ADMISSIBILITY OF AMICUS SUBMISSIONS: GLOBAL TRENDS AND INDIAN REGIME

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ABSTRACT

*The increasing recognition of amicus submissions in international arbitration has sparked a lively debate surrounding their admissibility and the potential impact on the core principles of International Arbitration. This article delves into the various areas regarding the admissibility of amicus submissions within the context of Investor-State Dispute Settlement ("**ISDS**"), while also highlighting the significance of amicus submissions through references to seminal decisions of tribunals in various disputes. A global perspective on amicus submissions is provided, with a primary focus on the North American Free Trade Agreement ("**NAFTA**") and the International Centre for Settlement of Investment Disputes ("**ICSID**"). The article explores the benefits and challenges associated with amicus submissions, delving into their*

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potential to enhance transparency, incorporate diverse viewpoints, and provide valuable insights to tribunals. It also acknowledges the concerns raised by critics, such as the risk of introducing biases, the possibility of diluting the arbitration process, and the potential for amicus submissions to be used as a delaying tactic by parties. However, it is outweighed by authorities such as environmental and human rights NGOs or public authorities. To address these concerns, the article suggests criteria for determining whether amicus submissions should be permitted, emphasising the need for a balanced approach that considers the potential contributions of amicus submissions while also safeguarding the efficiency and fairness of the arbitration process. Furthermore, the article delves into the Indian ISDS regime, with a particular focus on the RAKIA dispute, to underscore how amicus submissions can play a crucial role in representing the voices of non-parties not only against the investors but the state as well. By allowing third-party perspectives to be heard, amicus submissions can contribute to a more equitable arbitration process, ensuring that broader public interests are considered and that the outcomes of ISDS cases reflect a more comprehensive understanding of the issues at stake.

Keywords: *International Investment Arbitration, Amicus Curiae, ISDS, NAFTA, ICSID, Rakia Dispute.*

I. INTRODUCTION

Amicus Curiae's literal meaning has been defined as, 'friend of the court'.[1] In international investment arbitration, an amicus curiae is any third party that intervenes in the proceedings by assisting the tribunal in addressing certain aspects of the case.[2] Amicus submissions encompass all parties other than the state and investor in ISDS and can have a wide range where such submissions are accepted. Various institutions like NGOs, think tanks,[3] trade associations or inter-governmental institutions can participate as amicus curiae. These submissions are generally accepted by the tribunals as they can improve public acceptance of the international arbitral process by increasing transparency and openness. They also provide a broader perspective towards the disputes having public interest by bringing in arguments related to environmental protection, human rights or public health.[4] However, it can also introduce various challenges, such as procedural delays and increased arbitration costs. The Rakia dispute (discussed in the later chapters) presents a relevant example of the same.

Herein this essay, amicus curiae submissions have been dealt with as they have been an intriguing point of discussion. The debate surrounding amicus submissions is often related to issues like whether

[1]N Blackaby and C Richard, 'Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration?' in M Kaushal, A Chung, K.H.L. Balchin (eds), *The Backlash against Investment Arbitration* (Kluwer Law 2010) 258.

[2]S Alexandrov and M Carlson, 'The Opportunity to Be Heard: Accommodating Amicus Curiae Participation in Investment Treaty Arbitration' in M.A. Fernandez Ballesteros and D Arias Lozano (eds), *Liber Amicorum Bernardo Cremades* (La Ley 2010) 50.

[3]*Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7).

[4]Ralf Michaels, 'International Arbitration as Private or Public Good' (2017) Duke Law School Public Law & Legal Theory Series No. 2017-57 < https://dx.doi.org/10.2139/ssrn.3019557> accessed 5 July 2024.

the submissions can be accepted without parties' consent, and whether the perspective of other affected parties makes the process more efficient or causes undue delay in an already protracted process.[5] While there have been several in support of amicus submissions, there are others who raise apprehensions regarding the lack of knowledge of third parties related to the issue and potential prejudice caused by third-party submissions.

The recent trend has shown a growing acceptance of amicus submissions. Till October 2023, out of 94 applications for amicus submissions in the NAFTA and non-NAFTA cases, 56 applications were fully accepted and four were partially accepted.[6] Various international institutions are also recognizing amicus submissions. The United Nations Commission on International Trade Law ("**UNCITRAL**") Arbitration Rules also lays down certain guidelines for submission of amicus briefs. Article 4 and 5 outline the procedure for third and non-disputing parties to submit a written application to the tribunal providing information on their interest in the dispute.[7] The ICSID Arbitration Rules have given prerogative to the tribunals to determine the admissibility of amicus submissions and has provided

[5]L Brunner, 'Can Amicus Curiae Lead Investor-State Arbitration out of its Legitimacy Crisis and Towards More Efficient Dispute Resolution?' (*Kluwer Arbitration Blog*, 21 January 2024) < https://arbitrationblog.kluwerarbitration.com/2022/07/15/can-amicus-curiae-lead-investor-state-arbitration-out-of-its-legitimacy-crisis-and-towards-more-efficient-dispute-resolution/> accessed 5 July 2024.

