

# The Participation of *Amicus Curiae* in Investment Treaty Arbitration

Saravanan A\* and Dr. S.R. Subramanian

Rajiv Gandhi School of Intellectual Property Law, Indian Institute of Technology, Kharagpur, India

## Abstract

The investment treaty arbitral tribunals had experienced a significant increase in the disputes initiated for non-commercial activities, such as environmental protection, public health, human rights and labour standards. It has witnessed the greater participation of civil society as non-disputing parties to gain access to these forums as *amicus curiae*. Initially, none of the international investment instruments had explicitly authorized the submission of *amicus curiae* briefs. It was only after 2001 when the NAFTA tribunal accepted *amicus curiae* briefs in the most celebrated case of *Methanex*, which was followed by the *UPS* and the *Glamis* disputes, it is emerging as a practice in the investment treaty arbitration. The ICSID tribunal also admitted *amicus curiae* briefs on the basis of public interest for the first time in the *Vivendi* case on 19 May 2005, followed by the *Aguas Provinciales* in 2006 for the purpose of distribution of water. As an outcome of this Tribunal, the ICSID Arbitration Rules were amended to incorporate an explicit provision to approve *amicus curiae* briefs. The acceptance of *amicus* briefs clearly shows the interest of the common public in the process of investment arbitration.

Most of the scholars welcomed the arrival of non-disputing parties in the ICSID and the UNCITRAL arbitrations. But, the confidentiality of proceedings remains as a general rule. *Amicus-curiae* are refused to access documents and to attend hearings unless disputing parties consented to do so. This practice apparently raised a serious doubt on greater transparency and equal participation of non-disputing parties in arbitral proceedings. It is in this connection, the paper makes a concerted attempt to address the pertinent issues involved in participation of *amicus curiae* in arbitral proceedings. It further looks into the details on various issues on access to information, publication of awards and the admissibility of *amicus curiae* briefs.

**Keywords:** *Amicus Curiae*; ICSID; Investment arbitral proceedings; NAFTA; Transparency; UNCITRAL

## Introduction

The question of transparency and public participation is not restricted only to the areas of investment arbitration. For instance, the World Trade Organization (WTO) had deliberated upon these issues much before the investment arbitral tribunals. The WTO has well-established practice on the participation of non-disputing parties in their dispute settlement process [1]. The reason is clear because of the close bonding between economic interest and the public interest [2]. The decisions of the WTO dispute settlement bodies in the notable decisions of *US-Shrimp Case*, *US- Lead Bars* and *EC-Asbestos case* are evident of it [3-6]. It is pertinent to note that investment arbitration is governed by the public international law and laws of the host State [4,7]. The investment arbitration concerns not only the investor's interest but also the public interest. For this reason, the arbitral tribunals have strongly advocated the participation of non-disputing parties as *amicus curiae* in arbitral proceedings [7,8]<sup>1</sup>.

## Evolution and Diversification of Third Parties Participation in Investment Arbitration

*Amicus* requests have a long list which includes, standing as a party, leave to submit written submissions, access to case documents, to take part in court hearings, make oral submissions, respond to the questions, to review memorials, and declare observer status. Initially, the arbitral tribunals had rejected *amicus* submissions in its entirety. But, the subsequent decisions had gained a momentum because the tribunals started accepting *amicus* request only to leave to file briefs [9]. As a consequence of these developments, several amendments have

been brought to the existing international investment instruments in order to incorporate new provisions on the acceptance of *amicus curiae* briefs. Further, it clarifies the customary standards of non-disputing parties in investment arbitral proceedings [9,10].

The non-governmental organizations (NGOs) have profoundly exerted a development of international law since 1900. These public interest groups have attracted a greater attention by the legal scholars in the field of international investment law since 1990, with specific focus on environment and human rights issues [11]. The NGOs are requested to participate as an *amicus curiae* in investment treaty arbitration (ITA) for two reasons, first being an interpretation of investment treaty to increase harmonization and consistency, and second is to analyze the subject matters falls within the dispute [12].

Initially, only NGOs have submitted their *amicus* briefs in investment arbitration. This practice had shifted later, for instance, home-state submissions, international communities such as European Communities (EC) and World Health Organization (WHO), even individuals become a part of the *amicus curiae*, more particularly when the question of the interpretation of treaty occurs [11]. The *Glamis* tribunal had accepted *amicus* submissions from individuals, and business associations i.e., Quechan Indian Nation, National Mining Association, and American Business Association [13].

