

# Guide for Potential *Amici* in International Investment Arbitration

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INTERNATIONAL  
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PROGRAM



# GUIDE FOR POTENTIAL *AMICI* IN INTERNATIONAL INVESTMENT ARBITRATION

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**Authors and Researchers:**

Benjamin Miller, Jennifer Liu, Ramin Wright, Jenny Yoo

**Editors:**

Renu Mandhane, Marcos Orellana, David Scheiderman, Carmen Cheung

**Design:**

Meghan D'Mello

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## A. INTRODUCTION

### A.1. Who should use this guide?

This guide is aimed at non-governmental organizations (NGOs) who are concerned that a dispute before the International Centre for Settlement of Investment Disputes (ICSID) may have an impact on human rights, labor rights, the environment or any other public interest, and that these potential impacts will not be adequately addressed or taken into account by the ICSID Tribunal hearing a dispute.

Specifically, this guide provides an introduction to the process of intervening as a friend of the court, or *amicus curiae*, in ICSID proceedings. Section B of this guide provides a general introduction to ICSID and places it in the context of international investment law more broadly. Section C provides an overview of how investment arbitration implicates human rights. Section D introduces the *amicus curiae* and explains how this procedural tool can be used to pursue public interest objectives in ICSID proceedings. Section E, “Lessons Learned and Best Practices,” looks at the experience of past *amici curiae* and proposes a framework for maximizing the effectiveness of an *amicus curiae* application and submission. Along the way, there will be boxed case studies that demonstrate how a given principle or concept has been applied in a specific case. Finally, the appendices provide further information on ICSID and its jurisprudence.

### A.2. Disclaimer

The information provided here is not legal advice or legal assistance, and the International Human Rights Program (IHRP) at the University of Toronto Faculty of Law cannot provide such advice or assistance. This guide was prepared by law students, not lawyers or students-at-law. It is not exhaustive or updated on a regular basis. The IHRP and the Center for International Environmental Law (CIEL) are not affiliated with ICSID and do not, in producing this guide, endorse engagement with ICSID. ICSID did not assist in developing this guide nor was it requested to endorse its contents. The purpose of this guide is to provide information to NGOs in an accessible format so that they can make informed decisions regarding whether participation in this process is appropriate for them.

### A.3. What is international investment arbitration?

ICSID is one of a number of institutions that attempt to resolve disputes between investors and states. ICSID is intended to facilitate the resolution of disputes concerning governmental conduct that affects investments or investors without the necessity of having recourse to national courts. This is an attractive prospect to some parties that wish to avoid the perception of a “home court advantage” in favor of the party in whose domestic court the dispute is launched. Also, arbitration can, in some cases, be less costly than litigation, although ICSID arbitration does turn out to be quite costly.

#### A.3.1. Distinguishing international commercial arbitration from international investment arbitration

There are two major types of international arbitration that are intended to resolve economic disputes: (a) international commercial arbitration, which aims to resolve disputes over contracts that govern economic activity between parties engaged in commerce, and (b) international investment arbitration, which aims to resolve disputes concerning investments and generally arising from international investment agreements (IIAs). As an example of international commercial arbitration, imagine that Company A, based in Canada, has a contract to supply 50,000 tons of grain to Company B, a pasta firm based in Italy. The companies might agree to put a clause in the contract providing that disputes will be handled at the International Chamber of Commerce, rather than in the courts of Italy or Canada.

International investment arbitration, by contrast, generally arises out of agreements between states. The most common agreement of this sort is the bilateral investment treaty, or BIT. These treaties typically provide protections to investors and their investments, such as the obligation to provide fair and equitable treatment. Where two countries are signatories to a BIT, a company from the first country may bring proceedings against the second country alleging that the treaty has been breached. ICSID provides, among other things, dispute settlement facilities for the resolution of international investment disputes arising out of BITs and similar agreements.

### A.3.II. Distinguishing institutional arbitration from ad hoc arbitration

The field of international arbitration may also be divided into institutional arbitration, where parties refer their dispute to an arbitral organization, and ad-hoc arbitration, where parties arrange for arbitration themselves on a one-time basis. Different arbitral institutions provide different services, but these services typically include appointment of an arbitrator where parties cannot agree, and supervision of proceedings.<sup>1</sup> Ad hoc arbitration, by contrast, is carried out entirely by the parties. The parties have discretion to create their own procedural rules to govern the arbitration. This discretion extends to the method of selecting arbitrators, to the size and structure of the tribunal, and to the functioning of this tribunal once constituted. Despite this broad freedom, ad hoc arbitration agreements usually rely on a set of ready-to-use rules, such as the 2010 UN Commission on International Trade Law (UNCITRAL) Arbitration Rules<sup>2</sup> and the UNCITRAL Rules on the Transparency in Treaty-based Investor-State Arbitration, and rarely design new arbitration systems from the ground up. However, the parties may, in theory, agree to whatever rules suit them.

### A.4. Sources of international investment law

When an international investment dispute arises, how does an arbitral tribunal, ICSID or otherwise, make its decision? The sources of international investment law include IIAs such as BITs and investment chapters of free trade agreements, international customary law (used as evidence of a general practice accepted as law), general principles of law, judicial decisions and scholarly writings.<sup>3</sup>

In the context of investor-state dispute settlement, IIAs set out the rules that constrain the behavior of host states<sup>4</sup> with respect to foreign investors. For example, the behavior of the Albanian government with respect to an Austrian investor in Albania would be constrained by the Austria-Albania Bilateral Investment Agreement.<sup>5</sup> When applying these agreements, ICSID tribunals will also make reference to the Convention which established the Centre: The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, (more commonly called the ICSID Convention) and its rules and regulations.

Although IIAs act as the main source of rules governing the behavior of investment parties, arbitral tribunals often turn to other sources of international investment law in interpreting these agreements. International customary law is particularly relevant where the IIA refers explicitly to this type of law and where treaty provisions are subject to competing interpretations.<sup>6</sup> General principles of law come into play when “no applicable treaty provision or international customary rule exist” and include legal principles such as good faith and unjust enrichment.<sup>7</sup>

International investment law and human rights law, while distinct in their purpose and processes, nonetheless have significant similarities. As such, the arbitral tribunal is not necessarily limited to solely applying the rules and principles of international investment law but rather can refer to international human rights legislation and principles when interpreting investment rules and treaty regulations.<sup>8</sup> There are three primary ways in which human rights obligations can be brought into the tribunal’s analysis:

1. where the IIA itself makes reference to the applicability of international law,<sup>9</sup>
2. where the law applicable to a state contract, normally that of the host state, “establishes a constitutional link between public international law and the municipal legal order”; and

<sup>1</sup> See, for example, the services provided by the International Court of Arbitration at the International Chamber of Commerce, online: International Chamber of Commerce <<http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-arbitration-procedure/>>.

<sup>2</sup> See the UNCITRAL website for more information, online: United Nations Commission on International Trade Law <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1976Arbitration\\_rules.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html)>.

<sup>3</sup> Moshe Hirsch, *Sources of International Investment Law* (Jerusalem: International Law Forum of the Hebrew University of Jerusalem Law Faculty, 2011), online: Social Science Research Network <[papers.ssrn.com](http://papers.ssrn.com)> [Hirsch].

<sup>4</sup> When a company from Country A invests in Country B, B is the host state.

<sup>5</sup> “Total Number of Bilateral Investment Agreements Concluded, 1 June 2012” presented at the United Nations Conference on Trade and Development (2012), online: United Nations Conference on Trade and Development <<http://unctad.org>>.

<sup>6</sup> Hirsch, *supra* note 3 at 8-9.

<sup>7</sup> *Ibid* at 13 and 15.