[6]J Pablo, B Pablo, and L Helene, 'Amici Curiae in Investment Arbitration' (*Jus Mundi*, 21 January 2024) < https://jusmundi.com/en/document/publication/en-amici-curiae-in-investment-arbitration > accessed 5 July 2024.

[7]S. Manot & V. Jhunjhunwala, 'Rethinking the Role and Participation of Amicus Curiae in Investment Arbitration' (*Lexology, 2019)* <https://www.lexology.com/library/detail.aspx?g=a6cca092-d14d-4fba-995c-30856fd32d04#:~:text=Article%204%20and%205%20of,its%20interest%20in%20the%20dispute> accessed 16 December 2024.

certain guidelines for deliberation.[8] The main focus throughout has been on NAFTA and ICSID Arbitration rules in this essay.

In *Suez v. Argentina*,[9] the tribunal highlighted the significance of amicus submissions as they improve public acceptance of international arbitration and make the process more transparent. Similar views have been presented in other disputes like *Philip Morris v. Uruguay*,[10] which dealt with the regulation of cigarette packaging and investor's trademark rights. In this case, the tribunal noted that the amicus submissions increase the acceptability of decisions of international arbitration. This also underscores the importance and global recognition of the concept.

Various scholars have claimed that with the increase in the admissibility of amicus submissions, there has been an increase in the acceptability of international awards. However, there are several arguments against the admissibility of amicus submissions. The primary concern raised against the notion is that arbitration is consensual, and granting similar rights to third parties is stated to be against the principal notion of arbitration.[11] Besides that, the amicus submissions cannot be tested by the parties against whom the submissions were filed, it places amicus at a 'position of greater standing'.[12]

While addressing both supporting and opposing arguments, the author discusses the importance of amicus submissions by referring to the significant role amicus submissions have played in international

[8]ICSID Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules) (April 2006), Rule 37(2).
[9]*Suez & Vivendi v Argentina* (ICSID Case No. ARB/03/17) Order in Response to a Petition for Transparency and Participation as *Amicus* Curiae, 19 May 2005.
[10]*Philip Morris* (n 3).
[11]*Methanex Corporation v United States* (12, LLC 167 (2005) Decision of the Tribunal on Petitions from Third Persons to Intervene as Amicus Curiae of 15 January 2001.
[12]ibid.

arbitration thus far. The essay has been dissected into three parts. The first part discusses the global trend regarding the recognition and admissibility of amicus submissions in ISDS. The benefits and the need for provisions related to admissibility are also discussed. The second part delves into the Indian ISDS regime and analyses the *RAKIA dispute.* In the last part, various criteria are suggested which could streamline the admissibility of amicus submissions without violating the principles of arbitration.

II. CHAPTERS

A. Development in the Investment Arbitration

As of September 2022, there were at least 175 International Investment Agreements ("**IIA**") ISDS claims that are either directly or indirectly related to environmental protection and climate action.[13] A common basis for claims is *expropriation*,[14] where investors allege that their property was seized or substantially devalued through direct or indirect actions by the host state without adequate compensation. Another frequent ground is the fair and equitable treatment ("**FET**") standard,[15] which is invoked when investors perceive state actions as arbitrary, discriminatory, or inconsistent with their legitimate expectations.

[13]United Nations Conference on Trade and Development, 'Treaty-Based Investor-State Dispute Settlement cases and climate action' (September 2022) <https://unctad.org/system/files/official-document/diaepcbinf2022d7_en.pdf> accessed 4 June 2024.

[14]Investor-State Dispute Settlement (ISDS), 'State of play and prospects or reform' (January 2015) < https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/545736/EPRS_BRI%282015%29545736_EN.pdf> accessed 16 December 2024.

[15]Florencia Sarmiento, Suzy H. Nikièma, 'Fair and Equitable Treatment: Why it matters and what can be done' (*IISD*, 16 November 2022) < https://www.iisd.org/publications/brief/fair-equitable-treatment > accessed 16 December 2024.

Claims may also arise under the full protection and security ("**FPS**")[16] standard if the host state fails to safeguard investments against physical harm or legal uncertainties, especially in politically unstable regions. These aspects underscore the complexity of ISDS claims, often requiring tribunals to balance investor protections with the host state's right to regulate in the public interest.