**\*Corresponding author:** Saravanan A, Ph.D. Candidate at the Rajiv Gandhi School of Intellectual Property Law, Indian Institute of Technology, Kharagpur, India, Tel: +91-9932059007; E-mail: [saravananlaw1989@gmail.com](mailto:saravananlaw1989@gmail.com)

Received July 12, 2016; Accepted July 26, 2016; Published July 30, 2016

**Citation:** Saravanan A, Subramanian SR (2016) The Participation of *Amicus Curiae* in Investment Treaty Arbitration. J Civil Legal Sci 5: 201. doi:10.4172/2169-0170.1000201

**Copyright:** © 2016 Saravanan A, et al. This is an open-access article distributed under the terms of the Creative Commons Attribution License, which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

<sup>1</sup>Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic (Formerly Aguas Provinciales), Order in Response to a Petition for Participation as *Amicus curiae*, ICSID Case No. ARB/03/17, 17 March 2006, para 13.

## Home-State Submissions

The practice on home-State submissions is not a new concept in international investment law. It can be traced back to the Rules of Procedure of the Iran-United States Claims Tribunal, 1983, Article 15, Para 5 of the rules permits the submissions from the non-disputing States [2]. Subsequently, Article 1128 was incorporated to the North American Free Trade Agreement (NAFTA) and Article 37(2) to the ICSID Arbitration Rules through an amendment in 2006 [2]. For instance, the US had submitted the amicus briefs in *Marvin Feldman v Mexico* to support their investors and also to interpret Article 1117 (1) of the NAFTA<sup>2</sup>. Once again the US had requested the tribunal in the most celebrated case *Metalclad Corporation v Mexico* to express their opinion to define the term 'tantamount to expropriation' [3]<sup>3</sup>.

The European Commission had enabled its active amicus participation in investment arbitrations initiated against the new European Union (EU) members such as Hungary, the Slovak Republic, and Romania [1]. Interestingly, in *Eureka B.V. v The Slovak Republic*, the UNCITRAL Tribunal on its motion invited the home state's opinion from the EU and the Dutch Kingdom to decide the jurisdiction [14]<sup>4</sup>. It is interesting to note that this is the EC's first amicus request to support their investors [15]. Eventually, the ICSID tribunals also granted similar kind of requests to the EC in the most epic disputes such as *AES v Hungary*, *Electrabel v Hungary* and *Micula v Romania* [16]. The *AES* arbitration constituted as a result of disputed new regulations introduced by the Republic of Hungary to comply with the EU Competition Law. The EU had convinced the Tribunal and submitted its amicus brief to enforce the Competition Law<sup>5</sup>. It is in this connection the next part significantly discusses the necessary requirements to file amicus submissions under various international legal instruments.

## Requirements under the NAFTA, ICSID, and UNCITRAL Rules

Several adjustments had been brought to the North American Free Trade Agreement (NAFTA), the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID), the ICSID Arbitration Rules and the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules to address the potential imbalances. The participation of non-disputing parties was absent in Chapter Eleven of the NAFTA until the emergence of *Methanex* arbitration. Provisions were later incorporated in Article 1128 of Chapter Eleven, which explicitly grants the permission to amicus curiae submissions and to access court documents. The ICSID Convention also amended in 2006 to increase the access to court documents, the participation of non-disputing parties and to allow open hearings [5,17]. The similar provisions also incorporated in the UNCITRAL through the UNCITRAL Rules on Transparency in 2013.

## The NAFTA's Practice on admission of amicus submissions

In 2003, the Federal Trade Commission (FTC) issued a clarification Statement in the context of the participation of amicus curiae in arbitral

proceedings. It stated that the NAFTA does not limit the tribunal to accept the written submissions from the third parties. The statement also carved out certain guidelines to be followed by the tribunals while granting this kind of applications. The process of amicus curiae submission starts with the petition for leave to file a brief and when the Tribunal accepts the filing, then it is followed by actual submission. The statement also framed a detailed instruction on amicus requests which is more or less similar to the content and format adopted by the WTO DSB in the *Asbestos* dispute [18].

The *Methanex*<sup>6</sup> and *UPS*<sup>7</sup> are the two early cases recognized the admission of amicus curiae submissions. Surprisingly, both the tribunals held that it had no power to add any third parties other than the disputants to the arbitration. Further, it ruled that they can allow third parties to the proceedings only as amicus curiae, and they can submit written briefs, which was within the powers of the tribunal [17]. The final decision on acceptance such submissions to be determined with the consultation of the parties on merits of the proceedings.

