CENTRAL EUROPEAN UNIVERSITY

An "*Inter-friend-tion*" - Is the 'Amicus Curiae' truly living up to its purpose of being the 'Friend of the Court'?: A review of its role in Investor-State arbitration proceedings under the International Centre for Settlement of Investment Disputes (ICSID) Convention

by Rudrani Banerjee

LL.M. SHORT THESIS
COURSE: Investments and Investment Disputes
PROFESSOR: Prof. Markus Petsche
Central European University
1051 Budapest, Nador utca 9.
Hungary

ABSTRACT

The International Centre for Settlement of Disputes (ICSID) is a facilitator and administrator for resolution of disputes related to investment. The parties to such a dispute seldom have level playing ground in terms of stakes involved. In such a scenario where unequal bargaining power exists, a non-disputing party intervention has the potential to alter the course of such proceedings.

The introduction and rise of the '*amicus curiae*' under the ICSID regime has gathered a lot of attention from scholars and practitioners alike. Although such a mechanism has always existed in litigation as well as arbitration proceedings under other institutions, the traditional concept of a non-disputing party has evolved and taken its own course in investor state disputes. The role of the ICSID Tribunal, irrespective of its decisions, has extended beyond the contours of prevalent practice and has engaged itself with parties outside the dispute. The few cases are an illustration of the extent and the impact of these interventions that have assumed a jurisprudence of their own. The review of this mechanism and its stronghold is an attempt to empower the future potential and redress the existing lacunas.

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1. INTRODUCTION

The entire discourse of arbitration has never been in the shackles of complacency for too long and has always managed to evolve more meaningfully, both in terms of fulfilment of its existence and foresight. Although there are several categories and definitive procedures that have emerged out of this process, each of them have developed their own regimes in the international legal order. International investment arbitration is one such area which has demonstrated enormous potential in infusing remarkable confidence in investors to pursue their rights and challenge the might of the state in a contractual arrangement. The International Centre for Settlement of Investment Disputes (hereinafter referred to as "ICSID") Convention plays a very instrumental role in the administration of such disputes by facilitating the process of arbitration in an objective and unprejudiced environment, favouring neither of the parties. With 151 signatories to the convention, ICSID has accomplished more success and recognition than several of its peers. Notwithstanding the scrutiny of the nuances of ICSID's procedure and role in the settlement of these disputes, one cog in the wheel has singularly surfaced to effuse much attention and debate across the international legal community, namely, the amicus curiae or the amicus submissions by civil society agents, and more recently, by other institutions, in an investment arbitration proceeding.

The role of an amicus or more famously referred to as the 'friend of the court' in national courts system has withstood the test of time and reforms in several legal systems. However, in a transnational setting such as an investment dispute concerning Bilateral Treaties and Free Trade Agreements between investors and States, the amicus submission has witnessed both support and opposition. From public policy concerns to transparency and human rights, effectiveness of the amicus has withstood the litmus test of both peculiarities and procedure. This mechanism has encountered enormous resistance from being recognised as an effective

form of intervention in the face of the above mentioned concerns. However, a futuristic discernment beyond policy, transparency and human rights considerations shall measure the pulls and push of the amicus curiae. It is this examination of the efficacy of the amicus in a role that is both inclusive and supplemental to the whole procedural framework in administration of investment disputes that shall has been at the centre of all the scholarship.

From being an elephant in the room to sticking a foot in the door, the amicus has been called many terms in legal vocabulary. But as rhetorics are always laced with the eccentricities of the recipient, the amicus has managed to sustain all scepticism as well. It is this sustenance that has been a motivational force for a non-party to want to step in for advancing a cause different than its own. The dialectic has evolved at two stages. First, the inherent procedure under an institution and its accommodation of the amicus. Second, the developing jurisprudence and the Tribunals' engagement with the third party on all levels of the procedure. This dialectic has paved way for several interested parties to step in and agitate concerns at various levels. The following chapters shall examine some of the forms and causes of such agitation by non-disputing parties. The chapters shall also aid the reader in developing a perception based on existing jurisprudence and to anticipate the future potential of such interventions.

2. CHAPTER 1-BACKGROUND AND RELEVANCE

In the domain of investor-state arbitration, the ICSID Arbitration Rules have sustained utmost scrutiny and yet, have managed to accommodate current practices of tribunals and institutions. For the contracting states to this convention, these set of rules have succeeded in widening the jurisprudence as evinced by its 2006 amendments.[1] Despite ICSID's relatively more pronounced acceptance and reception in the international community, there remained certain endemic concerns. These concerns were first identified and addressed in the ICSID Secretariat Discussion Paper titled "Possible Improvements in the Framework for ICSID Arbitration" in the year 2004.[2] This paper suggested changes focusing on introduction of expedited procedures for applications for provisional measures and for dismissal of claims on the merits; mandatory publication of excerpts of awards; increased access of third parties to proceedings by attendance at hearings and written submissions of amicus curiae; expanded disclosure requirements of arbitrators and also the possibility of the establishment by ICSID of a mechanism for the appeal of awards in investment arbitrations.[3] My area of interest, being specific to Article 37 of the ICSID Arbitration Rules which discusses 'Submissions of Non-Disputing Parties'[4] I probed further to investigate the recommendations made in the Discussion Paper regarding the same. However, these recommendations were further sent out to business and civil society groups, arbitration experts and institutions across the world in addition to internally soliciting comments from the members of the ICSID Administrative Council. The subsequent comments, suggestions and an outcome of extensive consultations resulted in the Working Paper of the ICSID Secretariat in the year 2005, titled "Suggested Changes to the

[1] Aurélia Antonietti, *The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules, ICSID Review* – Foreign Investment Law Journal, Vol. 21, No. 2, pp. 427-448 (2006).

[2] See ICSID Secretariat Discussion Paper, "Possible Improvements in the Framework for ICSID Arbitration", 2004 available at https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf (accessed on October 29, 2015).

[3] *Supra* note 1 at p. 437.

[4] Please see https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partF-chap04.htm#r37

ICSID Rules and Regulations".[5] Notwithstanding the author's interest in exploring the realm of third party submissions under the ICSID regime, it was interesting to analyse the comments from external groups who could exercise their rights as third parties to an investment dispute. What was remarkable was the attempt that was being made to balance the allocation of power to both third parties as well as parties to the dispute, without distorting the procedural integrity. Interestingly, it also remains to be discovered and examined over the course of this paper whether the adoption of these third party submission rights post the 2006 amendments have fulfilled the purpose of their inclusion, or they have been merely titular in nature.

[5] See ICSID Secretariat Working Paper, "Suggested Changes to the ICSID Rules and Regulations" 2005, available at https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Suggested%20Changes%20to%20the%20ICSID%20Rules%20and%20Regulations.pdf.

