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Role Of Amicus Curiae in Balancing Public Interest and Investor Rights in ICSID Arbitrations: An Empirical Analysis

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Abstract

This research studies the effect of Amicus Curiae submissions on rulings in investment arbitrations by the International Centre for Settlement of Investment Disputes (ICSID investment arbitration). This research uses empirical test on ICSID cases to explore how Amicus Curiae, the non-disputing parties, affects the final judgment of arbitration on both substantive and procedural aspects. Based on the theoretical guidance of influential people on the affected side and market supply and demand, this analysis probes the content, experience and current situation of related amicus curiae submissions. Outcome shows that Amicus can have persuasive effect on tribunal, but depends on how much they are close to tribunal views, the social and specialized background of the Amicus Curiae and the kind of submissions. In this way it also illustrates the complexity of sustainability in investment arbitration... the study derives the absence of transparency, objectivity and neutrality inherent in the framework of regulation and recommends that ICSID principles be remodelled for a more liberal and sustainable mode in regulation to bring greater openness, fairness and probity in process of arbitration so as to ensure impartiality. The findings illustrate the urgent need for articulating a regulation that is designed to control Amicus Curiae participation and, equally vividly, reflect how court discretion holds the key to balancing an over the long-term effects of these interventions. This study sheds light on the nuanced idea of sustainability in investment arbitration while furthering our knowledge of the procedural and substantive factors affecting ICSID rulings.

Keywords: Amicus Curiae Opinions, Investment Arbitration, ICSID Awards, ISDS, Substantive Impact, Arbitral Tribunals, Non-Legal Factors, Award Legitimacy

1. Introduction

An important development in legal practice was the adoption of the Roman law-based Amicus Curiae system into common law courts and its subsequent spread to international conflict settlement (Mohan, 2010). In the 1990s, international investment dispute resolution (ISDS) underwent a significant policy change, especially with regard to the involvement of "non-disputing parties." These parties can now join as Amicus Curiae and further the public interest, albeit in a restricted capacity. This development, prompted by the international community's concerns over the legitimacy crisis in investment arbitration, has opened doors for non-involved parties to contribute to investor-state arbitration, within specific boundaries (Johnson et al., 2021). Law academics widely recognize the Amicus Curiae system's crucial role in ensuring "procedural justice". Consequently, a pertinent question arises about whether intentionally crafting the Amicus Curiae as a procedural mechanism can have a "substantive impact" on investment arbitration awards.

Although prior work in the realm of international investment arbitration has largely utilized traditional qualitative methods to assess the theory, practice, legislation, and case precedents of Amicus Curiae participation, it has failed to offer an objective view of how Amicus Curiae has affected investment arbitration awards. What remains lacking in the existing literature is solidly grounded analysis that looks at how much power Amicus Curiae's opinions have over the decisions of investment arbitrators and investment tribunals. This paper attempts to address this research gap.

Through the empirical examination performed by this study, a substantive and practical comprehension of the Amicus Curiae's impact can be further developed. The conducted analysis has examined cases involving the non-state third party's participation as Amicus Curiae, supervised by the ICSID. Therefore, the finding of these cases identified the trend where the party's intervention plays a role in the discourse development found in the investment arbitration award. Notably, the introduction of the Amicus Curiae application or its rule since 2002 and later incorporated into the Arbitration Rules in 2006 showcases the ICSID's primacy regarding such intervention in the international investment arbitration space (Yang, 2021). As of late 2022, Amicus Curiae had submitted 131 applications in 86 ICSID arbitration cases, with decisions on 49 applications made public. Out of these, 22 applications for Amicus Curiae submissions were approved by the Arbitral Tribunal, accounting for about 44.09% of the total. However, Amicus Curiae chose not to submit written opinions in four cases, resulting in only 17 filed Amicus Curiae opinions across 14 cases, which is roughly 34.69% of the total public requests.

The paper's argument is structured methodically. It begins with presenting theoretical assumptions about the influence of Amicus Curiae opinions on awards, drawing upon the "market supply and demand theory" and the "affected group theory". These assumptions posit that Amicus Curiae opinions could significantly sway IIA awards. The second part of the paper empirically investigates the effect of Amicus Curiae opinions on arbitral awards, categorizing the impacts as "positive" substantive, "not positive" substantive, and purely procedural. The third part identifies and scrutinizes non-legal factors that affect investment arbitration awards, such as the social standing of the Amicus Curiae, their experience in participation, submission methods, and the content of their opinions. The fourth part analyzes the reasons behind these influences, predicts trends, and examines countermeasures regarding the efficacy of Amicus Curiae opinions in investment arbitration awards. The final part reflects on the overall effectiveness of these opinions in the context of investment arbitration awards.

2. Two Theories on How Amicus Curiae Opinions May Affect International Investment Arbitral Awards.

The provided article gives an informative overview of the role of Amicus Curiae opinions in the context of IIA awards. Although many national and international legal systems often request and use the views, their importance in the context of IIA cannot be emphasized. The comparable roles that Amicus Curiae plays in the domestic legal system and IIA account for this relationship (Huete García et al., 2023). A fundamental concept in comprehending this relationship is the Market Supply and Demand Theory. According to this idea, Amicus Curiae opinions are an important source of information that help arbitral tribunals make decisions that are more informed and efficient. These views improve the tribunal's capacity to get and share crucial information, which influences the judicial decision-making process.

Furthermore, the Amicus Curiae opinions can be analyzed from a different angle according to the Affected Groups Theory. This idea makes clear how popular opinion and court rulings relate to one another. According to this theory, Amicus Curiae's viewpoints offer a window into popular opinion since they represent the interests and viewpoints of a wider societal base. As a result, these opinions bring public opinion into the framework of judicial reasoning in IIA circumstances by serving as a source of information for court rulings as well as a representation of the ideas and concerns of the

affected parties. This essay focuses on the complex ways that court decisions in the context of international investment arbitration are influenced by Amicus Curiae arguments.

2.1. Market Supply and Demand Theory: The Logic of Information Acquisition and Exchange

Market supply and demand theory is based on the "legal-informational" paradigm, which highlights the educational significance of Amicus Curiae briefs in judicial decision-making (Kleinheisterkamp, 2012). This strategy is predicated on the idea that judges who possess the independent authority to decide cases are well-versed in the law and fit to evaluate the evidence independently of other parties. Amicus Curiae are crucial because they improve the court's records by providing factual data and persuasive legal arguments. They also provide a comprehensive legal framework that greatly aids in the judiciary's decision-making (Laroche, 2009).

Judges necessitate information to render decisions, so they are inclined to regard Amicus Curiae opinions as a means of payment for gaining access to valuable insights. The extent of influence exerted by Amicus Curiae opinions on judicial decisions is directly correlated with the judges' information needs (Hansford & Johnson, 2014). In legal proceedings, judges are more inclined to consider amici's contributions when there is a greater necessity for additional information to inform their decisions. This dynamic creates an implicit quid pro quo relationship, wherein amici supply information anticipating that it will have a subtle yet significant influence on the judicial process. This interplay is rooted in the basic principles of information acquisition and exchange. Many organizations would hesitate to submit Amicus Curiae briefs if there were no prospect of influencing the decision-making, considering the costs involved. Judges and amici engage in vital information exchanges that enhance the decision-making process by providing essential and deliberate information sharing, which is a core aspect of legal adjudication (Chang, 2017).

For the benefit of arbitral tribunals, thorough data is even more important due to the intricacy of conflicts involving international investments. It can be particularly difficult for courts to make well-informed conclusions based merely on the facts presented by the opposing parties because many conflicts are complex and cross-border. The tribunal's restricted access to comprehensive data in this case might be somewhat mitigated by the inclusion of public opinion insights from Amicus Curiae, which offer a range of perspectives. This integration significantly improves the standard and reach of the international arbitration decision-making process.