With investors and the state as parties, the rights of third parties are often disregarded[17] and are often restricted to domestic courts for recourse. This major concern underscores the significance of amicus submissions in ISDS claims. The current system of allowing public participation doesn't provide any rights to third parties to participate in the proceedings, however, tribunals often admit amicus submissions by exerting their inherent powers without relying on relevant procedural rules.[18] The international commercial arbitration claims are usually either under the NAFTA arbitration or the ICSID arbitration. The admissibility of Amicus submissions has been rare in international adjudication since most of the international institutions do not explicitly talk about amicus submissions in their institutional rules.[19]

[16]Daniel, Arne and Maximilian, 'Full Protection and Security (FPS)' (*Jus Mundi*, 17 September 2024) < https://jusmundi.com/en/document/publication/en-full-protection-and-security-fps> accessed 16 December 2024.

[17]U.N. General Assembly, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises* (A/76/238, 2021) 26; N Perrone, 'The Invisible Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime' (2019) 113 American Journal of International Law Unbound, 16–21.

[18]Gary Born and Stephanie Forrest, 'Amicus Curiae Participation in Investment Arbitration' (2019) 34 ICSID Review, FILJ 626; WTO, *United States: Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom—Report of the Appellate Body* (WT/DS138/AB/R, 10 May 2000) 42.

[19]ibid.

a) Development under NAFTA

The investment dispute mechanism in NAFTA Chapter 11 allows investors to arbitrate claims if the host state violates investment protection obligations. In general, there are no provisions in particular that expressly allow or deny the submissions of the third party as amicus curiae. After various developments, a statement was issued by the NAFTA Free Trade Commission which officially allowed submissions as amicus curiae.[20] This signified a step forward in recognising the importance of third-party involvement in investment arbitration proceedings. It allows the public to have unrestrained access. Each NAFTA party maintains a website, where all the submissions, awards, and orders of the tribunal are posted.[21] There are both redacted and unredacted versions which are posted as a lot of information is confidential. The unredacted versions are provided to the tribunal and the non-disputing NAFTA parties, and the redacted versions are posted on the website for the public.[22]

For the first time, this issue was brought up in *Methanex v. the United States*, the tribunal allowed third parties to make submissions as amicus curiae as it fell within the procedural powers of the Tribunal under the scope of Article 15 of the United Nations Commission on International

[20]US Department of State, 'Statement of the Free Trade Commission on non-disputing party participation' (7 October 2003) < https://2009-2017.state.gov/documents/organization/38791.pdf> accessed 02 February 2024.

[21]*Pope & Talbot, Inc. v Canada* (UNCITRAL/NAFTA) Interim Order of Confidentiality, 11 March 2002, para 15; *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania* (ICSID Case No. ARB/05/22 Proc. Order No. 3), 29 September 2006, para 131; *Canfor Corporation v United States of America*; *Tembec Inc. et al. v United States of America and Terminal Forest Products Ltd. v United States of America* (UNCITRAL) Order of the Consolidation Tribunal, 27 September 2005, para 138–40.

[22]*Fireman's Fund Ins. Co. v United Mexican States* (ICSID Case No. ARB(AF)/02/1) Award (Redacted), 17 July 2003; *Archer Daniels Midland Co. v United Mexican States* (ICSID Case. No. ARB(AF)/04/05) Award (Redacted), 21 November 2007; *Mobil Investments Canada Inc. & Murphy Oil Corp. v Canada* (ICSID Case No. ARB(AF)/07/4) Award (Redacted), 20 February 2015.

Trade Law,[23] ("**UNCITRAL Arbitration Rules**").[24] The dispute involved a public interest and third parties were allowed to make submissions as amicus curiae. The parties were only allowed to make written submissions and were not allowed to attend the oral hearings as it was a matter of confidentiality and were prohibited from doing so without the consent of the disputing parties under Article 25(4) of the UNICTRAL Arbitration Rules.[25]

b) Development under ICSID

Similarly, like NAFTA, ICSID also lacked explicit provision regarding amicus curiae submissions. For the first time, the request for amicus submissions was made in *Aguas del Tunari, SA v. the Republic of Bolivia* ("**Aguas del Tunari v. Bolivia**"), where the third parties alleged that it was a fundamental right since it affects the people living in the area affected by the dispute.[26] The tribunal rejected the request stating that they didn't have any power to accept the submissions.[27]

For the first time, amicus submissions were recognised in *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v. Argentine (first petition*) ("***Suez v. Argentina***"), where under Article 44 of the ICSID Convention[28] the tribunal drew its relation with

