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## Submission of Amici Briefs in Arbitration Related to Environmental Concerns: Developing a Better Framework for Their Consideration Under ICSID Rule 37(2)

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## Submission of Amici Briefs in Arbitration Related to Environmental Concerns: Developing a Better Framework for Their Consideration Under ICSID Rule 37(2)

### Cover Page Footnote

J.D., Northwestern Pritzker School of Law, 2023; B.A., Grand Canyon University, 2017. The author thanks Professor Jide Nzelibe for his support, the 2023 Salzburg Global Seminar Fellowship advisors for their comments and encouragement, and the editing team at the Journal of International Law and Business for their assistance and work.

# Submission of Amici Briefs in Arbitration Related to Environmental Concerns: Developing a Better Framework for Their Consideration Under ICSID Rule 37(2)

*Clarissa Galaviz Lizarraga*\*

*Abstract:*

*This note examines the consideration of amicus curiae briefs in international arbitration matters under the International Centre for Settlement of Investment Disputes (“ICSID”), specifically focusing on arbitration cases involving environmental concerns. The note explores trends in consideration of amicus briefs in environmental arbitration by taking a historical look at cases and the rationales behind the decisions of the tribunals to consider amicus briefs and raises concerns regarding a better, uniform approach to amicus briefs.*

*To achieve a better system of consideration of amicus briefs when environmental concerns are at play, given their public and ecologic interest, the author suggests reworking and expanding Rule 37(2) of ICSID for a complete guideline for arbitration tribunals when considering amicus briefs. Furthermore, the note explores the suggestion of modeling the approach to the regulation and consideration of amicus briefs after research on American domestic courts’ treatment of these types of submissions to ensure that public environmental concern remains considered while adequately moderated.*

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\* J.D., Northwestern Pritzker School of Law, 2023; B.A., Grand Canyon University, 2017. The author thanks Professor Jide Nzelibé for his support, the 2023 Salzburg Global Seminar Fellowship advisors for their comments and encouragement, and the editing team at the Journal of International Law and Business for their assistance and work.

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## I. INTRODUCTION

There has been more significant pressure on companies to consider environmental impact in recent years, as a shift to greater detail at climate change and socioeconomic implications occurs. As a result, there have been developments in the arbitration field, including environmental protection and requiring environmental impact assessments as part of treaties to address concerns. However, when these developments are not present or complicated issues arise, arbitrators in environmental-related circumstances may find third parties submitting amici briefs for consideration. Therefore, the question arises of whether arbitrators should consider these or not. This debate is similar to the ongoing one in litigation. Public and environmental concerns become crucial and raise the query of whether arbitrators should give them weight when the private parties involved in the dispute do not submit them.

This note covers the concerns that may arise when considering these third-party amici briefs in environmental-related arbitration. It also looks into recent decisions and rationales towards amici curiae in recent arbitration cases and how tribunals need to be discerning in their treatment of these groups. Lastly, the note covers the possibility of regulating these amicus briefs modeled after research and American domestic courts' treatment of them to ensure that public environmental concern remains considered while adequately moderated. A suggestion on reworking Rule 37(2) of the International Centre for Settlement of Investment Disputes ("ICSID") to make it more effective is discussed as a solution, too.

## II. THE CURRENT LANDSCAPE: ARBITRATION, AMICI BRIEFS, AND PUBLIC CONCERN

As of the early 2000s, a push for transparency in arbitration has grown within North American Free Trade Agreement ("NAFTA") and United Nations Commission on International Trade Law ("UNCITRAL") arbitration matters.<sup>1</sup> This movement has its roots in public criticism of confidentiality and secrecy in arbitration, as awareness grew of international tribunals where unknown private investors and governments reached agreements that impacted environmental regulation, revoked national laws, and even questioned foreign justice systems.<sup>2</sup> One route that the public took to address this need for more transparency was in the form of the amicus brief.<sup>3</sup> For example, some better-known NAFTA arbitration cases that included the participation of amici curiae include *Methanex Corp. v. U.S.* ("Methanex") and *United Postal Service of America Inc. v.*

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<sup>1</sup> See Iain Maxwell, *Transparency in Investment Arbitration: Are Amici Curiae the Solution?*, 3 ASIAN INT'L ARB. J. 176, 176 (2007).