2.1. AMICUS CURIE AS WE KNOW TODAY: CURRENT DEVELOPMENTS

Arbitration agreements have been distinguished from other agreements on several criterias, for instance their separability, arbitrability. Their novelty has always been manifest in the progressive and unique ways in which they have been interpreted and given effect to by both tribunals and courts. From extending the arbitration agreement to non-signatories to examining split arbitration clauses, they have always evolved. But the element of a third party or a non-signatory to the agreement, being given the right to intervene is what appealed to me. Third party submissions are not intrinsically a new concept, even in the world of arbitration proceedings. But the introduction and involvement of a third party at the stage of decision making in an arbitration proceeding, where party autonomy, consent and privacy are cardinal features, has evoked a lot of interpretation and scholarship. The concept of 'amicus curiae' has existed in other international institutions as well, with varying degrees of acceptance and recognition. Recent history is replete with several such instances and on occasions, such submissions have been instrumental in determining the outcomes in such disputes. From the Court of Justice to the ECHR to the WTO, all of these institutions have allowed third party submissions at different stages of their proceedings and have respective limitations. However, under the ICSID regime, it has been relatively recent post the 2006 amendments pursuant to the above mentioned discussion. With the state as a party to the dispute in investor state arbitration proceedings, it is important to safeguard the rights of not only the investor but also greater public interest. It is imperative that these interests are examined more closely so as to make the purpose of intervention more effective. With the ever increasing Bilateral and Multilateral treaties and the possibility of more states ratifying the ICSID Convention, this issue shall always be deliberated upon in terms of its requirement and effectiveness.

2.2. PARTIES MAKING THIRD PARTY SUBMISSIONS

To be able to understand the role of an amicus with more clarity, it shall be necessary to examine all the parties that can be allowed to make third party submissions. Taking a closer look at practice, it is an interesting trend to see, despite the resistance that it faces, there has been a steady if not rapid increase in the number of these submissions. This is also an indication that not only interested parties willing to make amicus submissions are increasing, but the parties to an investor-state arbitration proceedings are also drawing assurance and getting comfortable with this system. This is again, not merely limited to instances under the ICSID Convention, but other treaties are experiencing this growth as well. There are some prominent institutions that have assumed the role of an amicus over the course of investor state arbitrations under various treaties and conventions. Center for International Environmental Law (CIEL) is one such party which has been quite prominent in both ICSID as well as NAFTA arbitrations.[6] As an amicus, they have vigorously tried to intervene in cases of environmental protection, conservation and human rights concerns. Securing participation rights as an amicus in arbitration proceedings is in alignment with their organizational mandate as an institution committed to the protection, advocacy, policy research and capacity building initiatives in the interconnected areas of human rights and environment.[7]

They have mostly argued on the grounds that most investors have belligerently resorted to investment rules in covert arbitration proceedings to benefit from them at the detriment of

[6] See *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5, 2 Feb. 2007; *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Procedural Order No. 8, 23 Mar. 2011; and *Piero Foresti and Others v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/01, Letter from ICSID regarding non-disputing parties, 5 Oct. 2009; *Methanex Corporation v. United States of America*, UNCITRAL (NAFTA), Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae', 15 Jan. 2001; *Suez Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrates v. Argentine Republic*, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae, 17 Mar. 2006.

[7] Bastin, Lucas. *'Amici Curiae in Investor-State Arbitration: Eight Recent Trends'*, Arbitration International, Vol. 30, No. 1, p. 128 (2014), available at http://arbitration.oxfordjournals.org/content/arbint/30/1/125.full.pdf (accessed on December 11, 2015); also *see* http://www.ciel.org/about-us/.

environment safety and human rights laws.[8]

2.3. DEPARTURE FROM CONVENTIONAL AMICI SUBMISSIONS

The other relevant aspect that the author is interested in examining is the participation of non-NGO submissions. *Glamis Gold v. United States* was the first case where an amicus submission was made entirely by a non-NGO party.[9] In that case, a body which was not an NGO was granted rights to file written submissions. This extension of amici curiae status to industry bodies and indigenous populations was repeated in several subsequent cases, i.e., *Merrill & Ring v. Canada*, *Grand River v. United States*[10] to name a few.

This was the beginning of several cases where submission of non-NGOs saw a gradual progress. Some of the other cases which I wish to discuss under the ICSID regime are *AES v. Hungary*, *Apotex v. United States*, *Eureko v. Slovak Republic*, to name a few.[11]

There are only 27 cases[12] on the ICSID website where a third party submission request has been made to this date, among which only 7 such requests have been granted, 5 have been denied and the remaining are pending decision. At this stage, it is premature to conclude anything as the cases can be distinguished on facts, nature of parties applying for appearing as an amicus, point in the proceedings where these submissions are made, grounds of acceptance and denial. A point of departure in this case can be justified on two levels; first, to identify parallel institutions and organizations which have intervened as an amicus; and second, to discern the areas which witness these interventions.

[8] Center for International Environmental Law, Trade & Sustainable Development Program Current Activities: Investment, http://www.ciel.org/Trade_Sustainable_Dev/TSD_Current_Activities.html.
[9] *Glamis Gold Ltd v. United States of America*, UNCITRAL (NAFTA), Award, 8 Jun. 2009, ¶ 286.

[10] *Merrill & Ring Forestry LP v. Canada*, UNCITRAL (NAFTA), Award, 31 Mar. 2010, ¶s 22-25; *America Inc. v. Canada*, UNCITRAL (NAFTA), http:// www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Nondisputing-en.pdf).

[11] *AES Summit Generation Limited & Another v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 Sep. 2010, ¶ 8.2; *Electrabel SA v. Republic of Hungary*, ICSID Case No. ARB/07/19, ¶ 1.

[12] Please see https://icsid.worldbank.org/apps/ICSIDWEB/process/Pages/Decisions-on-Non-Disputing-Party-Participation.aspx.

2.4. AMICUS CURIAE VIS-À-VIS TRANSPARENCY

The issue of third party participation has always been shrouded in a lot of pandemonium. All institutions which administer arbitration proceedings and facilitate third party involvements have had to curate specific provisions to ensure that the requirement of transparency is not compromised. The introduction of third party intervention is a step taken towards transparency in proceedings. However, it is important to evaluate what concerns gave rise to such greater needs for transparency when arbitration is an essentially confidential process of dispute resolution. Whenever the State is involved in any dispute, concerns of public interest and public policy cannot be divorced from the narrative. It is essential to understand that the State and its instrumentalities, in exercise of their sovereign functions, undertake various activities which are not always favourable to one section of people. There are other ways to hold the State accountable in those cases. But in an arbitration proceeding between a host State and an investor, the stakes are different. With the advent of civil society stakeholders being actively involved in and aware of decision making processes, their scrutiny of State actions have increased significantly. There is a sustained surge in collective awareness, hence challenging the State machineries to demonstrate credibility and justify any act or omission.[13]

It is undeniable that one of the biggest advantages of private commercial arbitration has become a malady for investor-state arbitration. One of the biggest advantages of commercial arbitration is its facilitation towards keeping proceedings between both parties confidential, thus making it both favourable and effective. But all efforts stemming from transparency concerns are directed at doing away with this very advantage of private arbitration proceedings in investor-state arbitration. So, it is but natural to wonder if this transition has been smooth enough to make parties feel comfortable about this entire shift in the process. In addition to that, it has

[13] Meg Kinnear, '*Transparency and Third Party Participation in Investor-State Dispute Settlement*' (2005). Available online at: http://www.oecd.org/investment/internationalinvestmentagreements/36979626.pdf.

also been quite a functional transformation, invoking questions of neutrality and effectiveness on the process of arbitration as a whole. However, with citizens increasingly challenging government actions and the blurring line between litigation and arbitration, this has been a slow and gradual progress.[14]

The process of an investment arbitration begins with the investor initiating a claim against the host state. The interesting aspect to be noted in these cases is that the State has the discretion to define issues of "public interest" or "public policy". Although the presumption is that the State will always define these terms taking into account the collective interest of its citizens, however, it is still a matter of discretion to be defined and defended by a particular host State. Although this discretion is exercised judiciously and with utmost caution, there are still areas of concern which transcend a state's definition of public policy or public interest. When the subject matter of disputes between investor and state ranges from environmental concerns to potential human rights violations, labour and health laws, there arise issues of competing interest.