<sup>8</sup> Pierre-Marie Dupuy, “Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law” in *Human Rights in International Investment Law and Arbitration* (New York: Oxford University Press, 2009) [Dupuy].

<sup>9</sup> See e.g. Article 1131 of the NAFTA as referenced in Dupuy, *supra* note 8 at 56: [the tribunal] “shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law” [emphasis added].

3. where “an issue of blatant violation of human rights [is] deemed to be incompatible with ‘transnational public policy’”.<sup>10</sup>

With respect to item (2) above, what does it mean for there to be “a constitutional link between public international law and the municipal legal order”? This refers to some sort of mechanism in the state’s domestic law – typically through its constitution – which explicitly links the international and domestic law. For example, the state’s constitution might contain an option in favor of “monism”, meaning that domestic law and public international law are seen as forming a unity.<sup>11</sup> As such, it is not only legislation made by the state itself which applies in disputes but also international rules that the state has accepted.

An example of monism can be found in the constitution of The Netherlands. Article 93 states that “[p]rovisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published”.<sup>12</sup> This means that after the Netherlands has signed on to a treaty, that treaty becomes binding in the domestic sphere as well. Moreover, Article 94 states that “[s]tatutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions”.<sup>13</sup> This means that international law is given primacy in situations where the application of domestic law conflicts with treaty provisions or resolutions by international institutions. Constitutional provisions such as these provide an opportunity for the incorporation of international human rights law into investment arbitration.

With respect to item (3), it is important to have an understanding of what is meant by transnational public policy. It involves “the identification of principles that are commonly recognized by political and legal systems around the world”.<sup>14</sup> International human rights legislation and principles establish the content of some of these commonly recognized principles. When the case before an international investment tribunal involves a blatant violation of human rights, human rights norms can be used to establish how the issues of the arbitration relate to transnational public policy.

There is no strict system of precedent in ICSID arbitration. That is, tribunals are not required to follow the example of previous arbitration awards.<sup>15</sup> This is partly a consequence of the fact that each investment treaty is unique; however, even when interpreting the same treaty, tribunals are not bound by prior cases.<sup>16</sup> Nevertheless, these tribunals can and do look to existing jurisprudence for guidance.<sup>17</sup> While ICSID tribunals tend to confine themselves to past decisions of ICSID tribunals, they may also look to decisions from tribunals established under other sets of rules, such as the UNCITRAL rules. Scholarly writings are also commonly used by investment arbitral tribunals in their decision-making process. Arbitrators may use publications in interpreting treaty provisions and clarifying the scope of rules of international customary law.<sup>18</sup>

## CASE STUDY

### *Tecnicas Medioambientales Tecmed SA v The United Mexican States*<sup>19</sup>

This claim was brought in relation to a Mexican regulation pertaining to environmental protection which resulted in a refusal to renew the investor’s landfill operating permit. The investor sought damages and restitution in kind through the granting of permits enabling it to operate the landfill until the end of its useful life. In making its decision, the arbitral tribunal used a form of a proportionality test, weighing the harm to the investor as a result of the regulation and the severity of the environmental and public health risks. In establishing this methodology, the arbitrators explicitly referenced decisions made by the European Court of Human Rights. Although the tribunal decided in favor of the investor, this is an example of how arbitral tribunals have used international human rights principles and case law in their process of judicial interpretation.

<sup>10</sup> Dupuy, *supra* note 8 at 56, 59 and 60.

<sup>11</sup> Dupuy, *supra* note 8 at 59.

<sup>12</sup> *The Constitution of the Kingdom of the Netherlands 2002*, 2002, c 5 at Article 93.

<sup>13</sup> *Ibid* at Article 94.

<sup>14</sup> Martin Hunter and Gui Conde e Silva, “Transnational Public Policy and its Application in Investment Arbitrations”, 4:3 *The Journal of World Investment* 367 at 367.

<sup>15</sup> Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (New York: Oxford University Press, 2008) at 3.84.

<sup>16</sup> *Ibid* at 3.85.

<sup>17</sup> *Ibid* at 3.83.

<sup>18</sup> Hirsch, *supra* note 3 at 22.

<sup>19</sup> *Tecnicas Medioambientales Tecmed SA v The United Mexican States* (2003), Case No ARB (AF)/00/2 (International Centre for the Settlement of Investment Disputes), all documents online: Investment Treaty Arbitration <<http://www.italaw.com>> [Tecmed].

## B. THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

### B.1. What is ICSID and how does it operate?

ICSID is one of the five institutions of the World Group, and it is dedicated to the resolution of international investment disputes. ICSID specializes in resolving disputes between governments and companies, or other private actors.

#### B.1.I. History of ICSID

The ICSID Convention was one of several mid-twentieth century initiatives aimed at promoting economic development in the so-called Third World. These initiatives came in response to the destruction and economic instability left following the end of World War II and the subsequent decolonization of much of the non-European world.<sup>20</sup> A number of organizations and scholars believed that the solution to this situation was an increase in private international investment in developing countries. This prompted a number of different individuals and organizations to propose ways to encourage foreign investment by reducing political risks associated with it. Among these organizations was the World Bank, which, after finding a consensus on standards of investment protection too difficult to reach, settled on a dispute settlement approach to reduce the risk of foreign investment. This approach resulted in the drafting of the ICSID Convention, which created ICSID on October 14, 1966.

#### B.1.II. Mandate and jurisdiction

ICSID exists to promote private international investment by settling disputes that arise out of investment agreements such as BITs. In order for the Centre to hear a dispute, it must be legal in nature and must arise directly from an investment. A dispute falls within the jurisdiction of the Centre if:

1. The state party to the dispute is a contracting state to the ICSID Convention<sup>21</sup>
2. The non-state party is a national of a contracting state<sup>22</sup>
3. Both parties have consented to the jurisdiction of the Centre.<sup>23</sup> In most cases, this consent is contained in an investment agreement (usually a BIT) between the host state (the country where the investor has invested) and the home state (the country of which the investor is a national).

If only one party to the dispute is an ICSID contracting state, or is the national of an ICSID contracting state, then the Additional Facility Arbitration Rules may apply.<sup>24</sup> In such situations, the provisions of the ICSID Convention do not apply.<sup>25</sup>

#### B.1.III. Structure<sup>26</sup>

While ICSID tribunals are established to adjudicate specific legal disputes, the Centre itself is a permanent institution composed of an Administrative Council and a Secretariat.

The Administrative Council, ICSID's governing body, is made up of one member from each contracting state, with the President of the World Bank acting ex officio as Chairman. Its responsibilities include the election of the Secretary-General and the Deputy Secretary-General, oversight of ICSID rules and procedures, adoption of the ICSID budget, and approval of the annual ICSID operations report.

The Secretariat, led by the Secretary-General, handles the day-to-day business of the Centre: registering proceedings, providing institutional support and maintaining ICSID's panel of preferred arbitrators and conciliators.

<sup>20</sup> Antonio R Parra, *The History of ICSID* (New York: Oxford University Press, 2012) at 13.

<sup>21</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States, entered into force October 14, 1966, online: <<https://icsid.worldbank.org>>, Article 25(1) [ICSID Convention] "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State..."

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

<sup>23</sup> *Ibid.* "... which the parties to the dispute consent in writing to submit to the Centre."

<sup>24</sup> ICSID, *Additional Facility Rules* (April 2006), online: The International Centre for the Settlement of Investment Disputes <<https://icsid.worldbank.org>>, Article 2(a).

<sup>25</sup> *Ibid.*, Article 3.

<sup>26</sup> ICSID, *Organizational Structure of ICSID* (retrieved 23 January 2013), online: The International Centre for the Settlement of Investment Disputes <<https://icsid.worldbank.org>>.

