Third Party Participation and Transparency in Investment Arbitration Proceedings*

국제투자중재 절차의 제3자 참여와 투명성 문제

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국문초록

비공개가 원칙인 국제 투자 중재에서 제3자 참여 또는 법정조언자 문제가 최근 NAFTA 판결, 국제 투자분쟁해결센터 (ICSID) 37조 2항, UN국제 무역법 위원회 (UNCITRAL)의 투자자-국가 중재 투명성 조항 4조 등의 사례에서 투명성과 개방성을 높이는 중요한 기제로 등장하고 있다. 중재 규칙상 제 3자의 참여는 전문적인 지식과 새로운 시각으로 중재판정부의 판정에 도움이 되고 해당 사건의 논점에서 벗어나지 않으면서 중요한 의미를 가지는 경우에 허용이 되고 있다. Mathanex 판결을 시작으로 Biwater 사례에서 보듯이 많은 비영리 단체와 지역 토착민 단체, 그리고 최근에 유럽연합 집행기관(European Commission) 등의 기관까지, 주로 환경, 인권, 보건, 정부정책 등의 공공의 이익이 걸린 분야에 제3자로 참가하여 투자중재의 투명성과 적법성을 높이는 새로운 흐름을 만들고 있다고 할 수 있다. 2016년 싱가포르 국제중재센터 (SIAC)의 개정된 규칙에서 제3자 참여를 강화하고 유럽연합 집행기관이 계속해서 투자중재에 제3자 참여로 의견을 내고 있는 것은 제3자 참여가 점차 중요해지고 있는 추세에 있다고 할 수 있다. 그러나 Von Pezold 등의 사례에서 보듯, 제3자 자신의 이해관계가 결부되어 있거나 논점에서 벗어난 경우 또는 중재 판정에 새로운 가치를 부여하지 못하여 중재판정부의 판정에 새로운 시각과 정보 및 논점으로 도움을 주어야 하는 제3자 참여의 의미가 손상되는 경우도 있다. 이에 투자중재 판정부가 제3자 참여를 어느 정도로 어떠한 범위에서 허용할 것인가에 대한 심도있는 분석과 판단이 요구되며 보다 장기적인 시각에서 장단점을 고려하여 발전시켜 나가야 할 필요가 있는 것으로 보인다.

주제어: 국제 투자중재, 투명성과 개방성, 제 3자 참여, 법정 조언자, 공공의 이익

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Ⅰ. Introduction

Investment arbitration is a rapidly growing area of dispute resolution. Especially, topic of transparency in international arbitration is gaining attention because investment disputes between foreign investors and host states before international investment arbitration tribunal often involve public interest issues such as environment, health, human rights, nations' infrastructure or governments policies. Tension and conflict emerge because these arbitration proceedings are, in its nature of confidentiality, conducted behind the closed doors. Thus various civil society groups as well as commentators from legal academia and practicing field have requested transparency and openness of the proceedings to incorporate broader policy considerations. In this transparency and openness debate, third party participation, also known as 'Amicus Curiae' submissions have recently been more meaningful and increasingly appeared in major investment arbitration cases.

Recently in Korea, Lawyers for a Democratic Society known as Minbyun requested for permission to observe the hearings in a multi-billion-dollar investor-state arbitration case brought by U.S. private equity firm Lone Star against Korean government (「Korean Herald」, 2015.6.3.). In a press conference, the Lawyers stated, "While the case involves some 5 trillion won of state budget, the people, the tax payers, are not aware of the alleged logic behind Lone Star's demand or who is appealing as witness." Lone Star demanded South Korean government to pay $4.68 billion, claiming Lone Star was forced to pay unfair taxes and was suffered losses due to Korean government's intentional delay in approving a profitable deal. The Lawyers' group requested Korean government to publicize the trial. The group also has submitted the request to observe the arbitration process with the International Centre for Settlement of Investment Disputes (ICSID) in Washington D.C.. Under ICSID rules, if all three arbitrators agree and the ICSID Secretary-General permits, visitors can attend part or all of the hearings. Attendance is not allowed if any of the two parties in the case, in here, either Lone Star or Korean government. Further, this group submitted an opinion calling for dismissal of the Lone Star's claim based that Lone Star partially concealed its industrial ownership on submitting papers to the South Korean government in order to avoid Banking Act Regulations of South Korea and

acquire share of Korea Exchange Bank (Matthias Menke & Dirk Schiereck, 2007: 22-33). These Lawyers groups' as a third party requests have been declined since then. This has created much debate of whether confidentiality in investment arbitration proceeding still need to be kept in case a nation's public interest and its people's right to information are at stake even though arbitration is a private form of dispute resolution based on parties' contract-here in the Lone Star case, based on a BIT (Bilateral Investment Treaty). Interesting point is that the ICSID Convention and Arbitration Rules do not contain a general presumption of confidentiality or transparency applicable to the parties. Instead, the parties may tailor the level of confidentiality or transparency to their proceedings (Confidentiality and Transparency - ICSID Convention Arbitration: ICSID Home page).