[23]*Methanex Corporation v United States* (12, LLC 167 -2005) Decision of the Tribunal on Petitions from Third Persons to Intervene as Amicus Curiae of 15 January 2001.
[24]United Nations Commission on International Trade Law, *Arbitration Rules* (1976), art 15.
[25]*Fireman's Fund Ins. Co. v United Mexican States* (ICSID Case No. ARB(AF)/02/1) Award (Redacted), 17 July 2003; *Archer Daniels Midland Co. v United Mexican States* (ICSID Case. No. ARB(AF)/04/05) Award (Redacted), 21 November 2007; *Mobil Investments Canada Inc. & Murphy Oil Corp. v Canada* (ICSID Case No. ARB(AF)/07/4) Award (Redacted), 20 February 2015.
[26]*Aguas del Tunari, S.A. v Republic of Bolivia* (ICSID Case No. ARB/02/3) NGO Petition to Participate as *Amici Curiae*, 29 August 2002.
[27]*Aguas del Tunari v Bolivia*, Letter from Tribunal President David D. Caron to *Amicus* Petitioner J. Martin Wagner (29 January 2003) 1.
[28]International Centre for Settlement Investment Disputes, *Arbitration Rules* (1966), art. 44.

Article 15(1) of UNCITRAL Rules.[29] It was stated that it had the power to accept the submissions. The submissions were only allowed in matters where the issue was about the public interest, as it would ensure transparency and legitimacy of the process.[30] The tribunal also laid down criteria to determine the admissibility of amicus submissions. The criteria ensured that it safeguarded the procedural and substantive rights of the disputants. The criteria were: (a) the relevance of the case's subject matter, particularly its implications and impacts on public interest; (b) the qualifications of a non-party to serve as an amicus curiae in the case, including their expertise, experience, and impartiality; and (c) the process by which the amicus submission is submitted and reviewed, ensuring that approved amici can express their views while safeguarding the rights of all parties involved. This decision was followed by an amendment which properly recognised that the tribunal has the discretion to permit the amicus curiae submissions under Rule 37(2) and Rule 32 (Oral Procedure).[31]

Biwater Gauff Ltd v. the United Republic of Tanzania ("***Biwater v. Tanzania***"), laid down a two-stage process for petitioners to file their submissions. During the initial stage, the amicus curiae were required to submit their statement within specific length and formatting constraints (fifty pages, double-spaced) and without including any exhibits.[32] This submission was scheduled three weeks before the hearing on merits to allow the parties time to decide whether they wanted to respond and how. The second part would occur after the hearing, during which additional procedural instructions would be provided based on whether parties wanted to further comment on the

[29]U.N. Commission on International Trade Law, *Arbitration Rules* (1976), art.15(1).
[30]*Brunner* (n 5).
[31]International Centre for Settlement of Investment Disputes, Rules of Procedure for Arbitration Proceedings ('Arbitration Rules') (1966), Rules 32(2) and 37.*Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v. Argentine* (second petition) (ICSID Case No. ARB/03/19).
[32]*Biwater Gauff Ltd v the United Republic of Tanzania* (ICSID Case No. ARB/05/22), 2 February 2007, para 60.

amicus submission or if additional submissions or evidence from them were sought by the tribunal.[33]

However, questions remain regarding the specific criteria for determining the admissibility of amicus submissions and the scope of participation allowed for these third-party entities. As the discussion surrounding amicus curiae participation continues, it is essential to consider the potential implications of these developments on the legitimacy and effectiveness of international investment arbitration.

B. Is a Mechanism for Amicus Curiae Representation Needed?

The participation of third parties as amicus curiae in investment treaty arbitration has been a matter of contention, warranting critical consideration due to the implications for public interests and the integrity of the arbitral process. Although third parties are allowed to make submissions as amicus curiae, their privileges and status remain limited.[34] The current mechanism for such submissions is non-uniform, lacks effective representation, and operates under the criterion that parties should consent to the submissions, potentially resulting in an arbitrary and unprivileged approach, thereby hindering effective representation.[35]

The adverse effects of such a restrictive mechanism are evident in cases where submissions are not allowed, which can lead to adverse public outcomes.[36] The absence of amicus submissions may limit the court's

[33]ibid.
[34]2004 U.S. Model BIT, art. 29 <https://www.ustr.gov/sites/default/files/U.S.%20model%20BIT.pdf> accessed 4 August 2024.
[35]E. Levine, 'Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation' (2011) 29 Berkeley Journal of International Law 200, 222; K. Gómez, 'Rethinking the Role of the Amicus Curiae in International Investment Arbitration: How to Draw the Line Favourably for the Public Interest' (2012) 35 Fordham International Law Journal 510, 562-3.
[36]*Philip Morris* (n 3); *United Parcel Services v Canada* (ICSID Case No. UNCT/02/1).

access to a wider perspective, potentially leading to decisions that do not fully consider the broader impact on society.[37] This illustrates the need for a more uniform and flexible mechanism that allows amicus submissions, especially in cases affecting public interest.