ICSID does not perform arbitral functions. When a request for arbitration is made, unless the Secretary General finds that the dispute is “manifestly outside the jurisdiction of the Centre”,<sup>27</sup> a tribunal will be constituted. The Convention allows parties wide discretion as to how to constitute this tribunal. If the parties agree, the tribunal may consist of “a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree.” In cases where the disputing parties cannot agree on how to constitute a tribunal, Article 37(2)(b) of the Convention applies. In such cases, each disputing party appoints one tribunal arbitrator, leaving a third to be appointed by agreement of the parties.<sup>28</sup> If, after 90 days, the parties cannot agree on this third arbitrator, either party may request that the ICSID Chairman make an appointment<sup>29</sup> from ICSID’s Panel of Arbitrators.<sup>30</sup>

#### B.1.IV Powers of the tribunals

The ICSID’s arbitral tribunals have the power to make binding and enforceable awards of monetary damages.<sup>31</sup> They also have the power to take “provisional measures”<sup>32</sup> to preserve the rights of the parties. In particular, tribunals have the power to determine the limits of their own competence<sup>33</sup> and marshal evidence.<sup>34</sup> Most importantly for the purposes of this guide, ICSID tribunals have the discretion to allow a non-disputing party (that is, someone other than the company or state involved in the dispute) to submit a written argument.<sup>35</sup> If the disputing parties agree, the Tribunal also has the power to allow a non-disputing party to attend proceedings.<sup>36</sup>

<sup>27</sup> ICSID Convention, *supra* note 26, Art 36(3).

<sup>28</sup> *Ibid*, art 36(7)(b).

<sup>29</sup> *Ibid*, art 38.

<sup>30</sup> *Ibid*, art 40.

<sup>31</sup> *Ibid*, art 54(1).

<sup>32</sup> *Ibid*, art 47.

<sup>33</sup> *Ibid*, art 41.

<sup>34</sup> *Ibid*, art 43.

<sup>35</sup> ICSID, *Rules of Procedure for Arbitration Proceedings (Arbitration Rules)*, r 37(2), online: International Centre for the Settlement of Investment Disputes <<https://icsid.worldbank.org>> [Arbitration Rules].

<sup>36</sup> *Ibid*, Rule 32(2).



## C. HOW INVESTMENT ARBITRATION IMPLICATES HUMAN RIGHTS

### C.1. Relevance

Human rights often will be engaged in the context of investment disputes, especially when disputes engage issues like equitable land reform, aboriginal rights, access to water or access to a clean environment.<sup>37</sup> We would expect investment treaties and investment arbitrators to pay attention to such concerns. Yet it turns out that human rights issues have difficulty gaining traction within international investment law.

Emblematic is the ruling in *Biloune v Ghana*.<sup>38</sup> The dispute concerned the unusual circumstance of an investor claiming an independent right to damages under treaty for being arbitrarily detained and deported, resulting in a denial of “fundamental human rights.” The arbitration tribunal passed on the opportunity to assess this aspect of the claim. The tribunal reasoned that it was not “competent to pass upon every type of departure from the minimum standard to which foreign nationals are entitled, or that this Tribunal is authorized to deal with allegations of violations of fundamental human rights.”<sup>39</sup>

The dominant understanding is well articulated by Clara Reiner and Christoph Schreuer: references to human rights in investment arbitration are “sparse and infrequent” and, in the text of an investment treaty, “highly unlikely.”<sup>40</sup> In “practice,” Bruno Simma observes, “human rights-based claims have not overrun the dockets of foreign investment tribunals.”<sup>41</sup> This is consistent with the observations of others, including the United Nations Conference on Trade and Development (UNCTAD).<sup>42</sup>

It is inaccurate to conclude that human rights have no presence in international investment disputes, however.<sup>43</sup> It is more likely the case that their presence has not been fully acknowledged or well-articulated. Occasionally, for instance, such claims get intermingled with national constitutional claims or are framed as claims about a “sovereign right to regulate.”<sup>44</sup>

### C.2. Investor grounds

At a very basic level, it has to be acknowledged that a form of property rights is engaged in almost every investment dispute.<sup>45</sup> This is precisely how investment claims are often described.<sup>46</sup> Yet, the *Biloune* case aside, investors have exhibited little interest in framing their claims in human rights terms.<sup>47</sup> This might be explained by the lack of clarity in international human rights instruments or the fact that there is no expectation that investors do so. Nor is there much incentive: investor rights, after all, are given sufficiently wide interpretation by tribunals. Indeed, some have concluded that outcomes in investment arbitration are entirely in sync with international human rights obligations.<sup>48</sup>

Foreign investors, furthermore, take on no direct obligations under an investment treaty connected to human rights. When they are implicated, typically this will be under soft law instruments that refer to principles and voluntary measures such as the UN’s Global Compact.<sup>49</sup> National constitutional obligations may apply to private actors in some contexts, but these obligations appear to have little or no place in investment treaty arbitration. The regime of investment law, after all, is meant to remove the resolution of disputes from national courts.

<sup>37</sup> Luke Eric Peterson, *Human Rights and Bilateral Investment Treaties: Mapping the Role of Human Rights Law Within Investor-State Arbitration* (Montreal: International Centre for Human Rights and Democratic Development, 2009) online: <<http://publications.gc.ca>> [Peterson].

<sup>38</sup> *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana* (1989), Award on Jurisdiction and Liability, 95 ILR 184.

<sup>39</sup> *Ibid* at 203.

<sup>40</sup> C Reiner and C Schreuer, “Human Rights and International Investment Arbitration” in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni, eds, *Human Rights in International Investment Law and Arbitration* [Human Rights in International Investment Law and Arbitration] (New York: Oxford University Press, 2009) [Reiner and Schreuer] at 82.

<sup>41</sup> Bruno Simma, “Foreign Investment Arbitration: A Place for Human Rights?” (2011) 60 ICLQ 573 [Simma] at 578.

<sup>42</sup> United Nations Conference on Trade and Development, “Selected Recent Developments in IIA Arbitration and Human Rights” (2009) International Investment Agreement Monitor No. 2.

<sup>43</sup> Susan L Karamanian, “The relationship between international trade law and international human rights law” in Erika de Wet and Jure Vidmar, eds, *Hierarchy in international law: the place of human rights* (New York: Oxford University Press, 2012) 272 [Karamanian].

<sup>44</sup> J.E. Alvarez, “The Public International Law Regime Governing International Investment” (2011) 344 Recueil des Cours 193 at 459.

<sup>45</sup> Reiner and Schreuer, *supra* note 40 at 83.

<sup>46</sup> For an example, see Zachary Douglas, *The International Law of Investment Claims* (Cambridge: Cambridge University Press, 2009) at 52.

<sup>47</sup> *Ibid* at 88.

<sup>48</sup> Timothy G. Nelson, “Human Rights Law and BIT Protection: Areas of Convergence” (2011) 12 J World Investment & Trade 27; James D Fry, “International Human Rights Law in Investment Arbitration: Evidence of International Law’s Unity” (2007) 18 Duke J Comp & Int’l L 77 [Fry]; Charles H Brower II, “Structure, Legitimacy, and NAFTA’s Investment Chapter” (2003) 36 Vand J Transnat’l L 37 [Brower II].

<sup>49</sup> United Nations, Economic and Social Council, Commission on Human Rights, *Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, E/CN.4/2006/97 (Special Representative: John Gerald Ruggie) (22 February 2006).

### C.3. State grounds

Host states may find it to their advantage to invoke international human rights obligations as a means of fending off investor claims, but rarely do so.<sup>50</sup> There are impediments even to these sorts of arguments arising. States may not want to admit that they initially were implicated in projects that had negative human rights consequences.<sup>51</sup> Nor might states wish to admit before an international tribunal that, if they had not taken action, they would not be living up to international minimum standards. It looks, moreover, like states have not very well articulated human rights claims before investment tribunals.

