A UNIT OF
LAW LABORATORY

MAY 2022

Law Laboratory Research Journal of Law & Socio-Economic Issues

ISSN: 2583-0783

VOLUME 1 | ISSUE 3

WWW.LAWLABJOURNAL.IN

ISSN: 2583 – 0783 **VOLUME 1 | ISSUE 3**

ANALYSING THE ROLE OF AMICUS CURIAE IN INTERNATIONAL INVESTMENT ARBITRATION AND HUMAN RIGHTS CONSIDERATIONS

- *Archana Goswami*[1]

ABSTRACT

The article pursues the analysis of the legal jurisprudence in matters of International Investment Arbitration and the subsumed or substantiated role of amicus curiae in the global legal forums. Pivotal focus is attached to international trade and connected disputes so as to reveal the existing dichotomy pertaining to the application human rights norms in such matters of conflict. In an attempt the extrapolate the manners in which global courts, tribunals and regimes treat the amici curiae, precedents set by such institutions are studied in necessary detail. Particularly deciphering few recent judgements, the paper aims to uncover the conflicting principles in adjudging the role of amici curiae in such proceedings, specifically analyzing the tussle between the conventional approach of "consent-based legitimization" and the growing demand for "communal/public interest via adequate involvement".

Keywords: International Investment Arbitration, Amicus Curiae, International Court, Public Interest, Bilateral Investment Treaties

INTRODUCTION

The dichotomy pertaining to balancing of public interest and legal principles relating to international investment arbitration can be traced back to the analysis offered by the "International Court of Justice" in the case of "Barcelona Traction" in the year 1970. In a detailed, much-referred decision, the court attempted to trace a distinctive factor among State-Obligations to the global populace or community at large and the obligation owed to a contemporary state in the arena of "diplomatic safeguard". The sole determining factor which

[1] 3rd Year, LL.B. (Hons.), Jindal Global Law School, Sonipat

sets this judgement apart and makes it relevant to the development of legal jurisprudence in such matters concerning human rights interventions in international investment arbitration, is that, in an attempted to make a distinction, the court provided clarity to an existing principle that two separate legal disciplines, which are analyzed in a compartmentalized approach currently, used to be largely intertwined in the past.[2] Making a reference to the "human rights law" and "laws pertaining to investment arbitration", the court realized that commercial protections afforded to investors in forms of rights were found to be under the larger shed of "rights of alien subjects", in the developmental phases of common law systems. In the preceding parts of the judgement, the court emphasized on the reason behind delineation of the two aforementioned disciplines, which was largely attributed to a stricter and more absolute sense of obligation that any state owes to its foreign subjects. This principle serves as the epicenter for the question or rather, conflict pertaining to involvement of amicus curiae as a "human rights deliberation" in matters of investment arbitration around the globe.[3] The real question or conflict, though, pertains to the ambit or limits of a state is exercising its regulation and assign burden on alien investors through application of "human rights or ecological protection norms". Observing the pattern in the past few years, there's a rising trend of non-profits and community associations seeking intervention in arbitration adjudications to project their representations and reservations pertaining to matter in dispute. In certain scenarios, bodies of authority have allowed such intervention in form of documented statements by non-profits, affirming their role as amicus curiae in the matter. The preliminary observation of such an instance can be observed in the matter of *"Vivendi Universal, S.A. v. The Argentine Republic"*.[4] The conflict arose after observing the detrimental impact such participations posed to the core legitimacy of the dispute resolution mechanism. To delve deeper into the issue, it's pertinent to note that human rights considerations can percolate into such investment disputes in certain manner. Primarily entering through "public policy clauses" in the agreements, it can also manifest in forms of "ecological reservation clauses", rights of workforce or labour legislations, malfeasance/misfeasance arising out of non-adherence to state responsibility and ultimately via submission of statement by interested parties in form of briefs.