<sup>2</sup> See Loukas A. Mistelis, *Confidentiality and Third Party Participation – UPS v Canada and Methanex Corporation United States*, 21 ARB. INT'L 205, 212 (2005).

<sup>3</sup> See Maxwell, *supra* note 1 at 177.

*Government of Canada (“UPS”).*<sup>4</sup> ICSID arbitrators opened up to them as well. Some cases that stand out on the matter include *Aguas Provinciales de Santa Fe SA, Suez, Sociedad General de Aguas de Barcelona SA and InterAguas Servicios Integrales del Agua SA v. The Argentine Republic (“Aguas Provinciales de Santa Fe”)*; *Biwater Gauff Ltd v. United Republic of Tanzania (“Biwater”)*; and *Aguas Argentinas SA, Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal v The Argentine Republic (“Vivendi”)*.<sup>5</sup> Tribunals possess the discretion to accept amici, and ICSID recognized this in the 2006 ICSID Arbitration Rules edition.<sup>6</sup> The publication shared the expectation that accepting amicus submissions would increase the yearned public transparency in arbitration.<sup>7</sup>

Accepting the submission of amici has not avoided criticism. Some scholars do not see this as a proper avenue to increase transparency and think the solution would lie in alternatives like opening the hearings to the public.<sup>8</sup> Nonetheless, it does not take away from the fact that granting some access to the public interest is helpful in some arbitrations. In the case of *Vivendi*, the arbitration revolved around a dispute over sewage works and water distribution in an area populated by millions of people.<sup>9</sup> The Vivendi decision’s impact on all these people is not negligible. The tribunal recognized this weight by acknowledging the application for submissions of amici briefs was due to this matter involving the public interest and not just because some meddling parties decided to impose their participation in the private arbitration.<sup>10</sup>

In a similar vein, *Aguas Provinciales de Santa Fe* opened up to amici curiae and described their participation as helpful for the tribunal’s decision-making because submissions can provide expertise, arguments, and perspectives that the arbitrating parties might not consider.<sup>11</sup> This case, like *Vivendi*, focused on a dispute over agreements on sewage works and water distribution in a populated area.<sup>12</sup> The amicus curiae help was an optional aid, though, and the tribunal was not obligated to accept their input.<sup>13</sup> The tribunal here accepted applications of submissions as it did in

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<sup>4</sup> *See id.*

<sup>5</sup> *See id.*

<sup>6</sup> *See id.*

<sup>7</sup> *See id.*

<sup>8</sup> *See id.*

<sup>9</sup> *See* *Aguas Argentinas, Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Award, ¶¶ 3, 29, 55 (Apr. 9, 2015) [hereinafter *Vivendi*].

<sup>10</sup> *See id.* at ¶ 113.

<sup>11</sup> *See* *Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, ¶ 15 (Jul. 30, 2010) [hereinafter *Aguas Provinciales de Santa Fe*].

<sup>12</sup> *See id.* at ¶¶ 30, 38, 52.

<sup>13</sup> *See* Maxwell, *supra* note 1 at 180.

*Vivendi*.<sup>14</sup> However, both tribunals share the same course of action towards amici curiae: they rejected their help offerings.<sup>15</sup> What would prompt the arbitrators to turn down these interventions for the public interest? *Aguas Provinciales de Santa Fe* tribunal provided compelling reasoning for this decision. The tribunals cannot justify an amicus submission from a non-governmental organization on the general grounds that it is devoted to humanitarian concerns or represents civil society.<sup>16</sup>

Under the NAFTA treaty, the *UPS* case also opened up to amici submissions.<sup>17</sup> This case dealt specifically with UPS' private business being affected. While not environmental per se, the case revolved around unfair competition in the postal service that UPS competes in, which brings up a public concern like environmental cases.<sup>18</sup> The opening to amicus curiae submission is also relevant in their evolving consideration in international arbitration. The tribunal substantiated that they would consider third-party recommendations if they could assist the proceedings beyond what the arbitrating parties have provided in their statements.<sup>19</sup> The tribunal decided that the parties submitted sufficient and complete arguments, so consideration for amicus curiae was unnecessary and discarded.<sup>20</sup>