This confidentiality and transparency issue inevitably has made legitimacy crisis appear in procedure and substance of investment arbitration. In this paper, recent transparency rules especially regarding third person participation known as Amicus Curiae participation has been analyzed by looking into the two major international investment arbitration institutions rules-ICSID (International Centre for Settlement of Investment Disputes) under World Bank and UNCITRAL (United Nations Commission on International Trade Law) rules. It further examines major investor-state arbitration case-laws that reflect critical issues of third party participation and further highlights issues of transparency and openness.

Ⅱ. The Development of Transparency Rules regarding Third Person Submissions

Third person participation has been usually recognized as a tool to enhance transparency and openness involving matters of a greater public interest, which frequently arise in the context of investor-state arbitration proceedings (Dimitriji Euler & Markus Gehring and Maxi Scherer, 2015:128-195). The Latin term 'Amicus Curiae' designates third person participation and it means 'friend of court' (Katia Fach Gomez, 2012:516). In the context of international investment arbitration, mostly NGOs (Non Governmental Organizations) have sought Amicus Curiae participation. The purpose of allowing third persons to participate in arbitral proceedings is that the tribunal and the

parties should benefit from the special knowledge of the third person and its perspective in the issues so the tribunal can avoid unexpected results caused by possible bias, misjudgment, or lack of knowledge in the given special field. The third person should add some added value to the proceedings such as factual information relevant to the case of which the tribunal otherwise might not aware, access to proceedings to persons who might be affected by the decision of the tribunal or participation of those who are representing broader public interest considerations (Pierre-Maries Dupuy, Francesco Francioni & Ernst-Urlich Petersmann, 2009:396-407). In practice, third person submissions have been expected to provide expert knowledge or opinion in the field of environment, government policy, human rights, public health or broader socio-public issues and so on.

In the international cases, Amicus briefs have been widely accepted over the past decades. NAFTA (North American Free Trade Agreement), BITs (Bilaterla Investment Treaties) and FTAs (Free Trade Agreements) have shown numerous cases of Amicus Curiae requests from NGOs, corporations, other groups and individuals seeking participation in investor-state arbitration proceedings. The contents of the requests have not in common, but mostly petitioners sought leave to file written submissions, access case documents, and participating in oral hearings. Third party participation involves matters of a greater public interest, which frequently arise in the context of investor-state arbitration mainly based on BITs and other treaties.

1. ICSID Amended Rule 37(2): Submissions of Non-disputing Parties

Participation as 'Amicus Curiae' or 'friends of court' in arbitration is different from participation as a direct party. Amicus Curiae submissions are limited to the issues in the dispute and it means that it should not bring new issues. The ICSID rules were amended in 2006 in consideration to developments in transparency of investments arbitration especially. The ICSID rule regulates two parts of non-disputing parties' participation: (1) the filing of a written submission (Rule 37(2)) and (2) the attendance at hearings (Rule 32(2)) (Non-Disputing Party Submission - ICSID Convention Arbitration: ICSID Home Page). Therefore, the two steps are first, the party seeking to participate as amicus should request the tribunal to leave to intervene as a non-disputing party. Second, if the tribunal grants the leave application, the amicus

may file written submissions (Benjamin Miller, Jennifer Liu, Ramin Wright, Jenny Yoo, 2013:12-20).

The main part of ICSID Amended Rule 37(2), Submissions of Non-disputing Parties states that:

After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the tribunal shall consider, among other things, the extent to which: (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (b) the non-disputing party submission would address a matter within the scope of the dispute; (c) the non-disputing party has a significant interest in the proceeding. The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party,..... (Non-Disputing Party Submission-ICSID Convention Arbitration : ICSID Home Page).

