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Can Amicus Curiae Lead Investor-State Arbitration out of its Legitimacy Crisis and Towards More Efficient Dispute Resolution?

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On 5 May 2022, Young ITF hosted its launch event, covering a debate on the motion that *"[t]his House believes that greater use of Amicus briefs will address the legitimacy crisis that [Investor-State-Dispute-Settlement ("ISDS")] is facing"*. The selection of this topic seemed reasonable as the legitimacy crisis of ISDS particularly affects the upcoming generation of young lawyers. The panel of speakers consisted of Prof. Maxi Scherer and Rebecca Zard who pleaded in favor of the motion, as well as Dr. Martins Paparinskis and Patricia Snell who represented the opposing view. Since the positions taken by the panelists were assigned to them in advance, the views expressed during the debate do not necessarily reflect their personal opinions.

At the outset, both sides of the panel agreed that they can hardly deny the legitimacy issues ISDS is currently facing. Moreover, they argued that civil society has increasingly raised its voice against ISDS and usually describes the system as an undemocratic, unaccountable, and untransparent corporate court. But are *amicus* briefs the right tool to address these issues associated with ISDS, or is it just another desperate attempt at reform of a failing regime? This post offers an overview of the main points of discussion on whether *amicus curiae* provide a viable solution to the current ISDS legitimacy debate.

Positive Implications of Amicus Curiae in ISDS

In their opening, the panelists arguing for the motion identified the main contours of criticism related to ISDS, before outlining arguments on why *amicus* briefs are appropriate to address these criticisms. The panelists noted that the issue of transparency refers to the lack of awareness of and access to the investment process by the public, whereas the criticism of a democratic deficit and unaccountability refers to the lack of public influence in the proceedings. The panelists argued that opening the doors of the proceedings to individuals, non-governmental organizations, trade associations, or inter-governmental institutions as *amicus curiae*, whilst at the same time providing these entities with insights into the investment arbitration process, could address these issues. It would allow the public to become aware of the subject matter of investment disputes and improve their understanding of the investment arbitration process. Additionally, *amici* participation could also address the lack of public influence, by providing the public with a meaningful say in the outcome of the proceedings and by promoting an informed public dialogue regarding the subject

matter of the dispute.

The positive implications of *amicus curiae* in ISDS have also been acknowledged by tribunals and in reform debates. In line with the arguments of the panelists, in *Vivendi v Argentina*, the tribunal stated that *amicus* submissions have the potential to improve public acceptance of the international arbitral process by increasing transparency and openness. This should be of particular importance when the proceedings involve matters of public interest. Furthermore, the tribunal in *Philip Morris v Uruguay* held that *amicus* submissions support the overall acceptability of decisions rendered by international investment tribunals. Also, in UNCITRAL's Working Group on Arbitration and Conciliation, many delegations have expressed strong support for allowing *amicus curiae* submission which could be useful for the arbitral tribunal in resolving the dispute and for promoting the legitimacy of the arbitral process. This perception that *amicus* submissions may be a useful tool to increase the legitimacy of ISDS also explains the increased statutory recognition of *amicus* submissions in institutional rules (e.g. 2022 ICSID Rules, Rule 67; 2017 SIAC Investment Arbitration Rules, Rule 29.2; 2017 SCC Arbitration Rules, App III, Art 3) as well as some new-generation bilateral investment treaties (e.g. US Model BIT (2012), Art 28(3); CETA (2017), Art 8.38).

Negative Implications of Amicus Curiae in ISDS

The panelists arguing against the motion noted that the concept of *amicus curiae* originates from the common law tradition and argued that this concept is not suitable for the investment arbitration process. They noted that investment arbitration is based on an agreement between the parties, and argued that allowing third parties access to the arbitral process would undermine the consensual nature of arbitration, in effect compelling the parties to arbitrate with 'strangers'. Further, *amicus* briefs could lead to procedural unfairness between the parties since most briefs are filed in favor of the respondent state. In response to the argument that *amici* participation invokes a productive public dialogue, the panelists argued that this could cause a politicization of the arbitral process which endangers the neutrality of the forum and transforms arbitral tribunals into 'courts of public opinion'.

