*, an application was rejected precisely because of inadequate disclosure, where the applicant failed to explain the origins of key documents and his personal involvement in the respective proceedings.[110]

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103 *See eg*, Canada–Ukraine Modernised FTA, Art 17.33(4); Cameroon–United Kingdom Economic Partnership Agreement, Art 81; Canada–Czech Republic BIT, Art II Annex B.

104 *See, eg*, Ishikawa, *n* 65 above.

105 SIAC Investment Rules (2017), Rule 29.2 ('The Tribunal may also, after considering the views of the Parties and having regard to the circumstances of the case, invite written submissions from a Non-disputing Contracting Party or Non-disputing Party under this Rule 29.2.'); SCC Rules (2023), Appendix III, Art 3(4) ('The Arbitral Tribunal may, after consulting the disputing parties, invite a Third Person to make a written submission on a material issue of fact or law in the arbitration. The Arbitral Tribunal shall not draw any inference from the absence of any submission or response to an invitation'); See, also, similarly: VIAC Investment Rules (2021), Art 14a(1) (' (...) The arbitral tribunal may also invite such written submissions from a non-disputing party'); CIETAC Investment Rules (2017), Art 44(2) (' (...) The arbitral tribunal may also, after considering the views of the parties and having regard to the circumstances of the case, invite written submissions from a Non-disputing Contracting Party or a Non-disputing Party on matters within the scope of the dispute').

106 *Bear Creek Mining Corp v Republic of Peru*, ICSID Case No. ARB/14/21, Procedural Order No. 5 (21 July 2016).

107 *Ibid*, para 23.

108 *Ibid*, para 50.

109 *Ibid*, para 52.

110 *Seda v Republic of Colombia*, ICSID Case No. ARB/19/6, Procedural Order No. 7 (1 December 2021) paras 35–39.

3. *Findings and recommendations*

77. The analysis in Section II confirms that arbitral tribunals possess the authority to accept TPP submissions even where the applicable IIA or institutional rules are silent, relying on their inherent procedural powers to manage the proceedings. At the same time, the review in this section highlights the following two main divergences in how this authority is applied.

78. First, while most IIAs require applicants to disclose their identity, ownership, affiliations, and sources of financial or other assistance, a minority of institutional rules contain no such requirements, and others vary in scope. This inconsistency is heightened in practice by divergent tribunal approaches in cases such as *Bear Creek* and *Seda*. Despite this, it is now commonly accepted that this information is needed for identifying potential conflicts of interest and, therefore, ensuring the integrity of the proceedings. Accordingly, to foster consistency and ensure the integrity of the proceedings, the IA Subcommittee makes the following recommendation:

Recommendation 1: Tribunals/ad hoc committees should require all third-party applicants to disclose the following information:

(i) The applicant's identity, ownership, and control;

(ii) All sources of funding and assistance for the preparation of the submission, including identifying any such funder or state that has a material interest in the outcome of the application; and

(iii) Any direct or indirect affiliation, connection, or financial link with any disputing party.

79. With respect to point (ii) of Recommendation 1, charitable organisations or non-profit associations shall not generally be required to disclose donors except to the extent that they are expected to participate in drafting or make a monetary contribution intended to fund the preparation of the TPP submission.

80. Second, some IIAs condition *amicus* participation on party consent, while others only require consultation, and many remain silent. Similarly, IIAs and the Rules differ on whether tribunals may invite submissions *ex officio*. Further, the power for a tribunal to invite a third-party submission *ex officio* is present in only a limited number of the Rules, and extending *ex officio* invitations is limited in the jurisprudence.[111] Accordingly, to promote consistency and fill possible gaps, the IA Subcommittee makes the following recommendations:

Recommendation 2: Tribunals/*ad hoc* committees should invite comments from the disputing parties on any application or *ex officio* invitation for third-party participation in a proceeding.

Recommendation 3: Where tribunals/*ad hoc* committees are considering inviting third-party participation *ex officio*, and where the applicable IIA and/or Rules are silent, tribunals/*ad hoc* committees may consider exercising this power, subject to:

111 *See, eg, Pac Rim Cayman LLC v El Salvador*, ICSID Case No. ARB/09/12, Procedural Order, ICSID News Release regarding Amicus Curiae (2 February 2011); *Apotex Holdings Inc and Apotex Inc v United States of America*, ICSID Case No. ARB(AF)/12/1, Invitation to Amici Curiae (31 January 2013).

(i) Comments received from the parties that they intend to invite TPP themselves, in which case tribunals/*ad hoc* committees should defer to such invitation;

(ii) Whether another avenue (*eg*, the use of a tribunal-appointed expert) is more appropriate for clarifying relevant issues.

B. Substantive requirements

81. While procedural requirements address whether a given applicant meets the threshold conditions to be considered an *amicus* under the relevant IIA or Rules, substantive requirements address whether an application should be admitted based on the substance and scope of the intended submission.

82. The substantive standards found in IIAs and the Rules will be set forth below (1), before turning to how tribunals have interpreted and applied those standards in practice (2). Based on the legal framework and arbitral practice, the IA Subcommittee sets forth its findings and recommendations regarding the substantive requirements for *amicus* applications (3).

1. Legal framework

83. With respect to IIAs, the NAFTA Statement sets forth the most significant substantive standards, namely:[112]

(i) The potential for the third party to provide assistance to the tribunal in evaluating the disputing parties' submissions, by bringing a distinct perspective to the subject matter apart from the disputing parties' interests.

(ii) The relevance of the third party's submissions to the subject matter of the dispute and the questions before the tribunal.

(iii) The significance of the third party's interest in the subject matter of arbitration.

(iv) There is a public interest in the subject matter of the arbitration.

84. In addition, the NAFTA Statement requires tribunals to ensure that third-party participation does not disrupt the proceedings or unduly burden or prejudice either disputing party.[113]

85. Many IIAs include similar substantive requirements as those set forth in the NAFTA Statement.[114]

86. As for the Rules, the ICSID Rules 37(2)(a)-(c) (2006 Rules) and 67(2) (2022 Rules) mirror the criteria found in IIAs, but do not explicitly mention the public interest. As the ICSID provisions are non-exhaustive, however, tribunals remain free to consider public interest factors where appropriate.

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112 'Statement of Non-Disputing Party Participation' (NAFTA Free Trade Commission, 7 October 2003) (hereinafter the 'NAFTA Statement'), Section B, para 6.

113 *Ibid*, para 7.

114 Angola–China BIT, Art 28(3); China–Nicaragua FTA, Art 11.22(3); Pacific Alliance–Singapore FTA, Art 8.25(3); Israel–Republic of Korea FTA, Art 9.23(3); China–Mauritius FTA, Art 8.28(3); Argentina–Japan BIT, Art 27(1); USMCA, Art 14.D.7(3) of Annex 14–D; CPTPP, Art 9.23(3); Central America–Republic of Korea FTA, Art 9.21(3); Australia–Peru FTA, Art 8.24(3); TPP, Art 9.23; Australia–China FTA, Art 9.16(3); Canada–Guinea BIT, Annex IV; Australia–Republic of Korea FTA, Art 11.20(5); Canada–Panama FTA, Annex 9.31; Republic of Korea–US FTA, Art 11.20(5); Colombia, El Salvador, Guatemala and Honduras FTA, Art 12.23(4); Colombia–Panama FTA, Annex 14–C; Colombia–Costa Rica FTA, Annex 12–D; Guatemala–Peru FTA, Annex 12.21(1); Costa Rica–Peru FTA, Annex 12.21(1); Peru–Panama FTA, Annex 12.21(1).