C. Challenges Faced in Allowing the Submissions

a) Disruption in the Arbitration Strategies of the Parties

It is important to note that amicus submissions in investor-state disputes often provide a unique perspective and may introduce new facts that were not previously presented by the involved parties.[38] This can significantly disrupt the proceedings and have substantive implications for the outcome of the dispute as a whole.[39] As such, parties are generally reluctant to readily consent to third-party submissions due to their potential impact on the course of proceedings.[40] For instance, in the *Methanex v. United States*,[41] while the United States perceived the Californian ban on MTBE as a measure for public health protection, the third-party submissions placed it within a broader context of environmental protection and raised concerns about the host State's right to protect the environment and promote sustainable development. Similarly, in other cases, [42] these additional perspectives assist tribunals in understanding not just a larger picture but also in conducting more profound analyses. Investor-state disputes usually involve matters of public policy. The submissions put forth by each party hold considerable weight in shaping the trajectory of these disputes. In failing to acknowledge these crucial

[37]ibid.
[38]*Philip Morris* (n 3).
[39]ibid.
[40]*Aguas del Tunari S.A. v Republic of Bolivia* (ICSID Case No. ARB/02/3) Decision on Jurisdiction, 21 October 2005; *Letter from David D. Caron, Tribunal President, to J. Martin Wagner, Amicus Petitioner* (29 January 2003).
[41]*Brunner* (n 5).
[42]*United Parcel Services v Canada*; *Apotex Holdings Inc. & Apotex Inc. v United States* (ICSID Case No. ARB(AF)/12/1), 11 October 2011, para 22.

elements, parties who are directly impacted by such disputes inadvertently remain voiceless and deprived of a platform through which they could advocate for themselves within legal proceedings.

To ensure that the involvement of non-disputing parties does not disrupt proceedings or unfairly disadvantage either disputing party, tribunals can impose specific conditions on the submissions.[43] Tribunals have applied various limitations in various cases. These conditions may encompass time limits, formatting requirements, and the scope of the submissions, as well as access to non-public documents filed in the proceedings unless either disputing party raises an objection.[44] Furthermore, tribunals have also invited the disputing parties to submit their observations regarding the applications for non-disputing party submissions, and then have decided on these applications within a designated timeframe. By implementing these measures, arbitral tribunals have addressed concerns about incomplete information stemming from the limited participation of non-disputing parties. This approach enhances the integrity, transparency, and fairness of the arbitration process. The tribunal's discretion in allowing submissions ensures that the contributions from non-disputing parties are relevant and do not interfere with the proceedings. Additionally, the requirement for parties to comment on the submissions fosters an inclusive environment where all perspectives can be considered.

Overall, these procedural safeguards are essential for maintaining a balanced arbitration process, allowing for the inclusion of diverse viewpoints while protecting the rights of the disputing parties. By establishing clear guidelines for non-disputing party participation,

[43] *Biwater v Tanzania* (n 32), para 31–37, 42–45.

[44] ICSID, 'Non-Disputing Party and Non-Disputing Treaty Party Submissions – ICSID Convention Arbitration (2022 Rules)', <https://icsid.worldbank.org/procedures/arbitration/convention/ndp-submissions/2022> accessed 16 December 2024.

tribunals can improve the overall quality of the arbitration process and ensure that it remains fair and equitable for all involved.

b) Lack of Transparency

Thirdly, the issue regarding effective representation without proper transparency has persisted for a while. To make proper submissions, the third parties need to be aware of the subject matter of the dispute and should have access to the material, but they are not allowed to fully access it due to the confidentiality of the process.[45] In *Suez & Vivenda v. Argentina*, even though the tribunal acknowledged the need to allow access to the material to make legitimate submissions, third parties weren't allowed to do so, as they already had sufficient information in hand.[46] In *Biwater v. Tanzania*, the request to access the materials was rejected on a similar basis as the information needed was already present in the public domain.[47] A specific solution can't be reached for this issue, as in many cases, the information that third parties need to make proper submissions is already present in the public domain, but in many others, it's not. Therefore, the issue depends on a case-to-case basis and the perspective a tribunal takes.

Despite efforts to mitigate risks, amicus submissions in ISDS proceedings can still potentially delay the process and impact the outcome of disputes. However, the importance of allowing affected third parties, such as environmental and human rights NGOs or public authorities, to participate outweighs these concerns.