[2] Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT'L L. 775 (2008)

[3] Kenneth Kinyua, *Assessing the Benefits of Accepting Amicus Curiae Briefs in Investor State Arbitrations: A Developing Country's Perspective*, http://papers.ssrn.com/sol3/papers.cfm?abstractid=1310753

[4] Vivendi Universal S.A. v. The Argentina, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae in Suez

UNDERSTANDING THE WTO CONTEXT

After being found as a general reference in the cases of "*Vivendi v. Argentine Republic*" and "*Interagua v. Argentine Republic*", the matter of amicus involvement with relation to the matters of World Trade Organization and its jurisprudence can be thoroughly examined in the subsequent precedents set in the cases of "*Methanex v. United States of America*" and "*UPS v. Canada*".[5] To encompass the entirety of the issue, one needs to deliberate on three primary settlements exploring the role of amicus in "WTO Dispute Settlement Body". Initially, one must look at the case of "United States – Import Prohibition of Certain Shrimp and Shrimp Products", in which the body of appeals provided clarity on the matter by establishing the principle: "whether or not a board expressly solicited it, a forum has the unilateral capacity to admit and examine or dismiss material and recommendations provided to it. The notion that a board may well have requested material *motu proprio* doesn't quite obligate the board to adopt and evaluate the material that is effectively submitted to it." The sheer discretion of an arbitral panel pertaining to consideration of brief submitted to it also reflects the likelihood of intervention of non-profits in matters of dispute. Following this decision, another precedent set in the case of "United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom" attempted to cure the lacuna in the previous matter which failed to justify via application of legal reasoning, the act of the appellate board in accepting the amicus brief. In the instant case, "Article 17.9" of the Dispute Settlement Understanding and "Article 16(1)" of the "Working Procedures" were read collaboratively to observe that amicus curiae briefs can be accepted in appellate levels when they are thought to be relevant to the matter and may serve beneficial in appropriate resolution".[6] The ultimate decision that holds relevance to the issue was delivered in the matter of "European Communities – Measures Affecting Asbestos and Asbestos-Containing Products", which emphasized on the procedural aspect of acceptance of amicus briefs and their preceding submissions. Few factors of the guidelines set in the precedent pertain to non-profits revealing their economic/funding sources, description of their initiatives and areas of operation, connection with the parties involved in the conflict and subjective interest in the cause of action, which shall be observe in assonance to determine the assistance that such amicus curiae can provide to the panel.

[5] Loukas Mistelis, Confidentiality and Third-Party Participation: UPS v. Canada and Methanex Corp. v. USA in INTERNATIONAL INVESTMENT LAW AND ARBITRATION 169, 169 (2005)

[6] The Amicus Curiae in International Courts: Toward Common Procedural Approaches?, in CIVIL SOCIETY, INTERNATIONAL COURTS AND COMPLIANCE BODIES 295, 296

ANALYSING THE NAFTA (UNCITRAL) APPROACH

Convening an unprecedented trend of acceptance of amicus briefs in "investment arbitration" matters adjudicated following the "UNCITRAL" procedures, "NAFTA", in the case of Methanex Corporation v. United States, substantiated its authority granted by virtue of Article 15(1) of "UNCITRAL" Rules to grant acceptance to such briefs, if felt prudent and relevant in disputes. The absence of any rule contrasting "Article 15", in "Chapter 11 of NAFTA", clears any impediment for such a practice.[7] The decision also highlighted the weightage of "public interest" in such matters in ascertaining validity to amicus participation. The tribunal attempted to distinguish between addition of parties to a proceeding and acceptance of amicus statements in relevant matters. Amicus were not to be attributed any party rights. A Plaintiff's allegation claiming accepting amicus contributions might impact the Contesting Party's fair treatment and hence violate article 15 was the subject of discussion. The panel overcame this argument by arguing that this was a possible danger inherent in any arbitral process, one that can be effectively mitigated by appropriate restrictions constraining amici engagement. Considering the context of the "Vivendi and Interagua trials", the insights from the "Methanex" judgment are especially fascinating. Three considerations tend to be critical in establishing the parameters of amici curiae's evolving precedent: amici's engagement in sovereign questions; the "marginalization" of the participants' assent; and the credibility question's repercussions. Shedding light on these considerations, amici are expressly barred from opining on circumscribed jurisdiction of a panel to hear a case. The assistance sought from the amicus must be limited to substantial aspects relating to interests of the public involved in the matter. This particular reflection was made in the case of "UPS v. Canada". The tension pertaining to party consent arose when in the Methanex case, the panel assumed authority to accept amicus brief when the parties vehemently opposed such intervention. The panel in the UPS case rejected the claims of necessity of party consent to admit interventions basing it on absolute legal principles set out in Article 15(1) of UNCITRAL procedures and outlined the impossibility of denying public interest consideration in "stakeholder-nation" relations. These aforementioned principles raise questions pertaining to limits of admittance of amicus in disputes, addressing which, the panel stated that bona fide intention is not sufficient to allow intervention, factors such as

