

A More Expansive Role For Amici Curiae In Investment Arbitration?

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Tribunals in investment arbitrations currently impose a fairly consistent set of restrictions to the submissions of *amici curiae* in proceedings before them, such as short page limits, no access to the arbitral record, etc. The question is whether there are instances where these restrictions need to be tempered.

Over the past ten years, tribunals in investment arbitrations have become increasingly flexible in allowing non-parties to make written submissions as *amici curiae*. This trend is already reflected in certain arbitral rules. Under ICSID Rule 37(2), for example, third parties may be allowed to file amicus submissions subject to certain requirements. The UNCITRAL Rules have also been interpreted to allow such submissions. A recent report by Jan Paulsson and Georgios Petrochilos, commissioned by the UNCITRAL Secretariat, has called for the formal adoption of a new UNCITRAL rule that would permit *amicus* submissions explicitly, similar to ICSID Rule 37(2). The UNCITRAL Working Group on Arbitration and Conciliation is currently considering the proposal.

Even in cases where they have allowed *amicus* submissions, however, tribunals typically have limited them to a fixed number of pages (in recent decisions between 30 and 50). Accompanying exhibits or other evidence may not be attached absent a request from the tribunal. Moreover, *amici* usually have been denied access to the evidentiary record and, in some cases, to the disputing parties' submissions as well. Finally, *amici* have not been allowed to make oral submissions, or to attend the proceedings if they are closed to the general public. See, e.g., *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5.

Nevertheless, the restrictions that tribunals have imposed in previous cases, and which function as the current benchmark, were fashioned in response to petitions mostly by NGOs-organizations that claim to be impartial to the outcome of the dispute but interested in preserving transparency and openness in the proceedings and alerting the tribunal to certain collateral effects, externalities, or consequences stemming from the dispute itself or its potential remedies.

It is not clear that the same restrictions should apply, *mutatis mutandis*, to *amici* with a significant, direct, and legally protectable interest in the outcome of the dispute.

Cases presenting an *amicus* with a substantial legal interest in the arbitration are rare. One such case arose recently in the context of a dispute under the Energy Charter Treaty ("ECT"), between a British investor and Hungary. In the ICSID arbitration *AES Summit Generation v. Hungary*, the European

Commission (“EC”) filed an unprecedented petition to appear as *amicus curiae*. Unfortunately, the relevant facts and tribunal holdings in *AES* are discernible only through news accounts because the tribunal’s ruling has not been made public. See *Global Arbitration Review*, News Briefing, Dec. 15, 2008.

The EC’s petition was based on its finding, after an investigation it conducted, that the contract between the parties violated EU competition law. Since aspects of the underlying contract were regulated by the EC under EU law, the EC sought to challenge the tribunal’s jurisdiction to resolve the dispute under the ECT alone.

The *AES* tribunal treated the EC’s petition consistently with past ICSID decisions on *amicus* participation. Thus, the tribunal allowed the EC to file a submission but not to access the parties’ pleadings. The tribunal limited the EC’s submission to 30 pages and confined the submission’s scope to abstract legal discussion on, *inter alia*, the relationship between EU law and the ECT. The tribunal, furthermore, declined to allow the EC to challenge the tribunal’s jurisdiction, apparently because neither of the disputing parties had mounted such a challenge.

The nature of the EC’s interest in this case was broader and more substantial than ensuring that the tribunal was aware of, say, environmental or cultural implications of the project at issue. The EC sought to assert the relevance of its legally prescribed regulatory mandate, which is replete with policy implications for the entire European Union, and to address the consequences of a conflict between that mandate and the tribunal’s jurisdiction.

Given the nature of its interest in the dispute, a more effective legal recourse for the EC arguably would have been intervention, not an *amicus* submission. However, party autonomy and jurisdictional concerns usually prevent tribunals from allowing third parties to participate as interveners-subject to limited exceptions in the commercial arbitration context. See, e.g., LCIA Rule 22(h). In any event, intervention was not an option for the EC in *AES*.

Given the unavailability of intervention in investment arbitration, participation as *amicus* is, in effect, the only recourse an interested third party has to participate in the proceedings. *AES* shows that an *amicus* can have a significant, direct, legally protectable interest in the outcome of the case that the disputing parties have not addressed, or have no incentive to address. The proper defense of that interest from the position of *amicus* might require a pleading of more than 30 pages, backed by evidence, and perhaps even targeted access to the record or the parties’ pleadings.

A relaxation of the current restrictions on *amicus* participation in the case of legally interested third parties would not only serve better the interests of those parties. Tribunals may also be able to achieve more comprehensive resolutions of the disputes before them, with greater likelihood of enforcement of the resulting award. To revert to the *AES* example, if the EC’s arguments were inadequately addressed in the arbitration, this could have had ramifications in a challenge of the award before a Hungarian or any other court bound by EU law.

At the antipode of this argument lies, of course, the additional time and money that the disputing parties must expend to address third party arguments that may be new, more expansive, and/or better informed than current practice allows for. Especially when such arguments support one side’s position over the other (as was the case, for example, in *AES*, where Hungary stood to benefit from the EC’s jurisdictional objection), tribunals will be wary of any prejudice introduced by increased *amicus* participation.

Although the answer seems highly contextual, then, it seems worth posing the question:

Would it be desirable for tribunals faced with *amicus* petitioners with a high legal stake in the outcome of the dispute, such as the EC in *AES*, to expand the degree of *amicus* participation to include longer submissions and access to relevant portions of the record and the parties' pleadings?