The *Methanex* tribunal reached the final decision on acceptance of amicus briefs without considering Mexico's objection. They contended that such kind of practice was not permitted under domestic law [19]. The tribunal further reasoned that the disputed issues had to be resolved under Chapter Eleven of the agreement which comes under the purview of international law and not the domestic law. The tribunal relied on the usual practice of WTO's DSB adopted in *Iran-US Claims Tribunal*. The *Methanex* tribunal also adopted the FTC statement and accepted amicus submissions from the two non-disputing parties, the IISD and Earth Justice with the consent of disputing parties [20]. The tribunal further described that the amicus brief was 'carefully reasoned' [21].<sup>8</sup> But, the limitation on submission of briefs and participation of amicus curiae in oral hearings has to be decided by the tribunal only with the consent of parties.<sup>9</sup>

Subsequently, the *UPS* Tribunal with the support from *Methanex* case granted the amicus curiae submissions and further observed that the petitioners are not entitled to make submissions on the issues related to the place of arbitration or jurisdictional matters [21].<sup>10</sup> The access to public hearing and documents can be granted only with the consent of both parties, and there was no such agreement in this case, and therefore, the Tribunal rejected the petitioner's request in this regard.<sup>11</sup>

The *Methanex* and *UPS* were followed by the *Glamis*, which raised aboriginal rights issues, mining claims and other matters concern on environmental protection. The Tribunal had 'decided to accept each submission and consider it, as appropriate, in accordance with the principles stated in the FTC Statement and the particular criterion mentioned by the Respondent that each submission brings a perspective, particular knowledge or insight that is different from that of disputing

<sup>2</sup>Marvin Roy Feldman Karpa v. United Mexican States, Interim Decision on Preliminary Jurisdictional Issues, ICSID Case No ARB(AF)/99/1, 6 October 2000, paras 2-12.

<sup>3</sup>Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB (AF)/97/1, 9 November 1999, paras 3-8.

<sup>4</sup>Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13 (formerly Eureka B.V. v. The Slovak Republic), 26 October 2010, paras 154-174.

<sup>5</sup>AES Summit Generation Limited and AES-Tisza Eromu Kft v. The Republic of Hungary, ICSID Case No. ARB/07/22, paras 3.18 & 3.22.

<sup>6</sup>Methanex Corporation v. United States of America, Decision of the Tribunal on Petitions from Third Persons to Intervene as 'amici curiae', UNCITRAL Award, 15 January 2001.

<sup>7</sup>United Parcel Service of America Inc. v. Canada, UNCITRAL Award on Jurisdiction, 22 November 2002.

<sup>8</sup>For further trade law approaches in investment dispute resolution, S.R.Subramanian (2012) Too Similar or Too Distant: State of Necessity as a Defence under Customary International Law and the Bilateral Investment Treaty and their Relationship, Manchester Journal of International Economic Law 9 (1): 79"

<sup>9</sup>*Ibid* at para 8; See the Table 1.

<sup>10</sup>UPS Award, *Supra* note 7 at para 60; See the Table 1.

<sup>11</sup>*Ibid* at paras 67 & 73.

parties' [17,22].<sup>12</sup> It is pertinent to note that the submission of amicus briefs are now become a continual feature of the NAFTA arbitration [23].

### Requirements under the ICSID Arbitration Rules

The practice of the ICSID Tribunals on amicus submissions has developed in a similar direction of the NAFTA Tribunals [23]. The ICSID Arbitration Rules are regularly used as a procedural rule in most of the Investor-State arbitral proceedings. It is interesting to note that admission of amicus curiae briefs have raised a serious concern before the ICSID tribunals on numerous occasions, even much before the adoption of the ICSID Arbitration Rules, 2006 [24]. These issues raised before the tribunal for the first time in the most notable case of *Aguas del Tunari v. Bolivia*<sup>13</sup>. Unfortunately, the tribunal had rejected all the requests made by the petitioners for the three reasons. *Firstly*, the claims were made 'beyond the power or the authority of the tribunal to grant'<sup>14</sup>. The tribunal held that it did not have any authority to grant such requests (Table 1)<sup>15</sup>. *Secondly*, there was no agreement between the petitioners and the disputing parties to accept amicus curiae submissions. Therefore the Tribunal held that petitioners' request cannot be allowed<sup>16</sup>. *Lastly*, the Tribunal emphasized on the treaties that 'there is no less our duty to follow the structure and requirements of the instruments that control this case' [14]<sup>17</sup>.