While the above has demonstrated a negative trend towards amici briefs, a shift that embraced them was noticeable in the *Methanex* case. In this case, the California legislature announced in 1999 a ban on methyl tertiary butyl ether ("MTBE") by 2002 due to concerns that this chemical compound contributed to groundwater contamination.<sup>21</sup> Methanex, a Canadian company whose methanol production is central to its industry, commenced arbitration due to the ban because methanol is a main ingredient in MTBE production.<sup>22</sup> As a result, this ban provoked a business loss.<sup>23</sup> During the arbitration, Earthjustice, the International Institute for Sustainable Development ("IISD"), and the Center for International Environmental Law ("CIEL") partnered up and requested permission to submit an amicus curiae brief.<sup>24</sup> In a press release, the tribunal announced

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<sup>14</sup> See *id.* at 177–78.

<sup>15</sup> See *id.*

<sup>16</sup> See *id.* at 180.

<sup>17</sup> See *United Parcel Service of America, Inc. v. Government of Can.*, ICSID Case No. UNCT/02/1, Award on the Merits, ¶ 3, (May 24, 2007).

<sup>18</sup> See *id.* at ¶ 11.

<sup>19</sup> See *id.* at ¶ 3.

<sup>20</sup> See *id.*

<sup>21</sup> See *Methanex Corp. v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, 44 I.L.M. 1345, 1410-12 (NAFTA Ch. 11 Arb. Trib. 2005) [hereinafter Final Award].

<sup>22</sup> See *id.*

<sup>23</sup> See *id.*

<sup>24</sup> See *Methanex vs. US: Amicus Briefs Allowed in International Investment Arbitration*, CTR. FOR INT'L ENV'T L., <https://www.ciel.org/project-update/methanex-vs-united-states-amicus-curiae-briefs-allowed-in-international-investment-arbitration/>.

that they would accept amici briefs from non-governmental organizations (“NGOs”) and other interested organizations, which, at the dawn of the 2000s, marked a historic shift towards amicus curiae in environmental arbitration.<sup>25</sup> Accordingly, Earthjustice and CIEL submitted an amicus brief together.<sup>26</sup> They emphasized human rights and environmental protection as an obligation under international law and requested the tribunal to defer to measures that achieve this petition.<sup>27</sup> The tribunal accepted this submission and others from NGOs.<sup>28</sup> A final award in favor of the State in 2005 requested Methanex to pay approximately \$4 million in arbitral expenses and legal fees.<sup>29</sup> Following *Methanex*, ICSID continues its efforts to make arbitration more transparent.<sup>30</sup>

### III. AMICI CURIAE: HOW ICSID HAS CHANGED THEIR TREATMENT AND CONCERNS ABOUT THEIR IDENTITY

The arbitration cases above were among parties that entered into agreements bound by investment treaties. When it comes to international investments, parties are aware that they need to safeguard themselves if disputes arise in the foreign country of their business venture.<sup>31</sup> Parties choose arbitration over litigation thanks to cost-effectiveness, arbitral awards, and the opportunity to conduct private proceedings.<sup>32</sup> However, when arbitration tribunals open the door to amicus curiae, the confidentiality advantage of arbitration finds itself diminished. A third party can assume good intentions from organizations regarding public environmental concerns. Still, healthy skepticism should prevail as it is relevant to question who these organizations are, where they come from, and why they seek to become involved. If the benefit of confidentiality faces diminishment due to public concern, the most responsible action a tribunal can take is to ensure the validity of the amicus curiae.

The cases above, *UPS*, *Agua Provinciales de Santa Fe*, *Vivendi*, and *Methanex*, all showed a substantial public interest concern. However, it is still up to whether the parties provide sufficient arguments on their own.<sup>33</sup> In addition, it is up to the tribunal to evaluate a case whether amicus

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<sup>25</sup> *See id.*

<sup>26</sup> *See id.*

<sup>27</sup> *See id.*

<sup>28</sup> *See* Final Award, *supra* note 21 at 1410-12.