2.2. Affected Group Theory: A "Barometer" of Public Opinion

The Amicus Curiae briefs serve as an important indicator of the general public's mood, as shown by the theory of the affected group, which establishes a crucial link between popular perceptions and court judgements. These briefs significantly influence judicial thinking by illuminating the implications for different social groups, which strengthens the legitimacy and systematisation of court decisions (Schill, 2010). Although this approach supports judicial independence and impartiality, it also acknowledges the influence of practical reality. Even in the pursuit of fair justice, outside influences are unavoidable. Judiciary credibility, which depends on the impact on society, requires judges to consider Amicus Curiae briefs that summarise popular opinions. Ignoring these viewpoints runs the danger of undermining the public's fundamental support for the court as well as its institutional legitimacy (Levine, 2011). Verdicts rendered in the area of IIA may have a significant impact on transnational or global affairs, including intricate themes like the intricacies of interstate investment, environmental concerns, and human rights violations (Reinisch, 2008). As a result, while making rulings, investment arbitration tribunals need to be aware of the significant social ramifications. It is essential to include Amicus Curiae involvement and comments in order to address these pervasive systemic implications and maintain the integrity and acceptability of the arbitration process and its decisions.

2.3. The Primacy of Market Supply and Demand Theory in Elucidating the Role of Amicus Curiae in International Investment Arbitration

The adjudicatory procedure in the intricate field of international investment arbitration requires a thorough comprehension of the factual and legal contexts. This calls for a theoretical framework that appropriately takes into account the informational needs that these kinds of arbitrations present. The Market Supply and Demand Theory, which emphasizes the value of Amicus Curiae remarks in expanding the tribunal's body of knowledge, is without a doubt the greatest choice. This argument holds that Amicus Curiae briefs are essential for providing the expert opinions and in-depth research required to make well-informed decisions. It is based on the "legal-informational" paradigm.

It is impossible to exaggerate how applicable this method is to issues involving foreign investment. These cases are notable for their complexity and international scope, often including issues that go beyond commonly recognized legal interpretations and evidence admissibility limitations. For this reason, the Market Supply and Demand Theory offers a strong foundation for examining the manner in which amicus curiae contribute to closing these knowledge gaps. This idea emphasizes the relationship between amici as information producers and tribunals as information consumers by presenting amici as significant sources of factual and legal information. This dynamic becomes more significant when the opposing parties' arguments fail to adequately address the complicated issues before the tribunal.

Moreover, this methodology emphasizes how important amicus curiae viewpoints are to the arbitral process. It makes it possible for an unbiased examination to concentrate on the case's factual and legal merits as opposed to the more contentious and arbitrary elements of public opinion and societal impact. Because it ensures that conclusions are based on thorough and pertinent information, this unbiased perspective is essential to preserving the arbitration process's integrity and focus. Adopting the Market Supply and Demand Theory significantly improves the analysis's intellectual rigor. It calls for a thorough investigation of the ways in which the data submitted by amici affect the arbitration's decision. The idea makes it easier to carefully assess the calibre, applicability, and significance of the data that amici provide, assessing how it fits in with the information requirements of the tribunal and influences the arbitral decision that is ultimately made.

3. Empirical Test of the Impact of Amicus Curiae Opinions on Investment Arbitration Awards

The preceding sections addressed the theoretical foundation for the influence of Amicus Curiae filings on arbitral awards. The subsequent study demonstrated how contextualized this impact on investment arbitration rulings is. Next, it is important to address the issue of the actual influence of Amicus Curiae submissions on arbitration outcomes, specifically with respect to ICSID arbitrations. To inform this discussion, the author suggests developing a test model that could systematically evaluate the tangible role of such submissions in the decision-making of ICSID arbitration panels.

3.1. Model Design for Impact Testing

The paper considers the impact of Amicus Curiae submissions on the arbitral awards, based on the decided cases, where the Arbitral Tribunal allowed their submission and the Amicus Curiae provided their written opinion to the arbitral tribunal. One of the decided challenging the jurisdiction shall be taken into consideration. Furthermore, the analysis concerns the manner in which the Arbitral Tribunal used and provided the opinion given by the Amicus Curiae in the arbitrator's decision. Consequently, the two effects of the Amicus Curiae should be distinguished. The substantive category further includes what is termed "presumptive" influence. The adoption of opinions from the Amicus Curiae represents the epitome of substantive influence, whereas the procedural influence is comparatively less pronounced (Cohen, 2017).

3.1.1. Three Presentation Modes of Amicus Curiae in Adjudication

The assessment of the influence of Amicus Curiae on arbitral awards necessitates a nuanced analysis of its integration within the award's framework. This evaluation can be most effectively conducted

by scrutinizing the manner in which Amicus Curiae is incorporated into the award. To develop a systematic approach for gauging the impact of Amicus Curiae on awards issued by the ICSID, it is imperative to explore its presentation modalities. As illustrated in Figure 1, the manifestation of Amicus Curiae in arbitral awards can be classified into three distinct categories: procedural acknowledgments of its involvement, a detailed exposition of the viewpoints it presents, and instances where the Arbitral Tribunal references the Amicus Curiae during the adjudicative discourse. It is important to note that an award may exhibit multiple instances of Amicus Curiae engagement, and the cumulative effect on the award is shaped by the interplay of these varied presentations.

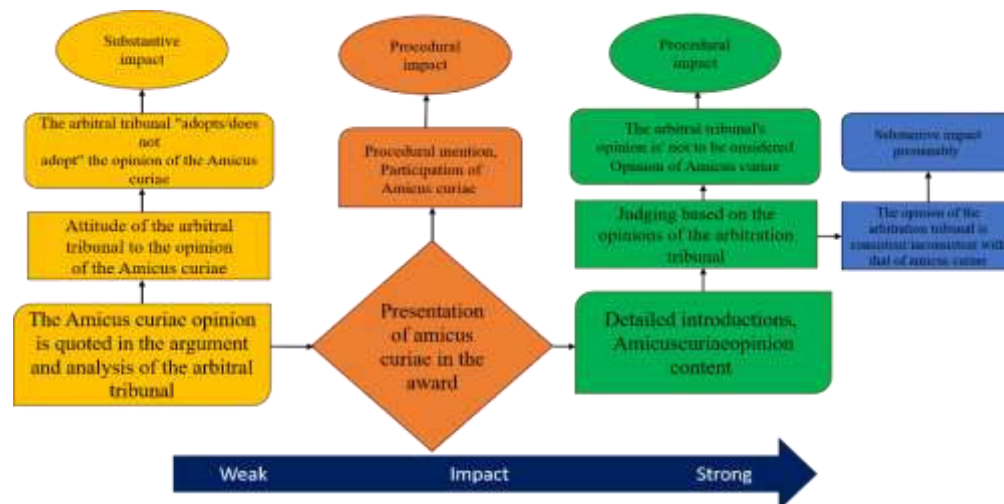


Figure 1: Design of the Empirical Test Model for the Influence of Amicus Curiae Opinions on ICSID Arbitral Awards.

(This figure was created by the author based on the presentation of Amicus Curiae opinions in ICSID arbitral awards and the approach taken by Arbitral Tribunals towards these opinions.)

3.1.2. “Procedural” Versus “Substantive” Impact Models

Amicus Curiae’s involvement in investment arbitration is expressed in two separate facets. First, the Procedural facet hardly matters. An Amicus Curiae forms the procedures of arbitration, as a rule, the initiative to intervene and the submission of written forms in the application. They seek to strengthen transparency and legitimacy in arbitration processes. Second, the Substantive determinant occurs when the Amicus Curiae has real influence on the final arbitral award or final decision of the case.