In analysis of the Rule 37(2), the Amicus Curiae petition must assist the tribunal in relation to the dispute and must have significant interest. However, this raises debate in regards to the definition of significant interest. Therefore, various positions may be supported, for example, an NGO may have to show a real 'pecuniary interest', which means it must result a 'special damage' or 'intellectual or emotional interest' (Katia Fach Gomez, 2012:532-541). However, notable numbers of scholars also opined that financial interest should not be required in the proceedings (Benjamin Miller, Jennifer Liu, Ramin Wright, Jenny Yoo, 2013:12-20). In general, Amicus Curiae participation should provide something beneficial and distinctive to the tribunal. Even though NGOs' appearance itself of course can represent something beneficial to the tribunal, the only fact that public money has been used is probably not sufficient to justify third party Amicus Curiae participation.

It should also be noted that in this Rule 37(2), the requirement that there is a public interest in the subject matter is absent, although ICSID tribunals usually consider the

public nature of a dispute in deciding whether the tribunals should allow third party participation. Rule 37(2) states that the tribunal shall consider 'among other things', but does not explicitly states what 'other things' are. The final paragraph of Rule37(2) states a concern that the Amicus Curiae submissions do not 'disrupt the proceeding or unduly burden or unfairly prejudice either party', which suggests that 'the other things' referred earlier in the Rule 37(2) should be fairness matter to parties. Thus the third party participation as Amicus submissions is to assist and persuade the tribunal that its submissions are 'related to the proceeding' and allowing participation of the non-disputing party is helpful to the proceeding. The amicus participant should also demonstrate that she has expertise, experience and independence in the scope of the dispute.

2. UNCITRAL Rules on Transparency, Article 4: Submission by a third person

In 2006, the 44th session, UNCITRAL (United Nations Commission on International Trade Law) in its Working Group II (Arbitration and Conciliation) started to discuss possibilities of future improvements in the UNCITRAL Arbitration Rules. The Working Group agreed that, there was no need for a general provision requiring confidentiality in the Arbitration Rules. The landmark *Methanex* decision that had accepted Amicus Curiae brief wholly for almost the first time in the NAFTA cases impacted UNCITRAL Working Group so that the group 'agreed third party intervention in arbitral proceedings was a matter closely to the confidentiality of proceedings' (Dimitriji Euler & Markus Gehring and Maxi Scherer, 2015:14-27). The 53rd session of the Working Group was focused on transparency, especially allowing third party submissions in investor-state arbitration proceedings.

This effort finally was concluded with the creation of new transparency rule. The UNCITRAL Rules especially on transparency in treaty-based investor-state arbitration (the "Rules on Transparency"), which come into effect on 1 April 2014, comprise a set of procedural rules that provide for transparency and accessibility to the treaty-based investor-state arbitration. The Rules on Transparency apply in relation to disputes arising out of treaties concluded prior to 1 April 2014, when Parties to the relevant treaty, or disputing parties, agree to their application. The Rules on Transparency

apply in relation to disputes arising out of treaties concluded on or after 1 April 2014 (“future treaties”), when investor-state arbitration is initiated under the UNCITRAL Arbitration Rules, unless the parties otherwise agree (UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration: UNCITRAL Home Page). In the center of this Rule, role of ‘Amicus Curiae’ or ‘friend of court’ has been emphasized greatly.

The main part of UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, Article 4 Submission by a third person states that:

(1). After consultation with the disputing parties, the arbitral tribunal may allow a person that is not a disputing party, and not a non-disputing Party to the treaty (“third person(s)”), to file a written submission regarding a matter within the scope of the dispute.
(2). (b) Disclose any connection which the third person has with any disputing party; (c) Provide information on any government, person or organization that has provided to the third person (i) any financial assistance; or (ii) substantial assistance of the two years preceding the application by the third person (e.g. funding around 20 per cent of annual operations); (d) Describe the nature of the interest that the third person has.
(3). the arbitral tribunal shall take into consideration: (a) Whether the third person has a significant interest in the arbitral proceedings; and (b) The submission would assist the arbitral tribunal in the determination of a factual or legal issue by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.
(4). The submission shall: (d) Address only matters within the scope of the dispute.
(5). The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.
(UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration: UNCITRAL Home Page).

In the analysis of the Article 4 (1), and as also in the ICSID Amended Rule 37(2), it should be noted that the Rules do not require the consent of the parties. It only requires to consult with the parties. It can be naturally assumed that if one party

makes strong objection to the participation of third persons in the proceedings, the tribunal would be exercising its discretion not to adopt the submission by a third party. In the Article 4 (1) however, the tribunal's obligation is merely consult with parties. This means that it will be the tribunal, not the parties who decide whether third party participation will be allowed. In the Working Group discussion, this rationale was made because often the nature of third person submission is one-sided or sometimes vague to both sides. Since the purpose of third person submission in the arbitration proceedings is to assist the tribunal, this rationale may have been developed for the tribunal to play major role.