87. Similarly, Article 3 of the UNCITRAL Transparency Rules, modelled on the NAFTA Statement and ICSID Rule 37(2) (2006 Rules), sets out a non-exhaustive list of criteria, also omitting an explicit reference to the public interest.[115] The UNCITRAL Transparency Rules require that any submission remain within the scope of the dispute, as provided in Article 4(4)(d).[116] This approach is similarly reflected in Rule 29.3, SIAC Investment Rules, and in Appendix III, Article 3(3), SCC Rules.

88. The Rules thus converge around three substantive criteria:

    (i) Whether the submission offers a distinct perspective, specialised knowledge, or insight capable of assisting the tribunal;

    (ii) Whether the submission falls within the scope of the dispute; and

    (iii) Whether the applicant has a significant interest in the subject matter of the proceedings.

2. Practice

89. Considering the discussion in paragraphs 51–57 above, tribunal practice relates principally to *amicus* participation, not that of NDTPs. This is because IIAs generally limit NDTP participation to issues of treaty interpretation. Although some IIAs and Rules take a slightly broader approach, this has not led to notable cases on point.

90. In the context of annulment proceedings, a number of cases speak to the question of the 'scope' of the dispute. In particular, a number of committees have highlighted that the limited nature of annulment proceedings circumscribes the admission and scope of third-party submissions. In *Iberdrola v Guatemala*, the tribunal declined to grant leave and noted the 'strict and exceptional nature of annulment proceedings'.[117] In *Gabriel Resources Ltd v Romania*,[118] the European Commission sought to participate in annulment proceedings relating to an award issued under the UK–Romania Bilateral Investment Treaty. The *ad hoc* committee denied the Commission's TPP application on the basis that the scope of its submissions (relating to the jurisdiction of the tribunal that heard the underlying claim) was not relevant to the issues raised in the annulment proceeding, as the jurisdiction of the tribunal was not at issue. In *Ioan Micula, Viorel Micula and others v Romania*, the *ad hoc* committee exercised its inherent powers, under Article 44 of the ICSID Convention applicable *mutatis mutandis* to annulment proceedings, to allow a submission from the European Commission.[119] The *ad hoc* committee noted that 'due to the limited scope of annulment proceedings, a request for leave by a non-disputing party must be dealt with in a more restrictive and circumscribed manner'.[120] Ultimately, the tribunal's treatment of the European Commission's submission was limited.[121]

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115 UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the Work of its Fifty-Fifth Session (UN Doc. A/CN.9/736, 17 October 2011) para 76.

116 UNCITRAL Transparency Rules (2013).

117 *Iberdrola Energía SA v Republic of Guatemala*, ICSID Case No. ARB/09/5, Decision on Annulment (13 January 2015) para 145.

118 *Gabriel Resources Ltd and Gabriel Resources (Jersey) v Romania*, ICSID Case No. ARB/15/31, Procedural Order No. 2 On the European Commission's Application to Intervene as Non-Disputing Party (25 August 2025).

119 *Ioan Micula, Viorel Micula and others v Romania*, ICSID Case No. ARB/05/20, Decision on Annulment (26 February 2016) para 61.

120 *Ibid*, para 63.

121 *Ibid*, para 322.

91. While the question of 'scope' has not raised particular problems, a review of tribunal practice reveals an inconsistent approach in addressing the grounds on which third party: (1) may provide a 'distinct perspective'; and (2) have a 'significant interest'.

A) 'Distinct perspective'

92. Although the case law provides only limited guidance, it confirms that the decisive question is whether the proposed TPP submission will genuinely assist the tribunal – a point that goes to the very core of the notion of TPP.[122] Without added value to the tribunal's deliberations, participation is generally not justified.[123] However, what constitutes 'assistance' or 'utility' has been interpreted inconsistently for determining whether the TPP will bring a 'distinct perspective' to the case.

93. Some tribunals have treated the existence of a broader public interest as a decisive factor in deciding whether an *amicus* would provide a 'distinct perspective'. For instance, in *Biwater Gauff Ltd v Tanzania*, the tribunal emphasised the significant public interest in the proceeding to grant a TPP application.[124] The *Biwater* tribunal drew from the position under NAFTA, and in particular the decision in *Methanex*, to decide that it would benefit from third-party submissions on the 'substantive issues' that 'extend far beyond those raised by the usual transnational arbitration between commercial parties' present in the case.[125]

94. Other tribunals have insisted on whether the applicant's 'distinct perspective' can assist the tribunal. In *Apotex v United States*, an ICSID Additional Facility tribunal, applying the NAFTA Statement, rejected two TPP applicants because neither possessed a sufficient degree of 'special knowledge or relevant expertise of experience' to furnish the tribunal with a 'particular perspective or insight that is different from that of the disputing parties'.[126] The tribunal stated that it must be in a position where 'it would not be able to decide the factual or legal issue concerned properly without the input from the third person submission'.[127]

95. In the context of annulment proceedings, the question has arisen as to whether repeat intervenors, who restate arguments previously made, contribute to providing a 'distinct perspective'. *Ad hoc* committees have diverged on how to address such repeat applications.

B. 'Significant interest'

96. Tribunals also diverge in how they apply the 'significant interest' criterion.

97. The strictness of this requirement was at issue in *Odyssey Marine Exploration v Mexico*.[128]

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122 Mariel Dimsey, 'Article 4: Submission by a third person' in Dimitrij Euler et. al. (eds) Transparency in International Investment Arbitration (Cambridge University Press, 2015)182.

123 Bear Creek Mining, *see n* 107 above, para 36. (The tribunal emphasised that 'the most important criteria is [...] whether *the applicant's submission would assist the Tribunal*. This is also inherent in the term '*amicus curiae*', used to describe such submissions and also used by the Parties in this case').

124 *Biwater Gauff (Tanzania) Ltd v Tanzani*a, ICSID Case No. ARB/05/22, Procedural Order No. 5, (2 February 2007) paras 51, 54, 57.

125 *Ibid*, para 51 (internal quotations omitted).

126 *Apotex Holdings Inc & Apotex Inc v United States of America*, ICSID Case No. ARB(AF)12/1, Procedural Order on the Participation of the Applicant, BNM, as a Non-Disputing Party (4 March 2013) paras 24–5, 32–3.

127 Dimsey, *see n* 123 at 183; Commission & Moloo, *see n* 60, para 6.21.

128 *Odyssey Marine Exploration, Inc (USA) v United Mexican States* ICSID Case No. UNCT/20/1, Procedural Order No 6 Decision on the Application for Leave to File a Non-Disputing Party Submission (Amicus Curiae) (20 December 2021).