From a legal standpoint, the procedural impact of Amicus Curiae participation can be divided into two primary aspects. Firstly, the involvement of Amicus Curiae itself, often cited as a quintessential example, predominantly affects the arbitration process in a procedural capacity. Secondly, a thorough analysis is required to determine whether the Amicus Curiae’s involvement has had a substantive effect on the Arbitral Tribunals approach to the award. However, for this analysis, such a context requires to be studied in conjunction with the opinion of the Amicus Curiae or other presentations. Furthermore, more cases could be found where the monetary award covers the position of the Amicus Curiae completely but explicitly states this decision was made irrespective of the presentation. In other words, such participation influenced just the procedure of making the award, and not its substance (Obersteiner, 2014).

The tendency of an adversary arbitral tribunal towards the interpretation of an Opinion submitted by an Amicus Curiae is a vital factor in determining its impact in the final arbitral award. From the convenience of the opinion, the tendency of a tribunal may be generally classified into three: adoption, non-adoption, and indeterminate. Adoption occurs when the tribunal has positively incorporated the opinion of an Amicus Curiae and has thus generally influenced the award. On the other hand, non-adoption entails rejection by the tribunal’s explicit negativity towards the opinion of an Amicus

Curiae. The indeterminate criterion is when there is no specificity by the tribunal that is discernible as to whether it accepted the opinions in the Amicus curiae.

The influence of the Amicus Curiae's submissions on the arbitral judgment is obvious when adopting or not adopting them. This situation may be read as indicated when the tribunal incorporates the Amicus Curiae's ideas into its rationale and deliberation, either by quoting directly from the argument or by the extensive reference of the Amicus Curiae's position in the award. In such matters, the impact of contributions of the Amicus Curiae on the arbitral award is easy.

Furthermore, a stratification in the levels of influence exerted by different modes of impact is observable. These levels range from "procedural impact" to "presumptive substantive impact" culminating in "substantive impact" each escalating in significance. Within the realm of "substantive impact" it is noteworthy that opinions of the Amicus Curiae that are adopted by the tribunal carry greater persuasive force compared to those that are not.

3.2. Typology of Impact Situations

This article offers a comprehensive typology based on an analysis of 14 cases in which Amicus Curiae submissions were filed and subsequent awards (inclusive of jurisdictional decisions) were issued by the Arbitral Tribunal. This typology categorizes the influence of Amicus Curiae briefs on ICSID arbitral awards into three distinct categories: "substantively positive" "substantively neutral or negative" and "solely procedural impact". This classification is detailed in Table 1, delineating the varying degrees and nature of the Amicus Curiae's influence on the arbitration outcomes.

Serial	Case Name	Case Status	Impact
1	VivendiSuez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.) v. Argentine Republic (II) (ICSID Case No. ARB/03/19)	Adjudicated	It can be inferred to have a non-positive substantial impact
2	MiculaIoan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I], ICSID Case No. ARB/05/20	Adjudicated	Presumed to have a positive substantive impact; Procedural impact
3	BiwaterBiwater Gauff (Tanzania) Ltd. v. United	Adjudicated	Can be inferred to have a positive substantial impact

	Republic of Tanzania, ICSID Case No. ARB/05/22		
4	ForestiPiero Foresti, Laura de Carli & Others v. The Republic of South Africa, ICSID Case No. ARB(AF)/07/01	Adjudicated	Only procedural impact
5	ElectrabelElectrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19	Adjudicated	Presumably having a positive substantive impact; It can be inferred that there is a negative substantive impact; Mention without considering.
6	AESAES Summit Generation Limited and AES-Tisza Erömu Kft v. The Republic of Hungary, ICSID Case No. ARB/07/22	Adjudicated	Only procedural impact
7	PacPac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12	Adjudicated	Only procedural impact
8	PhilipSaptec, S.A. v. Kingdom of Spain, ICSID Case No. ARB/19/23	Adjudicated	Positive substantive impact
9	InfinitoInfinito Gold Ltd. v. Costa Rica, ICSID Case No. ARB/14/5	Unsettled	Negative substantive impact
10	UnitedUnited Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia, ICSID Case No. ARB/14/24	Adjudicated	Presumably, having a negative substantive impact
11	RWERWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain, ICSID Case No. ARB/14/34	Adjudicated	Negative substantive impact

12	Opera FundOperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain, ICSID Case No. ARB/15/36	Unsettled	Negative substantive impact
13	TheodorosTheodoros Adamakopoulos and others v. Republic of Cyprus, ICSID Case No. ARB/15/49	Unsettled	Negative substantive impact
14	MagyarMagyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary, ICSID Case No. ARB/17/27	Adjudicated	Only procedural impact

Table 1: Summary of cases in which Amicus Curiae has filed a written submission and the Arbitral Tribunal has rendered an award (including a decision on jurisdiction)

3.2.1. “Positive” Substantive Impacts

The discernible positive impact of an Amicus Curiae's input in arbitration proceedings manifests through two primary indicators. First, this impact is evident when an Arbitral Tribunal explicitly cites and concurs with aspects of the Amicus Curiae's submissions within its award. Second, a more subtle influence is observed when there exists a notable alignment between the content of the Amicus Curiae's opinion and the tribunal's final decision, suggesting the tribunal's tacit endorsement of these views.

In the landmark Philip case, the Arbitral Tribunal significantly leveraged the Amicus Curiae's insights, particularly for fact verification and augmenting its arguments. This reliance is highlighted by the tribunal's explicit acknowledgment of the Amicus Curiae's comprehensive evaluation regarding the adverse effects of tobacco products and Uruguay's regulatory measures aimed at public health protection (ICSID Case No. ARB/10/7). These references were integral in shaping the tribunal's understanding of the case's factual matrix^{IBID}.

Similarly, following the submission of the European Commission as Amicus Curiae in the Micula case as well, also sheds light on taking a nuanced view of European Union law and Bilateral Investment Treaties between the EU Member States. The submissions of the Commission emphasized on the issue to put BITs in the context of the European framework because: (ICSID Case No. ARB/05/20). The Tribunal, in its deliberation, took cognizance of this viewpoint, particularly considering the legal implications of EU Member States' accession to the EU and the overarching EU legal structure.

Conversely, the Biwater case presents a more implicit instance of an Amicus Curiae's influence. While the tribunal's award did not overtly reference the Amicus Curiae's submissions, a meticulous analysis reveals that the tribunal discreetly integrated the Amicus Curiae's extensive discourse on investor liability into its judgment (ICSID Case No. ARB/05/22). The Amicus Curiae posited that investors are obligated to thoroughly evaluate the risks associated with their investments and maintain pragmatic expectations regarding profitability. Consequently, any losses incurred due to inadequate

risk assessment were deemed the responsibility of the investors, leading the tribunal to dismiss the investor's claim for damages. This adoption of the Amicus Curiae's rationale, albeit indirect, underscores the significance of such contributions in shaping arbitral outcomes (IBID).

3.2.2. Substantive Impacts that are Not Positive

The influence of an Amicus Curiae brief on arbitral awards is contingent upon its acceptance by the Arbitral Tribunal. This determination oscillates between two primary scenarios: instances where the Amicus Curiae's submissions are acknowledged but not incorporated, and those where they are presumptively disregarded. In the *Infinito* case, the tribunal thoroughly examined and cited the Amicus Curiae's submissions, yet ultimately chose not to integrate them into its decision. The Amicus Curiae contended that the concession granted to the investor was in violation of Costa Rican law. This assertion, viewed through the lens of prevailing interpretations under the ICSID rules, the BIT, and precedents set by IIA tribunals, purportedly stripped the tribunal of jurisdiction over disputes stemming from the alleged illicit investment (ICSID Case No. ARB/14/5). However, the tribunal concluded that not every infraction of the host nation's domestic law negates the substantive protections afforded to the investment under the BIT, thereby reaffirming the ICSID tribunal's jurisdiction (IBID).