#### CASE STUDY

##### *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic*<sup>52 53</sup>

This claim was one of more than 40 disputes launched against Argentina as a result of measures taken in response to the economic meltdown of 2000–01. The impugned measures included delinking the Argentinian peso to the US dollar (pesification) and de-indexing of rates to the US purchasing price index. Argentina sought to justify the taking of such measures on the basis that it was satisfying the “right to water”. The tribunal, however, declined to find that the right to water “somehow trumps” obligations under the BIT, nor did it “implicitly give Argentina the authority to take actions in disregard of its BIT obligations.” The implication of the tribunal’s reasons is that the state provided no compelling explanation of how the right to water could enter into the interpretation of the Argentine-US BIT.

### C.4. The text

BITs usually will not refer to international or national human rights obligations, other than obliquely to investor property rights and to equality rights. Obligations, moreover, are owed only to foreign investors and not to nationals who might have an interest in the enforcement of international human rights obligations.<sup>54</sup> BITs signed by the United States and Canada make reference to non-investment obligations like “health” and the “environment” but without acknowledging any linkage to international human rights obligations.

It turns out that the principal means by which human rights will enter into international investment law will be via treaty interpretation. In addition, even if not expressly mentioned in treaty text, human rights norms can enter into tribunal consideration as a matter of “applicable law.” It will be in the course of determining, for instance, whether a measure is “tantamount” to expropriation or amounts to a denial of “fair and equitable treatment” that international human rights obligations may have a point of entry as a relevant source of law under the treaty.<sup>55</sup> The task has been described as finding “windows for the direct application of non-investment international law,” including international human rights law.<sup>56</sup> Others have proposed the rapid adoption of proportionality analysis in respect of all investment disciplines in order that state objectives, including international human rights obligations, are weighed in determining whether a breach of an investment treaty obligation has occurred.<sup>57</sup> There appears to be, in other words, increasing consensus among scholars, at least, that human rights can in these ways have a role to play within the interpretation of BITs.

<sup>50</sup> Anne Van Aaken, “Fragmentation of International Law: The Case of International Investment Law” (2006) 17 *Finnish Yearbook of International Investment Law* 91 [Van Aaken] at 118.

<sup>51</sup> *Ibid* at 89; M Sornarajah, *The international law on foreign investment* (New York: Cambridge University Press, 2010) [Sornarajah] at 228.

<sup>52</sup> *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic* (2007), Order in Response to a Petition by Five Non-Governmental Organizations for Permission to make an *amicus curiae* submission, Case No ARB/03/19 (International Centre for the Settlement of Investment Disputes), online: Investment Treaty Arbitration <<http://www.italaw.com>> [*Suez Petition Response*].

<sup>53</sup> This arbitration generally is referred to below as *Suez v Argentina*. All documents related to this dispute can be found online: Investment Treaty Arbitration <<http://www.italaw.com/cases/1057>>.

<sup>54</sup> Ursula Kriebaum “Privatizing Human Rights: The Interface Between International Investment Protection and Human Rights” in August Reinsch and Ursula Kriebaum, eds, *The Law of International Relations – Liber Amicorum Hanspeter Neuhold* (Netherlands: Eleven International, 2007) 165 [Kriebaum].

<sup>55</sup> J Krommendijk and J Morijn, “‘Proportional’ by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration” in *Human Rights in International Investment Law and Arbitration* (*supra* note 40) 422 [Krommendijk and Morijn].

<sup>56</sup> *Ibid*.

<sup>57</sup> *Ibid*; Benedict Kingsbury and Stephan Schill, “Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law” in Benedict Kingsbury et al, eds, *El Nuevo Derecho Administrativo Global en América Latina: Desafíos Para las Inversiones Extranjeras, La Regulación Nacional y el Financiamiento Para el Desarrollo* (Buenos Aires: RPA, 2009) 221, online: Global Administrative Law Project <[www.iilj.org/GAL/documents/GALBAbook.pdf](http://www.iilj.org/GAL/documents/GALBAbook.pdf)> [Kingsbury and Schill].

The principal disagreement is the degree of intensity with which this will be accomplished. Some expect arbitrators to do no more than to “technically” take “into account” these sorts of “external obligations”<sup>58</sup> or to have human rights norms “fulfill no more than an ancillary role” in treaty interpretation.<sup>59</sup> Others propose a more “systemic integration” between investment law and other international legal obligations.<sup>60</sup> According to some, human rights norms amount to binding legal obligations that are “constitutional” and so temper investment treaty obligations.<sup>61</sup> Bruno Simma declares that an investment tribunal confronted with a human rights matter that “neglected to consider” such norms would be providing “insufficient” reasons and so its decision would be susceptible to annulment under the ICSID Convention.<sup>62</sup>

How have investment tribunals responded to this challenge in practice? Luke Peterson observes that arbitrators generally “have not grappled to the same extent” with claims raised by states or NGOs.<sup>63</sup> Moshe Hirsch, like Peterson, undertakes a qualitative analysis of some of the important cases and concludes that tribunals quite consistently treat international human rights law as not very significant.<sup>64</sup> A review of awards by Reiner and Schreuer indicates tribunals’ “reluctance” to grapple with human rights concerns, preferring to dismiss claims based upon procedural grounds.<sup>65</sup>

### C.5. The Critical Role of the *Amicus*

It is for these reasons critical to the future of international investment law that NGOs seek *amicus* standing to make submissions before investment tribunals. The frequency with which such submissions are made may help to speed up the entry of international human rights norms into the investment treaty context. There is, as mentioned, an increasing openness to considering international human rights, at least on the part of scholars working in the area. There is good reason, nevertheless, to be cautious about this outcome. It may be more realistic to expect resistance, at least in the short term, to this reception of human rights into investment law. We consider the *amicus* submission by a group of five environmental NGOs in *Biwater Gauff v Tanzania*<sup>66</sup> (appended to this report) as a model for intervention. Yet it appears to have had little or no impact on the tribunal’s reasoning. Indeed, the tribunal had earlier issued a ruling regarding the confidentiality of the proceedings that severely hampered the NGOs’ ability to contribute to the tribunal’s resolution of the dispute.<sup>67</sup> The lesson to be drawn from this dispute and others is that there is a lot of work yet to be done to facilitate human rights considerations in the context of investment disputes. It turns out that the *amicus* brief, perhaps, is the primary vehicle to make this happen.

<sup>58</sup> Pierre-Marie Dupuy, “Is There A Role for Human Rights in Investor-State Arbitration and International Economic Adjudication?” in *Human Rights in International Investment Law and Arbitration* (supra note 40) 45 [Dupuy] at 54, 59.

<sup>59</sup> Simma, supra note 41 at 578; see also Marcos A. Orellana, *Health, Safety & Environmental Measures and International Economic Law* (Michigan: ProQuest LLC, 2009), online: ProQuest <www.proquest.com>.

<sup>60</sup> Campbell McLachlan, “The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention” (2005) 54 ICLQ 279 [McLachlan 2005] at 318.

<sup>61</sup> Menno T. Kamminga, “Final Report on the Impact of International Human Rights Law on General International Law” in Menno T. Kamminga and Martin Scheinin, eds., *The Impact of International Human Rights Law on General International Law* (Oxford: Oxford University Press, 2009) 7 at 29.

<sup>62</sup> Simma, supra note 41 at 591.

<sup>63</sup> Peterson, supra note 37 at 9; UNCTAD supra note 42.

<sup>64</sup> Moshe Hirsch, “Investment Tribunals and Human Rights: Divergent Paths” in *Human Rights in International Investment Law and Arbitration* (supra note 40) 97 at 106.