There, a divided tribunal disallowed the intervention by both a fishing cooperative and a human rights group in a NAFTA arbitration. In respect of both TPP applicants, the significance of the groups' interests was found to be lacking. In the case of the cooperative, as the claimant in the arbitration was seeking compensation, and not restitution, the tribunal found that they did not have a significant interest in the matter. In relation to the human rights group, the majority found that a general interest in international environmental law or human rights is insufficient, and a specific interest in the resolution of the particular dispute must be demonstrated.[129] Professor Philippe Sands, in dissent, found that the ruling in respect of the cooperative was 'extraordinarily narrow', and did not engage with the impact on the legitimacy of the final award in light of both general concerns with international investment law, and specific community interests engaged in the case.[130]

98. In *Lone Pine Resources*, a NAFTA tribunal rejected the application of a lawyer from Bangladesh on the ground that he had not demonstrated a significant presence in North America and because the tribunal found it 'doubtful that he [had] any relevant interest in this arbitration or that he could materially assist the Tribunal'.[131]

99. In an annulment context, a number of ICSID *ad hoc* committees have addressed the procedural challenge that a tribunal improperly denied the European Commission's intervention as *amicus curiae*.[132] In *Hydro Energy v Spain*, the committee rejected the European Commission's application for leave, among other reasons, because 'given that the EC is not the decision-making body appointed to determine the Annulment Application pursuant to Article 52 of the ICSID Convention, the alleged interest that the EC has in the dispute was not a valid interest for the purposes of Rule 37(2)(c), if nothing else because it would subrogate the EC for this Committee'.[133]

100. By contrast, returning to the arbitration context, the applicant NGOs in *Biwater* met the 'significant interest' standard because, as indicated by the tribunal, '[t]he five Petitioners comprise NGOs with specialised interests and expertise in human rights, environmental and good governance issues locally in Tanzania' and that their approach to the issues provided a perspective materially different to that of the disputing parties.[134]

101. In *Achmea (formerly Eureko) v Slovak Republic*, the tribunal, upon the agreement of the parties, invited the European Commission and the Kingdom of the Netherlands to make third-party submissions without either non-disputing party seeking to do so of its own motion.[135] The tribunal in *Euram v The Slovak Republic* adopted a similar approach, in that case inviting Austria,

129 *Ibid*, paras 17–19.

130 *Ibid*, paras 1–2.

131 *See, eg, Lone Pine Resources Inc v Canada*, ICSID Case No. UNCT/15/2, Procedural Order on Amici Applications for Leave to File Non-Disputing Party Submissions (26 September 2017), paras 6 and 8; *Apotex Inc v United States of America*, ICSID Case No. UNCT/10/2, Procedural Order No. 2 on the Participation of a Non-Disputing Party (11 October 2011) para 28.

132 *SolEs Badajoz GmbH v Kingdom of Spain*, ICSID Case No. ARB/15/38, Decision on Annulment (16 March 2022) para 297. Cf. *Watkins Holdings Sàrl and others v Kingdom of Spain*, ICSID Case No. ARB/15/44, Decision on Annulment (21 February 2023) para 10. (The tribunal similarly imposed as a condition that the European Commission provide an undertaking as to the costs incurred by the parties in responding to the Commission's submissions. While the European Commission declined to adhere to the condition and therefore did not present a submission, this did not become the basis of a procedural challenge in Spain's application for annulment.); *BayWa r.e. renewable energy GmbH and BayWa r.e. Asset Holding GmbH v Kingdom of Spain*, ICSID Case No. ARB/15/16, Decision on Annulment (8 May 2023).

133 *Hydro Energy 1 Sàrl and Hydroxana Sweden AB v Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on the Kingdom of Spain's Application for Annulment (20 March 2023) para 43.

134 *Biwater Gauff Ltd v Tanzania*, ICSID Case No. ARB/05/22, Award, (24 July 2008), para 359.

135 *Achmea BV v The Slovak Republic*, PCA Case No. 2008–13, UNCITRAL, Award on Jurisdiction, Arbitrability and Suspension (26 October 2010) paras 31–2.

the Czech Republic, and the European Commission 'to file written *amicus curiae* submissions on the issue of whether the treaty continues to be in force.'[136]

102. Third parties that may not have a specific connection to the respondent state of the proceeding have still been allowed to participate given the third party's mandate. This was the case in *Philip Morris Brand Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, where the World Health Organization (WHO) was able to file an *amicus curiae* brief on the health effects of tobacco use.[137]

3. Findings and recommendations

103. The IA Subcommittee's review confirms that IIAs, the Rules, and tribunal practice converge on three substantive criteria for admitting *amicus* submissions:

    (i) They offer a distinct perspective that may assist the tribunal;

    (ii) They concern a matter within the scope of the dispute; and

    (iii) They present the view of an applicant with a significant interest in the subject matter of case.

104. Notwithstanding this convergence, the IA Subcommittee's review also shows that tribunals diverge in how they apply: (1) the 'distinct perspective' criterion, particularly where it is framed in terms of public interest and/or the level of specialised knowledge or expertise that an *amicus* must demonstrate; and (2) the 'significant interest' criterion, to the extent that an 'interest' sometimes has been considered insufficient when the TPP does not also offer novel information. In light of this, to promote greater clarity in the application of these substantive requirements, the IA Subcommittee suggests formulating the relevant test in accordance with the following recommendation:

    Recommendation 4: When considering whether a third-party applicant with a significant interest in the subject matter of the case can assist the tribunal/*ad hoc* committee on a matter within the scope of the dispute, the tribunal/*ad hoc* committee may wish to consider the expertise of the proposed participant, or the uniqueness of their perspective as distinct from that of the disputing parties.

105. Despite certain divergences, investment cases seem to suggest that tribunals interpret the 'significant interest' criterion to focus on the applicant's connection to the dispute. This has generally been assessed in three ways, namely, through:

    (i) A direct stake in the dispute's subject matter: a significant interest exists where the dispute directly implicates the applicant's mandate, rights or the activities of its members, requiring a tangible impact on a defined group. For instance, an industry association would have a significant interest when the legal doctrine at issue in the dispute, such as patent validity, directly affects the commercial operations and legal rights of its members;

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136 *EURAM v The Slovak Republic*, UNCITRAL, Award on Jurisdiction (22 October 2012) paras 24–5.

137 *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Written Submission (Amicus Curiae Brief) by the WHO and the Secretariat of the Tobacco Control Convention (28 January 2015). However, the tribunal stated that it needed to safeguard the integrity of the arbitral process, which requires 'that no procedural rights or privileges of any kind be granted to the non-disputing parties'. *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Procedural Order No. 3 (17 February 2015) para 22.

(ii) **A connection through mandate and action**, eg, an NGO whose mission is environmental protection might have a significant interest in a dispute where the investment in question affected a natural reserve; and/or

(iii) **A unique and compelling interest in the legal principles at issue**, eg, an international organisation responsible for implementing or maintaining a body of law implicated in the proceeding (eg, the European Commission in matters concerning the uniform application and interpretation of EU law); or an expert in a field of law at issue (eg, a group of esteemed law professors may have a significant interest in the integrity and coherent development of that legal system).

106. In light of this, the IA Subcommittee makes the following recommendation:

Recommendation 5: When considering whether a third-party applicant has a significant interest in the subject matter of the case, the tribunal/*ad hoc* committee should assess:

(i) whether the applicant has a direct stake in the dispute's subject matter;

(ii) whether the applicant has a connection with the dispute through mandate and action; and/or

(iii) whether the applicant has a unique and compelling interest in the legal principles at issue.