An aspect that can be considered to determine the balance between transparency and confidentiality is the harm threshold. Disclosing information should not cause disproportionate harm to the parties

[45]U.N. Conference on Trade and Development, India | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/96/india/investor accessed 16 December 2024.
[46]*Suez & Vivendi v Argentina* (n 9) para 24.
[47]*Biwater* (n 32), para 64.

involved, such as compromising trade secrets, commercial interests, or violating confidentiality agreements. Tribunals must carefully weigh the potential harm of disclosure against the benefits of enabling third-party participation. For instance, non-sensitive or generalised information may be disclosed while safeguarding sensitive contractual details.

Granting representation to these stakeholders is crucial for ensuring a fair, transparent, and comprehensive assessment of investment disputes, particularly those involving issues related to environmental protection and human rights. While tribunals must balance the risks and benefits, prioritizing the inclusion of diverse perspectives is essential for improving the legitimacy and fairness of the ISDS system.

D. Indian Landscape

India India's journey with the ISDS has not been a pleasant one. With the first adverse award passed against the nation in 2011, in the case of *White Industries v. India*,[48] it has been the 12th most frequent respondent nation to ISDS claims from 2012 to 2021, with a total of 16 claims being filed against the nation in that period. As of 2023, a total of 29 claims under ISDS have been filed against India. Out of these, six were adjudicated in favour of the investor, and only two pronouncements were in favour of the state.[49]

The perusal of the settled and pending cases highlights major fallacies in the Indian approach as most of the claims arose because of either inordinate delay caused by the judiciary or the whimsical and capricious behaviour of the executive and legislation.[50] India has been

[48]*White Industries Australia Limited v Republic of India* (Final Award, 30 November 2011) <https://www.italaw.com/cases/documents/1170> accessed 30 January 2024.
[49]*UNCTAD Investment Policy Hub* (n 45).
[50]Prabhash Ranjan, 'Investor-State Dispute Settlement (ISDS) Cases and India: Affronting Regulatory Autonomy or Indicting Capricious State Behaviour?' (2022) 21 Journal of International Trade Law and Policy 42–64 <https://doi.org/10.1108/JITLP-10-2021-0053> accessed 21 January 2024.

infamous for protracted judicial proceedings and delays, a fact noted by economic forums. [51] The first ISDS claim pronounced against the state was filed primarily due to the judicial delay of the domestic courts in enforcing the legal rights of the investor.[52]

In 2015, an arbitral award passed by ICC directed the Indian Space Research Organization's Antrix Corporation to pay damages of $562.2 million with interest and cost to Devas Multimedia in a dispute related to the unlawful termination of the deal in 2011.[53] This order was set aside by the Delhi High Court in 2017[54] and the same was affirmed by the Supreme Court of India in 2022.[55] The primary ground taken for setting aside the award is the alleged fraudulent commercial relationship between the parties due to which, all consequent transactions were said to be tainted with fraud and set aside.[56]

Besides that, there have been various other disputes where the tribunal held the state to be acting in bad faith and passing orders in capricious manners.[57] It is stated that the increase in claims against the state influenced the state to overhaul its policy.[58] In 2015, India terminated BITs with 57 countries following the introduction of a new model

[51]India Budget, 'Ease of Doing Business's Next Frontier: Timely Justice', <https://www.indiabudget.gov.in/budget2018-2019/economicsurvey2017-2018/pdf/131-144_Chapter_09_ENGLISH_Vol%2001_2017-18.pdf> accessed 30 January 2024

[52]Sumeet Kachwaha, 'The White Industries Australia Limited – Indian BIT Award – A Critical Assessment' (2013) 29 Arbitration International 275–93.

[53]*CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v Republic of India, Award on Jurisdiction and Merits (*P.C.A. Case No. 2013-09) 25 July, 2016.

[54]*Antrix Corporation Ltd. v Devas Multimedia Pvt. Ltd*. (2017) SCC OnLine Del 12791.

[55]*Antrix Corporation Ltd. v Devas Multimedia Pvt. Ltd*. (2023) 1 SCC 216.

[56]ibid.

[57]*United Parcel Services* (n 44).

[58]ibid.

BIT.[59] The Model BIT is criticised for being marred with restrictive provisions that create barriers for investors to file for ISDS claims.[60] One of the contested provisions is of compulsory exhaustion of local remedies for five years before pursuing international forums.[61]

India's suppressing regime and non-adherence to awards passed by international institutions also raise concerns related to other facets of international arbitration, including amicus submissions. In the next chapter, one of the ISDS claims related to environmental protection and the approach of the Indian state to *amicus submissions* has been discussed.