<sup>65</sup> Reiner and Schreuer, supra note 40.

<sup>66</sup> *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* (2008), Case No ARB/05/22 (International Centre for the Settlement of Investment Disputes), all documents online: Investment Treaty Arbitration <<http://www.italaw.com/cases/157>> [*Biwater v Tanzania*].

<sup>67</sup> Fiona Marshall, “The Precarious State of Sunshine: Case Comment on the Procedural Orders in the *Biwater Gauff (Tanzania) Ltd. V. Tanzania Investor-State Arbitration*” (2007) 3 McGill International Journal of Sustainable Development Law and Policy 181 at 185.

### D.1. What is an *amicus curiae*?

*Amici curiae*, or “friends of the court,” participate in dispute resolution proceedings as interested third parties. In the context of international investment arbitration, NGOs have most traditionally sought *amicus* status; however, increasingly diverse groups are seeking access to proceedings as *amicus curiae*. For example, the tribunal in *Glamis Gold Ltd. v United States of America*, governed by the UNCITRAL Arbitration Rules, accepted written submissions from the Quechan Indian Nation.

### D.2. *Amici curiae* in ICSID proceedings

Participation as *amicus curiae* in an arbitration proceeding is not equivalent to participation as a direct party: that is, *amicus curiae* submissions are limited to the matters at issue in the dispute (i.e., they are not able to introduce new issues) and must represent interests different from that of the parties. As such, the role of *amicus curiae* is centered on assisting a tribunal by providing expertise, perspectives and arguments that the parties themselves may not present.

The ability of investment tribunals to hear *amicus curiae* submissions can be found in both the 2006 amended ICSID Rules of Arbitration as well as in some investment treaties.<sup>68</sup>

### D.3. The goal of *amicus* intervention for NGOs

One of the key goals of *amicus* intervention for NGOs has been to ensure that tribunal decisions take into account human rights law obligations and/or take into account the perspective of rights holders impacted by the decision.

International investment arbitration, by definition, implicates the public interest, and tribunals are often tasked with assessing state execution of state duties.<sup>69</sup> Given the public impact of disputes, tensions emerge where the arbitration proceedings are conducted behind closed doors.<sup>70</sup> For example, and at its most basic, arbitral outcomes and monetary awards adverse to a state party will most likely be paid through the use of public tax revenues.<sup>71</sup>

In light of the impact that investment arbitration has on stakeholders beyond the two direct parties to the dispute, there is a critical space to be filled by NGO *amici*. NGOs can highlight the public interest implications in disputes that may have an impact on international human rights such as health, indigenous rights and the right to a healthy environment. Effective third-party participation can increase the transparency and openness of international investment arbitration and international economic dispute settlement.<sup>72</sup>

### D.4. Acting as *amicus*

Non-disputing parties in ICSID arbitration are frequently referred to as having *amicus curiae* “status,” but, as the tribunal in *Biwater v Tanzania* made clear, rather than providing generally for such “status,” “the ICSID Arbitration Rules expressly regulate two specific – and carefully delimited – types of participation by non-parties, namely: (a) the filing of a written submission (Rule 37(2)) and (b) the attendance at hearings (Rule 32(2)).”<sup>73</sup> Therefore, participating in ICSID proceedings as *amicus curiae* involves two steps: first, the party seeking to participate as *amicus* must petition the Tribunal for leave to intervene as a “non-disputing party”; and second, if the Tribunal grants the leave application, the *amicus* may file written submissions. Rule 37(2) of ICSID’s Rules and Regulations governs both steps of the process.

<sup>68</sup> For an example, see Article 20.11 of The Dominican Republic–Central America–United States Free Trade Agreement, which specifically provides for third party participation (online: Office of the United States Trade Representative <[http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset\\_upload\\_file85\\_3940.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file85_3940.pdf)>).

<sup>69</sup> Eric De Brabandere, “NGOs and the ‘Public Interest’: The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes” (2011) 12 Chi J Int’l L 85 [De Brabandere] at 102.

<sup>70</sup> *Ibid* at 109.

<sup>71</sup> Eugenia Levine, “*Amicus Curiae* in International Investment Arbitration: Implications of an Increase in Third-Party Participation” (2011) 29 Berkeley J Int’l L 200 at 206.

<sup>72</sup> De Brabandere, *supra* note 69 at 102.

<sup>73</sup> *Biwater v Tanzania*, *supra* note 66, Procedural Order No 5 at para 46.

#### D.4.I. Rule 37 and criteria for admitting *amici curiae*

Procedurally, NGOs interested in participating in ICSID arbitral proceedings as *amicus* must first petition the Tribunal for leave to make a written submission. (An application to participate as an *amicus curiae* is also known as a “petition”, and applicants are referred to as “petitioners”. In the discussion here, we will use these terms interchangeably.) The Tribunal will then consider factors set out in Rule 37(2) in determining whether to grant leave to intervene.

It is important to note that Rule 37(2) only allows petitions for written *amicus* submissions. As well, unless the *amicus* submission is jointly written, the Tribunal’s decision to accept one *amicus* submission in a proceeding does not necessarily mean that other *amici curiae* are automatically allowed to participate.

Generally, the petition must persuade the Tribunal that the submission will address a subject matter “within the scope of the dispute”.<sup>74</sup> An *amicus curiae* petition often includes a brief description of the party applying for *amicus status*, background information regarding the dispute, the *amicus*’ interest in the dispute, and the requests they would like the Tribunal to grant. These requests may include substantive issues the petitioners would like the Tribunal to consider, as well as procedural requests such as attending oral hearings under Rule 32. Finally, petitions should strategically cite previous ICSID decisions to show that the Tribunal has the power to grant *amicus* status to the petitioners under the ICSID rules.

Ultimately, the petition to intervene must address the factors set out in Rule 37(2) (a) through (c): assistance to the tribunal, relevance to the dispute and significant interest.<sup>75</sup> These factors are discussed in detail below. The Arbitration Rules provide that the Tribunal will consider these factors “among other things,” but does not explicitly say what these “other things” are.<sup>76</sup> The final paragraph of Rule 37(2) expresses a concern that the *amicus curiae* submissions not “disrupt the proceeding or unduly burden or unfairly prejudice either party,” which suggests that the “other things” referred to earlier in 37(2) can also relate to fairness to the parties. The jurisprudence reinforces this suggestion.<sup>77</sup>

#### D.4.II. Consultation with the disputing parties

Prior to examining whether or not an *amicus* submission fulfills the requirements as set out in Rule 37(2)(a) through (c), the Tribunal must consult both disputing parties involved in the proceeding. Rule 37(2) provides disputing parties with the opportunity to comment on a proposed *amicus curiae*’s request for leave to file a written submission; however, neither party has a veto right with respect to the granting of such an application. For example, *amicus* requests for leave to file submissions were granted in both the cases of *Biwater v Tanzania*<sup>78</sup> as well as *Suez v Argentina*,<sup>79</sup> in spite of objections by the investor.<sup>80</sup>

#### D.4.III. Assistance to the Tribunal

Rule 37(2)(a) states that the purpose of *amicus* submissions is to assist the Tribunal to determine a factual or legal issue “related to the proceeding”. The petition must impart “a perspective, particular knowledge or insight” to the Tribunal that is “different from that of the disputing parties”.

In short, the applicant for *amicus* status must persuade the Tribunal that its submissions are sufficiently “related to the proceeding” and that allowing participation from a non-disputing party is not only appropriate in the circumstances but will also be helpful. The petitioner should also present itself as a suitable participant in the proceedings by demonstrating that it has expertise, experience and independence in the scope of the dispute. This can be accomplished through a brief description of the petitioner’s organization, its history, and its objectives.

<sup>74</sup> *Arbitration Rules*, *supra* note 35 at r 37(2)(b).