<sup>29</sup> *See id.*

<sup>30</sup> *See id.*

<sup>31</sup> *International Legal Research: International Arbitration*, LOUIS L. BIRO L. LIBR., <https://libraryguides.law.uic.edu/c.php?g=261791&p=1750896>.

<sup>32</sup> Gary Born & Wendy Miles, *Global Trends in International Arbitration*, WILMERHALE LLP, <https://www.wilmerhale.com/insights/publications/global-trends-in-international-arbitration-june-2007>.

<sup>33</sup> *See* Maxwell, *supra* note 1 at 180.



assistance is necessary.<sup>34</sup> In the cases where they rejected amici, the suggestions were not helpful either because they did not add to the arguments submitted or did not deem expertise sufficient.<sup>35</sup> *Aguas Provinciales de Santa Fe* stands out because they stated requirements for an amicus submission consideration.<sup>36</sup> The tribunal noted that claiming to represent humanitarian concerns is not enough.<sup>37</sup> Instead, an NGO needs to demonstrate that (1) it possesses relevant expertise, (2) relevant experience, and (3) independence from the parties.<sup>38</sup> In *Aguas Provinciales de Santa Fe*, the tribunal rejected amicus submission requests from four parties because they did not provide enough information or reasons to satisfy the three attributes they requested.<sup>39</sup>

ICSID has not remained silent on the topic of amicus curiae. In 2006, they introduced changes in Rule 37(2), granting discretion to the tribunal to allow the filing of written submissions from non-disputing parties.<sup>40</sup> The rule outlines three factors but differs slightly from the tribunal in *Aguas Provinciales de Santa Fe*. ICSID leaves up to the discretion of the tribunal to consider (1) whether the submission would help to provide a different perspective from the ones submitted by the parties, (2) whether the submission addresses a matter within the scope of the dispute, and (3) whether the non-party possesses a significant interest in the proceeding.<sup>41</sup> The rule mentions, too, that some treaties already outline the rights and criteria of submissions for non-disputing parties.<sup>42</sup> While ICSID and *Aguas Provinciales de Santa Fe* cover important considerations for non-parties treatment, it does not feel sufficient. Still, they are already on the right track of regulating amicus curiae because, even when there is a public concern, tribunals should not accept submissions from anyone claiming to be an interested party in the dispute.

#### *A. Why Should There Be Healthy Skepticism Towards Amicus Curiae?*

As in the arbitration cases mentioned above, they tend to defend causes close to one of the sides of arbitrating parties.<sup>43</sup> It is easy to think

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<sup>34</sup> *See id.*

<sup>35</sup> *See id.*

<sup>36</sup> *See* Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales del Agua S.A. v. Argentine Republic, ICSID Case No. ARB/03/17, Order In Response To A Petition For Participation As Amicus Curiae, ¶ 33 (Mar. 17, 2006).

<sup>37</sup> *See id.*

<sup>38</sup> *See id.*

<sup>39</sup> *See* *Aguas Provinciales de Santa Fe*, *supra* note 11 at ¶ 15.

<sup>40</sup> *See* ICSID Rules of Procedure for Arbitration Proceedings, Rule 37(2) (Apr. 10, 2006).

<sup>41</sup> *See id.*

<sup>42</sup> *See id.*

<sup>43</sup> *See* Maxime Somda, *Protecting Social Rights Using the Amicus Curiae Procedure in*

that briefs would tend to side with the State given the rights of the people, like access to appropriate water services and health concerns that can arise due to exposure to chemicals, for example. Indeed, this concern was raised in *Methanex*, as taking the side of the State is more likely to happen, which can be a procedural disadvantage for the opposing party.<sup>44</sup> However, amicus submissions can occur where they seek to protect an investor against regulation or reform.<sup>45</sup> While these considerations create an inequity concern, one concern tribunals are not asking that requires a hard look is the following: how legitimate are these NGOs, and how long have they existed?