However, the ICSID tribunal had reached a different conclusion in the subsequent cases, *Aguas Argentinas*<sup>18</sup>, and *Aguas Provinciales*<sup>19</sup>. The tribunal held that it had sufficient power under Article 44 to grant amicus curiae submissions [8,22]. Provided that the petitioners had to establish to 'the Tribunal's satisfaction that they have the expertise, experience, and independence to be of assistance' in appropriate cases<sup>20</sup>. Further, the Tribunal in *Aguas Argentinas* adopted three criteria to determine the acceptance of amicus submissions<sup>21</sup>. The Tribunal concluded that the appropriate non-disputing parties might assist the arbitral tribunals to reach the correct decisions [8,25]. The detailed analysis of these cases are provided in the Table 1 below.

### The ICSID Arbitration Rules, 2006

The ICSID Arbitration Rules were amended in 2006, and new Paragraph 2 of Rule 37 was added with an additional title 'submissions of Non-Disputing Parties' [10]. The revised rules stated that 'after consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute' to 'file a written submission before the Tribunal regarding a matter within the scope of the dispute' [10,26]. To determine the submissions from non-disputing parties to accept or reject, the Tribunal shall consider the following three requirements, which were adopted by *Aguas Argentinas* Tribunal,<sup>22</sup>

- a) The submissions would assist the tribunal in the determination

<sup>12</sup>Glamis Gold Ltd. v. The United States of America, UNCITRAL Award, 8 June 2009, para 286.

<sup>13</sup>*Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005.

<sup>14</sup>*Ibid* at Appendix III.

<sup>15</sup>*Ibid* at paras 15-18; *Also* refer the Table 1.

<sup>16</sup>Appendix III of the Order.

<sup>17</sup>*Ibid*.

<sup>18</sup>*Aguas Argentinas S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus curiae, 19 May 2005.

<sup>19</sup>*Aguas Provinciales Award*, *Supra* note 1.

<sup>20</sup>*Supra* note 18 at paras 15 & 24; *Ibid* at paras 14 & 23.

<sup>21</sup>*Supra* note 18 at para 17.

<sup>22</sup>*Ibid*.

of factual or legal issue, and it would also bring a new perspective or insight which should be different from the disputing parties;

- b) The subject matter of submissions should fall within the scope of the dispute, and

- c) The non-disputing parties should have a significant interest in the proceedings [8,27].

In addition to that, the Tribunal shall ensure the equal opportunity to the parties to convey their observations [1]. The interpretation for Rule 37(2) and scholarly writings sets out that arbitral tribunal has to consult the parties, but it authorizes the courts to accept amicus briefs even if the parties vetoed it [17,28]. Since the 2006 amendment, the Tribunal received amicus briefs from non-disputing parties on many occasions. Surprisingly, the tribunal had rendered only a few awards<sup>23</sup> till to date, and the remaining cases are still pending<sup>24</sup>.

### Requirements under the UNCITRAL arbitration rules

The UNCITRAL Arbitration Rules 1976 have the most restrictive approach to the aspects of transparency, and also the transparency is an exception rather than a rule [29]. It is interesting to note that unlike the ICSID Rules and the NAFTA, the UNCITRAL Arbitration Rules 1976 and amended 2010 Rules had no express provisions to permit amicus briefs in the UNCITRAL administered proceedings. However, Article 17(5) of the UNCITRAL Rules, 2010 is strictly limited only to the joinder of a person who is a party to the arbitration agreement. It states that third persons can join as a party to the arbitration only if they are party to the arbitration agreement [30,31]. The need for obtaining factual information through amicus curiae participation is somewhat discussed in the 2013 UNCITRAL's new standard for transparency, and it is excelled than the ICSID and the NAFTA on many aspects discussed below [10].

### The UNCITRAL rules on transparency, 2013<sup>25</sup>

Unlike the 2010 Rules, Articles 4 and 5 of the 2013 Rules addressed the amicus submissions. Article 4 created a standard for the third party, who is not a disputing party and not a party to the Treaty. Article 5 made another standard for non-disputing parties, who are not a disputing party, but a party to the Treaty [31].

The petitioners, who wish to make amicus submissions, shall provide the following details to tribunal:<sup>26</sup>

- a) The submissions must be in writing, and it should provide the details of the third person, relevance of its membership, its objectives and the nature of its activities;

- b) Any other information which the petitioner has direct or indirect connection with any disputing party; and

- c) The information regarding financial or other assistance rendered to the petitioner while preparing the submission [29].

<sup>23</sup>*Biwater Gauff v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5, 2 February 2007; *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01, Letter Regarding Non-Disputing Parties, 5 October 2009.

<sup>24</sup>*AES Summit Generation Limited and AES-Tisza Eromu Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19; *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20

<sup>25</sup>The UNCITRAL Rules on Transparency, G.A. Res. 69/116, U.N. Doc. A/RES/69/116, 1 April 2014.