As the discourse starts getting more inclined towards giving primacy to transparency concerns, the other issues which rise simultaneously are the cost effectiveness and length of the arbitration proceedings. It has been seen on instances that the practical considerations of considering an amicus submission in any proceeding, be it arbitration or judiciary, incurs more cost and lengthens the duration of the proceedings. Because the parties are under the burden to go through additional pleadings after the amicus has filed its brief. Although there is hardly any consensus on how much of a procedural burden is caused to the parties, the author would like to argue that it is not the case. As it has happened on several occasions that the amicus submission has not been determinative in rendering of the award, but has assisted the tribunal

[14] *Ibid*.

in discerning of issues at the same time.[15] In ICSID arbitrations to be more specific, the parties to the dispute are consulted before accepting an amicus submission. Unless an intervention is of nature that it offers the Tribunal a fresh perspective on the dispute which the parties have been unable to do so, amicus submissions are not entertained as much by ICSID. There are few additional considerations to permitting these submissions as well. The scope and subject matter of the arbitration proceeding is one such additional consideration. The ICSID Tribunal also takes into account the interest of the amicus in the ongoing proceedings succeeded by the consideration of burden on the disputing parties as already discussed above.

These considerations go a long way in assisting the Tribunals to see if a fresh perspective can affect the nature of the proceedings.

[15] *Methanex Corporation v. United States of America*, UNCITRAL (NAFTA), Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae', 15 Jan. 2001.

3. CHAPTER 2- DIFFERING TRENDS IN AMICUS PARTICIPATION

The literature stemming from amicus submissions is both dispersed and wide-ranging in as much as, it covers several attending issues related most notably either towards an examination of the different forums approached by third parties or the nature and scope of such interventions in those forums. That apart, some of the more recent interventions have demonstrated a departure from the conventional notions of third parties towards recognizing a much broader category of applicants with varying interests. The author devotes this section of the paper in collating the different trends in amicus participation and proceeds in a two-fold fashion. First, an evaluation is undertaken with respect to the various forums in which amicus submissions have surfaced in the past, with an objective to extrapolate on how such interventions have been viewed in the light of established rules. Second, to capture the shift in jurisprudence with respect to who is or can be a 'third party' in amicus Curiae submissions.

3.1. AMICUS CURIAE IN DIFFERENT FORUMS

The institution of amicus Curiae goes a long way and has had a visible and stimulating presence in both traditional national court systems, most notably in common law jurisdictions and international tribunals and therefore makes a compelling case for addressing the same with individual focus.

3.2. TRADITIONAL NATIONAL COURTS

National courts have been observed to operate within the strictures of the established domestic legal rules, attuned by judicial discretion with respect to specific circumstances of the case.[16] Common law jurisdictions have exhibited a certain permissive attitude towards third party

[16] Gómez, Katia Fach, *Rethinking The Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest*', Fordham International Law Journal, Vol. 35:510, 513 – 563, 518.

submissions and one finds the US Supreme Court in this regard, as the leading institution in augmenting its jurisprudence towards recognizing the increasing importance of amicus submissions.[17] Although, the Supreme Court's increasingly tolerant approach has not evaded academic criticism,[18] it is has generally been understood to have been beneficial. For instance, empirical research has documented that on many occasions, involvement of the amicus Curiae has only augmented the chances of obtaining a favourable decision on the merits of the case.[19] In deciding amicus submissions, the Supreme Court is obliged to take into consideration Rules of the Supreme Court of the United States. Rule 37 (1) of the same reads "…*amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An amicus curiae brief that does not serve this purpose burdens the Court, and its filing is not favored*…" Therefore, the above rule grants a broad level of discretion to the Court while setting its outer boundaries with respect to accepting submissions which are both relevant and unique. The approach of the Court so far has been to keep an 'open door policy'[20] towards third party litigants, which also perhaps explains the deluge of such claims before the court.

[17] Karen O'Connor & Lee Epstein, '*Court Rules and Workload: A Case Study of Rules Governing Amicus Curiae Participation*', 8 JUST. SYS. J. 35, 36 (1983); Kearne, D. Joseph and Merrill W. Thomas, '*The Influence of Amicus Curaie Briefs on the Supreme Court*', Vol. 148:743, 744 – 847 (2000).

[18] Harrington, John, '*Amici Curiae in the Federal Courts of Appeals: How Friendly Are They*', Case Western Reserve Law Review, Vol. 55:3, 667 (2005).

[19] Collins, M. Paul (Jr.), '*Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*', Law & Society Review, Vol. 38, No. 4 (2004), 807, 808.

[20] Kearne, D. Joseph and Merrill W. Thomas, '*The Influence of Amicus Curaie Briefs on the Supreme Court'*, Vol. 148:743, 744 – 847 (2000).

The English Courts on the other hand, have been slow to accept 'intervener'[21] submissions with the House of Lords making the first of such moves in 1995.[22] The rules of procedures of the UK Supreme Court expressly provide for third party interventions while imposing an obligation on the intervener to provide adequate notice to the other parties to the dispute.[23] The rationale for inviting interventions is to enable the Court to acquire a perspective or expertise different to that of the parties. In similar vein other Commonwealth countries like Canada, South Africa[24] and Australia,[25] provide for rules in entertaining amicus submissions, with varying degrees of flexibility. The position in Civil law countries has originally been different with respect to the fact that Courts sitting in such jurisdiction have been tepid towards entertaining amicus interventions. However, Steven Kochevar in one of his recent contributions,[26] suggests that through a combined effect of factors like, increasingly pushy NGOs and the influence of international law on domestic courts, there is a growing trend in Civil law jurisdictions in leaning favourably towards accepting amicus submissions.

3.3. INTERNATIONAL TRIBUNALS AND COURTS

With reference to international and regional Courts it is instructive to note that most of them including, the European Court of Human Rights, the International Court of Justice, Inter-

[21] The term 'intervener' is more commonly used in the UK. See George Williams, *The Amicus Curiae and the Intervener in the High Court of Australia: A Comparative Analysis*, 28 Federal Law Review 365, 366 (2000).

[22] *R v. Khan* (1996) 3 WLR 162.

[23] The Supreme Court Rules 2009, Rule 15.

[24] Mubangizi C John and Mbazira Christopher, '*Constructing the Amicus Curiae Procedure in Human Rights Litigation: What Can Uganda Learn From South Africa?*', Law, Democracy and Development, Vol. 15, 199 (2012) available here.

[25] Australia has generally been conservative with respect to Amicus submissions. *See* generally Willheim, Ernst, '*Amici Curiae and Access to Constitutional Justice in the High Court of Australia*', Bond Law Review, Vol. 22:3, 126 (2010) available here.