The questioning above should not undermine how the “friends of the court” can contribute. Amicus curiae submissions present a healthy development in arbitration, though. In environmental concerns, they can help preserve the public’s concern and give fuller consideration to a possible ecological threat when needed. They also contribute to the transparency effort ICSID seeks to provide in arbitrations where the issue goes beyond affecting just the parties involved. They can become a great tool to ensure that possible abuses do not occur. Still, there needs to be a better system to ensure that they do not end up being used unfairly by either party or become too convenient sources of information for arbitrators. The latter would remove the impartiality they need to maintain in dispute resolution.

#### IV. BALANCING THE NEED FOR TRANSPARENCY AND ENVIRONMENTAL WELL-BEING: A BETTER WAY TO CONSIDER SUBMITTED AMICI CURIAE BRIEFS

The approaches from *Aguas Provinciales de Santa Fe* and ICSID Rule 37(2) are similar. Still, they do not feel sufficient to adequately address the concern about how to screen amicus curiae submissions. Therefore, this note breaks down a couple of suggestions on how to filter these suggestions more effectively, focusing on environmental concerns in international arbitration to narrow an illustration of public worry that can arise in disputes. The first suggestion goes over modifying Rule 37(2) of the ICSID Convention Arbitration Rules. Rule 37(2) can be a better guideline for arbitrators to maintain impartiality by being more detailed. A second suggestion goes over another possibility to filter amicus curiae based on a proposal for amicus submissions in U.S. domestic courts. While litigation is

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*Investment Arbitration: A Smokescreen Against Third Parties?*, INT’L INST. FOR SUSTAINABLE DEV., (Apr. 23, 2019), <https://www.iisd.org/itn/en/2019/04/23/protecting-social-rights-using-the-amicus-curiae-procedure-in-investment-arbitration-a-smokescreen-against-third-parties-maxime-somda/>.

<sup>44</sup> See Katia Fach Gómez, *Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest*, 35 FORDHAM INT’L L. J. 513, 548-562 (2012).

<sup>45</sup> See *id.*

a different domain, the application on amicus submissions can easily translate to the one in arbitration because the scenarios are still similar enough.

A. *Reworking ICSID Convention Arbitration Rule 37(2) for More Expansive Factors Applying to Amicus Curiae*

The 2006 update on the ICSID Convention Arbitration Rules made Rule 37(2) cover factors to consider at the tribunal's discretion for non-disputing party submission.<sup>46</sup> The current factors include (1) whether it provides a different perspective from the disputing parties, (2) whether it addresses a matter within the scope of the dispute, and (3) whether there is significant interest in the proceeding from the non-disputing party.<sup>47</sup> However, the current outlining of these factors is insufficient to address more complete concerns about properly filtering amicus curiae. An outline of a drafting proposal below attempts to make the factors more encompassing to serve as a better discretionary tool for arbitrators.

The first factor should be more explicit about treating a different perspective. For example, a concern that arose during *Methanex* was that an amicus submission could repeat the reasoning of the State, which would make it redundant or seem to favor the State too much in the arbitration.<sup>48</sup> However, it requires notice that environmental disputes can include technical issues that can be too complicated and scientifically uncertain.<sup>49</sup> There can be different models to interpret data, disciplines with their terms, and other considerations that complicate the analysis of the issue.<sup>50</sup> Therefore, the tribunals should be wary about the framing of information. It could not be an objective measure, but rather a choice of a system that favors that party for that purpose can happen. This consideration brings up a lack of impartiality, which is discussed later in this section, but it is still possible that NGOs can do if arguing on a cause similar to a party. For example, an arbitrator could see an amicus submission that comes to a very different conclusion with the same data set of case data, which the arbitrator would think is a different perspective. Therefore, the arbitrator should be careful and look into the information with a critical eye, trying to find omissions and the details on how the models of interpretation differ from one another. The first factor should clarify that they should scrutinize the different perspectives for strength and methodology to support arbitrators in their endeavors when they might not have the expertise required for the environmental issue at hand. Therefore, a more effective way to phrase this

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<sup>46</sup> See Rule 37(2), *supra* note 40.