<sup>26</sup>*Ibid* at Art 4 (2).



The amicus submissions can be allowed at the discretion of the tribunal after consulting the parties. But, the tribunal has less discretion when the requests are made by the non-disputing parties, who are parties to the treaty. The tribunal shall accept the amicus submissions from non-disputing parties only if 'it does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party'<sup>27</sup>. The Tribunal also ensures the equal opportunity to the disputing parties to convey their observations in the submissions<sup>28</sup>.

The investment treaty arbitration is a method of public law adjudication and it also 'touches upon matter of public policy' [7]. On the one side, amicus submissions act as a shield to reduce the risk of public goods and host state, and on the other hand, it imposes a burden on disputing parties. Accordingly, the benefits and concerns of amicus curiae submissions are considered in greater detail in the next section.

## Benefits of Accepting Amicus Briefs

### Protection of Public Interest and improvement in quality of award

It provides an option to the civil societies to raise their voice to protect the public interest such as environmental issues, labour welfare, human rights, cultural rights, and corruption issues [28]. It also ensures the procedural openness in investment arbitration [13]. The *amicus curiae* are expert in scientific as well as technical knowledge, and they have to conduct extensive research before filing the amicus submissions [1]. Arbitrators and disputing parties might lack knowledge and expertise on some issues such as ecological studies, environmental impact assessment, and cost-benefits analysis on environmental policy. With the grassroots level experience, the NGOs can make a significant contribution and assist the tribunal to reach a quality decision [7]. For instance, the *Suez* tribunal acknowledged that 'non-parties may be able to afford the Tribunal perspectives, arguments, and expertise that will help it to arrive at a correct decision'<sup>29</sup>.

### Increase in transparency

Transparency combats legitimacy in investment arbitral proceedings. It also enhances the public credibility and acceptability of decision of the investment arbitral tribunal [28]. Amicus participation might eliminate the corruption practices which are prominent in most of the investment arbitrations [14]. For instance, in *World Duty Free v the Republic of Kenya*<sup>30</sup> both the parties expressly acknowledged the payment of a bribe to the previous government [13]. From the institutional perspective, the practice of amicus briefs could enhance the trust on the arbitral proceedings [1].

## Concerns on Amicus Submissions

### Unilateral approach and reflecting on the impartiality

Amicus briefs supported in favour of the host State's approach in most of the cases and the tribunal might be compelled to accept their submissions and give importance to the host State's arguments. This risk was identified in *Methanex*, as 'any amicus submissions are more likely to run counter to the claimant's position and eventually to support the respondent's case'<sup>31</sup>. Amicus briefs are often criticized for

repeating respondent's argument and intervening Civil Society groups are also biased [21]. Allowing amicus curiae to the arbitral proceedings would lead to 'subvert the consensual nature of arbitration' this might depart from the fundamental arbitral principle [9].

### Cost and delays to be borne by the disputing parties

The participation of amicus curiae increases the cost and also creates an unnecessary delay for the parties because they have to analyse and respond to the amicus curiae submissions [28]. If the tribunal accepted the amicus submissions, then the expenses of the submissions shall be borne by the parties. The arbitral proceedings held for several years and runs into enormous costs, further burdening the disputing parties would be inappropriate [9,32]. The Tribunal in *Merrill and Ring Forestry L.P v Canada* observed that 'if a tribunal permit amicus briefs liberally, then the proceeding would become unmanageable, that would be unfair and costly to the disputing parties, who would be called upon to respond to voluminous material' [28,32]<sup>32</sup>. The UPS Tribunal also observed that amicus briefs are 'unduly burdensome for the parties or which unnecessarily complicates the Tribunal process'<sup>33</sup>.

### Politicization of the dispute

As the concern of the public is extremely high in this kind of disputes, the risk of politicization of the third party is more prevalent, particularly NGOs. In some instances, NGOs are being funded and manipulated by the host States or Private companies [7,33]. It is difficult for the tribunal to balance the economic interests of the foreign investor and the public interest of host state in amicus submissions. The NGOs are often extending their support in favour of the host states in many cases. For instance, the US Chamber of Commerce in UPS and National Mining Association in *Glamis* supported the position of foreign investors [9,34]. The US Chamber of Commerce had received \$100,000 from the UPS before submitting their briefs [8,35]. The active participation of other entities such as EC and WHO also seriously raised the politicization issue in investment arbitrations [1].