<sup>75</sup> *Ibid*, r 37(2)(a-c).

<sup>76</sup> *Ibid*, r 37(2).

<sup>77</sup> *Suez v Argentina*, *supra* note 53; *Biwater v Tanzania*, *supra* note 66, Procedural Order No 5; *Border Timbers Limited, Border Timbers International (Private) Limited*, Case No ARB/10/15 and *Hangani Development Co (Private) Limited v Republic of Zimbabwe*, Case No ARB/10/25 (2012), Procedural Order No 2 (International Centre for Settlement of Investment Disputes), online: <[www.italaw.com](http://www.italaw.com)> [*Border Timbers and Hangani*].

<sup>78</sup> *Biwater Gauff v Tanzania*, *supra* note 66.

<sup>79</sup> See *Suez* Petition Response, *supra* note 52.

<sup>80</sup> Andrew de Lotbiniere McDougall and Ank Santens, “ICSID Tribunals Apply New Rules on Amicus Curiae” (2007) 22 Mealey’s International Arbitration Report at 9.



#### D.4.IV Within scope of dispute

The petition for leave to intervene as a non-disputing party must address a “matter within the scope of the dispute.”<sup>81</sup> It is difficult to predict how tribunals will apply this requirement. In *Biwater v Tanzania*, the Claimant argued for a strict definition of the “scope of the dispute,” seemingly claiming that the Tribunal must be directly considering a human rights or environmental issue in order for an *amicus* submission to be considered “within the scope of the dispute.”<sup>82</sup> However, the Tribunal rejected this interpretation, accepting as sufficient the petitioners’ assurance that their argument would be relevant and reserving for itself the right to disregard any part of the submission that was not relevant.<sup>83</sup>

#### D.4.V. Interest

Closely related to the scope of the dispute is the third prong of Rule 37(2), which requires the non-disputing party to show a “significant interest” in the proceeding. This factor is often addressed in the brief description of each petitioner, as set out in the petition for *amicus* status. In framing its interest, the petitioner should ensure that its interest is not tangential to the dispute. Importantly, “significant interest” does not require a financial interest in the proceedings.

#### D.4.VI. General provisions for procedural fairness

Because of the wording in Rule 37(2), the requirements outlined in (a) through (c) are not exhaustive. This means the Tribunal can look to other factors in deciding whether or not to allow an *amicus* intervention. For example, the Tribunal will assess the impact of the *amicus*’ participation on the proceedings. The Tribunal will not accept submissions that will disrupt proceedings or unfairly prejudice the disputing parties. For example, a submission on the merits presented days before a hearing on the merits may be considered by the tribunal and the parties to disrupt the proceedings. It is thus a good strategy for petitioners to address the procedural implications, if any, that arise by reason of their participation in the dispute.

### D.5. Drafting the submission

If the petition for *amicus* status is successful, the *amicus* must then draft a written submission elaborating on the issues addressed in the petition. In practice, however, potential *amicus* often submit both the petition for *amicus* status and the written submission in one package. The Tribunal will open the written submission only upon the granting of *amicus* status.

Like the initial application for *amicus* status, the written submission must show that the *amicus* brings a particular knowledge or insight that is within the scope of the dispute, and demonstrates a significant interest in the dispute. While these are requirements that would have already been addressed in the application for *amicus* status, the written submission must present full and compelling arguments that help the Tribunal place the dispute in context. The submission should not only address “broad policy issues” but also detail the legal implications arising from these issues.

Specifically, reiterating Rule 37(2), the *amicus* submission should:

- (a) Assist the Tribunal to determine 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) Address matter(s) within the scope of the dispute, and
- (c) Show a significant interest in the proceeding.

Elaborating on the issues raised in the initial application for *amicus* status, the written submission should be parsed into the various issues that the Tribunal should have an awareness of and take into consideration. The *amicus* submission, however, is not expected to support the arguments of any disputing party nor does it necessarily have to advise the Tribunal on how to weigh on the arguments presented by the disputing parties. Again, the written submission should provide the Tribunal with “a perspective, particular knowledge or insight”<sup>84</sup> that is different from the disputing parties.

<sup>81</sup> *Arbitration Rules*, *supra* note 35 at r 37(2)(b).

<sup>82</sup> *Biwater v Tanzania*, *supra* note 66, Procedural Order No 5 at paras 32-34.

<sup>83</sup> *Ibid* at para 50.

<sup>84</sup> *Arbitration Rules*, *supra* note 35 at r 37(2)(a).

All disputing parties have the opportunity to submit observations on the *amicus* submission. The Tribunal may request follow-up submissions from the *amicus curiae* in response to questions and comments.

The first ICSID decision to apply Rule 37(2) was the 2006 decision in *Biwater Gauff*. Biwater, a UK company, sued Tanzania for terminating its contract to supply water and sewage services to the capital of Dar es Salaam. Five NGOs filed a joint written submission for participation as non-disputing parties. These NGOs raised human rights, environmental and sustainable development concerns. Their initial petition sought three orders: (1) standing as *amici* in the dispute, (2) access to key arbitration materials, and (3) leave to attend and pose questions during oral proceedings that might have resulted from the written submission.

Per Rule 37(2), the Tribunal invited the disputing parties to make observations on the written submission. Both disputing parties commented on the NGOs' petition to participate, with Biwater opposing the petition and Tanzania supporting it.

After canvassing the factors in Rule 37(2), the Tribunal decided that the NGOs: (1) could participate as non-disputing parties in the proceedings,<sup>85</sup> (2) did not need documents from the arbitration because “[t]he broad policy issues on which the Petitioners [were] especially qualified are ones which are in the public domain, and about which each Petitioner is already very well acquainted”,<sup>86</sup> and (3) could not participate during oral proceedings.<sup>87</sup>

## D.6. Access to proceedings

*Amici curiae* cannot attend oral proceedings without the consent of the disputing parties.

In their initial petition, potential *amicus curiae* may request leave to attend oral proceedings under Rule 32(2).<sup>88</sup> However, the Tribunal requires both disputing parties' consent in order to grant this request.<sup>89</sup> No ICSID Tribunal has yet granted an *amicus curiae* permission to attend the oral hearings. Unlike Rule 37(2), which gives the Tribunal exclusive discretion to allow *amicus curiae* submissions, Rule 32(2) gives each disputing party a veto on allowing an *amicus* to attend proceedings and provides the Tribunal no discretion to overrule this.<sup>90</sup> This power makes gaining leave to attend oral proceedings difficult, as at least one of the disputing parties nearly always objects.<sup>91</sup>

Certain investment treaties, such as the Dominican Republic–Central America–United States Free Trade Agreement (CAFTA-DR), require open hearings.<sup>92</sup> For example, in *Pac Rim Cayman LLC v Republic of El Salvador* (discussed directly below) the treaty required that the proceedings be “open”.<sup>93</sup> This requirement, it was decided, was best fulfilled by webcasting. This degree of openness, however, is exceptional in ICSID arbitration.

<sup>85</sup> *Biwater v Tanzania*, *supra* note 66, Procedural Order No 5 at para 60.

<sup>86</sup> *Ibid* at para 65.

<sup>87</sup> *Ibid* at para 71.

<sup>88</sup> *Arbitration Rules*, *supra* note 35 at r 32(2).

<sup>89</sup> *Ibid*.

<sup>90</sup> *Ibid*.

<sup>91</sup> See, e.g., *Biwater v Tanzania*, *supra* note 66, Procedural Order No 5 at paras 69-71; *Border Timbers and Hanganí*, *supra* note 77, Procedural Order No 2 at para 63.

<sup>92</sup> *The Dominican Republic–Central America–United States Free Trade Agreement*, United States, Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua (5 August 2004) online: Office of the United States Trade Representative <<http://www.ustr.gov>>, art 10.21 and 10.17.2(a) [CAFTA-DR].