[26] Kochevar, Steven, '*Amici Curiae in Civil Law Jurisdictions*', The Yale Law Journal, Vol. 122, 1653 (2013) available here.

American Court of Human Rights, and the Special Court for Sierra Leone to name a few, allow for the participation of third parties or amicus Curiae in their proceedings.[27] While there certain common factors which run through these institutions with respect to their general approach, standard of enquiry and tolerance towards third party submissions, it can observed that typically human rights courts or human rights issues have invited a great deal of amicus submissions.[28] However, a great deal of variance is noticed in terms of who can participate in such proceedings, depending on both the forum and the jurisdiction. For instance, particularly in human rights courts like ECHR or the IACHR, a wide range of intergovernmental organizations, NGOs, States and even private individuals, in certain instances, have been allowed as third party interveners. On the other hand, disputes under NAFTA, ICSID and WTO have limited its exposure to specific categories of amicus participants.[29]

3.4. LEGAL STANDARD FOR THE PARTICIPATION OF AMICUS CURIE IN INVESTMENT ARBITRATION

Increasing willingness and participation of third parties' in international investment disputes over the years, has only led governing bodies of international convents to both recognize and entrench their role through concrete legal rules and constructions. ICSID and NAFTA were amongst the early movers towards such a trend in as much as, several amendments to ICSID rules and notifications issued under NAFTA, addressed the propriety, scope and limits of amicus curie participation.[30] Moreover, international tribunals have also contributed greatly

[27] For a detailed and incisive analysis, *see* Bartholomeusz, Lance, '*The Amicus Curiae before International Courts and Tribunals', Non-State Actors and International Law*', Vol. 5. 209 – 286 (2005).

[28] Laura Van Den Eynde, '*An Empirical Look at the Amicus Curiae Practise of Human Rights NGOs Before the European Court of Human Rights*', Netherlands Quarterly of Human Rights, Vol. 31/3, 271–313, (2013) available here.

[29] *Supra* note 27 at p. 275.

[30] *See* Rule 37 (2) ICSID and NAFTA, Statement of the Free Trade Commission on Non-Disputing Party Participation, 7 October 2003.

towards a growing body of precedent in clarifying the legal standard of participation in different contexts. The pace in the development of such standards has also been kept alive by an overwhelming interest in academia and research towards evaluating claims in the larger scheme of efficiency and credibility of dispute resolution processes.[31] As result of such efforts, one might argue that a common thread with respect to the requisite legal standard for amicus participation in investment arbitration disputes, is evolving and readily discernable. Through a combined assessment of the new ICSID rules and decisions of various arbitral tribunals, this section of the paper captures the growing familiarity with the standards of amicus participation.

Rule 37 (2) of ICSID referring to "Submissions of Non-Disputing Parties" as opposed to 'amicus curie', lists a non-exhaustive set of criteria which ought to be considered by tribunals in allowing for third party intervention and requires to be quoted in full:

"…*(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;*

(b) the non-disputing party submission would address a matter within the scope of the dispute;

(c) the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission….".

[31] *See* for example Patrick Wieland, '*Why the Amicus Curiae Institution is ill-suited to address indigenous peoples' rights before investor-state arbitration tribunals: Glamis Gold and the right of intervention*', 3 Trade, Law and Development 2 (2011), 334-366; Katia Fach-Gomez, '*Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest*', 35 Fordham Journal of International Law (20U-2012), 510-564.

It can be clearly gleaned from the above provision that an amicus curie submission ought to bring to the table certain specific components as regards the issues to the dispute and deter from otherwise causing disruption or an element of prejudice to the proceedings. At this stage it should be noted that Rule 37 (2) is in essence an encapsulation of years of tribunal rulings and hence it is appropriate to evaluate the individual grounds in the light of its given interpretation.[32] Although, the above provision does not establish a particular hierarchy while considering individual criteria, it is generally understood that amicus interveners at the outset,[33] ought to establish before a tribunal, that it seeks to advance a particular insight or perspective to the dispute which is distinct from the parties. The relevance of a different insight is most acute to those tribunals which may not otherwise be in a position, either due to its lack of expertise on the subject matter or unfamiliarity with particular factual considerations, to fully discern the true claims of the parties to the dispute.[34] In that manner, amicus submission can truly assist tribunals which are more often than not, traversing in unfamiliar terrain.

Secondly, an amicus submission ought to be within the contours of the dispute in question. In this regard, although there is no explicit consensus, tribunals have more often than not accepted amicus briefs which relate directly to the substantive claims of the dispute as opposed to the procedural ones.[35] That is however not to suggest that tribunals have invariable rejected submissions on procedural or jurisdictional questions.[36] Nonetheless, the phrase 'scope of the

[32] Schliemann, Christian, '*Requirements for Amicus Curiae Participation in International Investment Arbitration - A Deconstruction of the Procedural Wall Erected in Joint ICSID Cases ARB/10/25 and ARB/l0/15*', 12 The Law and Practice of International Courts and Tribunals (2013) 365-390, 370.

[33] See *Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales delAgua S.A. v The Argentine Republic*, ICSID Case No. ARB/o 3 /17.

[34] See generally Epaminontas E. Triantafilou, '*Is a Connection to the 'Public Interest' a Meaningful Prerequisite of Third Party Participation in Investment Arbitration?*', 5 Berkeley journal of International Law (2010) 38-46, 44.

[35] *Supra* n.33 at p. 375.

[36] *Electrabel S.A. v Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability,30 November 2012, ¶ 1.18.

dispute' is itself open ended and has been interpreted differently by different tribunals in view of the facts of the specific case in hand.

As a third and somewhat equivocal requirement, an amicus curie needs to satisfy to the tribunal that it has a significant interest in the proceedings. Due to the unrestrained language of the provision, tribunals have devised their own methodologies in appropriating significance to third party interests. While certain tribunals have enquired no further than approximating a direct or indirect effect of the outcome of the decision on the third party concerned,[37] others have called into question any private legal interests that may have enjoined the third party to the proceedings. While still others, consider public interest of the dispute and its representation of the same through the amicus to be a influencing factor in granting intervention.[38]

The fourth criterion requires the tribunal to preserve the credibility and integrity of the proceeding by ensuring that amicus submissions do not disrupt ongoing proceedings. Further tribunals should also ensure that amicus participation does not unduly burden or prejudice either party to the proceedings. In this regard, while the tribunal could easily provide for certain procedural safeguards in the nature of strict timelines for amicus submissions, limits on volume of the submission, omission of oral hearings etc,[39] it is more challenging to first assess and then mitigate any substantive impact on the party's claims. It is indeed for this reason both the provision and the UNCITRAL working group[40] notes that parties to the dispute should be

[37] *Glamis Gold, Ltd v United States of America*, Award of 8 June 2009, [2009] 48 ILM 1039 (International Centre for Settlement of Investment Disputes).

[38] *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No. ARB/o 5 /22, Procedural Order No. 5, 2 February 2007.

[39] See *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. RB/o3/19; Methanex Corporation v. United States of America, Decision of the Tribunal on Petition from Third Persons to Intervene as "Amici Curiae", 15 January 2001.