It has been announced that denial of the Lawyers for a Democratic Society known as Minbyun's request of observation and submission of their opinion to the ICSID tribunal in Lone Star case was denied by Korean government with any unknown reason. However, decision to deny Minbyun's request would have been made ultimately by ICSID tribunal according to this UNCITRAL Article 4. It seems therefore the tribunal would have considered that it was proper to deny third party's intervention in this case. However, there's a chance that the Minbyun's request could have probably been allowed if one party, Korean government did not deny the third person's participation. Interestingly enough, the other party, Lone Star have revealed its request of arbitration and other informations with seeking less confidentiality in the proceeding so far than Korean government does.

In the Article 4(1) of 'matter within the scope of the dispute', the tribunal should determine whether the matter falls within the scope of the dispute. Thus burden of proof that the matter is within the scope of the dispute should be on the third person. In *UPS v Canada* tribunal, the third person submissions are to relate to issues raised by the disputing parties and cannot introduce new issues (UPS v Canada:2003).

Article 4(2) states a third person's suitability to make a submission to the tribunal. Basically, the tribunal will examine that a potential third person has the expertise, experience and independence to be of assistance to the tribunal. This Article states detailed provisions regarding information to be provided by the third person. It is critical that the third party remains as third persons, not having any connection with any disputing party or not being economically dependent on any of the disputing

parties. This requirement of independency is important to guarantee fairness and transparency in the arbitral proceeding. This duty to report information is unique because it is a duty on the part of the third party, not the tribunal. Such connections between third party and the parties should be disclosed voluntarily by the third parties.

The 'nature of interest' described in Article 4(2)(d) should be relatively specific interest and not a general interest in public interest. Rationale of investor-State arbitration is to protect foreign investors from the risk of investment hosting states' political intervention and regulation, so foreign investors can securely make investment in hosting states by not subjected under the hosting states' domestic court's jurisdiction. Thus investor-state arbitration can be said to create as a tool of de-politicizing the investment dispute, whether the third person's interest is political or not can also be a factor to determine whether to accept the submission. Vice-versa, if interest of third person's participation is political rather than purey specific described in the Article 4, it would be inappropriate that the submission is allowed.

Article 4(3)(a) significant interest of a third party may have two different aspects. Basically, the tribunal will want a third party participation which can genuinely assist the given case. One the other hand, the tribunal will not probably want a third party participation which has certain interest in the given dispute (Dimitriji Euler & Markus Gehring and Maxi Scherer, 2015: 128-195). However, a third party must not be involved in the interest of the outcome of the dispute.

As in Article 4(3)(b), 'by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties' is the same expression in ICSID Rule 37(2). These commonly used wordings are therefore can be seen core ones in investment rule making. Since third party's role is to assist the tribunal, the tribunal should avoid any factual or legal information from a third party that is identical or similar from one of the parties. When a tribunal considers whether to allow a third party submission, 'added value' should be an critical standard. In case of *Biwater v. Tanzania* the tribunal stated an important role of the third persons. It sates that "The five Petitioners comprise NGOs with specialized interests and expertise in human rights, environmental and good governance issues locally in Tanzania. They approach the issues in this case with interests, expertise and perspectives that have been

demonstrated to materially differ from those of the two contending parties, and as such have provided a useful contribution."(Biwater Gauff v. Tanzania:2005).

A third person's participation also should not unduly burden the parties or the arbitral proceeding itself as in Article 4(5), by providing unnecessary, complicated information. It is one of the core rules in the third party participation as this is also same wording as in ICSID Rule 7(2).

Ⅲ. Main Cases regarding Third Person Submissions in the Investment Arbitration Proceedings

1. *Methanex v. USA* (*Methanex Corporation v. USA* : 2005) and NAFTA Trade Commission Statement

Methanex case is a landmark investor-state arbitration which third person participation in the proceeding first issued in the history of NAFTA (North America Free Trade Agreement) dispute cases. This claim was filed under NAFTA Chapter 11 in which claimant, Methanex, a Canadian manufacturer of the gasoline additive against USA sought US $970 million of damages because of a California state government ban on a gasolin additive. The Methanex company argued that the planned ban is tantamount to expropriation of the company's investment, a violation of NAFTA's Article 1110, and was enacted in breach of the National Treatment under NAFTA Article 1102 and minimum international standards of treatment under Article 1105 obligation to protect investors, including fair and equitable treatment (Nathali Bernascni - Osterwalder, Lise Johnson: 2011).