In the *Vivendi* matter, the Arbitral Tribunal effectively dismissed the Amicus Curiae's stance, which could be characterized as a “de facto rejection”. The Amicus Curiae argued that Argentina's obligations regarding human rights, specifically the right to water for its residents, superseded its commitments under the BIT. This line of reasoning suggested that these human rights obligations tacitly authorized Argentina to temporarily suspend its treaty obligations as necessary. Contrary to this argument, the tribunal found no support in either the BIT or general international law for the assertion that Argentina's human rights obligations conflicted with its treaty commitments. It was determined that Argentina could concurrently fulfill both sets of obligations.

Additionally, the European Commission's role as Amicus Curiae in several cases has demonstrated a similarly negligible impact on arbitral decisions. The Commission argued that the ICSID tribunal lacked jurisdiction in matters related to the Energy Charter Treaty, the implications of the *Achmea* judgment, and the application of EU state aid law. Nonetheless, the tribunals in cases like *Electrabel* and *Opera Fund* did not concur with the European Commission's interpretation regarding the interplay between the Energy Charter Treaty and EU law. Despite the Commission's cogent arguments, its views were not incorporated into the tribunal's decisions (Kleinheisterkamp, 2012). The United Tribunal disagreed with the European Commission's perspective that the *Achmea* judgment bound IIA tribunals. In the *RWE* and *Theodoros* cases, the European Commission's submissions were limited to jurisdictional issues.

3.2.3. Procedural Impact Only

In the *PAC* case, the Center for International Environmental Law (CIEL), serving in the capacity of Amicus Curiae, proffered written submissions. These submissions offered a succinct yet comprehensive perspective on the matter. However, the tribunal elected to eschew consideration of this input. The Amicus Curiae's argument hinged on the premise that the host State's regulatory actions vis-à-vis the investor were in congruence with the evolving tenets of international law, particularly those pertaining to human rights and environmental protection (ICSID Case No. ARB/09/12). Nevertheless, the tribunal determined that the Amicus Curiae lacked requisite access to critical, case-specific information, contingent upon party consent. Hence, it was deemed prudent to analyze the Amicus Curiae's contributions with an adequately informed perspective on the case (IBID).

In the context of the *Micula* case, the Arbitral Tribunal adjudged the incorporation of potentially relevant EU law within the ambit of “Enforcement of Arbitral Awards and EU Law” as extraneous. The tribunal further resolved that it was inapt to engage with the contentions advanced by the

disputing parties and the European Commission on the enforceability of the award (ICSID Case No. ARB/05/20). Additionally, in the *Electrabel* case, the tribunal opined that *Amicus Curiae* submissions from the European Commission, predicated on the internal juridical frameworks of the European Union, were not germane for consideration in the context of IIA awards. This was attributed to the inherently international purview of ICSID tribunals (IBID). Moreover, in the *AES*, *Foresti*, and *Magyar* cases, the arbitral awards merely acknowledged the procedural participation of the *Amicus Curiae*. They refrained from delving into an analysis or evaluation of the submissions presented. Consequently, this reticence in engagement renders it arduous to discern any tangible, positive influence emanating from the *Amicus Curiae*'s involvement in these cases.

3.3. Empirical Findings

The influence of *Amicus Curiae* opinions on arbitral awards is significant, as evidenced by case statistics. Such opinions have been observed to positively and substantially impact the formation of Arbitral Tribunal awards. Even in cases where the tribunal did not adopt the *Amicus Curiae*'s opinion or its impact was solely procedural, the tribunal diligently considered and analyzed the opinion as part of its decision-making process. For example, the tribunal acknowledged the *Amicus Curiae*'s participation in the *AES* award and thoroughly considered its opinion before issuing the final award (ICSID Case No. ARB/07/22). The *Amicus Curiae*'s opinion can significantly influence the Arbitral Tribunals award formation, even when not adopted by the tribunal itself, though this impact may only sometimes be entirely positive.

The interplay between the opinions of *Amicus Curiae* and Arbitral Tribunals, and their influence on the outcome of arbitral awards, warrants careful examination. Notably, a direct causal relationship between the *Amicus Curiae*'s input and the final award is discernible in only a handful of instances, such as in the notable *Biwater* case (Marshall, 2007). The determination of an award is a multifaceted process, influenced by an array of factors and the perspectives of various parties. Consequently, establishing a straightforward causal link between the opinion of an *Amicus Curiae* and the award's outcome is complex and rarely straightforward, notwithstanding the potential constructive influence of the former on the latter.

The efforts of *Amicus Curiae* have repeatedly resulted in procedural implications on arbitral judgements in the field of publicly available ICSID proceedings. This presence disproves any claim that *Amicus Curiae* has no effect at all and emphasises the idea that its influence is a recognised procedural reality. Furthermore, the incorporation of *Amicus Curiae* viewpoints into arbitral rulings often exhibits a convergence of factors, making it difficult to distinguish between procedural and substantive effects. Although substantive influence does not always follow procedural influence, the opposite is also true: substantive influence always involves some degree of procedural influence. As a result, there is a complicated and interdependent link between these two types of influence rather than them being distinct.

4. Unlawful Components in *Amicus Curiae* Decisions Affecting Investment Awards Without Justification

Determining the basis for accepting *Amicus Curiae* views in investment arbitration proceedings is a major difficulty since the ICSID Convention Arbitration Rules do not provide clear guidelines for doing so. When legal documents are not easily available, this uncertainty often causes a reliance on a range of non-legal concerns, which influences tribunal rulings. This empirical study's main goal is to determine how much non-legal elements influence arbitration awards (Marshall, 2007). It explores the legal framework that controls arbitral tribunals' discretionary authority and aims to clarify how non-legal variables affect the results of investment arbitrations. This is accomplished by critically analysing the function, contributions, and substantive substance of *Amicus Curiae* opinions in these proceedings both conceptually and practically.

4.1. Impact of Amicus Curiae “Status Factor” on Award

Applying the social authority theory to the Amicus Curiae role can help understand how it affects court judgments. According to this viewpoint, influential amici have a greater say in how cases are settled. Prominent amici often compose argumentative papers emphasizing their influence and influencing the court's rulings by citing their prestigious social status and vast experience.

4.1.1. The Impact of Amicus Curiae's “Social Status” on Adjudication

Under ICSID Arbitration Rules (2022), Article 67, paragraph 1, "Persons or entities not party to the dispute" may submit written comments to the Arbitral Tribunal on pertinent dispute themes. For non-disputing parties, this ICSID arbitration procedure streamlines Amicus Curiae involvement. These stakeholders may consist of individuals, businesses, and non-governmental and intergovernmental organizations on a local, national, and worldwide level (Shaw, 2023).

4.1.2. Theoretical Assumptions and Analysis

The authority of third parties in legal proceedings is intricately linked to their respective social standings (Shaw, 2023). A notable empirical study focusing on the role of Amicus Curiae within the United States' domestic legal system found a clear correlation: submissions from Amicus Curiae of higher standing were more likely to influence the tribunal's decision-making (Shaw, 2023). This trend parallels the impact of Amicus Curiae in IIA proceedings, mirroring the dynamics seen in domestic courts. Specifically, in the context of ICSID investment arbitration, submissions from Amicus Curiae possessing significant social status have a pronounced effect on the arbitration awards.

The assessment of an Amicus Curiae's social status can be effectively understood through the lens of organizational sociology theory (Gaillard, 2015). This theory posits that public organizations wield more authority than their private counterparts, and formally established organizations command more respect than informal ones. Within this framework, private corporations are perceived as having lesser authority when compared to public entities such as Non-Governmental Organizations (NGOs) and Intergovernmental Organizations (IGOs). In the hierarchy of public organizations, IGOs are accorded more authority than NGOs. This hierarchical structure influences the impact of Amicus Curiae submissions in a descending order, with IGOs at the forefront, followed by NGOs, and finally private corporations.