[40] UNCITRAL, Working Group II (Arbitration and Conciliation), Settlement of Commercial Disputes: Preparation of a Legal Standard on Transparency in Treaty-Based Investor-State Arbitration, UN Doc. A/CN.9 WG. II/WP 169, Art. 5, ¶ 35.

afforded an opportunity to comment on the amicus submissions, which operates as a built in safeguard against any unfair prejudice.

A visibly new and controversial basis for evaluating amicus participation seems to have surfaced in recent tribunal decisions, most notably in von *Pezold v Zimbabwe and Border Timbers v Zimbabwe*.[41] In that case, the arbitral tribunal refused to allow certain NGOs and indigenous communities of Zimbabwe from intervening as amicus curie on the basis that it was not 'independent' from respondent Zimbabwe in addition to falling foul of the other criteria under Rule 37 (2) ICSID. The tribunal held that the requirement of independence of the amicus curie is "…*implicit in Rule 37 (2) (a)*…".[42] The approach of the tribunal in *Pezold* has been criticized for lacking both in precedent and legal reasoning. Lucas Bastin for instance, argues that the reasoning of the tribunal does not find any place in the explicit text of Rule 37 (2) and moreover runs contrary to Rule 37 (2) (c) of ICSID.[43] The dichotomy lies in the fact that while Rule 37 (2) (a) implicitly mandates independence of the amicus curie, Rule 37 (2) (c) prescribes an amicus curie to have a significant interest in the proceedings. The ingenuity of the proposition aside, it can be argued that the *Pezold* award is break in the established wisdom with respect to third party intervention and it remains to be seen whether subsequent tribunals adopt a similar approach.

In light of the above, it submitted that Rule 37 (2), despite its loose ends, has gone a long way in infusing more coherence and predictability in providing for a definitive set of criteria for tribunals to refer to and apply in disputes before them. Nonetheless, a review of past decisions also shows that tribunals have not always been consistent in either their approach or

[41] *Benhard von Pezold v Republic of Zimbabwe and Border Timbers Limited v Zimbabwe* (ICSTD Case No ARB/10/15 and ICSID Case No ARB/10/25 (joined), Procedural Order No 2, 26 June 2012.

[42] *Ibid* at ¶ 49.

[43] Baston, Lucas, '*Amicus Curie in Investor State Arbitrations – Two Recent Decisions*', 20 Austl. Int'l L.J. 95 (2013).

interpretation, leaving much to advocacy and chance. Moreover, cases like *Pezold* only add to the continuing divergence in thought and approach, without providing for adequate attending reasons. Following suit, NAFTA through its Free Trade Commission released a statement in 2003 incorporating certain guidelines with respect to amicus intervention, which are for most part, *pari materia* to ICSID Rule 37 (2).[44] The relevant literature has noted that despite the 'recommendatory' nature of the NAFTA statement, tribunals have generally thought fit to observe them in their decisions.[45] That said however, jurisprudence under NAFTA suffers from the same set of aberrations and disjunctions that one observes under ICSID. Therefore, in conclusion, it is argued that codification of legal standards applicable to third party intervention has certainly bridged the gap between coherence and the lack of it.

[44] NAFTA, Statement of the Free Trade Commission on Non-Disputing Party Participation, 7 October 2003.

[45] Baston, Lucas, '*Amicus-Curie in Investor-State Arbitration*', Cambridge Journal of International and Comparative Law, Vol 1, No. 3, p. 208 – 234 (2012).

4. CHAPTER 3- AMICUS CURIE UNDER THE ICSID CONVENTION

There have been 8 instances since 2005[46], wherein the request for an Amicus submission has been granted by an ICSID Tribunal. It is interesting to note the various reasons that Tribunals have provided for granting those requests. One cannot ignore the submissions that one of the parties to the dispute have made for resisting such intervention. Both Tribunals and parties have relied on cases under different institutional rules and different Tribunals to advance their arguments. Specifically, in ICSID cases, Tribunals have distinguished the cases before them from precedents by interpreting the relevant legal provisions before elaborating on the relevance of such non-party submissions.

There are several considerations that the Tribunals have had to deliberate upon before making any decision on the suitability of a submission. The suitability of a non-party is evaluated by a Tribunal on grounds independent of the Tribunal's own powers to admit such submissions. On one hand, as the Tribunal acknowledges and applauds the traditional role of an amicus in the history of both jurisprudence and practice, on the other hand, it also breaks down the components of such request and examines them independently.

A span of ten years, from 2010 to 2015, is not a very long time for culling out specific jurisprudence tracing the development of non-party submissions. It is not merely sufficient to take a look at the cases where the request to appear as an amicus curiae was granted, but it is equally important to also take a close look at those instances where such requests were denied. This duration of a decade also saw some of the ICSID Arbitration Rules getting amended.[47] The first case where this request for third party submission was filed was in the year 2003,

[46] *See* 'Decisions on Non-Disputing Party Participation'; available at https://icsid.worldbank.org/apps/ICSIDWEB/process/Pages/Decisions-on-Non-Disputing-Party-Participation.aspx.

[47]The present rules came into force in April 2006. Please see, https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Pages/ICSID-Convention-Arbitration-Rules.aspx.

before the amended rules on 'Oral Procedure (Rule 32)' and 'Visits and Inquiries; Submissions of Non-Disputing Parties (Rule 37) were introduced. But in that case, the request was denied. Therefore, it is essential to evaluate the considerations that were relied upon both by the Tribunal and the parties in each of these cases. The author shall undertake an appraisal of each of these cases where the request for making an amicus submission was granted to a non-party followed by cases where such a request was denied.

4.1. An Analysis of Jurisprudence

CASES WHERE THE SUBMISSION WAS GRANTED:

1. *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic (Vivendi petition no. 1)*[48]:

Under the ICSID regime, this was the first case wherein the Tribunal acknowledged the significance and the role of a non-party submission or an amicus curiae in an investor state proceeding, thereby setting the ground for potential future submissions. Not only was the permission granted in exercise of the Tribunal's inherent powers[49], but the Tribunal also discussed certain additional concerns so as to justify such exercise of its power. The dispute in this case was regarding the privatization of water services[50]. Five non-governmental organizations (hereinafter referred to as "Petitioners") files a "Petition for Transparency and Participation as Amicus Curiae" (hereinafter the "Petition") before the ICSID Tribunal. The Petition had three major components, among other things. The Petitioners requested access to (a) the hearings in the case, (b) an opportunity to present legal arguments as Amicus Curiae

[48] ICSID Case No. ARB/03/19; Order in Response to a Petition for Transparency and Participation as Amicus Curiae; ICSID Review – Foreign Investment Law Journal, May 19, 2005; available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC516_En&caseId=C19.

[49] Art. 44 of the ICSID Convention; available at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partA-chap04.htm#s03.