These arguments have also found resonance in practice and in reform debates. Indeed, some parties and some tribunals have held that *amicus* submission could lead to procedural unfairness. In *Methanex Corporation v. USA*, it was argued by the investor that an *amicus* submission cannot be tested by the party against which it is filed, placing the *amicus* in a 'position of greater standing' than the parties. It is also true that *amicus curiae* originate from court proceedings in common law jurisdictions. Such proceedings are not based on an agreement and also entail hearings which are usually open to the public. Arbitration, on the other hand, is consensual in nature. *Amici* are not parties to the arbitration agreement which begs the question why these entities should nevertheless be accorded similar rights as the parties. Finally, the panelists pointed to the Mauritius Convention on Transparency. The Convention has currently been ratified by only nine states which indicates that few states have agreed to provisions which would increase the use of *amicus curiae* in investor-State arbitration. For these reasons, the criticism that the potential short-term benefits of *amicus curiae* do not justify the risk of frustrating the very process to which the *amicus* seeks to participate seems understandable.

The Impact of Amicus Curiae on the Arbitral Process – When Intuition is Misleading

The positions of the respective debaters regarding the impact of *amicus curiae* on the course of ISDS proceedings could not lie further apart, which justifies addressing this particular point in a separate section. On the one hand, it was argued that tribunals have repeatedly acknowledged the benefits of *amici* briefs in their decision-making process as they support the tribunal with particular knowledge and expertise regarding the subject matter in dispute. On the other hand, the panelists arguing against the motion countered that *amici* rarely have access to the case file, which means that *amici* can rarely present a full picture of the facts or address the core issue of the case. On top of that, additional submissions to which both parties must have the opportunity to respond lead to additional work for the tribunal and the disputing parties and thus delay the inherently long investment arbitration process even further. While the latter argument seems intuitively right, the panelists presenting this argument were unable to support their position by any empirical data. This begs the question: which of the two propositions regarding the course of the proceedings is true?

The answer to this question was delivered by the panelists arguing in favor of the motion. The panelists presented the results of an (unpublished) empirical analysis involving the latest 66 investment arbitration cases, in which *amici* applications were filed and the respective decisions on these applications were published. The outcome of this study was unexpected and to some extent counterintuitive. While the median length of proceedings in which *amici* participated lasted 4.26 years, the proceedings where *amici* applications were filed but rejected by the tribunal, lasted 4.94 years. This provides a difference of 0.68 years in median length. Put simply, proceedings in which *amici* briefs were filed last shorter than proceedings in which they were denied doing so.

Concluding Remarks

Some people might question their intuition after hearing the numbers presented regarding the length of the proceedings in which *amici* participated compared to those in which they were denied access. The argument that *amici curiae* burden the tribunal and delay the proceedings is consequently not supported by the study presented by the panelists arguing in favor of the motion. But what conclusion can be drawn from this counterintuitive result? Does this *e contrario* mean that *amici* enhance the efficiency of ISDS proceedings? This question can hardly be answered with a simple ‘yes’ or ‘no’. More accurately, the answer appears to be: ‘it depends’. It depends on several variables, such as the complexity of the case, the conduct of the parties, the knowledge of the *amicus*, the case management of the tribunal, etc.

Can *amici curiae* lead ISDS out of its legitimacy crisis? Possibly. However, further tools are required to resolve the crisis in its entirety. Several suggestions on what these tools could look like can be found in the new ICSID Rules, which include the possibility to hold open hearings and incorporate additional transparency provisions like the expeditious publication of arbitral awards (see 2022 ICSID Arbitration Rules, Rules 62-4, 65). Nonetheless, an increased use of *amici curiae* can lead the regime in the right direction and may constitute a valuable first step for ISDS to emerge out of its crisis and into greater popularity.

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