C. Procedural safeguards

107. Given that admitting TPP submissions may, among other things, lengthen the proceedings and engender additional costs, IIAs and the Rules foresee procedural safeguards to enable tribunals to consider TPP submissions while ensuring efficiency and fairness to the disputing parties (1). This section examines how tribunals use these safeguards (2). Based on the legal framework and arbitral practice, the IA Subcommittee sets forth its findings and recommendations regarding the procedural safeguards on *amicus* applications (3).

1. Legal framework

108. Procedural safeguards are a common feature of IIAs, designed to prevent TPP submissions from disrupting proceedings, creating undue burdens, or causing unfair prejudice to the disputing parties.[138] Most commonly, IIAs' safeguards include conditions on the application itself[139] and limits on the timing, content and form of submissions.[140]

109. As for the Rules, they are broadly aligned on the following safeguards:

(i) The tribunal has the authority to impose conditions on TPP submissions, such as format

138 Angola–China BIT, Art 28(4); Canada–Ukraine Modernized FTA, Art 17.33(6); China–Nicaragua FTA, Art 11.22(3); Pacific Alliance–Singapore FTA, Art 8.25(3); Israel–Republic of Korea FTA, Art 9.23(3); China–Mauritius FTA, Art 8.28(4); Australia–Hong Kong Investment Agreement, Art 29(3); Argentina–Japan BIT, Art 27(1); USMCA, Art 14.D.7(3) of Annex 14-D; CPTPP, Art 9.23(3); Central America–Republic of Korea FTA, Art 9.21(3); Australia–Peru FTA, Art 8.24(3); Canada–Guinea BIT, Art 33; Canada–Serbia BIT, Art 32; Canada-Nigeria BIT, Art 32; Australia–Republic of Korea FTA, Art 11.20(5); Cameroon–Canada BIT, Art 31; New Zealand–Taiwan Province of China ECA, Art 25; Benin–Canada BIT, Art 34; Canada-Panama FTA, Art 9.31(1); Colombia–EFTA FTA, Art 12.7(3); Canada-Colombia FTA, Art 831(1); Republic of Korea–US FTA, Art 11.20(5).

139 *See, eg,* NAFTA Statement, s B para 2.

140 *See, eg,* Peru–Canada FTA, Annex 836.1, Art 2; ICSID Rules (2022), Art 67(4); UNCITRAL Transparency Rules (2013), Art 4(4).

and length of the submission, scope of the submission, and filing deadlines, in order to prevent undue burden or disruption to the proceedings;[141]

(ii) The tribunal may consider whether the third party is entitled to receive relevant documents from the case, but in doing so must balance transparency with the need to protect the disputing parties' confidential or sensitive information;[142]

(iii) To ensure due process, if the tribunal allows the TPP submission, the disputing parties must be given the right to comment and provide observations on its content;[143] and

(iv) The tribunal has to weigh undue burden, unfair prejudice and additional costs to the disputing parties.[144]

110. In addition to the above, some of the Rules expressly impose additional requirements:

(i) Under the ICSID Rules, the tribunal must issue a reasoned decision within 30 days after receiving the last submission on the application for leave;[145]

(ii) Under the SIAC Investment Rules and SCC Rules, a tribunal may request additional details from the amicus curiae or require it to attend a hearing for clarification or examination of its submission;[146] and

(iii) Under the SCC Rules, a tribunal may require the third party to provide financial security to cover legal or other costs incurred by the disputing parties due to the TPP submission.[147]

2. Practice

111. Any tribunal's overriding obligation when considering a TPP application is to ensure that it 'does not disrupt the proceedings or impose an undue cost or prejudice.'[148] This section canvasses

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141 ICSID Rules (2022), Rule 67(4); UNCITRAL Transparency Rules (2013), Art 5(4); SIAC Investment Rules (2017), Rule 29.9; SCC Rules (2023), Appendix III, Art 3(9).

142 ICSID Rules (2022), Rules 67(6), 68(3) ('The Tribunal shall provide the non-disputing (Treaty) party with relevant documents filed in the proceeding, unless either party objects'); UNCITRAL Transparency Rules (2013), Art 7(4) (providing for more general rules on confidentiality and transparency); SIAC Investment Rules (2017), Rule 29.8 ('The Tribunal shall take appropriate measures to safeguard the confidentiality of information'); SCC Rules (2023), Appendix III, Art 3(6) ('a Third person may apply to the Arbitral Tribunal for access to submissions and evidence filed in the arbitration. The Arbitral Tribunal shall... safeguard any confidentiality of the information in question').

143 ICISD Rules (2022), Rule 67(7) ('If the Tribunal permits a non-disputing party to file a written submission, the parties shall have the right to make observations on the submission'); UNCITRAL Transparency Rules (2013), Art 5(5) ('The arbitral tribunal shall ensure (...) a reasonable opportunity to present their observations'); SCC Rules (2023), Appendix III, Art 3(8) ('The Arbitral Tribunal shall ensure that the disputing parties are given reasonable opportunity to present their observations on any submission by any Third Person'); but see SIAC Investment Rules (2017) (not providing the disputing parties the right to provide observations on the content of an *amicus curiae*'s submission).

144 ICISD Rules (2022), Rule 67(4) ('The Tribunal shall ensure that non-disputing party participation does not disrupt the proceeding or unduly burden or unfairly prejudice either party'); UNCITRAL Transparency Rules (2013), Art 4(5) ('The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party'); SCC Rules (2023), Appendix III, Art 3(9) ('The Arbitral Tribunal shall ensure that any Third Person submission does not disrupt or unduly burden the arbitral proceedings or unduly prejudice any disputing party').

145 ICSID Rules (2022), Rule 67(5) ('The Tribunal shall issue a reasoned decision on whether to permit a non-disputing party submission within 30 days after the last written submission on the application').

146 SIAC Investment Rules (2017), Rule 29.6 ('The Tribunal shall decide which further written submissions shall be required from a Non-disputing Contracting Party or Non-disputing Party'); *Ibid*, Rule 29.7 ('The Tribunal may, if either Party so requests or the Tribunal so decides, hold a hearing for a Non-disputing Contracting Party or Non-disputing Party to elaborate on or be examined on its written submissions'); see also SCC Rules (2023), Appendix III, Art 3(7) ('The Arbitral Tribunal may, at the request of a disputing party, or on its own initiative: i. request further details from the Third Person regarding the written submission; ii. require that the Third Person attend a hearing to elaborate or be examined on its submission').

147 SCC Rules (2023), Appendix III, Art 3(10) ('The Arbitral Tribunal may, as a condition for allowing a Third Person to make a submission, require that the Third Person provide security for reasonable legal or other costs expected to be incurred by the disputing parties as a result of the submission').

148 Born and Forrest, 'Amicus Curiae Participation in Investment Arbitration' (2019) 34(3) ICSID Review 626, 644; ICSID Arbitration Rules (2022) Rule 67(4).

the common types of issues that arise in connection with that obligation, namely: formatting and length restrictions (a); timing issues and their impact on the proceedings (b); managing costs resulting from TPP (c); and determining access to documents (d).

a) Formatting and length restrictions

112. Tribunals regularly impose formatting and length restrictions on third-party submissions to afford the disputing parties procedural fairness.