[50] Ishikawa, Tomoko, '*Third Party Participation in Investment Treaty Arbitration*', International and Comparative Law Quarterly Vol. 59, April 2010 pp. 373-412; *Supra* note 18.

and (c) to be allowed a timely, sufficient and an unrestricted access to all of the documents in the case.[51]

If one were to analyse the components of this request, it is logical to assume that the rights that a non-party wishes to exercise are precariously bordering on the rights of one of the direct parties to the dispute. Although the request to file a submission as an amicus is a matter of procedure, however, it can be argued that the outcome of allowing all parts of such request may have substantive consequences. And as one could reasonably expect, such an objection was indeed raised by the Claimants in this case.[52]

But the Tribunal, while interpreting the relevant rules under the ICSID Convention, made a couple of observations, which can be subsequently evaluated as the author traces the jurisprudence though the timeline. The two principal questions that the Tribunal sought to address were, (a) if the Tribunal has power and (b) if yes, the conditions for exercising such power. While reaffirming its powers as guaranteed under Art. 44 of the ICSID Rules, the Tribunal also retained its discretion in exercise of its residual powers. Art. 44 of the ICSID Rules states[53]:

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. ***If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question. (emphasis supplied)***

Consequently, while discussing on its powers under Art. 44, the Tribunal sought to address the procedural versus substantive question. In assessing the potential overlap, the Tribunal resorted

[51] *Ibid* at p. 343.

[52] *Supra* note 18 at ¶ 12.

[53] *Supra* note 19.

to an interpretation whereby it distinguished the nature and purpose of an amicus submission from the substantive rights and obligations of the disputing parties. It relied more on a purposive interpretation stating the traditional role of an amicus as that being of a friend to the court. The Tribunal also emphasized on the role of an amicus to encompass assisting the decision maker by providing with arguments, perspectives and expertise for making a reasoned and sound decision, possibly different from the disputant's contribution.[54]

The Tribunal, while making the order for granting this request, also drew a parallel between Arts. 15 (1) of the UNCITRAL Rules and Art. 44 of the ICSID Rules, wherein a NAFTA Tribunal had granted a petition from third parties to make amicus submission in *Methanex v. United States of America*.[55] It has to be taken into account that this was the first case under the ICSID Convention where the Tribunal was posed with the question of allowing a non-party submission. Although there had been several instances in the past where the Tribunal could draw references from while deciding on the present request, but it was still confronted with the responsibility of introducing new standards against which future requests for such submissions could be tested. The novelty and reliability of these standards would serve as a guiding force for future Tribunals as it was highly likely that all investor state disputes would have some common denominator in terms of issues of public interest and transparency concerns. Bearing such considerations in mind and drawing from parallel and existing jurisprudence, the Tribunal identified three grounds on which the question of admissibility of an amicus submission could be determined under the powers conferred by Art. 44 of the ICSID Rules, while addressing the original components of the request at the same time.[56]

The three grounds thus expounded were as follows:

[54] *Supra* note 18 at ¶ 13.

[55] *Methanex Corporation v. United States of America*, UNCITRAL (NAFTA), Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae', 15 Jan. 2001.

[56] *Supra* note 20.

(a) The appropriateness of the subject matter of the case

(b) The suitability of a given non-party to act as amicus curiae in that case

(c) The procedure by which the amicus submission is made and considered[57]

While deciding the appropriateness of the subject matter of the case, the Tribunal elaborated on matters of public interest, while considering the legality of state action under international law as opposed to domestic private law. At this point, the author would like to reiterate the crux of this dispute which was regarding water distribution and sewage systems in the state capital of Buenos Aires and surrounding municipalities.[58] Evaluating the actions of the Republic of Argentina as amounting to impact such massive scale of basic public services, the Tribunal contemplated a situation which was not merely confined to the domain of public and international law, but could be extended to issues of human rights.[59]

The Tribunal, discussing further on the matter of public interest, was of the opinion that allowing amicus submissions in such instances would also adequately touch upon transparency concerns. In the previous chapters, the author has discussed about confidentiality as being one of the significant features of an arbitration proceeding which makes it stand apart as compared to other forms of dispute resolution. However, as a departure from this feature, the Tribunal argued in favour of increasing access of the public to the intricacies of international arbitration proceedings in the interest of transparency and to encourage participation of civil society agents, in matters of public interest.

On the issue of suitability of a particular non-party, the Tribunal closely examined the qualifications of the party in terms of its expertise and experience that it could bring to the dispute. While making a submission, a party had to furnish certain necessary information

[57] *Supra* note 18 at ¶ 17.

[58] *Ibid* at ¶ 19.

[59] *Ibid*.

describing its identity, background, among other things. An additional requirement was that of independence of the parties. This requirement could be verified by examining the nature of the party's interest in the case and if the party had received any financial or other material support from any of the disputing parties. The party making an amicus submission also had to afford compelling reasons before the tribunal for admitting its petition.[60]

The third ground for making of the amicus submission and to be considered by the Tribunal was not much deliberated upon. However, what the Tribunal did specify was that the procedure would be determined in a manner so as to fulfil the purpose of the amicus submission on one hand, without affecting the substantive and procedural rights of the disputing parties on the other hand. The Tribunal also made reference to considerations of due process and equal treatment of parties, which would neither burden any of the disputing parties unduly nor would impair the efficiency of the proceedings.[61]

On the matter of allowing the Petitioners to attend the hearings as was formulated in the Petition, the Tribunal declined that part of the request stating lack of consent between both parties to the dispute which was a requirement under Rule 32(2) of the ICSID Rules.[62]

On the request for access to documents, the Tribunal deferred the decision until such time as a non-disputing party was granted leave by the Tribunal to file an amicus curiae brief.[63]

2. *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales*

[60] *Supra* note 18 at ¶s 24-25.

[61] *Ibid* at ¶ 29.

[62] Rule 32 contains 'Oral Procedure'. Sub-clause (2) states, "Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information."

[63] *Supra* note 18 at ¶ 33.

de Agua S.A. v. Argentine Republic[64]

About a year later, the same Tribunal was constituted for deciding on the amicus submission in this case. While acknowledging that the issues as raised in the Suez/Vivendi order[65] were identical to the present case, the Tribunal still elaborated on each of those issues in great detail. Without reiterating the discussion as elaborated in the previous section, the author would like to focus on the aspect that was unique to this case. Albeit the nature of the issues and concerns being similar, the interesting element in this order by the Tribunal was its denial of the Petitioner to make an amicus submission. The Tribunal in this case was not satisfied with the information and reasons as had been furnished by the Petitioner. However, this was not a blanket denial. Drawing on its previous order and the grounds that the Tribunal had laid for admissibility as an amicus, it afforded one more opportunity to the Petitioners to provide sufficient information and advance their reasons for being considered as an amicus more convincingly before the Tribunal.[66]

3. *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic (Second Petititon)*[67]

This case, also known as the *Suez/Vivendi (Second Order on Amici)*, came before the ICSID Tribunal after the amendment of the Arbitration Rules in 2006. For the purposes of this paper, the relevant Rules which were amended were Rules 32 and 37. Rule 32 contained rules on "Oral Procedure". Under the new paragraph, the wordings were only slightly modified but

[64] ICSID Case No. ARB/03/17; Order in Response to a Petition for Participation as Amicus Curiae; March 17, 2006; available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC512_En&caseId=C18.

[65] *Supra* note 18.

[66] *Supra* note 35 at ¶ 38.