<sup>93</sup> *Pac Rim Cayman LLC v Republic of El Salvador* (ongoing), Case No ARB/09/12 (International Centre for the Settlement of Investment Disputes), online: Investment Treaty Arbitration <<http://www.italaw.com>> [*Pac Rim*].

## WEBCASTING AT ICSID: TRANSPARENCY CONCERNS REACHING BOILING POINT, OR A JUST FLASH IN THE PAN?

### *Pac Rim Cayman LLC v The Republic of El Salvador*<sup>94</sup>

Some small rejoicing in human rights circles accompanied an ICSID Tribunal's 2010 decision to webcast arbitral proceedings in the yet-unresolved dispute between Pac Rim Cayman LLC, an affiliated company of Canadian mining firm Pac Rim Mining Corp., and the Republic of El Salvador. The confidentiality of arbitral proceedings at ICSID—one of the reasons many economic disputes are resolved in arbitration rather than through litigation—has long been a source of frustration for organizations seeking to promote accountability in investment arbitration. A CIEL report called the decision “a major step towards increasing transparency in investor-State arbitrations...”<sup>95</sup> The adoption of webcasting in more investor-state arbitration disputes would be beneficial to *amici curiae*, whose submissions could be more tailored to the issues if proceedings were publicly available. Webcasting would also be beneficial in enhancing public awareness and access to arbitral proceedings.

However, webcasting advocates must temper both their optimism and their expectations. It is important to note that the Tribunal's decision in *Pac Rim v El Salvador* was based primarily on a requirement in the investment treaty it was interpreting. The Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR), out of which the dispute between Pac Rim and El Salvador arose, contains a provision that requires proceedings be open to the public. Article 10.21.2 provides that “The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements.”<sup>96</sup>

## D.7. Costs associated with intervening

### D.7.I. Translation

The official languages of ICSID are English, French, and Spanish. Per Rule 22(1), parties in each dispute can agree on one or two official language(s) in which to conduct the proceedings. As well, Rule 22(2) allows submissions to be filed in either language if two languages are chosen. Parties can elect to submit documents in both languages.

ICSID also allows proceedings to be conducted in a non-official language as long as the Tribunal, after consulting ICSID's Secretary-General, gives its approval.

### D.7.II. Counsel

Non-disputing parties are required to provide their own legal counsel. ICSID is not responsible for appointing counsel to represent *amici curiae*. While the cost of hiring legal counsel throughout the proceedings could be prohibitive, there may be legal NGO partners who can provide assistance in terms of preparing the leave applications, written submission, and/or attending the hearing.

<sup>94</sup> *Pac Rim*, *supra* note 93.

<sup>95</sup> Center for International Environmental Law, *Webcasting as a Tool to Increase Transparency in Dispute Settlement Proceedings* (Washington, DC: Center for International Environmental Law, 2010) at 1.

<sup>96</sup> CAFTA-DR, *supra* note 92.



## E. LESSONS LEARNED AND BEST PRACTICES

It is difficult to predict whether an application for *amicus* standing will be granted in any given case. It is equally hard to predict the effect an *amicus* brief will have on a tribunal's ultimate findings. As a threshold matter, ICSID tribunals are not formally bound by prior decisions. Moreover, the law in this area is still developing. However, by observing the success and failure of past *amici* and by keeping the interests of all parties in mind, this report proposes the following framework for approaching *amicus curiae* participation. *Amicus* participation involves certain costs, both financial and otherwise. The petition for *amicus* status should show that the *amicus* is able to minimize those costs while maximizing benefits.

### E.1. The petition

The petition for *amicus* status should demonstrate four things: (1) the Tribunal's discretion to allow third-party participation in suitable disputes; (2) the suitability of the dispute at hand for public interest intervention; (3) the suitability of the specific petitioner in terms of presenting the public interest aspects to the Tribunal; and (4) the desirability of allowing the petitioner to intervene in the dispute at hand. The first two criteria demonstrate that the Tribunal has the authority to allow the *amicus* to participate, while the last two are designed to persuade the Tribunal of the benefits of participation by the applicants.

#### E.1.I. The Tribunal's power to permit participation by non-disputing parties

Rule 37(2) of the ICSID Arbitration Rules gives tribunals the discretion to accept written submissions from non-disputing parties. In exercising this discretion, the Tribunal must consult the disputing parties, but the disputing parties do not have a veto on the decision. That is, the Tribunal may allow a written submission even if both parties are opposed to it. Despite the Tribunal's discretion in this matter, it is likely to give significant weight to the parties' positions on an *amicus* petition. This is due to the arbitral culture that puts the arbitration in the hands of the contending parties, within the parameters of the arbitration rules and the ICSID Convention. Consequently, to the extent possible, the petition to file an *amicus* submission should attempt to convince the parties as well as the Tribunal that the *amicus* should be allowed to file such a submission.

A well-composed petition will remind the Tribunal of its discretion to accept written submissions and point to the history of the practice to demonstrate that allowing such submissions is now part of standard international arbitration practice. Most submissions will point to *Methanex*<sup>97</sup> (below, Appendix A), a decision made under the UNCITRAL rules and the first tribunal to allow an *amicus curiae* submission. Other important decisions are *Suez v Argentina*, *Biwater Gauff* and *Pac Rim Cayman*, all of which allowed submissions from non-disputing parties. However, when making reference to these decisions, it is important to remember that ICSID tribunals are not bound by precedent the way that domestic courts are in common law systems, so they may choose not to follow the example of past tribunals. The relevant excerpts from these decisions are reproduced in Appendix A.

Many petitioners request access to arbitral proceedings in addition to permission to file a written submission. Such access may include permission to be present at oral hearings, permission to make oral arguments, or access to dispute documents. While this kind of participation is theoretically possible, it is elusive in practice. The general rule regarding access to the proceedings is that it is contingent on the disputing parties' consent. However, the situation will vary depending on the IIA that the Tribunal is interpreting and the way the proceedings are structured.

In sum, do not take for granted the Tribunal's knowledge of its own jurisdiction. The petition for *amicus* status should specifically demonstrate that the Tribunal has the power to accept *amici* in its own discretion and should cite the growth of this practice.

#### E.1.II. Public interest dimension of the dispute

In making the case for why an *amicus* submission should be accepted, consider detailing why the public interest dimensions of the dispute in question are greater than those that arise simply due to the nature of investor-state arbitration. That is, since states are assumed to act in the public interest and to therefore represent the public interest, arbitral tribunals may want to see a special public interest involved in the dispute.

<sup>97</sup> *Methanex Corporation v United States of America* (2005), Final Award (United Nations Commission on International Trade Law), online: Investment Treaty Arbitration <<http://www.italaw.com>> [*Methanex*].

When determining whether a given dispute has that something “extra” to justify allowing an *amicus* brief, tribunals tend to consider the importance of the public interest and the closeness of the connection between the public interest concern and the dispute. For example, in *Suez v Argentina*, the Tribunal permitted filing of an *amicus* brief on the basis that the dispute had the potential to affect “basic public services” to millions of people. In this case, the concern for the public interest was severe. The Tribunal in *Biwater* also used this reasoning in granting *amicus* status to CIEL and a number of other organizations. In these cases, it was helpful that the petitioners were able to tie their claim to a legally-binding human right.

### E.1.III. Suitability of petitioner

An effective petition will demonstrate that the organization requesting *amicus* status is well-suited to present the public interest concern to the Tribunal. When formulating this part of the petition the organization should demonstrate that it is well-suited to comment on the dispute. The petitioners in *Biwater* did this effectively: Lawyers’ Environmental Action Team (LEAT) described itself as the “first and premier public interest environmental law organization in Tanzania” (Proc. Order No. 5). By describing itself this way, LEAT established its interest and relevant expertise. An organization seeking *amicus* status can demonstrate its suitability by showing that it has (a) recognized expertise, (b) an established interest, and (c) independence.