113. For example, in *Stadtwerke München GmbH and others v Kingdom of Spain*, the tribunal's authority to accept TPP arose under ICSID Arbitration Rules (2006), Rule 37(2).[149] There, the intervenor was the European Commission. The tribunal conditioned the admission of the intervenor's submissions by imposing formatting and length requirements on the submission, as well as fixing a deadline for filing.

114. The tribunal in *Biwater Gauff v Tanzania* (which was the first ICSID case to apply the amended Rule 37(2) of the ICSID Arbitration Rules (2006)) ordered the five third-party applicants to file a single petition, not exceeding 50 pages, without any attachments of evidence or documentation.[150]

115. Relatedly, when tribunals have had to consider whether TPP applicants can attach materials to their submissions, they have generally sought to limit the admission of duplicate documents into the record.[151]

b) Timing and impact on proceedings

116. Tribunals have taken diverging views on timing, with tribunals sometimes admitting late submissions and at other times applying strict limits.

117. In *Merrill & Ring*, the tribunal accepted a TPP submission notwithstanding a two-week delay in filing, as both parties had consented to its admission.[152]

118. In *Suez*, the tribunal admitted a four-month late third-party submission because it found that the submission would not impede the progress of the case, as the parties had yet to file their memorials and there was sufficient time for party observations on the submission before the hearing.[153]

119. In *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v Czech Republic*, the tribunal allowed a petitioner to participate but imposed a timetable for the submission.[154]

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149 *Stadtwerke München GmbH and others v Kingdom of Spain*, ICSID Case No. ARB/15/1, Award (2 December 2019) para 25.

150 *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5 (2 February 2007), para 60(a).

151 *See eg, Infinito Gold Ltd v Republic of Costa Rica*, ICSID Case No. ARB/14/5, Procedural Order No. 2 on Non-disputing Party's Application (1 June 2016) paras 43 and 49; *Electrabel SA v Hungary*, ICSID Case No. ARB/07/19, Procedural Order No. 4 (28 April 2009) para 26; *Eli Lilly and Co v Government of Canada*, ICSID Case No. UNCT/14/2, Procedural Order No. 6 (27 May 2016) paras 1–4; *Vivendi see n* 70 para 27.

152 *Merrill & Ring Forestry LP v The Government of Canada*, ICSID Case No. UNCT/07/1, Decision on Non-disputing Party Applications (31 July 2008).

153 Vivendi *see n* 66 para 21.

154 *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v Czech Republic*, PCA Case No. 2014–03, Final Award (11 October 2017) para 97.

c) Costs resulting from *amicus* participation

120. Although the Rules, particularly the ICSID Arbitration Rules (2022), provide for a general duty to conduct the proceedings in a 'cost-effective manner',[155] the Rules do not explicitly deal with costs in respect of TPP. In practice, tribunals have taken divergent approaches.

121. Some ICSID tribunals have considered that they have the power to condition the participation of a third party on a requirement to provide an undertaking as to costs. For instance, in *Stadtwerke*, the European Commission was required to give an undertaking to bear any costs arising from its intervention in order to participate in the proceedings.[156]

122. By contrast, in another ICSID case, *Electrabel v Hungary*, no such cost-shifting safeguard was imposed regarding the European Commission's intervention.[157]

123. In the ICSID annulment context, in *Eiser. v Spain*, the *ad hoc* committee allowed the European Commission to participate in the annulment proceedings and limited the scope of the Commission's written submissions to the question 'whether the Tribunal had seriously departed from a fundamental rule of procedure by requiring a commitment from the European Commission to pay the costs associated with such written submission, and by refusing the Commission's written submission after it refused to provide the requested commitment'.[158] Ultimately, however, the *ad hoc* committee did not address the refusal by the tribunal to grant the Commission leave to participate.

124. A different approach was taken outside of ICSID practice. In Voltaic Network GmbH v Czech Republic, for example, the tribunal granted leave for intervention only on the condition that the petitioner pay the full reasonable costs of all parties resulting from its submissions.[159]

d) Access to documents

125. A related, but distinct, issue is determining the extent of third parties' access to the record.

126. In the context of NDTP submissions, and as noted in paragraph 57 above, the majority of IIAs provide that NDTPs shall be delivered a set of documents (eg, notice of intent, notice of arbitration, pleadings, memorials, briefs, minutes or transcripts of the hearing of the tribunal, orders, awards and decision, etc.) either automatically or upon request.

127. By contrast, outside the NDTP context, no firm rules exist, leaving tribunals to balance transparency and confidentiality on a case-by-case basis.

128. In some cases, tribunals have taken a restrictive approach, emphasising that admission as *amicus curiae* does not confer party rights. For example, in Philip Morris Brand Sàrl, *Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, the tribunal noted that the '[a]cceptance of a submission shall confer to the petitioner neither the status of a party to

155 ICSID Rules (2022), Rule 3(1).

156 Stadtwerke, *see n* 150, para 25.

157 *Electrabel SA v Republic of Hungary*, ICSID Case No. ARB/07/19, Award (25 November 2015).

158 *Eiser Infrastructure Limited and Energía Solar Luxembourg Sàrl v Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on The Kingdom of Spain's Application for Annulment (11 June 2020) para 37.

159 *Voltaic Network GmbH v Czech Republic*, PCA Case No. 2014-20, Award (15 May 2019) para 38.

the arbitration proceeding nor the right to access the file of the case or to attend hearings'.[160] This was justified on the basis that the tribunal needed to safeguard the integrity of the arbitral process, which requires 'that no procedural rights or privileges of any kind be granted to the non-disputing parties'.[161]

129. This approach reflects what commentators have referred to as an unwillingness on the part of tribunals to release procedural documents without party consent.[162] A further example of this is the decision in *Aguas del Tunari SA v Bolivia*, where the tribunal rejected the request for release of the documents because no party consent was obtained.[163] Similarly, in *AES Summit Generation Ltd. v Hungary*, the application was refused due to lack of consent by both parties, and in *Electrabel SA v Hungary* such consent was obtained and the request was accepted.[164]

130. More recently, some tribunals have moved in a different direction. In *Piero Foresti v South Africa*, the tribunal ordered the parties to disclose their key memorials to the third-party participants.[165] In support of its decision, the tribunal noted that: (1) the purpose of TPP is 'to enable NDPs [non-disputing parties] to give useful information and accompanying submissions to the [t]ribunal, but is not intended to be a mechanism for enabling NDPs to obtain information from the [p]arties';[166] and (2) in the event of NDP participation, the tribunal 'must ensure that it is both effective and compatible with the rights of the [p]arties and the fairness and efficiency of the arbitral process'.[167]

3. Findings and recommendations

131. Procedural safeguards are used to preserve fairness and efficiency of the proceedings, particularly *vis-à-vis* the disputing parties. Different tribunals have taken different approaches regarding procedural safeguards, depending on the case before them.