US Government argued that the rationale for this ban was the additive was a health risk because it potentially contaminated drinking water in California. Public interest in this case that the Government tried to protect was public health and the environment. Both the US and Canadian Governments argued that public interests in this case are issues. This drew significant public attention and the need for transparency and openness in NAFTA dispute arbitration proceedings eventually made several NGOs applied to the tribunal for non-disputing party status as Amicus Curiae.

One of the NGOs which has sought to intervene was the International Institute for Sustainable Development (IISD). The IISD requested that it be permitted to submit an Amicus brief to the NAFTA arbitral Tribunal. Unlike most private or commercial arbitrations, there were great public interest. Shortly after IISD petition, a second petition from other, US-based NGOs.

Every NGO participant supported the position of USA. In the landmark decision the tribunal held that it had the power to accept Amicus Curiae (Pierre-Maries Dupuy, Francesco Francioni & Ernst-Urlich Petersmann, 2009:396-407). From this *Methnex v. USA* along with *UPS v. Canada* the breakthrough of NAFTA dispute cases, NAFTA Trade Commission Statement on non-disputing party participation Statement which has been had been made in October 2003.

The NAFTA FTC issued formal procedures outlining when Amicus submissions should be accepted by tribunals in Chapter 11 proceedings. The NAFTA guidelines suggest four criteria for the acceptance of a non-disputing party brief. First, amicus participation must assist the tribunal in assessing the facts and legal issues by bringing a perspective to the proceedings different than that of the disputing parties. Second, the brief must address matters within the scope of the dispute. Third, the amicus must have a significant interest in the arbitration at hand. Fourth, the subject matter of the arbitration must contain an element of public interest. (Statement of the Free Trade Commission on Non-disputing Party Participation, NAFTA Free Trade Commission: 2003).

Methanex tribunal initially adopted this four procedures. It found for the first time in the NAFTA and UNCITRAL context that it had the power to accept the Amicus written submissions from the petitioners. The tribunal stated its general power in Article 15(1) of the old UNCITRAL Arbitration Rules (Lucas Bastin, 2012: 208-234). The Article 15(1) of old UNCITRAL Arbitration Rules, now Artilce 17(1) provides that "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate". The NGOs sought Amicus Curiae participation in the form of (i) making written submissions; (ii) receiving the parties' pleadings; (iii) attending the hearing; (iv) making oral submissions at the hearing. The tribunal granted Amicus Curiae leave to file written submissions, but it was minded to allow

the third persons to make such submissions at a later stage of the arbitral proceedings.

The *Methanex* btribunal recognized that there is undoubtedly public interest in this arbitration. It recognized the substantive issues are extended far beyond those raised by the usual transnational arbitration between commercial parties. This Methanex therefore has been a landmark decision that first expressly allowed third parties' participation due to the existence of public interest in the case. However, the tribunal partially limited the participation stating that receipt of written submissions from third party other than disputing parties in not equivalent to adding that third party (Kaita Fach Gomez, 2012: 534-543).

2. *Biwater Gauff v. Tanzania* (*Biwater Gauff (Tanzania) Ltd. V. United Republic of Tanzania* : 2006)

This is the first BIT/ICSID arbitration which applied the amended ICSID Arbitration Rules. On August 2, 2005 Biwater Gauff Ltd. filed a request for arbitration based on ICSID Convention and the United kingdom-Tanzanian BIT. Biwater argued that the respondent, the United Republic of Tanzania breached duties under the BIT and Tanzania caused damage of US $20 to 25 million. Biwater - Tanzania illegally cancelled water supply contract which it had concluded with the two years earlier. This case was a World Bank-funded project to expand and repair Dar es Salaam's water and sewerage infrastructure. Biwater claimed that Tanzania (i) unlawfully expropriated property; (ii) did not provide fair and equitable treatment; (iii) impaired the investment through unreasonable or discriminatory measures; (iv) did not grant full protection and security; (v) did not guarantee the unrestricted transfer of funds.

After Biwater brought arbitration in ICSID, five petitioners filed for Amicus Curiae claiming that their interests are among other things, that 'this arbitration goes far beyond merely resolving commercial or private conflicts, but rather has a substantial influence on the population's ability to enjoy basic human rights'(Petition for Amicus Curiae Status, *Biwater Gauff v. Tanzania*; 2006).