C. E. Rakia Dispute

The claim in *Rakia v. India*[62] arose because the state of Andhra Pradesh did not adhere to certain provisions of the Memorandum of Understanding ("MOU") signed between the state of Andhra Pradesh and RAKIA. Basic facts of the case were that in 2007, the state of Andhra Pradesh entered into a MOU with Ras Al-Khaimah for providing bauxite to the refinery plant which was established by Anrak Aluminium Ltd., a joint enterprise of Penna cement industries and RAKIA, the investment body of Ras Al-Khaimah.

The Bauxite supply agreement was signed between the Andhra Pradesh Mining Development Corporation (APMDC) and Anrak Corporation. Afterwards, due to the opposition by the people because of the high

[59]Government of India, Ministry of Commerce and Industry, Department of Industrial Policy and Promotion (*Lok Sabha Unstarred Question No. 1290*, 25 July 2016) <http://164.100.47.190/loksabhaquestions/annex/9/AU1290.pdf> accessed 21 January 2024.

[60]Prabhash Ranjan and Pushkar Anand, 'The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction' (2017) 38 Northwestern Journal of International Law & Business 1.

[61]*Indian Model Bilateral Investment Treaty between the Government of India and the Government of [Country]* (2016), arts. 15.1-15.2.

[62]*Ras-Al-Khaimah Investment Authority v Republic of India* (Final Award, 11 May 2022).

probability of harsh impact on tribals and the environment because of the mining of Bauxite, the state government was not able to source Bauxite for the plant. Following the same, RAKIA filed for ISDS under India-UAE BIT (2013) for the alleged failure of the AP government to fulfill its responsibility under the MOU signed between the parties.

The tribunal gave the decision in favour of the state, citing its lack of jurisdiction in the following matter. However, in addition to that, it made certain notable observations like the state governments in India often give mining leases without considering the hardships and apprehensions of the tribals or the harsh environmental effects of mining. The tribunal explained how the states exploited the judgment of the Supreme Court in the case of *Samatha v. State of Andhra Pradesh*,[63] where it was held that the 'transfer' of a state-owned entity by the state is not a 'transfer' but rather 'entrustment of its property for a public purpose'. This judgment created a loophole allowing private entities to obtain mining licenses by forming joint ventures with state-owned entities.

The same method was employed by the state government to grant a license of mining to a private entity. The emphasis should be laid on the fact that it is not a sole instance, rather a similar issue arose due to the MOU signed between Vedanta and Odisha which was later struck down by the Supreme Court.[64] Additionally, in this particular case, the state did not even mention public opposition as a primary reason for failing to source bauxite and annulment of the contract.

This specific case illuminates a critical aspect in the realm of Investor-State ("IS") dispute resolution— the imperative of third-party involvement. Drawing insights from past foreign cases and the notable instance of the RAKIA dispute, it becomes evident that public interests

[63] *Samatha v State of A.P.* (1997) 8 SCC 191.
[64] *T.N Godavaraman Thirumulpad v UOI* (2008) 2 SCC 222.

are frequently either inadequately represented or outright disregarded in the resolution of disputes with investors.

III. CRITERIA

Upon reviewing the cases cited and arguments put forward, it becomes evident that there is a need to officially recognise and allow amicus submissions. Tribunals have attempted to provide criteria to determine the admissibility of amicus submissions in the IS claims. While discussing various arguments for and against such submissions, the author firmly believes that the two approaches mentioned below, are most suitable to determining their admissibility.

1. **Direct Impact**: To address various challenges, a balanced and open approach can be advocated. This approach, which can follow the criteria laid down in *Suez v. Argentina*,[65] would require third parties to demonstrate a *direct impact* on the dispute and prove their qualifications in terms of expertise and experience to make submissions.

An argument against this approach is that it would place an additional burden on both the parties and the tribunal.[66] Negating this argument, the tribunal has asserted that the powers of the tribunal under Article 44[67] can be used in such a way as to minimise the additional burden on both the parties and the tribunal. While an increase in burden is inevitable, it would help the tribunal benefit from the views of relevant amicus submissions.

2. **Utility Approach**: In the case of Koch,[68] the United States was allowed to make a short submission before the openings of both parties.

[65] *Philip Morris* (n 3).
[66] *Philip Morris* (n 3), para 15.
[67] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (1966) art. 44.
[68] *Koch Industries, Inc. and Koch Supply & Trading, LP v Canada* (ICSID Case No. ARB/20/52), December 2022.