4.1.3. Empirical Evidence of Impacts

As depicted in Figure 2, an analysis of publicly accessible cases involving ICSID Amicus Curiae participation shows that NGOs accounted for approximately 67.20% of all amicus applicants. Notably, within this cohort of NGOs, about 85.57% were representatives of the host State involved in the investment dispute. This data underscores the significant role of NGOs, particularly those affiliated with the host State, in shaping the discourse and potentially influencing the outcomes in ICSID arbitration cases.

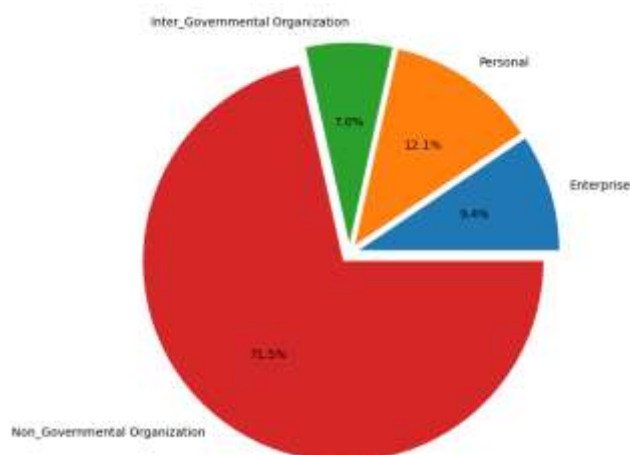


Figure 2: Amicus Curiae applications for participation in cases with different statuses in ICSID. The measurement standard is the "individual," implying the computation of the "quantity" of amicus curiae. If a particular amicus curia engages in various cases within the same court multiple times, their designation as an amicus curiae is unique in the calculation. This signifies that they are counted as a sole individual.

Table 2: Approval of Amicus Curiae applications by ICSID Arbitral Tribunals in different capacities. Approval of applications by amici curiae of different statuses is counted in "times," i.e., the number of times amicus curiae has applied is counted using double counting. For example, in the case of a joint application by several amici curiae and where the arbitral Tribunal makes only one decision, each amicus curiae is counted once, depending on the amicus curiae status.

Identity	Inter-governmental organizations	International Non-Governmental Organization	Regional governmental, non-governmental organizations	Host country non-governmental organization	Company	General Individuals	Individuals with expertise
Refuse	7	0	0	11	7	6	0
Approval	16	5	2	24	0	0	3

(Table created by the author based on ICSID Arbitral Tribunal decisions on Amicus Curiae applications)

First, in a recent development, the European Commission exercised discernment in its approach to Amicus Curiae submissions. Specifically, it declined several applications for Amicus Curiae opinions. Contrastingly, submissions from esteemed intergovernmental organizations, such as the WHO Framework Convention on Tobacco Control (FCTC) Secretariat and the Pan American Health Organization (PAHO), received approval (ARB/05/20, ARB/0 (ICSID Case No. ARB/10/7)). This trend of acceptance extended to prominent international non-governmental organizations, including the CIEL, the ICSID, and the ICJ. Second, a notable pattern emerged regarding corporate submissions. The Commission uniformly rejected applications originating from corporations. Only submissions from individuals possessing relevant expertise were considered, with a selective approval process applied to general individual applications (ICSID Case No. ARB/03/17).

4.1.4. Impact Logic Projections

It is difficult to conduct an empirical analysis of the effect that individual Amicus Curiae contributions have on arbitral awards in the context of ICSID arbitration. Nonetheless, social authority theory provides a helpful framework for calculating the potential impact of these submissions on the outcomes of ICSID arbitration's. It is necessary to consider the effects that different Amicus Curiae submissions have on different submitting entities. It is possible that individual amici lack access to resources that organizational amici do, such as skill, capital, or specialized knowledge. This discrepancy can occasionally result in the Arbitral Tribunal favoring submissions from organizations over those from individuals. It is shown that judges tend to be biased in favor of applicants from using sociological theory created by Donald Black. (Van Aaken & Kurtz, 2019). However, it is important to note that, in the context of ICSID arbitration, there have yet to be instances where both an individual and an organization have submitted separate Amicus Curiae briefs in the same case. This absence makes the task of comparatively assessing the influence of individual versus organizational submissions on a case-specific basis particularly challenging.

Moreover, within the hierarchy of influence among amici curiae, a distinction emerges. An individual with expertise typically carries greater authoritative influence compared to a lay individual. This is especially true when the individual is acknowledged as an expert in a field directly related to the

arbitration issue at hand. Therefore, submissions by such specialized individuals are more likely to exert a significant impact on the final decisions in ICSID arbitration proceedings.

4.2. Impact of Amicus Curiae's "Participation Experience" on Adjudication

In evaluating authority, social status is considered a singular factor; however, practical experience serves as a pivotal basis for elucidating authority. This principle is illustrated through the regular participation of Amicus Curiae in various legal cases, which effectively demonstrates their specialized knowledge and proficiency in the field of investment arbitration.

4.2.1. Theoretical Assumptions and Analysis

The nexus between experiential proficiency and judicial authority is universally recognized. A detailed empirical analysis focusing on Amicus Curiae engagement within the United States Court of Appeals for the State of New York reveals a distinctive category of participants, termed "institutional litigants" (Laroche, 2009). These entities or individuals, characterized by their frequent involvement in legal proceedings as amici curiae, are distinguished by their substantial experience and resources. The research suggests that these "institutional litigants" wield a greater potential to sway judicial decisions (Laroche, 2009). Extending this premise, this paper examines the influence of Amicus Curiae expertise on decision-making processes within the ICSID. It advances the hypothesis that a direct correlation exists between the extent of Amicus Curiae experience and the efficacy of their contributions in shaping adjudicatory outcomes.

4.2.2. Empirical Evidence and Projections of Impacts

Key players in a published analysis of 37 Amicus Curiae cases were the European Commission and the CIEL. After CIEL successfully requested three times for the ability to offer Amicus Curiae briefs, the European Commission approved twelve of the organization's requests for views in eighteen cases.

In the realm of the ICSID, CIEL's Amicus Curiae interventions were notable in the Vivendi, Biwater, and PAC cases. These submissions, often alongside other amici curiae, primarily addressed issues related to human rights and sustainable development (ICSID Case No. ARB/03 /19), (ICSID Case No. ARB/05 /22) : (ICSID Case No. ARB/09 /12.) The disputes in the Vivendi and Biwater cases revolved around the allocation of water resources and sewage treatment, whereas the PAC case concerned a conflict over a mining concession. In the Vivendi case, the Amicus Curiae underscored the intricate international law implications tied to the operation of water and sewage systems in Argentina, highlighting the potential impact on human rights of millions. However, the tribunal in this instance did not incorporate the perspectives offered by the Amicus Curiae in its final ruling (ICSID Case No. ARB/03/19 .). Conversely, the Biwater tribunal acknowledged the Amicus Curiae submission, which delved into specifics regarding investor obligations, human rights, and sustainable development, deeming it "useful" (ICSID Case No. ARB/05/22). During the PAC case, Amicus Curiae opinions were presented both during the litigation phase, focusing on substantive legal issues, and at the jurisdictional determination stage (ICSID Case No. ARB/09/12). These opinions encompassed a broad spectrum, including the legality of regulatory actions by the host country, the delineation of public interests, and the social conflicts underpinning the factual matrix of the dispute. Although the tribunal did not fully engage with the arguments presented by CIEL, it ultimately ruled in favor of the host state (Najm et al., 1998). CIEL's proficiency as an Amicus Curiae has evidently matured over time. However, due to the limited public disclosure surrounding these cases, it remains difficult to definitively ascertain the extent of the Amicus Curiae's influence on the final awards. Nonetheless, the role of Amicus Curiae in IIA proceedings mirrors the impact seen in domestic jurisdictions. This observation suggests a potential for ICSID arbitration processes to also recognize and benefit from what might be termed an "empirical advantage" inherent in Amicus Curiae participation.