## Conclusion

The recent practice of accepting amicus participation in investor-state arbitration has become a unique feature in international law. Amendments to the Chapter Eleven of the NAFTA, the ICSID Arbitration Rules, and the UNCITRAL Arbitration Rules are only the first step and made marginal improvements to the jurisprudence of international investment law. Still, the current position is unsatisfactory. It is necessary to reassess the existing legal framework in order to find a right balance between public legitimacy and secrecy of international investment disputes. The success of transparency will be achieved only if the tribunals guaranteed the public access to attend hearings, to present their legal arguments and to access the documents.

<sup>27</sup>*Ibid* at Art 4(5) and Art 5 (4).

<sup>28</sup>*Ibid* at Art 4(6) and Art 5(5).

<sup>29</sup>*Supra* note 18 at Para 21.

<sup>30</sup>*World Duty Free v. the Republic of Kenya*, ICSID Case No. Arb/00/7, Final Award Oct 4, 2006.

<sup>31</sup>*Methanex Award*, *Supra* note 6 at Para 50.

<sup>32</sup>*Merrill and Ring Forestry L.P. v. The Government of Canada*, Opinion with respect to the Effect of NAFTA Article 1116 (2) On Merrill and Ring's Claim April 22, 2008, Para 25.

<sup>33</sup>UPS Award, *Supra* note 10 at Para 69.

**Table 1:** Amicus Curiae requests in Investment Arbitration filed under the different forums.

Sl.no	Disputing Parties	Applicable Arbitration Rules	Third Parties	Amicus Request/s	Tribunal Held	Observation
1	<i>Methanex Corporation v USA</i> (15.01.2001) <sup>34</sup>	UNCITRAL 1976: ▪ Art 15(1) ▪ Art 25(4) <i>Legal Instrument:</i> ▪ NAFTA	IISD and Earth Justice <sup>35</sup>	i) Oral and Written Submissions ii) To participate in the proceedings iii) To review memorials and to declare an observer status	Accepted only amicus curiae written submissions and refused to grant all other requests	i) This is the first NAFTA arbitration, where amicus brief was accepted ii) Tribunal relied on the WTO <i>Iran-US claims</i> tribunal and the <i>Carbon Steel</i> disputes
2	<i>UPS v Canada</i> (17.10.2001)	UNCITRAL 1976: ▪ Art 15(1) ▪ Art 25(4) <i>Legal Instrument:</i> ▪ NAFTA	The Canadian Union of postal workers, Council of Canadians, and US Chamber of Commerce	i) To stand as parties ii) To intervene in the proceedings and disclose the court materials	Accepted only amicus curiae written submissions and denied all other requests	i) Tribunal relied on <i>Methanex</i> arbitration ii) US Model BIT was revised after <i>UPS</i> and <i>Methanex</i> decisions
3	<i>Glamis Gold Ltd v USA</i> (16.09.2005)	<i>Legal Instrument:</i> ▪ NAFTA	Quenchen Indian Nation, and two other joint submissions <sup>36</sup>	Only leave to file and acceptance of written submissions	Accepted the amicus briefs	Overlap between investment and non-investment obligations are significantly described [21]
4	<i>Aguas Del Tunari v Republic of Bolivia</i> (29.01.2003)	ICSID : ▪ Rule 6(2) ▪ Rule 32(2) <i>Legal Instrument:</i> Bolivia-Netherlands BIT	On behalf of four NGOs <sup>37</sup> Earth Justice filed the amicus briefs	i) Standing as parties to the dispute and make Submissions iii) To attend the hearings and make oral presentation iv) To have access to all the submissions <sup>38</sup>	Rejected all the requests	First ICSID case, where amicus brief was filed. Unsurprisingly, the tribunal denied all the requests
5	<i>Aguas Argentinas et al v Argentine Republic (Suez/ Vivendi)</i> (19.05.2005)	ICSID : ▪ Rule 32(2) ▪ Rule 32(6) <i>Legal Instrument:</i> Argentina- France BIT; Argentina- Spain BIT	Five NGOs <sup>39</sup>	i) To make amicus submissions ii) Access to court hearings iii) To present their legal arguments and access to case materials	Accepted only amicus submissions and rejected all other requests	The tribunal adopted the three criteria to qualify for submitting amicus curiae briefs
6	<i>Aguas Provinciales et al v Argentine Republic (Suez/InterAguas)</i> (17.03.2006)	ICSID : ▪ Art 44 ▪ Rule 32(2) <i>Legal Instrument:</i> Argentina- France BIT; Argentina- Spain BIT	One NGO along with three individuals <sup>40</sup>	i) To accept and grant amicus curiae status ii) To make a written submissions and access to documents	Refused to grant permission to make amicus submissions and also denied all other requests	This lead to an amendment to the ICSID Arbitration Rules 32, 37 and 48 in 2006
7	<i>Bewater Gauff v United Republic of Tanzania</i> (02.02.2007)	ICSID: ▪ Rule 37(2) ▪ Rule 41(3) <i>Legal Instrument:</i> Tanzania-UK BIT	Three Tanzanian based NGOs <sup>41</sup> and two international NGOs <sup>42</sup>	i) To make written submissions ii) To grant access to key documents and attend oral hearings iii) To respond questions	Only granted the parties to submit amicus briefs and denied all other requests	First amicus petition filed after 2006 amendment
8	<i>Piero Foresti, Laura de Carli and others v Republic of South Africa</i> (05.10.2007)	ICSID Additional Facility Rules: Articles- 41(3), 27, 39 and 35	Four NGOs <sup>43</sup> jointly filed a brief	i) To make written submissions ii) To grant access to key documents iii) To attend oral hearings	i) Grant permission to file written submissions ii) Also granted an access the key documents iii) Denied the request to take part in oral hearings	Tribunal adopted a novel procedure for participation of non-disputing parties in arbitral proceedings