[67] ICSID Case No. ARB/03/19; Order in Response to a Petition by five Non-Governmental Organizations for permission to make an Amicus Curiae submission; February 12, 2007; available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC519_En&caseId=C19.

reflected the same intent as before the amendment.[68] The new wording emphasized on grant on access to hearings by an ICSID Tribunal unless there was an express objection from either party, as opposed to the Tribunal deciding pursuant to consent of the parties.[69]

What was however a significant addition was the second paragraph which was added to Rule 37[70], which contained the main operative provision on an amicus curiae submission:

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

(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;

(b) the non-disputing party submission would address a matter within the scope of the dispute;

(c) the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission."

In the light of these amendments, the Tribunal was confronted with a new task of interpretation. Although some of the circumstances were still identical to *Suez/Vivendi (First Petition)*, but the applicable rules had to be revisited.[71] It is a mandate under Art. 44 of the ICSID Convention

[68] AR Parra, *'The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes*' (2007) 41 The Int'l Lawyer 1, 47, 56.

[69] *Supra* note 33.

[70] Rule 37 (2) specifically contains provisions on 'Submissions of Non-Disputing Parties'. Please see https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partF-chap04.htm.

[71] Five NGOs made an application and an identical request before the Tribunal for making an Amicus submission.

that a Tribunal can only apply those set of rules which were in effect at the time the parties consented to arbitration proceedings, irrespective of any subsequent amendment. Therefore, the Tribunal in the present proceeding could not resort to the amended Rule contained in 37 (2) as retrospective application was not possible. However, the Tribunal still made some significant observations. The three grounds that the Tribunal had articulated in the previous *Suez/Vivendi* petition were similar to the amended provisions contained in Rule 37, both in terms of substance as well as procedure.[72] Drawing an analogy therefore, the Tribunal concluded that the Petition fulfilled the requirements that had been made in the First Petition, and were eligible for admission.[73]

On the request regarding access to documents related to the proceedings, the Tribunal noted that the amended rules were silent on that matter. However, in order to be able to discharge its role as an amicus, the information at the disposal of the Petitioner was considered as adequate for the purpose of the present proceedings.[74] It is also interesting to take note of the fact that the Claimant which was opposing the motion for access to documents raised some new objections as compared to the First Petition. Concerns of confidentiality of documents[75], argument stating that the Petition was filed too late and it would cause disruption in proceedings[76], argument stating that the withdrawal of one of the parties may change the nature of the case and therefore affect the subject matter for making such a submission and inappropriateness of chosen forum.[77]

The Tribunal, while elaborating on each of these objections, rejected all arguments advanced

[72] *Supra* note 38 at ¶s 14, 15, 16.

[73] *Ibid*.

[74] *Supra* note 38 at ¶s 24, 25.

[75] *Supra* note 38 at ¶ 9.

[76] *Ibid*.

[77] *Ibid*.

by the Claimant. The Tribunal, while responding to the requirement on procedure for making a submission, directed the Petitioner to make an electronic submission in a time bound manner.[78] To ensure that such a submission is not burdensome to either of the disputing parties, the Tribunal also directed the submission to be limited in terms of page numbers.[79]

4. *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*[80]

In this procedural order, the Tribunal was not bound by the limitation in Art. 44 as the parties consented to arbitrate post introduction of amended rules in 2006. Therefore, the Tribunal was free to apply the new rules and add to the existing jurisprudence. The facts in this case were similar in terms of the number of petitioners making the submission.[81] One issue however, which was discussed at length in response to the Petitioners' request for access to all documents connected with the proceedings was the issue of confidentiality. An order numbered Procedural Order No. 3[82], which was issued prior to the present Order had addressed Biwater's concerns regarding confidentiality. In that previous Order, the Tribunal had imposed certain limitations on disclosure of documents in the interest of preserving the integrity of the process.[83] By extending its reasoning from the previous Order, the Tribunal reasoned that the issues concerning the amicus intervention were in the nature of public policy and therefore would not require special access to any additional arbitration documents.[84]Since the documents were

[78] *Supra* note 38 at ¶ 27.

[79] *Ibid*.

[80] ICSID Case No. ARB/05/22; Procedural Order No. 5; February 2, 2007; available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1584_En&caseId=C67.

[81] Five NGOs namely LEAT, LHRC, TGNP, CIEL, IISD filed a petition for making an amicus curiae intervention.

[82] *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*; Procedural Order No. 3; Order on confidentiality/procedural integrity; 29 September 2006.

[83] *Supra* note 51 at ¶ 62.

[84] *Supra* note 51 at ¶ 65.

easily available in the public domain, it was not a compelling enough reason for the Tribunal to tamper with the safeguards in place which would be effectively swept away if access to all categories of documents were granted.[85] Notwithstanding the Tribunal's firm position on the issue of confidentiality vis-à-vis concerns on procedural integrity, the Tribunal still acknowledged the possibility of doing away with strict concerns of confidentiality once subsequent hearings were concluded.[86]

5. *Piero Foresti, Laura de Carli and others v. Republic of South Africa*[87]

This was a short order wherein the Tribunal granted the Non-Disputing Parties (referred to as "NDP"), access to documents, subject to two conditions. The first condition was that the NDPs, in exercise of their right to make amicus submissions, would not obtain important information from the disputing parties in order to make their own submissions effective. And the second condition was that any NDP intervention should not affect rights of the disputing parties or prejudice fair and efficient conduct of arbitration proceedings.[88]

6. *Pac Rim Cayman LLC v. Republic of El Salvador*[89]

In this short and succinct Procedural Order, the Tribunal decided to grant the request for an amicus submission partially, on the condition that the written submission should be embodied within the existing submission with a view to assist the Tribunal's determination of the jurisdictional issues raised by the Parties only. The Tribunal also stated that such submission

[85] *Supra* note 51 at ¶ 66.

[86] *Ibid*.

[87] ICSID Case No. ARB (AF)/07/1); Further Decision Concerning the Applications of the Non-Disputing Parties; September 25, 2009; available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2391_En&caseId=C90.

[88] *Ibid* at pp. 1-2.

[89] ICSID Case No. ARB/09/12; Procedural Order No. 8 on Amicus Curiae; March 23, 2011; available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2011_En&caseId=C661.

should not in any way disrupt the arbitration proceedings or unduly burden any of the Parties. It also left the door for the possibility for making future submissions slightly ajar.[90]

7. *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay* (Procedural Order No. 3)[91]

This Procedural Order can be distinguished from the ones that the author has discussed at length above in terms of the components of the request. In this Procedural Order, the Petitioners, unlike in the previous cases, do not request for access to documents in the proceedings, but only seek to assist the Tribunal in determination of factual and legal issues by demonstrating the requirements of subject matter of the dispute and significant interest in the outcome of the proceedings. The Tribunal reasoned on these very components and granted the request for making this submission accordingly.[92]

8. *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*[93] (Procedural Order No. 4)

This Procedural Order was made subject to one additional Petitioner, namely, PAHO, making a submission on very similar grounds as the two Petitioners in Procedural Order No. 3. However, the Petitioner in this Order asserted that its submission shall not be a duplicate of the previous amicus submission, as it had different grounds for making the same requests.[94] The

[90] *Ibid* at p. 2.

[91] ICSID Case No. ARB/10/07; Procedural Order No. 3; February 17, 2015; available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC5532_En&caseId=C1000.

[92] *Ibid* at ¶s 23-32.

[93] ICSID Case No. ARB/10/07; Procedural Order No. 4; March 24, 2015; available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC5672_En&caseId=C1000.