In this case, the tribunal noted that Article 1128 is not limited to written submission. The tribunal gave 3 criteria to determine whether to permit oral submission or not-

a) timeliness of the notice to make an oral submission
b) the utility of such a submission
c) any undue burden on the parties

In this dispute, the argument used against the admissibility of the oral submissions of the United States was that article 1128 of the NAFTA only focuses on written submissions and oral submissions of the United States would put them in an unfair position. The tribunal noted that Article 1128 does not specify the modality of submissions, and it is within the tribunal's discretion of the tribunal to determine whether oral submissions should be allowed.

Amicus is stated to be a "friend of the court" and not a third party to the proceedings. Thus, the arguments that the amicus submissions will have substantive consequences and "the party might end up mitigating with the entities which are not party to the arbitration agreement"[69] is negated since Amicus Curiae cannot be considered a third party but rather a non-disputing party which assists the court by providing a wider scope to the issue at hand. Besides that, as discussed in earlier chapters, the admissions of amicus submissions would be considered a procedural question, directly related to assisting the tribunal to reach a correct decision.

The cases of *CC/Devas v. India*[70] and *Deutsche Telekom v. India*,[71] highlight the significant role of amicus submissions in expanding the scope and reinforcing the procedural fairness of ISDS proceedings. Both disputes stemmed from India's unilateral cancellation of contracts related to broadband services, citing essential security concerns.

[69]*Philip Morris* (n 3), para 12.
[70]*CC/Devas* (n 54), para 244.
[71]*Deutsche Telekom AG v Republic of India* (2023) SGCA(I) 10, para 235.

However, the tribunals ruled against India, awarding substantial damages to the investors. These rulings raised questions about the legitimacy of India's claims, as inconsistent government positions on the S-band spectrum and prolonged delays in reallocating it for military use pointed to potentially pretextual motives. Adding to the controversy were delayed corruption allegations against Devas, which were dismissed as procedurally deficient, and the liquidation of Devas, which further opened the door for future ISDS claims.[72]

In such disputes, the Direct Impact and Utility approaches provide a compelling framework for effectively incorporating amicus submissions. The Direct Impact Approach emphasizes contributions from credible third parties, such as industry experts or advocates for public interest, to provide valuable perspectives on regulatory, technical, and broader public interest dimensions. On the other hand, the Utility Approach prioritizes procedural adaptability, enabling tribunals to control the timing, format, and relevance of submissions, ensuring they do not disrupt the proceedings.

When these approaches are harmonized, tribunals are better equipped to handle disputes that involve the intersection of public interest and investor rights. This integration enhances transparency, legitimacy, and the quality of decision-making. Ultimately, the inclusion of amicus submissions serves as a critical mechanism to balance sovereign regulatory autonomy with the need for equitable protection of investments, ensuring that the process remains fair and informed in disputes of this nature.

IV. CONCLUSION

As observed in earlier foreign cases and exemplified by the *RAKIA* case, the absence of third-party participation can lead to a skewed

[72]P Anand, 'Antrix-Devas, BIT Arbitrations, and India's Quixotic Approach' (*The Wire*, 31 May 2021) <https://thewire.in/business/antrix-devas-bit-arbitrations-isro-india-nclt> accessed 20 April 2024.

representation of interests during ISDS proceedings. The consequences of such imbalances resonate not only in the immediate resolution but also in the long-term impact on public welfare and national development.

Recognising the gravity of this issue, progressive entities like the European Union have taken proactive measures.[73] They have introduced provisions acknowledging the vital role of third-party participation in ISDS proceedings. This acknowledgement underscores a growing global understanding that the involvement of impartial entities is pivotal for ensuring a fair and comprehensive assessment of IS disputes.

In light of these international developments, it becomes increasingly apparent that India, too, stands to benefit from embracing a similar approach. To guarantee a thorough representation of public interests in IS disputes, the incorporation of a comparable provision within the Indian legal framework becomes imperative. This move aligns with the broader global trend toward fostering transparency, accountability, and inclusivity in the resolution of disputes between states and foreign investors.

As the nation continues to navigate the complexities of international investment relationships, integrating such a provision would serve as a safeguard against potential pitfalls. It would contribute not only to the fairness of individual dispute resolutions but also to the overall credibility of India's commitment to balancing investor interests with the broader concerns of its citizenry.

In conclusion, embracing third-party participation in ISDS proceedings is a crucial step for India to ensure a fair and balanced approach to investment disputes. By incorporating a provision that allows for the involvement of impartial entities, India can enhance the transparency

[73]European Commission, 'Reform of the ISDS mechanism' (2024) < https://www.europa.eu> accessed 29 April 2024.

and accountability of its ISDS framework, ultimately contributing to the long-term sustainability of its investment relationships.