<sup>34</sup>Date of decision on amicus curiae petitions.

<sup>35</sup>On behalf of other three NGOs Blue Water Network, Communities for a Better Environment, Center for International Environmental Law.

<sup>36</sup>One Joint submission by Friends of Earth Canada and US, and another joint submission by National Mining Association and Sierra Club/Earthworks

<sup>37</sup>The Coalition for the Defense of Water and Life (*Coordinadora*), the Cochabamba Federation of Irrigators' Organizations, Friends of the Earth-Netherlands and SEMAPA Sur.

<sup>38</sup>It includes written submission, claims and defences of the disputing parties.

<sup>39</sup>*Asociacion Civil por la Igualdad y la Justicia (ACIJ)*, *Centro de Estudios Legales y Sociales (CELS)*, *Center for International Environmental Law (CIEL)*, *Consumidores Libres Cooperativa Ltda. de Provision de Servicios de Accion Comunitaria*, and *Union de Usuarios y Consumidores*.

<sup>40</sup>Mexico based *Fundacion para el Desarrollo Sustentable* (AC Sustainable development Foundation) as well as Professor Ricardo Ignacio Beltramino, Dr. Ana Maria Herren, and Dr. Omar Dario Heffes.

<sup>41</sup>The Lawyers' Environmental Action Team (LEAT), the Legal and Human Rights Centre (LHRC) and Tanzania Gender Networking Programme (TGNP).

<sup>42</sup>Center for International Environmental Law (CIEL) and International Institute for Sustainable Development (IISD).

<sup>43</sup>Namely, the Centre for Applied Legal Studies (CALs), the Legal Resources Centre (LRC), the Center for International Environmental Law (CIEL), and INTERIGHTS (the International Centre for the Legal Protection of Human Rights).