132. As for timing, the stage of the proceedings at which a submission is made often plays a role in a TPP submission's admissibility. Tribunals have admitted some late filings while rejecting others, but without articulating clear thresholds or factors guiding the exercise of their discretion. Accordingly, to promote clarity and consistency, it is recommended that tribunals establish timetables for TPP to include deadlines at least for:

(i) the application for leave to file a submission;

(ii) the TPP application;

(iii) the disputing parties' opportunity to comment on the application, and

(iv) a timeframe during which a decision on the application is to be rendered.

160 *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Procedural Order No. 3 (17 February 2015) para 22. However, please note that the *amici* did not require permission for access to documents or hearings, so we do not know how the tribunal would have decided such request. Nonetheless, the decision is useful in understanding what procedural and substantive rights are associated with an admission of an amicus curiae application.

161 *Ibid.*

162 Marisi, *see n* 2, 154.

163 *Aguas del Tunari v Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (21 October 2005) paras 15–18.

164 *AES Summit Generation Limited and AES-Tisza Erömü Kft v The Republic of Hungary*, ICSID Case No. ARB/07/22, Award (23 September 2010) para 3.22; *Electrabel SA v Republic of Hungary*, ICSID Case No. ARB/07/19, Procedural Order No. 4 (28 April 2009).

165 Piero Foresti, *see n* 54.

166 *Ibid.*

167 *Ibid.*

133. In light of this, the IA Subcommittee makes the following recommendation:

Recommendation 6: Tribunals/*ad hoc* committees should: (i) establish clear timetables for third-party participation; (ii) indicate an estimated date by which they anticipate rendering a decision on an application for third-party participation; and (iii) undertake all efforts with the disputing parties to ensure that timetables are made publicly available.

134. In addition, clear timetables may assist in managing unexpected scenarios, such as when states and institutions seek to participate outside formal TPP procedures. For instance, in *Siemens AG v Argentine Republic*,[168] the US, which was neither a party to the arbitration nor to the underlying treaty, submitted a letter during the annulment phase to clarify what it viewed as Argentina's mischaracterisation of Articles 53 and 54 of the ICSID Convention. It made no formal request beyond asking the *ad hoc* committee to treat the letter as a statement of its position.[169]

135. Once a TPP application is granted, tribunals/*ad hoc* committees may consider imposing the following further conditions to minimise the impact of TPP submissions on the proceedings:

(i) the format, length, and scope of the third party's submission, including specific issues of fact or law on which third-party input is permitted, in light of the application of the substantive requirements for TPP;

(ii) whether the third-party submission may be accompanied by other attachments;

(iii) the format, length, and scope of the disputing parties' comments on the third party's submission, once the third-party's input is received; and

(iv) the language of the submissions should be one of the official languages of the arbitration.

136. With respect to costs, most IIAs and Rules do not expressly address costs arising from TPP, and tribunals have taken divergent approaches. Some have required intervenors to provide undertakings or bear the full costs of responses, while others have imposed no conditions at all. Considering the sensitivities surrounding such costs issues, the IA Subcommittee does not make a specific recommendation how to deal with them. However, as a benchmark, the IA Subcommittee suggests that the allocation of costs associated with TPP submissions may be guided by distinguishing between voluntary applications and those invited by the tribunal *ex officio*.

137. In the case of TPP applications, while the disputing parties typically bear their own costs of responding, arbitral practice shows that tribunals retain the discretion to order a TPP applicant to post security for costs in appropriate circumstances.

138. Where tribunals/*ad hoc* committees invite TPP submissions on their own initiative, the cost allocation could, by contrast, mirror the treatment of a tribunal-appointed expert. In this scenario, any reasonable, additional costs incurred by the parties as a result of the submission may be considered part of the costs of the arbitration, to be allocated between the disputing parties at the end of the proceedings.

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168 *Siemens AG v Argentine Republic*, ICSID Case No. ARB/02/8.

169 *Ibid*, Letter from Lisa Grosh, Acting Assistant Legal Advisor, Office of International Claims and Investment Disputes, to Claudia Frutos-Peterson, Secretary of the *ad hoc* Committee (1 May 2008).

139. Beyond the question of costs, there is no uniform approach to allowing third parties access to the record. Some tribunals have permitted limited disclosure of pleadings, while others have denied access altogether, often subject to party consent. In the absence of specific provisions in the relevant IIA or Rules, tribunals have tried to balance the objective of obtaining meaningful TPP submissions with confidentiality, using discretion on a case-by-case basis.

140. To promote uniformity, the IA Subcommittee recommends that tribunals/*ad hoc* committees adopt a two-tiered approach, subject to the provisions of the relevant IIA and/or Rules, with the aim of limiting access to what is strictly necessary to enable the TPP applicant to focus its submission on the pertinent issues in the case. This approach would operate as follows:

    (i) For most TPP submissions, particularly those focused on legal interpretation, tribunals/*ad hoc* committees may limit access to certain redacted pleadings (eg, memorial and counter-memorial). This would grant third parties access to enough information to understand the parties' positions on the relevant issues, without revealing the full record. This is in keeping with the prevailing view among tribunals that access to the full evidentiary record should be denied by default.

    (ii) In exceptional circumstances, a tribunal may grant access beyond the redacted pleadings. The third party must demonstrate that such access is justified and essential to its submission, for instance, when its arguments are not purely legal and must comment on a specific factual issue. The IA Subcommittee recommends that, even then, access should be narrowly tailored to the needs of each case.

141. In light of the above, the IA Subcommittee makes the following recommendation:

    Recommendation 7: In the absence of express provisions in the relevant IIA and/or Rules, tribunals/*ad hoc* committees should provide third parties with access to the pleadings, subject to the protection of any confidential or sensitive information. Tribunals/*ad hoc* committees may consider allowing access to other arbitral documents where the third parties can demonstrate that such access is justified and essential to the preparation of their submissions.

142. Regardless of the level of access granted, the IA Subcommittee suggests that tribunals/*ad hoc* committees impose protective measures, including:

    (i) The redaction of all commercially sensitive, privileged, or otherwise confidential information.

    (ii) The third party being required to sign a formal undertaking to not communicate the documents to other third parties or use them outside the arbitration.

143. Of course, where the disputing parties have agreed on the scope of disclosure to a third party, the tribunal should, in principle, give decisive weight to that agreement.

IV. TREATMENT OF *AMICUS* BRIEFS BY INVESTMENT TRIBUNALS AND *AD HOC* COMMITTEES

144. None of the IIAs or Rules studied contain express requirements for tribunals/*ad hoc* committees to state the treatment of or weight given to TPP submissions in their decisions. Rather, the applicable instruments are confined to the general obligation on tribunals to give reasons for their decisions.[170] While this duty requires that awards set out the tribunal's reasoning on the issues submitted, it does not *per se* extend to addressing whether, or to what extent, TPP submissions were relied upon.

145. There has been a mixed treatment of TPP submissions by tribunals, both with respect to *amicus curiae* and NDTP submissions.