4.3. Impact of "Mode of Submission" of Amicus Curiae's Opinion on Award

Amicus Curiae briefs are typically presented in either a "joint" or "individual" format. The prevailing legal theory posits that a joint brief can exert a more substantial influence on judicial decisions compared to individual submissions.

4.3.1. Theoretical Assumptions and Analysis

The theory of affected groups contends that Amicus Curiae briefs serve as a "barometer" of public opinion. This perspective is evidenced by the aggregation of non-disputing parties within a single Amicus Curiae brief, which provides arbitrators with a general measure of the extent to which a dispute resonates with the public (Shaw, 2023).

Furthermore, the benefits of joint Amicus Curiae submissions are multifaceted. Primarily, they level the playing field for individual entities or organizations that might otherwise face professional and financial constraints, thereby enhancing the overall quality of the Amicus Curiae brief. Additionally, joint submissions, constrained by word limits, tend to be more succinct and aligned with the submitting organization's core interests and objectives. This focus on specific issue facets is often more favorable to Arbitral Tribunals, who prefer targeted arguments over exhaustive summaries. Moreover, these collective submissions ease the burden on the Arbitral Tribunal. Empirical evidence from a survey conducted among U.S. Supreme Court Associate Judges reveals that 90% express a preference for jointly filed Amicus Curiae briefs, primarily due to the reduced volume of submissions they need to review (SMITH, 1988). This analysis indicates that within the context of the ICSID, joint Amicus Curiae submissions potentially wield greater influence on arbitral decisions compared to individual submissions.

4.3.2. Empirical Evidence of Impact

Upon examining 49 Amicus Curiae applications, it emerges that 11 were filed collaboratively, while 34 were lodged individually, in line with the applicants' preference. Notably, the Arbitral Tribunal exhibits a marginally higher approval rate for joint applications compared to individual submissions, approving approximately 54.55% of the former and 44.12% of the latter (Echandi, 2019). In terms of the influence of Amicus Curiae briefs on the final decisions, the Tribunal incorporated insights from both individual and joint submissions into two of its awards.

Furthermore, the CIEL, an international non-governmental organization renowned for its expertise, has consistently participated in Amicus Curiae filings, often in conjunction with other international, intergovernmental, or national entities of the host state. Significantly, the Arbitral Tribunals have not only acknowledged these submissions but have also explicitly articulated their positions regarding the adoption or non-adoption of CIEL's contributions in their rulings.

Mode		Joint	Individually
Number of applications submitted		11	34
Ratifications	Acceptance	2	2
	Not accepted	2	7
	(sth. or sb) else	2	2

Table 3: Impact of the Mode of Submission of Amicus Curiae's Statement of Claim on Arbitrary Tribunal Approval and Award

4.3.3. Impact Projections

It is anticipated that amicus curiae submissions—particularly those from "non-traditional allies"—will influence judges' rulings more. The cooperation of several entities in their submissions—such as environmental organizations and human rights organizations, or a domestic host state and an international organization—best illustrates this dynamic. Such coalitions usually receive greater judicial attention than regular joint submissions, which can incorporate many domestic environmental organizations from the same host state. There have been suggestions that coalitions between predictable partners, such as the United States, may not have the same influence as the idea of "unexpected allies" filing joint Amicus Curiae petitions (Echandi, 2019). This approach highlights how crucial it is to forge diverse coalitions when it comes to legal advocacy. Moreover, the "numerical advantage" is directly tied to the degree to which Amicus Curiae submissions impact arbitral decisions. However, the number of amici curiae in a case does not always imply their level of influence, therefore this statement may be a little misleading. Instead, it emphasizes the complex nature of influence in court that the perceived advantage of having more Amicus members than opponents typically depends on a range of other contributing conditions.

4.4. Influence of the “Content” of Amicus Curiae's Opinion on Award

Specific guidelines are provided in Article 67(2)(b) of the 2022 ICSID Arbitration Rules for receiving Amicus Curiae submissions. For these submissions to be considered, they must fulfill two requirements: first, they must provide information or perspectives that are notably different from those advanced by the disputing parties; second, they must assist the Arbitrary Tribunal in resolving any pertinent factual or legal disputes. This means that Amicus Curiae submissions must present original concepts or points of view in order to reduce the tribunal's focus on factual or legal matters. The degree to which these inputs influence the ultimate award will depend on their factual or legal content. "Fact or law" refers to a broad category of the given facts. This array underscores a fundamental interplay between these elements, shaping the tribunal's understanding and interpretation of the case (ICSID Case No. ARB/03/19).

4.4.1. Theoretical Assumptions and Analysis

The discourse surrounding the interplay of facts, law, and their application in legal proceedings is multifaceted. A predominant view emphasizes the criticality of factual content. This perspective gained traction when the United Nations Commission on International Trade Law (UNCITRAL) highlighted the importance of factual information in its endeavor to establish new transparency standards. Specifically, UNCITRAL noted the value of factual data provided to Arbitrary Tribunals through the mechanism of Amicus Curiae submissions (UN Doc. A/ CN. 9 / 760). In the context of the ICSID tribunals, the reliance on parties' submissions is mandatory, as these tribunals are precluded from conducting independent fact-finding. This procedural limitation elevates the significance of Amicus Curiae briefs in enriching the tribunal's understanding of the factual matrix of the dispute.

Additionally, an observation by a judge of the United States Supreme Court underscores this point. The judge remarked that Amicus Curiae briefs often contribute more substantially in terms of factual elucidation than legal reasoning (Lynch, 2004). However, this viewpoint is not without contention. Contrasting research indicates a divergence, revealing that Amicus Curiae opinions are predominantly incorporated in the “legal argumentation” segment of judicial awards, rather than the “factual exposition” part (Collins Jr et al., 2015). This finding suggests a judicial inclination towards a more legalistic approach, emphasizing the application of law to facts, rather than focusing on the purely factual aspects presented by the Amicus Curiae. This dichotomy in perspectives underscores the complex dynamics between factual content and legal reasoning in the adjudicatory process, illustrating how different forums and judicial philosophies can influence the weighting of these elements in legal deliberations.

4.4.2. Empirical Evidence of Impacts

A detailed example of how Arbitrary Tribunals have included Amicus Curiae submissions into their rulings may be found in Figure 3. According to the analysis, the tribunals mentioned the involvement of Amicus Curiae in three different cases in a "procedural reference" without mentioning the actual influence of these submissions on the decisions that were taken. On the other hand, most tribunals specifically mentioned or took into account "legal" ideas from Amicus Curiae opinions. Remarkably, in three circumstances did this legal input take the shape of a combination of factual and legal elements; in eight cases, the material was solely legal. Notably, no tribunal made a ruling based only on "factual" information found in the Amicus Curiae opinions, highlighting the importance of legal considerations in these references.

In summarizing the nature of Amicus Curiae contributions, eight cases explicitly cited legal information, with none relying solely on factual data. When examining the specific influence of Amicus Curiae opinions on tribunal awards, notable examples include the Bi water, Electrabel, and Philip cases. In these instances, the tribunals "adopted" the Amicus Curiae opinions, particularly the components blending facts and law. The Electrabel tribunal's approach to purely factual content from the European Commission merits attention, as it expressed reservations about the utility of such information in aiding the tribunal's decision-making process (ICSID Case No. ARB/07/19). This analysis underscores a pivotal point: the value and influence of Amicus Curiae submissions are contingent upon the individual tribunal's criteria and needs. As such, the impact of different Amicus Curiae contributions must be evaluated on a case-by-case basis, recognizing the unique context and requirements of each tribunal.