At this time, ICSID Arbitration Rules were amended and Rule 37 was revised for the tribunal to exercise its authority to accept Amicus Curiae. *Biwater* objected to the

Amicus Curiae claiming that those Amicus briefs are factually and legally irrelevant because the brief would not add value that could not be added by the party (Petition for Amicus Curiae Status, *Biwater Gauff v. Tanzania*,; 2006). However, the tribunal accepted the Amicus Curiae noting that the broad implications of public interest is involved. The tribunal's consideration of Rule 37 was that those NGOs were with 'specialized interests and expertise in human rights, environmental and good governance issues who approached the issues with interests, expertise and perspectives that have been demonstrated to materially differ from the two parties, and as such have provided a useful contribution' (Petition for Amicus Curiae Status, *Biwater Gauff v. Tanzania* ; 2006). Nonetheless, the tribunal imposed a number procedural measures for example, the five petitioners submitted one joint brief within 50 page limits. The tribunal also rejected the Amici's attempts to challenge those limits by denying the Amici's requests to access the documents and to attend oral hearings. The tribunal explained that because Biwater objected to open the hearing to the Amici, the tribunal was powerless to allow the Amicus Curiae participation under the ICSID Rule.

In this case, the acceptance of non-parties' attendance has wider and more significant meanings than *Methanex* that recognizes public interest in investor-state arbitration by considering broader issues including environment, human rights, sustainable development and broader social issues. The Amici themselves in *Biwater* stated in detail that their primary concerns were human rights and sustainable developments (Petition for Amicus Curiae Status, *Biwater Gauff v. Tanzania* ; 2006). Thus, the tribunal actually defined Amicus participation as a useful instrument, thereby giving contribution to the decision making.

Also this case was the first case to apply revised ICSID Arbitration Rile 37 (2). The tribunal allowed written submissions although there was Biwater's objection that any decision by the arbitral tribunal would potentially impact on wider interest.

3. *Bernhard von Pezold and others v. Republic of Zimbabwe (Bernard von Pezold v Zimbabwe* : 2010); *Border Timbers Ltd v Zimbabwe (Border Timbers Limited, Timber Products International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe* : 2010)

In 2010, Bernhard von Pezold as well as Border Timbers Limited, Timbers Products International (Private) Limited, and Hangani Development Co. (Private) Limited (von Pezold) brought two claims against the Republic of Zimbabwe. The disputes were eventually joined by the parties' agreement and they claimed Zimbabwe's alleged breach of duty under BIT between Germany and Switzerland on the one hand and Zimbabwe on the other, for unlawful expropriation and for failing to provide fair and equitable treatment committed while Zimbabwe's land reform program is executed.

Under these two ICSID cases, the tribunal finally denied two third person's participation. The two petitioners, the European Center for Constitutional and Human Rights (ECCHR) and a group of indigenous communities in Zimbabwe, requested to submit Amicus Curiae brief based on investment treaty law and human rights law (Christian Schliemann, 2013; 369-381). ECCHR and the indigenous group stated that they had a significant interest in the outcome of the arbitration since they impacted rights over the ancestral land of the indigenous communities and since the ECCHR's mission to develop corporate human rights responsibilities. Especially, the indigenous communities group claimed that the land was in their land territory. This issue was the subject of work by the African Commission on Human and People's Rights, the Inter-American Court of Human Rights and the United Nations Human Rights Committee (Christian Schliemann, 2013; 369-381). However, not like the previous *Methanex* and *Biwater*, the tribunal rejected to accept the Amicus Curiae participation.

The tribunal applied ICSID Arbitration Rule 37 (2) and its one of the most important base of refusing Amicus status in the *von Pezold* case was the lack of independence of the petitioners. The tribunal considered that a requirement of independence, although not expressed, was in the ICSID Rules. This independent character of the Amicus petitioner make it possible to bring a perspective that is different from that of the disputing parties (Von Pezold, Procedural Order No.2 ; 2012). The tribunal noted that they were not independent because the indigenous group sought to possess parts of the land which was at issue in the arbitration proceedings. Thus the tribunal's reasoning was that this group was not independent of the Zimbabwe. They further noted that the claimant's evidence on the political ideas of the director of that local NGO and on an article published by that same person on land reform and the witness testimony of a claimant, that found her to be in supportive position of land in

Zimbabwe and the respondent's land reform policies (*Von Pezold*, Procedural Order No.2 ; 2012).