146. As for *amicus curiae* submissions, one strand of jurisprudence reflects a restrained approach, where tribunals admitted *amici* but gave little substantive weight to their submissions. In some cases, beyond acknowledging that a third party was permitted to make submissions,[171] tribunals did not explicitly address the substance of third-party submissions in their awards, making it difficult to determine what weight, if any, was accorded to those submissions.[172]

147. For instance, in *Methanex*, the tribunal's explicit engagement with the substance of the third-party submissions was limited. In the award, the tribunal noted that it had accepted *amicus* submissions, appreciated the 'scholarship and industry which [...] the *amici* have deployed'[173] but ultimately did not 'seek to summarise... the contents of the *amici* submissions which were detailed and covered many of the important legal issues that had been developed by the Disputing Parties'.[174] The tribunal made no further comments on the *amici curiae* submissions besides a statement that it had ruled in favour of Methanex in respect of Methanex's response to the *amici*.[175]

148. A similar approach was taken in *Glamis Gold, Ltd v United States*. There, while the tribunal expressed appreciation for the 'thoughtful submissions made by a varied group of interested non-parties',[176] it noted that section (B)(9) of the NAFTA Statement 'does not require the Tribunal to consider that [accepted] submission at any point in the arbitration, nor does it entitle the non-disputing party to make any further submissions.'[177] While such consideration of the submissions is discretionary, the tribunal emphasised the need 'to address those filings

170 ICSID Arbitration Rules (2022), Rule 59(1)(i)–(j) (requiring 'the decision of the Tribunal on every question submitted to it, and the reasons on which the Award is based,' as well as 'a reasoned decision on costs'); SCC Arbitration Rules (2023), Art 42(1); SIAC Investment Arbitration Rules (2017), Rule 30.4.

171 *See, eg, UPS, see n* 63, para 73.

172 *Merrill & Ring Forestry LLP v Canada*, ICSID Case No. UNCT/07/1, Award (31 March 2010) paras 22–5. The tribunal referred to the *amici* submissions only in the context of the procedural history.

173 *Methanex, see n* 55, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005) Part I–Preface, para 11.

174 *Ibid*, Part II–Chapter C: The Arbitral Procedure, para 29.

175 *Ibid*, Part II–Chapter I: The USA's Application for the exclusion of certain of Methanex's Evidence, para 3.

176 *Glamis Gold, Ltd v United States*, NAFTA/UNCITRAL, Award (8 June 2009), para 8.

177 *Ibid*, para 286.

[referring to the amicus filings] explicitly in its Award to the degree that they bear on decisions that must be taken'.[178] Applying this reasoning, the tribunal did not further consider those submissions since they did not 'reach the particular issues addressed' therein.[179]

149. In the ICSID annulment context, in *OperaFund v Spain*, in which the European Commission was granted leave under ICSID Rule 37(2) (2006 Rules), Spain brought an application for annulment of the award and challenged the weight accorded by the tribunal to the Commission's submissions.[180] Spain contended that the tribunal breached its right to be heard as, *inter alia*, 'while the Award summarized the content of the EC's intervention, it failed to make an assessment of the EC's submissions on EU law and its applicability to the dispute'.[181] The *ad hoc* committee found that there was no departure from a fundamental rule of procedure and that whereas 'the gravamen of Spain's claim is of one seeking reasons',[182] the committee had already rejected this ground for annulment.[183]

150. By contrast, other tribunals have engaged more closely with the substance of the *amicus curiae* submissions and addressed the arguments in detail in their analyses.[184]

151. In *Grand River Enterprises Six Nations et al v USA*, the tribunal gave a non-disputing party submission weight as an exhibit submitted in support of the claimant's case.[185] In *Suez/Vivendi v Argentina*, the tribunal grappled with *amicus* submissions on Argentina's necessity defence. The tribunal considered that the *amicus* submissions on the role of human rights 'further developed the relationship of the human rights law to water and to the issues in this case.'[186] Ultimately, however, the tribunal disagreed with the argument that 'Argentina's human rights obligations to assure its population the right to water somehow trumps its obligations under the BITs', holding instead that 'Argentina could have respected both types of obligations'.[187]

152. In *Biwater v Tanzania*, the tribunal stated that it had relied on the *amicus* submissions in its examination of the alleged breaches of customary international law and the obligations in the BIT.[188] Further, the tribunal stated that it had 'found the *Amici's* observations useful', '[t]heir submissions... informed the analysis of claims' and where relevant 'specific points arising from the Amici's submissions are returned to in that context.'[189]

153. *AS PNB Banka and others v Republic of Latvia*[190] occupies a middle ground. There, the tribunal granted the European Commission leave to participate given its 'knowledge and insight to the proceedings', and requested the Commission's views 'on the implications, if any, of Brexit on

178 *Ibid*, para 8.

179 *Ibid.*

180 *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v Kingdom of Spain*, ICSID Case No. ARB/15/36, Decision on Annulment (2 March 2023) para 588.

181 *Ibid.*

182 *Ibid*, para 592.

183 *Ibid*, paras 592, 407.

184 *See, eg, Vivendi*, *see n* 70, para 262; *Biwater Gauff Ltd v Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008) para 392; *Belenergia SA v Italian Republic*, ICSID Case No. ARB/15/40, Award (28 August 2019) para 287.

185 *Grand River Enterprises Six Nations, Ltd et al v United States of* America, NAFTA/UNCITRAL, Award, (12 January 2011) para 60.

186 *Vivendi*, *see n* 66, para 255.

187 *Ibid*, para 262.

188 *Biwater Gauff Ltd v Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008) paras 355, 359.

189 *Ibid*, para 392.

190 *AS PNB Banka and others v Republic of* Latvia, ICSID Case No. ARB/17/47, Procedural Order No. 3, (30 October 2018).

the legal issue which it will address'.[191] The tribunal qualified this statement by stating that the claimant's objections to the participation of the European Commission 'may affect the weight to be given to the Commission's submission'.[192] In its 'Decision on the Intra-EU Objection', the tribunal dealt concisely with the Commission's submissions,[193] noting that Latvia's position was supported by the European Commission's amicus brief.[194]

154. In *Encavis and others v Italian Republic*, the European Commission requested leave to participate as a non-disputing party under Rule 37(2) of the ICSID Arbitration Rules concerning the proper construction of Article 26 of the Energy Charter Treaty.[195] The tribunal granted permission, noting in its decision that it placed weight on the Commission's responsibility to 'ensure the application of the Treaties and its measures adopted by the institutions pursuant to them' and to 'oversee the application of [EU] law under the control of the [CJEU]'.[196]

155. In *Huawei Technologies Co. Ltd v Kingdom of Sweden*, the European Commission sought to address the tribunal on two matters as a non-disputing party: EU law and policy on security of 5G networks, and the margin of appreciation enjoyed by EU Member States under EU law in defining and ensuring their essential security interests in relation to 5G networks.[197] While the tribunal found that the Commission's submissions would assist it on the first issue, that was not the case for the margin of appreciation matter.[198]

156. Moving on to NDTPs, while some awards do not address the NDTP submissions at all, most at least note their contents and many rely on, or at least engage with, the treaty interpretations presented by the NDTP.[199]

157. One issue that has arisen in several cases is whether NDTP submissions that coincide with the interpretation advanced by the respondent state constitute a 'subsequent agreement' on treaty interpretation within the meaning of Article 31 of the Vienna Convention on the Law of Treaties (VCLT).[200] The International Law Commission has stated that subsequent practice evidencing agreement under Article 31(3)(b) of the VCLT may include 'statements in the course of a legal dispute,'[201] which could potentially include NDTP submissions.