[7] Andrea K. Bjorklund, The Emerging Civilization of Investment Arbitration, 113 PENN ST. L. REV. 1269, 1287–88 (2009)

credibility, expertise and impartial nature of the non-profits must be taken into account while admitting them as amicus in disputes.[8]

DIFFERENTIATING FACTOR IN THE ICSID RULES

There came a phase in the development of principles pertaining to amicus engagement, which required deliberation on whether or not "access to hearings" must be provided to non-profits, in situations lacking party consent. Vivendi and Interagua case, both of which were subject to the ICSID procedural norms, answered the question in negative by stating that express interpretation of Article 32(2) prohibits authorization to amicus participation sans express consent of parties. An alteration amendment was proposed to modify the language of the said provision in 2005 so as to allow the panel the same rights as under WTO and UNCITRAL to admit amicus without consent of parties but it was rejected in its course. The current scenario grants a party the "right to veto" any amicus intervention proposal, making ICSID, a favoured procedure for political and public disputes.

BRIDGING THE GAPS IN CONTEMPORARY STANDARDS

The initial step that must be taken to avoid concerns over improper or injudicious admittance of amicus in investment arbitration proceedings, should be to create a uniform standard to adjudge and filter applications for participation or intervention.

- *Identification of an Amicus* - Observing through the trends of aforementioned cases, it's evident that the nature of the amicus is highly varying. They can range from non-profits, legal firms, aid clinics, expert cluster, pressure groups and academicians. In certain cases, the amicus represents the interests of a large section of the public and in other instances, interests are largely individual in nature. The amount of populace represented must not be a deciding factor in admittance. Factors such as existing nexus between practice area of the amicus and the consequence or crux of the dispute must be given emphasis while deciding on acceptance. Distinctive stratification attempts can be made considering the varying levels of interests of the amicus with the concerned issue.
- *Commercial Independence with respect to Parties Involved:* Whenever appointing to admitting any intervening body to a dispute resolution process, the concern of prejudice is

[8] Amanda Perry, An Ideal Legal System for Attracting Foreign Direct Investment? Some Theory and Reality, 15 AM. U. INT'L L. REV. 1627, 1644–45 (2000)

highly prevalent. To avoid such an incursion to occur, it is highly essential and must be treated as a mandate to create and implement a test to verify whether or not amicus curiae have any connecting links of financial or commercial nature with the contesting parties, which may affect their credibility and incline their submissions to favour a party's contention. Subsidization schemes and funding from state or non-state actors are essential considerations in ascertaining lack of bias.

- *Irrefutable Proof of Credible Interest -* The process of determining presence of intention to apply for intervention can be quite arduous. To simplify such determination, it's essential to view any demonstrated adverse impact that the investment may have on the ecosystem in which the non-profit or amicus operates. The fact that the investment doesn't harm the amicus personally is irrelevant. Political ambition and garnering fame can be ulterior motives that any amicus may have before attempting to intervene, such ambitions must also be analyzed and can serve as grounds for rejection.
- *Expense Revelation -* The expenses that an amicus may incur in the process of filing a brief is a worthwhile consideration precedent to its admission. Commonly, the task of drafting of such statements are handled by the non-profits themselves but in some cases, such initiation is not pro-bono in nature, rather burden the amicus with a financial impediment. Amicus must be mandatorily made to disclose the source of their funding which facilitates their petition. In most cases, the brunt of costs of amicus involvement falls on the state or investors which may be avoided by possible creation of a fund to manage costs arising from such participation.

CONCLUSION

The phenomena of amicus participation only keep evolving with passage of time and cannot be ignored for much longer. Such balancing of proportionality in case of human rights, public interests and legal principles demand creation of uniform safeguards and standards for full realization and for reaping voluminous benefits out of the interventions. The welcoming inclusion of amicus petitions in the "Bilateral Investment Treaties" and in procedural aspects of arbitral proceedings has significantly increased the number of intervention applications. Towards the concluding remarks, this paper seeks to propose a two-pronged approach. Firstly, admittance of intervention applications must be governed by certain guidelines so as to filter out malicious, prejudicial and political ambitions and secondly, it calls for creation of subordinate bodies under arbitral institutions to specifically deal with amicus briefs and realization of public interest.