Eventually, the tribunal noted that the petitioners were seeking to make submissions on legal and factual issues that are unrelated to the matters at issues. Neither party had brought issues of human rights law in the given arbitration proceedings. ECCHR's mission of corporate human rights responsibilities were not also related to the issues at stake. The tribunal further found that indigenous communities' rights was not within the scope.

In should be noted that this *Von Pezold* case has been criticised by practitioner as well as academia bacause it has deviated from the consolidated set stated in ICSID Rule and NAFTA FTC Statement. A commentator has opined that these treaties and the legal possibility to accept and use Amicus petitions are not only recommendations, such as NAFTA Free Trade Commission's Statement, but legally binding and required (J Anthony Vanduzer; 2007). However, it should be also noted that Amicus Curiae could be irrelevant, imperfect, connected to an interest of the outcome, thus not independent. It seems that implication of *Von Pezold* remains open regarding third party participation and human rights context.

4. Recent Trends of Third Party Participation

Nevertheless, consistent with this emerging third party participation trend, in the 2016 Draft SIAC (Singapore International Arbitration Center) Investment Arbitration Rules, Rule 28.2 confer tribunals with the discretion to permit non-disputing party submissions (SIAC Homepage ; 2016). However, the tribunal must first consult with all parties to the dispute. This gives the tribunal the opportunity to balance the public interest and non-disputing party participation with the confidentiality of proceedings. In addition, the tribunal must consider the extent to which the non-disputing party submissions will bring a different perspective to the legal or factual matters that are relevant to dispute, and whether the non-disputing party has a 'sufficient interest' in the proceedings (SIAC Homepage, Draft SIAC IA Rules, Rule 28.3). This seems to be a lower standard than under the ICSID Rule 37(c) and UNCITRAL Transparency Rules, art 4(3)(a), which may amicus curiae without a strong link to the proceedings,

but who nonetheless have important expertise and knowledge to a better understanding or resolution of the dispute.

Up until recently, NGOs and indigenous communities have been most frequently filed Amicus Curiae status. However, a formal public institution such as EC (the European Union) has most recently and frequently appeared as one noticeable Amicus Curiae third party in investment arbitration.

One notable Amicus participation was filed in *Micula v Romania* after two Swedish brothers, Ioan and Viorel Micula, and three Romanian food production business in which they had interests, brought their investment arbitration against Romania in 2005 after Romania cut some incentives on the grounds that they were not following EU state aid law (Global Investment Protection ; 2014). The incentives included subsidies, tax breaks and customs duties exceptions for investors on machinery and raw materials. Claimants argued that they had set up their businesses in the region of northwestern Romania – manufacturing syrup, vinegar, fruit juice and mineral water among other things – in the belief that the tax incentives would be in place. Romania for its part argued that the repeal of the incentives was not a wrongful act, but a requirement to complete its accession to the EU.

The Miculas renounced their Romanian nationality to become Swedish citizens in the 1990s. Their claim was based on the BIT (Bilateral Investment Treaty). In the final award on December 2013, the tribunal found that Romania breached the fair and equitable treatment standard when it removed the incentives introduced in 1998 to encourage investment in economically disadvantaged regions of the country. The arbitral tribunal ordered Romania to pay US$116 million in damages, along with interest, which the claimants say puts the state's total liability at US$250 million. In the eight-year long proceedings, the arbitral tribunal invited the European Commission to provide an Amicus Curiae brief to inform it regarding EU law matters. It also invited representatives from the European Commission to the hearings, to clarify their written submissions and answer questions from the parties (Ioan Micula, Viorel Micula and others v. Romania ; 2014).

Interestingly enough, even after Micula obtained a USD 250 million ICSID award

against Rumania, the European Commission has significantly consisted its intervention as third party. First, the EC had issued an injunctive decision against Romania prohibiting it from executing the ICSID award, claiming that the payment of the compensation would constitute new, unlawful state aid by letter of May 2014. According to the EC, enforcement of the measure would constitute unlawful state aid. Thereafter, the EU started a formal investigation under Art 108 (2) of the Treaty on the Functioning of the EU at the November 2014 (Carlos González-Bueno and Laura Lozano ; 2015). This Amicus petition filed by the EC in of investor-state claims should be carefully examined since there is ongoing debates. What is more in the *Micula* case has evolved from its mere participation as amicus to an active stance against the enforcement of the ICSID award.

Since the EC is clearly not a party to the proceeding, parties should not be burdened by its participation. Therefore such participation could unfairly prejudice either party as stated in the ICSID Arbitration Rule 37. Also the investor might consider that the privacy of the proceeding is jeopardized. In contrast to this, the Art. 13 of the EU Regulation states the respondent EU Member State shall fully cooperate and take all necessary measures to ensure an effective defense.