158. Some early investment tribunals resisted the application of Article 31(3) of the VCLT to NDTP submissions. In *Gas Natural v Argentina*, for example, the tribunal concluded that 'an argument made by a party in the context of an arbitration [does not] reflect practice establishing

191 *Ibid*, para 55.

192 *Ibid*, para 57.

193 *AS PNB Banka and others v Republic of Latvia*, ICSID Case No. ARB/17/47, Decision on the Intra-EU Objection (14 May 2021) para 440.

194 *Ibid*, para 479.

195 *Encavis and others v Italian Republic*, ICSID Case No. ARB/20/39, Decision on the European Commission's Application for Leave to Intervene as Non-Disputing Party (15 June 2022) paras 7–8.

196 *Ibid*, paras 34, 39.

197 *Huawei Technologies Co., Ltd v Kingdom of Sweden*, ICSID Case No. ARB/22/2, Procedural Order No. 6 (26 June 2024) paras 5–6.

198 *Ibid*, paras 9–11.

199 *See, eg, Alicia Grace et al v United Mexican States*, NAFTA/ICSID Case No. UNCT/18/4, Award (19 August 2024) para 22; *Ioan Micula, Viorel Micula and others v Romania*, ICSID Case No. ARB/05/20, Award (11 December 2013) para 54.

200 Magraw, 'Investor-State Disputes and the Rise of Recourse to State Party Pleadings as Subsequent Agreements or Subsequent Practice under the Vienna Convention on the Law of Treaties' (2015) 30(1) *ICSID Review* 142, 144–5.

201 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties' (International Law Commission, 2018, UN Doc A/73/10), 32.

agreement between the parties to a treaty...'.[202] This argument was likewise an issue in *Pope & Talbot v Canada*, where each of the state Pparties to NAFTA argued that their pleadings (including the two NDTP submissions of the US and Mexico) amounted to a subsequent agreement on the interpretation of the fair and equitable treatment standard under NAFTA Article 1105.[203] The tribunal, despite noting the agreement of the states in their submissions, did not give that agreement effect.[204] Other tribunals have similarly declined to give effect to such submissions when they arose in the context of arbitration or litigation.[205]

159. More recently, tribunals have found differently. In *Alicia Grace et al. v United Mexican States*, the tribunal held that 'the concurring statements submitted by the Non-Disputing Parties in the course of this arbitration alongside the positions of Mexico regarding dual nationals are to be understood as subsequent practice for the purposes of Article 31(3)(b) of the VCLT.'[206]

160. When tribunals and *ad hoc* committees permit TPP submissions, they often do not articulate how, if at all, those submissions were considered in their decision-making.

161. The IA Subcommittee makes this observation without making any recommendation on the matter, as this is, ultimately, a substantive issue. However, the IA Subcommittee raises for consideration that, if the tribunals/*ad hoc* committees consider it appropriate, they may wish to briefly address the contribution of any admitted TPP submission in a decision or award (even to the effect that it did not contribute to their decision-making). Of course, tribunals/*ad hoc* committees should not do so if engaging with the TPP will unnecessarily prolong the length of the decision or award, or the timing in which such decision or award will be rendered.

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202 *Gas Natural SDG v Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions of Jurisdiction, (17 June 2005), para 47.

203 *Pope & Talbot v Canada*, NAFTA/UNCITRAL, Award on the Merits of Phase 2 (10 April 2001).

204 *Ibid*, paras 79, 115, 116.

205 Magraw, *see n* 201, 147-9.

206 *Alicia Grace et al v United Mexican States*, ICSID Case No. UNCT/18/4, Final Award (19 August 2024) paras 473–74 ('[I]n light of the common understanding of the NAFTA Parties regarding the application of the dominant and effective nationality test, the Tribunal finds compelling to proceed with its jurisdictional analysis within this framework.'); *see also*, *Mobil Investments Canada Inc v Government of Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility (13 July 2018) paras 103, 104, 158, 160 (explaining that the approach advocated by claimant had 'clearly been rejected by all three NAFTA Parties in their practice subsequent to the adoption of NAFTA,' as evidenced by 'their submissions to other NAFTA tribunals,' and that '[i]n accordance with the principle enshrined in Art 31(3)(b) of the Vienna Convention on the Law of Treaties, 1969, the subsequent practice of the parties to a treaty, if it establishes the agreement of the parties regarding the interpretation of the treaty, is entitled to be accorded considerable weight'); *Canadian Cattlemen for Fair Trade v United States of America*, UNCITRAL, Award on Jurisdiction (28 January 2008) paras 188–9 (explaining that 'the available evidence cited by the Respondent,' including submissions by the NAFTA Parties in arbitration proceedings, 'demonstrates to us that there is nevertheless a "*subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its applications*"').

V. SUMMARY OF RECOMMENDATIONS ON THIRD-PARTY PARTICIPATION IN INVESTMENT ARBITRATION

Recommendation 1: Tribunals/*ad hoc* committees should require all third-party applicants to disclose the following information:

(i) The applicant's identity, ownership, and control;

(ii) All sources of funding and assistance for the preparation of the submission, including identifying any such funder or state that has a material interest in the outcome of the application; and

(iii) Any direct or indirect affiliation, connection, or financial link with any disputing party.

Recommendation 2: Tribunals/*ad hoc* committees should invite comments from the disputing parties on any application or *ex officio* invitation for third-party participation in a proceeding.

Recommendation 3: Where tribunals/*ad hoc* committees are considering inviting third-party participation *ex officio*, and where the applicable IIA and/or Rules are silent, tribunals/*ad hoc* committees may consider exercising this power, subject to:

(i) Comments received from the parties that they intend to invite TPP themselves, in which case tribunals/ad hoc committees should defer to such invitation;

(ii) Whether another avenue (eg, the use of a tribunal-appointed expert) is more appropriate for clarifying relevant issues.

Recommendation 4: When considering whether a third-party applicant with a significant interest in the subject matter of the case can assist the tribunal/*ad hoc* committee on a matter within the scope of the dispute, the tribunal/*ad hoc* committee may wish to consider the expertise of the proposed participant, or the uniqueness of their perspective as distinct from that of the disputing parties.

Recommendation 5: When considering whether a third-party applicant has a significant interest in the subject matter of the case, the tribunal/*ad hoc* committee should assess:

(i) Whether the applicant has a direct stake in the dispute's subject matter;

(ii) Whether the applicant has a connection with the dispute through mandate and action; and/or

(iii) Whether the applicant has a unique and compelling interest in the legal principles at issue.

Recommendation 6: Tribunals/*ad hoc* committees should: (i) establish clear timetables for third-party participation; (ii) indicate an estimated date by which they anticipate rendering a decision on an application for third-party participation; and (iii) undertake all efforts with the disputing parties to ensure that timetables are made publicly available.

Recommendation 7: In the absence of express provisions in the relevant IIA and/or Rules, tribunals/*ad hoc* committees should provide third parties with access to the pleadings, subject to the protection of any confidential or sensitive information. Tribunals/*ad hoc* committees may consider allowing access to other arbitral documents where the third parties can demonstrate that such access is justified and essential to the preparation of their submissions.

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