

Impact of Amicus Curiae Submissions in Investment Treaty Arbitration

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Legitimacy Crisis



THEIR meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small group of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations challenged.

Anthony DePalma New York Times 2001



As to the contents of [amicus] written submissions; it would always be for the Tribunal to decide what weight (if any) to attribute to those submissions. Even if any part of those submissions were arguably to constitute written “evidence”, the Tribunal would still retain a complete discretion under Article 25.6 of the UNCITRAL Arbitration Rules to determine its admissibility, relevance, materiality and weight. Of course, if either Disputing Party could not then complain at that burden: it was always required to meet its opponent’s case; and that case, however supplemented can form no extra unfair burden of unequal treatment.

Methanex Corporation v U.S.A

**Move towards including
amicus curiae**

Statement of the Free Trade Commission on
non-disputing party participation
2006 amendments to ICSID Arbitration Rules
UNCITRAL Rules on Transparency

● **Philip Morris v Uruguay** ●

Switzerland-Uruguay BIT

Uruguay's enactment of tobacco measures

Limited number of product lines

Increased mandated graphic images

Substantial reduction in sales

Amici curiae:

WHO and WHO FCTC Secretariat

PAHO

Survey of cases

9 cases (leading up to an Award)

Methanex Corporation v USA

United Parcel Service of America Inc v Canada

Glamis Gold v USA

Biwater Gauff (Tanzania) v Tanzania

Suez, Sociedad General de Aguas de Barcelona and Vivendi v Argentina

AES Summit Generation v Hungary

Electrabel S.A v. Hungary

Eureko v Slovak Republic

Ioan Micula v Romania

NGOs and European Commission

The approaches

- **Acknowledgment**

Approach 1

Methanex v USA

NAFTA, Chapter 11

State of California's ban on the sale and use of MTBE.

Methanex: world's largest producer of methanol, a feedstock for MTBE

Amici: IISD & Earthjustice

Methanex v USA

Costs against Methanex:

- “ *strategic purposes, to mount opposition to environmental and other regulatory measures that could have an economic impact on an investor*
- “ *frivolous claim apparently intended either to create opportunities to gain publicity, to insulate itself from the normal business risks of doing business in a highly regulated industry, or both*

Methanex v USA

“

At the beginning of this Award, therefore, it is appropriate to record our appreciation of the scholarship and industry which Counsel for the Disputing Parties, Mexico and Canada as NAFTA Parties and the amici have deployed during these lengthy arbitration proceedings, together with their respective experts, assistants and other advisers.

The Tribunal does not seek to summarise here the contents of the amici submissions, which were detailed and covered many of the important legal issues that had been developed by the Disputing Parties.

Methanex v USA

Close analysis of the factual and expert evidence adduced by both Disputing Parties

Citation to IISD's "carefully reasoned" amicus submission which also disagreed with Methanex's contention that trade law approaches could simply be transferred to investment law

Decided on costs by reference to Disputing Parties' agreed approach



...it is the Tribunal's view that it should address [amicus] filings explicitly in its Award to the degree that they bear on decisions that must be taken. In this case, the Tribunal appreciates the thoughtful submissions made by a varied group of interested non-parties who, in all circumstances, acted with the utmost respect for the proceedings and Parties. Given the Tribunal's holdings, however, the Tribunal does not reach the particular issues addressed by these submissions.

Glamis Gold v. USA

- **Summary**

Approach 2

Biwater v Tanzania

United Kingdom-Tanzania BIT

Joint amicus submissions:

Certain key themes were summarized

Investor responsibility

Bidding process/strategy

Biwater v Tanzania

Exercise executive authority

In relation to *amici curiae*:

Consideration of Amici Brief

Very useful initial context

Approached issues with interests, expertise and perspectives that have been demonstrated to materially different

Informed analysis

Where relevant, specific points returned to that context

Single footnote: evidence was not available to *amici*

Conclusion contrary to *amici curiae*'s submissions

Bid was poorly prepared

Engagement?

● **Exception?**

Approach 3

Electrabel v Hungary

Energy Charter Treaty

Termination of the PPA and other steps
were taken to reduce tariffs and
guaranteed pricing

European Commission allowed to file as it
was “an expert commentator” on EC law
but...



...the scope of its legal opinion should in principle be directed to addressing the following issues: (a) European Community Law and its connections with the ECT; (b) Community Law and the State Aid investigation concerning the Power Purchase Agreements signed by Hungary; and (c) the effect of Community Decisions on the European Union's Members, particularly Hungary

As to purely factual questions, the Tribunal notes that, in principle, the European Commission is unlikely to assist the Tribunal in these arbitration proceedings.

Electrabel S.A. v The Republic of Hungary

Electrabel v Hungary

However, European Commission did not
limit itself

Raised questions concerning jurisdiction



At the outset, the Tribunal wishes to record its thanks and appreciation to the European Commission for its Submission, as regard both applicable law and jurisdiction. It is a lengthy, scholarly and important document for these arbitration proceedings; and only part of it is cited in this Decision.

Electrabel S.A. v The Republic of Hungary

● **Electrabel v Hungary** ●

In respect of jurisdiction, the Tribunal cited European Commission's concluding submissions almost verbatim (paras. 41 to 68)

Points only raised by EC

But rejected by Tribunal



The Tribunal (with the assistance of the Parties and their expert witnesses) has considered at length the terms and effect of the European Commission’s Submission in these arbitration proceedings. Albeit with hindsight, it is unfortunate that the European Commission could not play a more active role as a non-disputing party in this arbitration, given that (as was rightly emphasised in the European Commission’s Submission), the European Union is a Contracting Party to the ECT in which it played from the outset a leading role; and, moreover, that the European Commission’s perspective on this case is not the same as the Respondent’s and still less that of the Claimant. In short, the European Commission has much more than “a significant interest” in these arbitration proceedings. Unlike the two Parties, the Commission has made a jurisdictional objection based on EU law as the law applicable to the Parties’ arbitration agreement. Whilst that objection is addressed by the Tribunal in Part V below, it is necessary to start here with the Commission’s arguments on applicable law.

**Ioan Micula, Viorel Micula v
Romania**

Sweden-Romania BIT

Revocation of incentives (F&B business)

European Commission filed submissions and attended hearing

Claimants sought to have *amicus curiae* be treated as hostile witnesses

Amicus curiae as confirmation of Respondent's submissions/evidence

- **Implications?**

Summary

Note: most *amici curiae* took positions broadly aligned with respondent states

Impact unclear

Reasons

Philip Morris v Uruguay

“

by providing evidence of the relationship between large graphic health warnings, bans on misleading branding and the protection of public health; providing facts concerning “tobacco control globally and the regulatory environment in which the Claimant operates”, there by assisting the Tribunal in determining Claimants’ legitimate expectations; explaining the provisions of the WHO FCTC and its legal relationship with the Switzerland-Uruguay BIT; and bringing perspective, knowledge and insight distinct from the parties.

Further, according to the Request the Submissions addresses matters within the scope of dispute as required under Rule 37(2)(b) as it sets out a body of evidence underlying tobacco control from other WHO Member States which is relevant to the Uruguayan context.

● **Possible approaches?** ●

Scientific evidence v.s. legal submissions

World's leading authorities on the scientific basis of the public health measures in dispute and involved in their implementation

Attend hearing to confirm Uruguay's submissions and evidence

Accept “scholarly” submissions

Conclusion

Complete discretion

Support the transparency of proceedings
and its acceptability by users at large

Give effect to Glamis Gold principle

Thank You