<sup>47</sup> See *id.*

<sup>48</sup> See Gómez, *supra* note 44 at 548-62.

<sup>49</sup> See Gail Bingham, Pamela Esterman & Christopher Riti, *Effective Representation of Clients in Environmental Dispute Resolution*, 27 PACE ENV'T L. REV. 61, 63 (2009).

<sup>50</sup> See *id.*

factor would be the wording “sufficiently different perspective.”<sup>51</sup> In this way, submissions can fill gaps that arguments from the disputing parties might overlook. Furthermore, this requirement could effectively invite NGOs to collaborate and submit only one amicus brief to avoid overlapping on the same issue.<sup>52</sup> By encouraging this collaboration, ICSID achieves administrative efficiency by reducing the number of possible submissions through consolidation of these.

The second factor of addressing a matter within the scope of the issue seems sufficient, and there is no suggestion for further modification. The environmental concerns that arise within the dispute need to be related to the actions taking place within it. In this manner, the factor helps filter possible amicus briefs that may not be relevant to the issue.

The third factor, whether there is significant interest from the non-disputing party in the dispute, needs to be reframed. As it is, the wording is too ambiguous and could be subject to conflicting interpretations. The main point of this factor is to address the motivation of the third party. Therefore, a more effective phrasing would explain the significant interest of the arbitrator. This factor must outline how a tribunal needs to look into the background of the possible amicus curiae. It is advisable to mention how the tribunal needs to look into their relevant work to the events in the dispute and ask what could motivate the active intervention in the matter. An invitation to analyze the arbitration context should arise in this factor because the climate surrounding the location of the issue and relevant events can motivate a party to intervene. For example, arbitration could involve extensive deforestation of an area where endangered wildlife lives. The tribunal can look at the environmental concern and adequately conclude that this matter would significantly affect the local ecosystem if the habitat is modified.

*B. Expanding Rule 37(2) Factors: The Addition of a Fourth to Seventh Factors to Provide a Complete Framework*

Besides the reframing suggested above for the three factors in Rule 37(2), I offer an expansion to cover four more factors to complete the framework of amici briefs consideration. The extensive reframing and clarification seek to provide uniform guidance across tribunals, so doubts on how to approach Rule 37(2) would be decreased with the expansion. In a fourth factor, addressing an economic independence inquiry would round up the guidance for the tribunal to ensure fairness and transparency in the amici briefs consideration. A fifth factor focused on the identities of individuals behind the organization submitting an amicus brief provides the tribunal does due diligence to ensure impartiality toward either party. A sixth factor would prompt an inquiry into the public interest concern, which

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<sup>51</sup> See Gómez, *supra* note 44 at 548-62.

<sup>52</sup> See *id.*

covers potential environmental risks, their impact, and imminency. Finally, a seventh factor would require considering administrative matters to ensure the efficiency and timeliness of the arbitration. When weighted together, these factors would provide a more complete, better framework that ICSID can set an example to other arbitration tribunals for a more appropriate approach when environmental arbitration is at stake.

The fourth factor that needs inclusion in the rule asks the third-party to submit an amicus brief for economic independence from the parties in the arbitration. Often, an NGO that wants to submit an amicus brief during an arbitration proceeding finds domicile within the State, a party of the dispute.<sup>53</sup> When this is the case, it is crucial to look into the funding of the NGO: do they receive significant grants from the government?<sup>54</sup> Can private funding or donations be traced back to the investor party in the arbitration? Does the NGO receive financial contributions from a political party in the State? Are donors related in any way to the people involved in the arbitration investor party? These questions do not intend to create additional work for the tribunal.

On the contrary, they should expect amicus curiae to submit their funding and donations sources in an attachment to their request or submission to ensure that bias due to economic dependency is not at play. The question of financial independence should not stop with the arbitrating parties themselves. The tribunal must ensure that lawyers and key staff working on representation or consulting with the parties are not donors to the amicus curiae. This requirement would not present a significant burden because the field of international arbitration is not large, given the field's specialty.<sup>55</sup> Hence, the possibility of connections to NGOs or similar third parties becomes less likely to affect significant numbers. However, tribunals should acknowledge if possible economic ties arise that happened in the past and do not seem likely to happen again or continue. If they ran into a situation of this kind, then economic dependency should be discarded as a conflict. Therefore, a presentation on who funds the NGO and who sponsors the preparation of the amicus brief would ensure better impartiality from the non-disputing party.