Ⅳ. Conclusion

As we have seen in *Methanex and Biwater* there is undoubtedly public interest in investment arbitration, especially in investor-state arbitration. This is not only because one party of the arbitration is a hosting state, but because subject matter itself is almost always public interest issue. As observed in the cases investor-state arbitration needs to meet high standards of transparency and openness. Such transparency and openness are fundamental values of international economic order (J Anthony Vanduzer; 2007).

The legal standard of third party Amicus Curiae has opened a broad debate among commentators. Similar wordings of the third perty participations bear important aspects of the meaning of the participation. ICSID Arbitration Rule 37.2, states that third party

submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; would address a matter within the scope of the dispute; and would reflect a significant interest in the proceeding. It is still not quite defined what really means this core wordings are. Each case would present an opportunity to elaborate in detail the meaning of the Rule. In anyway, Article 4 of the UNCITRAL Rules on transparency in investor-state arbitration has stated that it is necessary to include participation of third persons with upgraded transparency rules. Most of all, it is public interest usually at stake in investor-state arbitration that makes third party participation useful and assisted.

Procedurally, the Amicus Curiae third party participation will enhance transparency and openness issues in investment arbitration proceedings along with written submission, oral hearings and additional intervention with certain measures. It should be noted that in case encroachment of the autonomy of the parties principle of arbitration happen as seen in *Von Pezold* and possibly in *Micula,* the tribunal's involvement with Amicus participation do not necessarily result enhancement of transparency.

Ensuring transparency in investment arbitration including NAFTA, ICSID and UNCITRAL cannot be done only by third party participation alone. However, third party participation as genuine friend of court has been gradually allowed to add value to this juncture in investor-state arbitration proceeding. The role of Amicus Curiae in an arbitration proceeding have been focused on assisting a tribunal by providing expertise, knowledge and perspectives that parties did not bring on tribunal so this Amicus Curiae would be able to enhance legitimacy, transparency and openness.

It is critical that the third party involvement actually serves to improve quality of the tribunal's decision and to further develop investment arbitration system. In this point, it should be reminded that participation as Amicus Curiae in an arbitration proceeding is not equivalent to participation as direct parties. It signifies that third parties may not bring new issues other than the given issues in the dispute and the third parties should represent interests different from that of the others. On this point of view, it may be appropriate to consider that the acceptance of Amicus Curiae briefs should be governed by a set of new rules in more detailed than ICSID and

UNCITRAL Rules. Thus, any Amicus participation not qualified to benefit of the outcome of the arbitration may not be allowed.

Also such participation is only meaningful when arbitration tribunal engage sincerely with the third party to make legal arguments polished. Thus viability of third party will rely on how much the tribunal will diligently demonstrate approach with Amicus Curiae. In this perspective, time and costs are important issues to the disputing parties. International arbitration is expensive and it usually increases costs. Arbitration tribunal will also concern this matter and especially the investors will likely to be against admitting a third party because investors and they often concern about confidentiality of business information as well as adverse publicity. Therefore in practice, time and cost issues should be carefully examined when allowing Amicus Briefs.

In conclusion, it remains as an unsolved tasks that third party participation actually serves to improve tribunals's decision and further contribute to international investment law. It will be dependent on tribunal whether it allows the third party participation or not. This gives rise to further examines about the extent to which Amicus submissions are likely to be considered by tribunals in the future.

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<Abstract>

Third Party Participation and Transparency in Investment Arbitration Proceedings

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Third party participation or Amicus Curiae submission in investment arbitration proceedings appear as a important tool to enhance transparency and openness under NAFTA, ICSID and UNCITRAL. Third party participation or Amicus Curiae have been allowed when the participation is within the scope of the dispute and assist the tribunal and the participation has significant interest. Starting with the landmark case of Methanex, various NGOs, indigenous communities and even European Commission have been participating as third parties in investor-state arbitration in the field of environment, human right, health and government policy etc. The new set of rules regarding third party participation in Singapore International Arbitration Center and increasing participation of European Commission signify progressive increasing importance of third party participation. However, as in the *Von Pezold* case, the meaning of Amicus Curiae could be ruined in case third parties' interest itself is related, is deviated from the scope or it does not add value. It is critical that viability of third party participation depend on how the tribunal will diligently demonstrate its approach with Amicus Curiae.

Key words: Investment Arbitration, Transparency and Openness, Third Party Participation, Amicus Curiae, Public Interest