## References

- Knahr C (2011) The New Rules on Participation of Non-Disputing Parties in ICSID Arbitration: Blessing or curse? Evolution in Investment Treaty Law and Arbitration (ed. Chester Brown, Kate Miles). Cambridge University Press. pp: 319-338.
- Ruscilla G (2015) Transparency in International Arbitration: Any (Concrete) Need to Codify The Standard? Goettingen Journal of International Law 3: 16.
- Dolzer R, Schreuer C (2008) Principles of International Investment Law. Oxford University Press.
- Delaney J, Magraw DB (2008) Procedural Transparency. The Oxford Handbook of International Investment Law. Oxford University Press.
- Sornarajah M (2010) The International Law on Foreign Investment. Cambridge University Press.
- Vinuales JE (2007) Amicus Intervention in Investor-State Arbitration. Dispute Resolution Journal 72: 74.
- Ishikawa T (2010) Third Party Participation in Investment Treaty Arbitration. International Comparative Law Quarterly 59: 373.
- Schreuer CH (2001) The ICSID Convention: A Commentary. Cambridge University Press.
- Bastin L (2012) The Amicus Curiae in Investor-State Arbitration. Cambridge Journal of International and Comparative Law 3: 208-234.
- Schliemann C (2013) 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/10/151. The Law and Practice of International Courts and Tribunals. BRILL 12: 366-367.
- Kawharu A (2010) Participation of Non-governmental Organizations in Investment Arbitration as Amici Curiae. The Backlash Against Investment Arbitration: Perceptions and Reality. Kluwer International. pp: 275-296.
- Maupin JA (2013) Transparency in International Investment Law: The Good, the Bad, and the Murky. Transparency in International Law. Cambridge University Press.
- Levine E (2011) Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation. Berkeley Journal of International Law 29: 200-217.
- Yotova R (2013) The new EU competence in FDI and intra-EU investment treaties: does the emperor have new clothes? Investment Law within International Law: Integrationist Perspectives. Cambridge University Press. pp: 407-410.
- Mourre A (2006) Are amici curiae the proper response to the public's concern on transparency in investment arbitration? The Law and Practice of International Courts and Tribunals.
- Jack JC (2006) Transparency in the Resolution of Investor-State Disputes- Adoption, Adaptation, and NAFTA Leadership. Kansas Law Review 54: 1366.
- VanDuzer JA (2007) Enhancing the Procedural Legitimacy of Investor-State Arbitration through Transparency and Amicus Curiae Participation. McGill Law Journal 52: 681-710.
- Knahr C (2007) Transparency, Third Party Participation and Access to Documents in International Investment Arbitration. Arbitration International. Oxford University Press 23: 327-340.
- Newcombe A, Lemaire A (2001) Should Amici Curiae Participate in Investment Treaty Arbitrations. Vindobona Journal of International Commercial Law & Arbitration 22: 24.
- Hirsch M (2008) Interactions between Investment and Non-investment Obligations. The Oxford Handbook of International Investment Law. Oxford University Press. p. 156.
- Vinuales JE, Grisel F (2010) Amicus Intervention in Investor- State Arbitration: A Contemporary Reappraisal. Handbook on International Arbitration and ADR. JurisNet.
- Ragni C (2014) Role of Amicus Curiae in Investment Disputes: Striking a Balance Between Confidentiality and Broader Policy Considerations, Foreign Investment, International Law and Common Concerns.
- Dumberry P, Labelle-Eastaugh E (2011) Non-State Actors in International Investment Law: The Legal Personality of Corporations and NGOs in the Context of Investor-State Arbitration, Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law.
- Caliskan Y (2011) Dispute Settlement in International Investment Law, Implementing International Economic Law: Through Dispute Settlement Mechanisms. Martinus Nijhoff 148: 123-186.
- OECD (2005) International Investment Law: A Changing Landscape a Companion Volume to International Investment Perspectives.
- Brabandere ED (2014) Investment Treaty Arbitration as Public International Law. Cambridge University Press.
- Happ R (2013) ICSID Rules. Institutional Arbitration.
- Gomez KF (2012) Rethinking The Role of Amicus Curiae in International Investment Arbitration: How To Draw The Line Favorably For The Public Interest. Fordham International Law Journal 35: 534.
- Chazournes LBD, Baruti R (2015) Transparency in Investor-State Arbitration: An Incremental Approach. Bahrain Chamber for Dispute Resolution International Arbitration Review 2: 70-71.
- Croft C, Kee C, Waincymer J (2013) A Guide to the UNCITRAL Arbitration Rules. Cambridge University Press.
- Levander S (2014) Resolving "Dynamic Interpretation": An Empirical Analysis of The UNCITRAL Rules on Transparency. Columbia Journal of Transnational Law 52: 506.
- Rubins N (2006) Opening the Investment Arbitration Process: At What Cost, for What Benefit? Transnational Dispute Management 3: 8.
- Blackaby N, Richard C (2010) Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration? The Backlash against Investment Arbitration: Perceptions and Reality. Kluwer. pp: 253-274.
- Ishikawa T (2009) NGO Participation in Investment Treaty Arbitration, Connected Accountabilities: Environmental Justice & Global Citizenship. Inter-Disciplinary 101: 114.
- Buckley RP, Blyschak P (2007) Guarding the Open Door: Non-Party Participation Before the International Centre for Settlement of Investment Disputes. University of New South Wales Faculty of Law Research Series.

Citation: Saravanan A, Subramanian SR (2016) The Participation of *Amicus Curiae* in Investment Treaty Arbitration. J Civil Legal Sci 5: 201. doi:10.4172/2169-0170.1000201

### OMICS International: Publication Benefits & Features

#### Unique features:

- Increased global visibility of articles through worldwide distribution and indexing
- Showcasing recent research output in a timely and updated manner
- Special issues on the current trends of scientific research

#### Special features:

- 700+ Open Access Journals
- 50,000+ editorial team
- Rapid review process
- Quality and quick editorial, review and publication processing
- Indexing at major indexing services
- Sharing Option: Social Networking Enabled
- Authors, Reviewers and Editors rewarded with online Scientific Credits
- Better discount for your subsequent articles

Submit your manuscript at: <http://www.omicsonline.org/submit>