A fifth factor to consider in Rule 37(2) is the identity of the people drafting the amicus brief and behind the organization itself. While an NGO can be established for decades and recognized internationally, the tribunal needs to scrutinize beyond the organization's name. Who are these individuals? Have they been involved as former employees of either party? How long have they been at the organization? Are they established in their corresponding fields? These questions are just a framework that helps to investigate further beyond the organization's façade. These inquiries can

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<sup>53</sup> *See id.*

<sup>54</sup> *See id.*

<sup>55</sup> *See id.*

take a tribunal to ask how long the organization has been around, the identity of its founders, and why it came to be. The transparency these organizations seek needs to be a two-way street. Ensuring that these prospective amici curiae are upfront about their information provides tribunals' consideration on a more fair basis for all the parties involved in the dispute.

A sixth factor that needs inclusion in Rule 37(2) is the requirement of public interest at stake in the dispute. Surprisingly, the rule's text does not explicitly include the term public interest.<sup>56</sup> Therefore, ICSID should amend the text to inquire whether a public interest exists in the scope of the matter surrounding the dispute. They could model the inquiry after the one in the Canadian-Slovak Bilateral Investment Treaty ("BIT"), which required this interest to exist before considering an amicus submission.<sup>57</sup> This question can be complicated, but the tribunal can look at past cases that opened up to amicus curiae where the environmental impact was significant in populated areas. For example, the compound MTBE could significantly pollute groundwater in *Methanex*, and its consumption was toxic.<sup>58</sup> It is easy for a tribunal to see how the impact goes beyond the parties to the public.

Now, people, animals, and the environment in the area are at risk. Similar environmental impacts were witnessed in *Vivendi* and *Agua Provinciales de Santa Fe*, where access to water and sewage works impacted millions of people. The tribunal needs to examine the context and assess how the scope of the dispute can affect the public. Of course, a tribunal must not forget that some environmental impacts might not affect a population directly but an essential ecological system for the area. A problem of this kind could arise when looking at disputes involving deforestation. Therefore, when accounting for a public interest, a tribunal should review environmental impact issues on habitats. If people are not directly affected, what about native flora and fauna? Is the habitat endangered in any way already or at significant risk due to human irresponsibility? By applying this factor, tribunals filter out baseless submissions and ensure they remove an unnecessary burden from the process.<sup>59</sup> While a complete assessment may be complex in certain circumstances, a tribunal should do their best due diligence given the information they have available.

A seventh factor that needs inclusion in Rule 37(2) for administrative efficiency is a time limit for amicus curiae submission. Arbitrations can take several years, and it matters to recognize that keeping them within an

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<sup>56</sup> See *id.*

<sup>57</sup> See *id.*

<sup>58</sup> See *Methanex vs. US: Amicus Briefs Allowed in International Investment Arbitration*, *supra* note 24.

<sup>59</sup> See Gómez, *supra* note 44 at 548-62.

appropriate timeframe avoids delays in proceedings. Therefore, it should be up to the discretion of the tribunal's expertise to determine how long non-disputing parties to make submissions. In addition, arbitrators are in a better position to estimate the settlement of a dispute sooner or later, given their experience and the precedent available. Keeping the amicus briefs timely could also open up the possibility of allowing disputing parties to respond to them. After all, for fairness, it is better to give space to the actual parties of the dispute to have a chance to look at the amicus submission and respond if the information undermines their arguments. Otherwise, the process becomes less transparent for the arbitrating parties. It could create more significant problems down the line for arbitration that could impact not only the preference for arbitration but also increase the risks in investing internationally when environmental issues could be possible.