[94] *Ibid* at ¶ 9.

Tribunal, while taking note of the reasons put forward by the Petitioner, granted the request, stating similar justifications as in the previous Order, while emphasizing on transparency concerns more in addition to merely public interest.[95]

CASES WHERE THE SUBMISSIONS WERE DENIED:

1. *Aguas del Tunari, S.A. v. Bolivia*[96]

It is crucial to evaluate this case as this was the first case where a request for filing of amicus submission was made before an ICSID Tribunal. This subject matter in this case was similar to the *Suez/Vivendi* disputes concerning privatization of water services in Bolivia.[97] This privatization led to a lot of turbulence in Cochabamba due to arbitrary escalation in pricing, where violent clashes between the public and the state authorities resulted in the death of a teenage boy.[98]

The Petitioners in this case, initially requested the Tribunal to join them as parties to the dispute. In the alternative, they filed a submission for making amicus submissions if the Tribunal were to reject their prior request. As an amicus, they sought full rights on making submissions on procedural, substantive and jurisdictional issues connected to the matter, attendance in hearings, right to make oral submissions and to have immediate access to all submissions made before the Tribunal.[99] The Petitioners had presented an exhaustive list of demands before the Tribunal claiming broader concerns of fairness, transparency and public interest. The requests in their petition also extended to asking the Tribunal to allow public disclosure of all documents

[95] *Supra* note 64 at 30.

[96] ICSID Case No. ARB/02/3; Tribunal's Letter in Response to Non-Disputing Parties' Petition; January 29, 2003; available at http://www.italaw.com/sites/default/files/case-documents/ita0019_0.pdf.

[97] ICSID Case No. ARB/02/3; Petition by NGOs and people to participate as an intervening party or amici curiae; August 29, 2002; available at http://www.italaw.com/sites/default/files/case-documents/ita0018.pdf.

[98] *Ibid* at ¶ 1.

[99] *Supra* note 99 at ¶ 3.

related to the dispute, including conduct of arbitral proceedings in public and an interesting request for the Tribunal to be seated in the affected city of Cochabamba.[100]

Although this was one of the first cases before the ICSID Tribunal which sought to introduce the practice of making non-party/third-party submissions, the Petitioners had massive support to advance their claims. The petitioners themselves were major stakeholders in the civil society in Bolivia and represented as having a direct interest in the outcome of the arbitration.

However, in a letter dated January 29, 2003, the President of the Tribunal, David D. Caron, rejected all the requests as put forth by the Petitioners.[101] The letter contained a unanimous decision of all the members of the Tribunal, rejecting their requests on the ground of 'lack of power or authority of the Tribunal' in the absence of parties' agreement to the contrary. The Tribunal was also of the opinion that there was no requirement to seek such submissions at such a nascent stage of the proceedings.[102]

2. *Bernhard von Pezold and others v. Republic of Zimbabwe*[103] *and Border Timbers Ltd., Border Timbers International (Private) Limited,* and *Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*[104]

The two conjoined cases brought about a very different dimension to rulings of the ICSID Tribunal on amicus submissions. Although the non-state actors were different, but the subject matter of both disputes concerned the same issue and the state of Zimbabwe. The Claimants in

[100] *Ibid.*

[101] *Supra* note 98.

[102] *Ibid* at p. 2.

[103] ICSID Case No. ARB/10/15; Procedural Order No. 2; June 26, 2012; available at http://www.italaw.com/sites/default/files/case-documents/ita1044.pdf.

[104] ICSID Case No. ARB/10/25; Procedural Order No. 2; June 26, 2012; available at http://www.italaw.com/sites/default/files/case-documents/ita1043.pdf.

this case were investors interested in timber plantations.[105] The Petitioners in this case were the European Center for Constitutional and Human Rights (hereinafter referred to as the "ECCHR") and the Chiefs of four indigenous communities.[106] The state had acquired the properties owned and inhabited by these indigenous communities, as a result of which, the cultural and legal rights of the communities were at peril. This was further exacerbated by the fact that any outcome of the arbitral proceedings would potentially prejudice or jeopardize their internationally recognized rights to their lands which could have unforeseeable future implications.[107]

The Petitioners also alleged violations in the broader and evolving realm of business and human rights issues.[108] Conducting Human Rights Due Diligence is one of the cardinal features under the United Nations Guiding Principles on Business and Human Rights.[109]The Petitioners also relied on investor disputes in the past to demonstrate instances where the relevant BITs had been interpreted in the light of international human rights law.[110]

Despite the several considerations put forth by the Petitioners in their request, the ICSID Tribunal rejected all their requests. The Tribunal adopted a very narrow approach in the interpretation that the Petitioners had sought to establish. It was not satisfied either on the evidence presented or on the merits of the dispute regarding the interplay of investment

[105] 'Human Rights inapplicable in International Investment Arbitration?'; A commentary on the non-admission of ECCHR and Indigenous Communities as Amici Curiae before the ICSID tribunal; Berlin, July 2012; available at file:///C:/Users/user/Downloads/ICSID%20tribunal%20-%20Human%20Rights%20Inapplicable_A%20Commentary.pdf.

[106] *Ibid* at p. 2.

[107] *Supra* note 107 at p. 4.

[108] *Ibid.*

[109] "Guiding Principles on Business and Human Rights"; Implementing the United Nations 'Protect, Respect and Remedy' framework'; p.6; available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

[110] *Sawhoyamaxa Indigenous Community v. Paraguay*, Inter-American Court of Human Rights; March 29, 2006; at ¶ 140.

obligation under treaties and international human rights laws. The Tribunal also reserved its scepticism regarding the independence of the Petitioners as non-disputing parties and on the competence to determine rights of the individuals in the indigenous communities.[111]

[111] *Supra* note 107 at p. 7.

5. CHAPTER 4- CONCLUSION

These decisions subsequently led to more clarity on how the ICSID Tribunals, in exercise of their powers and functions, regulated the mobility of the amicus briefs in the investor state dispute jurisprudence. While most of the requests for submissions hinge on similar grounds, in both pre and post amendment of the ICSID Rules, the Tribunals have adopted bespoke approaches in examining the grounds for such requests and responding to them accordingly. A thorough scrutiny of each petition, the underlying considerations, the arguments in favour of transparency, public interest, procedural fairness, international human rights law etc., shall give the reader an insight into the evolution of the process. The Tribunals although have been both cautious and generous in their treatment of non-disputing party submissions, certain areas have emerged as being more prominent than the others.

Defining the broad contours of an arbitration proceeding is a task that is shared both by the parties to the dispute as well as the Tribunal. Although, consent of the parties is a cornerstone of any agreement between the parties to arbitrate, it also is upon the Tribunal to ensure how inclusive the process of arbitration can be accomplished. The procedure under the ICSID regime facilitating the third party submission has veered through several phases. While some phases have witnessed legitimate interests being represented, some have struggled to separate interest from fresh perspective. The harmonization between right based concerns and investor obligations under treaties is an area that still needs to see a lot more jurisprudential rigour. It cannot be established in a few words or so as to how much or how little does an amicus contribute to a case before an ICSID Tribunal, but what can be certainly observed is that there lies tremendous potential for an amicus intervention to impact both the interest of the parties as well as the overall outcome of the proceedings.

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