## THE INDEPENDENCE REQUIREMENT

### *Border Timbers et al v Republic of Zimbabwe*<sup>98</sup>

The Tribunal’s rejection of the petitioners’ petition to appear as an *amicus curiae* in this case demonstrates the strict criteria applied to such applications. Several Zimbabwean indigenous groups and the European Centre for Constitutional and Human Rights (ECCHR) requested permission to participate as *amici* in a dispute over land to which the indigenous groups claimed ancestral title.<sup>99</sup> The indigenous groups had received “support from the [Nyahode Union Learning Centre] in the nature of facilitating communications between the ECCHR and the indigenous communities, the production of affidavits and the holding of meetings to discuss the Application.”<sup>100</sup>

The Tribunal denied the application, finding that a Mr. Sacco, a central figure in the activities of the NULC, was strongly allied with the Respondent Zimbabwe’s land resettlement policies. This was found to “give rise to legitimate doubts as to the independence or neutrality of the Petitioners” sufficient to defeat the petition.<sup>101</sup>

### E.1.IV. The desirability of participation and importance of the *amicus*’ contribution

The petition for *amicus* status should establish that it is in the Tribunal’s best interest to allow the organization’s participation. From the Tribunal’s perspective, there are costs and benefits to allowing *amicus curiae* participation. An effective *amicus* application will demonstrate to the Tribunal that the benefits outweigh the costs.

First, consider the interests of the Tribunal:

1. fairness to the parties
2. legitimacy of the institution
3. adherence to the relevant law

Allowing an organization to intervene can have different effects on these interests depending on the context, but in most cases the Tribunal has to perform the same balancing act, weighing the benefits of legitimacy that come with allowing third-party participation (discussed further below) against the potential burden on one or both of the disputing parties. In most cases, the most significant articulated burden on the parties will be the added cost of allowing *amicus curiae* participation. The arbitration facilities at ICSID are expensive, and both states and investors often employ large teams of lawyers for the length of the dispute. Parties may argue that the additional financial burden on them created by the *amicus* submission is undue.

<sup>98</sup> *Border Timbers and Hanganai*, *supra* note 77.

<sup>99</sup> *Ibid*, Procedural Order No 2 at para 21.

<sup>100</sup> *Ibid* at para 54.

<sup>101</sup> *Ibid* at para 56.

In cases that involve the public interest, the benefits of allowing intervention are relatively consistent. Tribunals have acknowledged repeatedly that allowing a submission from *amici curiae* have the benefits of supporting ICSID's legitimacy by increasing transparency, demonstrating a concern for the public interest and thus "securing wider confidence in the arbitral process itself".<sup>102</sup> Tribunals have also noted that this practice may assist the Tribunal in discharging its mandate by ensuring that all relevant issues are taken into account. After reminding the Tribunal of these benefits, the petition for *amicus* status should try to tip the scales by showing the low cost of *amicus curiae* intervention. The main cost to the Tribunal of allowing an *amicus* submission is the risk that proceedings will be disrupted or delayed, or that the submission will create a bias in favor of one party. Therefore, the petition should give compelling reasons why such concerns are unwarranted. In *Biwater*, the petitioners cited the record of *amicus* submissions in investor-state arbitration and pointed out how past submissions have not disrupted proceedings. The organization seeking *amicus* status could demonstrate how the difficulties potentially imposed on the tribunal in the case are less severe than those in *Biwater*, for example, where the Tribunal did accept the brief.

## E.2. The submission

If the petition for *amicus* status is successful, the organization will be allowed to file a written submission. Note that the organization may request more than just permission to file a written brief. Many petitioners have requested access to the proceedings and other participatory concessions. However, in most cases, the submission will be the extent of the *amicus*' participation in the dispute, so it should comprehensively set out the organization's argument. A good submission will present arguments that are directly related to the dispute and grounded in law relevant to the dispute. It should also clearly state what the *amicus* is asking of the Tribunal.

### E.2.I. Make specific requests

Before writing the submission, the organization should clearly identify the purpose of its *amicus* submission. This may be simply to have the Tribunal consider binding human rights law or public interest considerations when making its decision. Or, it may be that the *amicus* wishes the Tribunal to structure its analysis in particular ways that enable a fair consideration of human rights concerns. Compelling submissions will advocate for a specific outcome or a set of outcomes in order of preference. The *amici* in *Biwater Gauff* made specific arguments concerning how the dispute should be resolved. They claimed that the Tribunal could (a) "find the underlying investment contract invalid and thus dismiss the claims on the basis of a lack of jurisdiction or justiciability;" (b) "find that reproachable investor conduct affects the finding of a breach and ultimately deny the claim on the merits; or" (c) "reduce the damages award in consideration of the investor's conduct."<sup>103</sup>

### E.2.II. Make legal arguments

Tribunals may be deeply moved by strong ethical claims, but unless they are grounded in legal argument Tribunals have no jurisdiction to address them. Often the difference between a purely moral and a legal claim is as simple as a few words. Rather than saying, for example, "the citizens will not have access to water" say "the citizens' legally binding right to health will be implicated/contravened." An even stronger argument would be to find a norm in international investment law itself that supports the *amicus*' claim as discussed in Section E.2.III. below.

### E.2.III. Use applicable law

The *amicus*' argument should demonstrate in as much detail as possible why the law applicable to the dispute results in the outcomes requested in the submission. While Tribunals may make occasional reference to international human rights law, they have traditionally been hesitant to assume jurisdiction over such matters and make findings based on international human rights law. As such, it is the job of the *amicus* to tie human rights law and principles to the international investment law governing the dispute.

<sup>102</sup> *Biwater v Tanzania*, *supra* note 66, Procedural Order No 5 at para 50.

<sup>103</sup> *Biwater v Tanzania*, *supra* note 66, Amicus Curiae Submission (appended below) at paras 44-45.

Human rights legislation and principles can play a key role in treaty interpretation, particularly through the principle of systemic integration.<sup>104</sup> Systemic integration is the process whereby international obligations are interpreted such that, in the case of investment arbitration, the relevant rules of international law should inform the interpretation of the investment law.

Human rights legislation and principles are thus of significant assistance when establishing the meaning of party obligations under the IIA at issue. For example, some investment agreements will, in their preamble, state their objectives in relation to sustainable development as opposed to solely economic growth.<sup>105</sup> The *amicus* can use human rights treaties to illustrate international rules and norms in order to aid in the interpretation of what is meant by “sustainable development”. This in turn provides an opportunity for the *amicus* to show that the parties involved in the IIA or the dispute are subject to certain human rights obligations. From there, the *amicus* can use its submission to provide further detail on what these obligations entail.

Human rights conventions can also be used to illustrate that a violation has occurred which is incompatible with transnational public policy. An example is found in *World Duty Free Co Ltd v Republic of Kenya*, where the ICSID tribunal examined domestic laws and international conventions related to corruption and used their findings to conclude that “claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal”.<sup>106</sup> Anti-corruption norms thus presented an international public order. Although this analysis was undertaken by the tribunal itself and not advanced by an *amicus*, it provides an example of how human rights laws and norms can be brought into arbitration disputes.

<sup>104</sup> Orellana, *supra* note 59 at 11.

<sup>105</sup> *Ibid* at 171.

<sup>106</sup> *World Duty Free Co Ltd v Republic of Kenya* (2006), Case No ARB (AF)/00/7 (International Centre for the Settlement of Investment Disputes), all documents online: International Trade Arbitration <italaw.com> at 157.