Expanding the factors in Rule 37(2) to the seven outlined above would provide a better filtering and consideration system for amicus curiae. If all the factors are satisfied by NGOs and other interested organizations or parties, their briefs would be more helpful and relevant to the tribunal. This more encompassing regulation also results in the preservation of impartiality and administrative efficiency needed in arbitral proceedings to avoid unnecessary waste of time. Furthermore, this more strict filtering can assure parties that the matter is not allowing too much meddling from outside forces. Finally, the narrowing of who can submit in the end contributes to maintaining the case within the parties as much as possible while allowing space for necessary public concerns.

### *C. Implementing Additional Measures to Help the Regulation of Amicus Curiae*

While the above would only affect ICSID Convention Arbitration Rule 37(2), some additional measures can apply to help regulate the submission from amicus curiae. Below, this section outlines a couple of possibilities inspired by domestic courts in the U.S. and from Katia Fach Gomez's 2012 research published in the *Fordham International Law Journal*.

The first suggestion stems from Fach Gomez's 2012 article, which proposed the establishment of a permanent institution by ICSID and other similar organizations that devotes its purpose to the protection of the public interest.<sup>60</sup> While some tribunals that arbitrate matters are ad hoc, having an institution rooted in ICSID or the International Criminal Court ("ICC") contributes to a permanent structure that would specialize in addressing public concerns in arbitration.<sup>61</sup> In this manner, the burden is taken away from the tribunals for each case. In addition, the institution can directly address disputes in a more streamlined way to help maintain administrative efficiency and cost efficiency and keep most arguments confidential by not

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<sup>60</sup> *See id.* at 562-64.

<sup>61</sup> *See id.*

opening up each one to the public. Another advantage is that institutions like ICSID can help avoid what looks like an intrusion from third parties in the arbitration by having an institutional intermediary. If an independent institution raises the concerns, impartiality can prevail and contribute to a better way to communicate the public interest in cases not to undermine one side of the dispute. Furthermore, another advantage is that the institution can be more efficient with meeting deadlines and helping to keep tribunals accountable, so they do not try to circumvent the consideration of public interest when it is at stake in the case. The institution, in this manner, contributes to the transparency efforts that ICSID desires.

A caveat is that this solution is difficult to achieve. It would require significant effort from ICSID, from planning to taking steps that ensure the institution remains impartial. Moreover, it could be an arduous effort that could not be as efficient due to the ad hoc tribunals. Perhaps parties could stir away from ICSID-hosted tribunals due to the institution's intervention, which investing parties could perceive as hostile. On the other hand, suppose an announcement from the get-go emphasizes public interest. In that case, investing parties could think that it is more likely that tribunals will give more consideration to the arguments on the side of the State. This risk of partiality in arbitration proceedings needs careful thought. Still, this solution could become feasible after conducting studies and proposals from ICSID to help balance the need for the public interest.

Lastly, another suggestion that international tribunals can adopt from U.S. domestic courts is the use of certifications in the process of amicus submissions. Some states have resorted to this measure to ensure accountability of interested third parties, which adds a step for the submitting parties.<sup>62</sup> However, this step of requiring disclosure or certification can help expose possible abuse.<sup>63</sup> This step would require establishing a uniform system that would need cooperation from existing treaties to ensure that all treatment of amici curiae is equal and accountable. Otherwise, variations could lead to disagreements and possible abuse that tribunals look to avoid.

## V. CONCLUSION

The inclusion of amicus curiae briefs in international arbitration is considerably new. Nevertheless, the tribunals have been on a correct path when they acknowledge that disputes can encompass public interest impact beyond the issue at hand. However, these "friends of the court" require adequate screening processes to ensure that they genuinely focus on the public interest and are not misused by individuals or entities with a stake in

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<sup>62</sup> Helen A. Anderson, *Frenemies of the Court: The Many Faces of Amicus Curiae*, 49 U. RIC. L. REV. 361, 397-405 (2015), <https://digitalcommons.law.uw.edu/faculty-articles/214>.

<sup>63</sup> *See id.*



the arbitration. This note suggests improving ICSID Convention Arbitration Rule 37(2) to be more encompassing and considering additional options to accomplish this goal. In this effort, more effective transparency and proper accountability result in accomplishments.