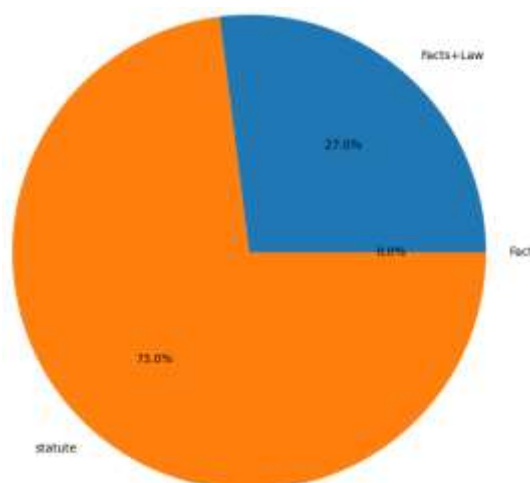


Figure 3: 3 Types of Content of Amicus Curiae Submissions.

(The author created this figure based on a typology of the specific content of Amicus Curiae submissions in ICSID arbitration).

4.4.3. Assessment of Impact

The influence of "purely factual information" presented in Amicus Curiae briefs on arbitrary awards seems to be circumscribed. However, the incorporation of "social science statistics" which represent tangible, empirical data, might be highly regarded by the adjudicator. Factors such as the identity and societal engagements of the amici can yield factual insights into the repercussions of the investment project at hand (Triantafylou, 2010). This data transcends the limited perspectives of the disputants, offering a realistic portrayal of the situation and shedding light on the potential implications of the award (Lynch, 2004). When it reaches the stage of rendering an arbitrary award, the tribunal is more inclined to consider information of substantive relevance. Such relevance necessitates a bespoke assessment by the Arbitrary Tribunal, with no one-size-fits-all definition. Research involving Judges of the U.S. Federal Supreme Court indicates that Amicus Curiae briefs can profoundly influence

tribunal decisions, particularly in cases that venture into realms outside the court's or the disputants' expertise. This is especially true in technologically nuanced legal fields such as taxation, patent law, and trademark law (Lynch, 2004). These insights are pertinent when evaluating the effect of Amicus Curiae briefs in international investment arbitration contexts.

5. Reflections on the Effectiveness of Amicus Curiae Opinions on Investment Arbitrary Awards

Empirical research suggests that Amicus Curiae petitions influence investment arbitration decisions in a complicated way. Numerous factors, including the weight and substance of the Amicus Curiae brief and the Arbitrary Tribunal's discretionary powers, may be responsible for this influence. The brief's persuasiveness stems from a number of extralegal factors that muddle and heighten the unpredictable nature of the tribunal's decision-making process. This misunderstanding highlights how crucial it is to examine these components in great detail in order to fully comprehend how Amicus Curiae norms and practices affect the results of arbitrary judgments.

5.1. Analysis of Factors Influencing Effectiveness

The interplay between the Amicus Curiae's substantive content, referential value, and arbitrary tribunal's discretionary judgment determines the effectiveness of its contribution to the arbitrary ruling.

5.1.1. Reference Value of Amicus Curiae Opinions in Support of Decisions

Amicus Curiae's value in aiding the Arbitrary Tribunal's decision-making, especially when evaluating a case's merits, is heavily impacted by the petition's premise as well as the kind and importance of its contributions. The function of Amicus Curiae is not, however, expressly defined by international law or other dispute resolution frameworks like the ICSID Arbitration Rules. It's interesting to note that these rules are ambiguous regarding the role and jurisdiction of the Amicus Curiae. Specifically, Article 37(2) of the ICSID Arbitration Rules (2006) facilitates the engagement of Amicus Curiae in ICSID arbitration. This was exemplified in the landmark *Divisive* case, where the ICSID Arbitrary Tribunal formally acknowledged and considered the submissions made by Amicus Curiae, thereby clarifying their status as “non-parties” consistent with other legal systems and proceedings (ICSID Case No. ARB/03/19). The support provided by Amicus Curiae is extremely beneficial to the Arbitrary Tribunal, especially when it comes to international conflicts, which frequently entail intricate and varied concerns. The opinions offered by Amicus Curiae on significant topics, such as human rights, the environment, and other matters of public concern, are essential in assisting the tribunal in coming to more comprehensive and informed decisions (Francioni, 2009). The ICSID Arbitration Rules empower Amicus Curiae to contribute effectively to the tribunal's deliberations by presenting unique perspectives, specialized expertise, and insights that may differ significantly from those of the disputing parties. This was further underscored in the *SUEZ* case (ICSID Case No. ARB/03/17) when the Arbitrary Tribunal stressed the significance of Amicus Curiae submissions. These contributions aid in the tribunal's development of a more sophisticated grasp of the pertinent issues, allowing the tribunal to render more just and accurate verdicts. They accomplish this by offering distinctive arguments, viewpoints, and specialized experience. Amicus Curiae are therefore an essential supplementary tool that improves the tribunal's database and makes it easier to thoroughly assess the matters pertinent to the decision.

5.1.2. Amicus Curiae Difficult to Put Forward “New Views” Different from Host Country

The decision of the tribunal to eschew the utilization of the Amicus Curiae brief potentially emanates from its redundancy, echoing the arguments already presented by the disputing parties. In the realm of investment arbitration, Amici Curiae fulfill a pivotal role by contributing opinions that predominantly champion the public interest, often mirroring the concerns of the respondent host State involved in the dispute. This congruence with the host State's public interest has been consistently evidenced through empirical analysis of ICSID arbitration cases. Nonetheless, while the Arbitrary Tribunal is empowered to consider the submissions of the Amicus Curiae, it is under no obligation to adopt their viewpoints unless they offer substantial aid to its adjudicatory responsibilities.

5.1.3. Exercise of Arbitrary Tribunals “Discretionary Power”

The discretion wielded by an Arbitrary Tribunal in considering the influence of an Amicus Curiae brief on an arbitrary award is pivotal, particularly in light of the fact that the ICSID Arbitration Rules do not explicitly prescribe guidelines for integrating such submissions (Schadendorf, 2015). As elucidated by the Free Trade Commission Statement under the North American Free Trade Agreement (NAFTA), the tribunal's acceptance of an Amicus Curiae brief does not necessitate a corresponding obligation to address its contents (Commission, 2003). In a similar vein, the ICSID tribunal has affirmed its autonomy in deciding whether to accept or disregard these opinions. Furthermore, permitting an Amicus Curiae to intervene in arbitrary proceedings does not create a legal duty on the part of the tribunal towards the Amicus Curiae. The tribunal's primary obligation remains with the disputing parties, and it is under no compulsion to reference or assimilate the views presented by the Amicus Curiae (Triantafylou, 2008). Consequently, the Arbitrary Tribunal retains complete discretion in managing and evaluating the contributions of the Amicus Curiae.

5.2. Forecasting and Analysis of Impacts

Figure 4 delineates an ascending trajectory in the prevalence of Amicus Curiae interventions within the ICSID case filings, spanning from 2002 to 2022. This period has witnessed a marked escalation in the frequency of such interventions, particularly in more recent years, underscoring a burgeoning interest among amici curiae in the realm of investment arbitration.

This increasing involvement can be attributed to two pivotal developments: the incorporation of Amicus Curiae provisions in international investment agreements and the progressive refinement of ICSID's Amicus Curiae guidelines. Consequently, there is an observable surge in Amicus Curiae engagement in investment arbitration proceedings.

This enhanced participation of amici curiae is poised to indirectly influence future case precedents and play a consequential role in shaping the deliberations and decisions of Arbitrary Tribunals. Over the course of time, it is anticipated that the perspectives and submissions of amici curiae will wield a more pronounced impact on arbitrary outcomes. Furthermore, with the ongoing evolution of Amicus Curiae clauses in international investment treaties and the continuous improvement of ICSID's procedural rules, the impetus for Amicus Curiae involvement in investment arbitration is expected to intensify further.

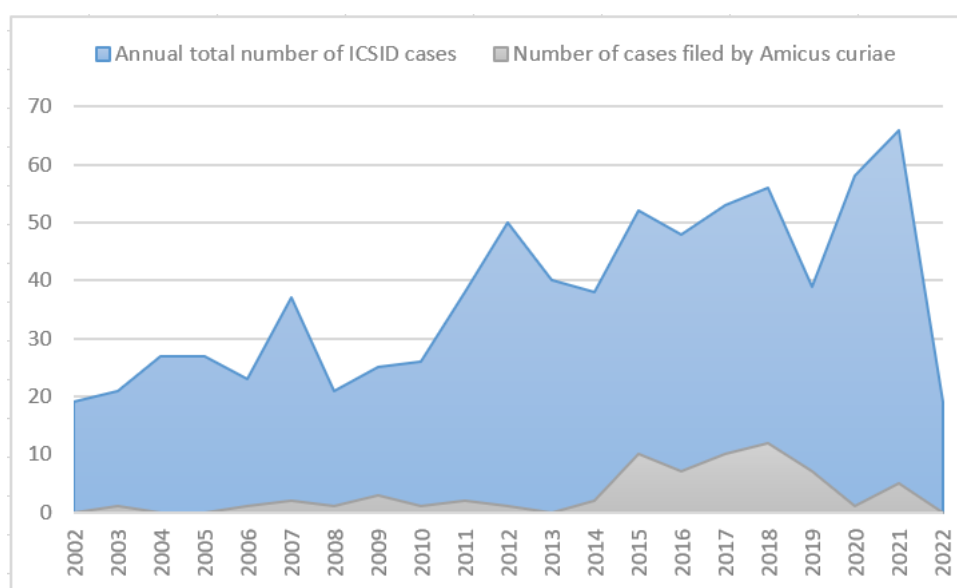


Figure 4: Trends in the total annual ICSID caseload and the annual Amicus Curiae participation caseload, 2002-2022 As shown in Figure 4, the proportion of amicus curiae interventions continued to increase after the enactment of Article 37(2) of the ICSID Arbitration Rules in 2006 and until 2015, reaching a peak of 32.69% in 2015. The proportion of amicus curiae cases continued to

increase between the enactment of Article 37(2) of the ICSID Arbitration Rules in 2006 and 2015, reaching a peak in 2015, accounting for 32.69% of the total number of amicus curiae cases. The ICSID initiated the fourth round of the rule revision process in 2016, which involved the amendment of the amicus curiae rules

Firstly, the active engagement of amici curiae in previous cases significantly enhances their involvement in subsequent proceedings. This heightened involvement often results in a greater likelihood of their submissions being favorably considered by the Arbitratory Tribunal. The accrual of experience plays a pivotal role in this dynamic. However, it is crucial to avoid overstating the impact of prior cases (Pte-Case) on subsequent ones (Post-Case), especially since the investor-host State dispute settlement framework does not operate under the principle of stare decise (Bishop & Marchili, 2012). An in-depth analysis of the influence exerted by Amicus Curiae submissions on arbitrary awards, coupled with an understanding of the decision-making protocols of the Arbitratory Tribunal, can notably improve the prospects of successful Amicus Curiae interventions in future disputes. By assimilating lessons from earlier Amicus Curiae contributions during the preparatory phase, these parties can enhance the persuasiveness of their submissions, thereby increasing the likelihood of their acceptance by the Tribunal (Bartholomeusz, 2005). Furthermore, heightened motivation among amici curiae to participate could significantly boost their potential to influence the Tribunal's deliberations.

Secondly, the escalating involvement of amici curiae in arbitration tribunals emphasizes the critical nature of investment disputes and their intersection with public interest considerations. The decisions rendered by these tribunals often carry complex and extensive implications for various stakeholders. To preserve the integrity and legitimacy of the ISDS regime, it is imperative for tribunals to thoroughly evaluate the broader systemic ramifications of their rulings, encompassing social, political, and judicial dimensions, while concurrently adhering to pertinent legal principles (Van den Eynde, 2013).

5.3. The Search for Discretion and Rules to Balance the Impact of Amicus Curiae

A careful balance between the rights of amici to participate, the parties' legitimate interests, and the integrity of the judicial system must be struck in light of Amicus Curiae activity and its growing influence on judicial decisions. It is essential to follow the maxim "lenient admission, rigorous scrutiny" in order to decrease the impact of Amicus Curiae petitions. Both the creation of procedural rules and the judge's discretionary procedures should give considerable thought to this strategy.

5.3.1. "Leniency": Facilitated Design of the Participation Process

Protecting the rights and interests of Amicus Curiae is the main objective of the concept of "leniency" in international investment law. This enhances the credibility and openness of the investment arbitration process. This aim is achieved and the arbitration process is rendered more inclusive and accessible by promoting Amicus Curiae involvement through provisions in international investment treaties and arbitration rules. (Born & Forrest, 2019). One significant advancement in the area of international investment law is the inclusion of Amicus Curiae clauses in investment agreements. Their inclusion greatly improves the regulations regulating Amicus Curiae's involvement in IIA proceedings, encouraging their active engagement. In order to attract amici, arbitration procedures must be made simpler, particularly when it comes to defending their participation rights. (Dolzer et al., 2022). Amicus Curiae participation is encouraged by Article 67(5) of the ICSID Arbitration Rules (2022), which sets a 30-day deadline for the Arbitratory Tribunal to evaluate their applications. This is a significant advancement in this regard. (Parra, 2022). However, historical evidence reveals a stark difference: In the past, ICSID Arbitral Tribunals have adjudicated Amicus Curiae applications in as little as two years, with an average processing time of several months. (ICSID Case No. ARB/03/19).

6. Conclusion

Through its innovative empirical investigation, this article has illuminated the intricate and significant role of Amicus Curiae opinions in the context of International Centre for Settlement of Investment Disputes (ICSID) arbitration. Our study is noteworthy because it employs a fresh method to analyze the intricate relationships that develop between non-disputing parties, arbitral tribunals, and the interplay of extralegal and legal factors. The findings indicate that Amicus Curiae can have a substantial impact on arbitral decisions, but only if their opinions align with the tribunals' inclinations and their arguments are skillfully crafted. The detailed empirical evidence in this study brings a fresh perspective to the body of previous research and challenges conventional wisdom regarding the function of Amicus Curiae in investment arbitration. Our study sheds light on the intricate relationships that exist between legal reasoning and the broader socio-political environment in which these arbitrations are held. This provides new insight into the procedural procedures and substantive factors that affect ICSID rulings.

Expanding on these insights, we provide several policy suggestions meant to maximize the function and influence of Amicus Curiae in the arbitration procedure. In order to provide more detailed instructions for the filing and evaluation of Amicus Curiae perspectives, the ICSID framework must first be amended. The primary goals of this modification must be to preserve the integrity of the arbitral process, fairly represent a range of interests, and increase transparency. Second, it is critical to create an atmosphere where judges are predisposed to carefully consider the arguments presented by Amicus Curiae, especially in instances involving intricate, multidisciplinary challenges or matters of general public interest.

The study's conclusion promotes an accommodating and all-encompassing strategy for limiting Amicus Curiae involvement in ICSID arbitration. The arbitration community may be better equipped to balance the important contributions of Amicus Curiae with the primary objective of reasonable and effective conflict resolution by embracing a more liberal and open paradigm in the formulation of rules and judicial discretion. This method preserves the validity of the arbitration process while making sure that the diverse and often opposing viewpoints of non-disputing parties are fairly considered in the resolution of complex international investment disputes.

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