

Legal Briefing on the Arbitral Tribunal's Decision to Deny Third Party Submission in Odyssey Marine Exploration, Inc. v. The United Mexican States (ICSID CASE NO. UNCT/20/1)

Foreign investment projects and investor-state disputes often affect the rights and interests of other actors that are not formally party to those disputes. Most often, those other actors are project-affected communities. Although communities have a lot at stake in foreign investment projects and the resulting disputes, they “are invisible under the current international investment agreement system.”¹ The asymmetrical protection offered by investment agreements and the general lack of transparency in investor-state processes “create incentives for investors to focus on the protection of their investment and pay inadequate attention to their human rights responsibilities under local laws and international standards.”²

The investor-state dispute settlement (ISDS) system deals with important issues of public interest, and disputes often consider legal questions regarding human rights and the environment, including the actions of civil society organizations in defense of affected communities. In addition, foreign investment disputes have broader impacts on affected communities and the environment. Therefore, it is essential to sufficiently accommodate potentially affected communities within disputes.³ Against this backdrop, participating as an *amicus curiae* and filing a non-disputing party submission in the arbitral process is recognized as one of the most tangible opportunities to rebalance the scales and bring public interest considerations into the realm of ISDS. Furthermore, filing an *amicus curiae* brief offers an important means of giving effect to the general obligation to protect the environment, which is “part of the corpus of international law.”⁴

Arbitral Tribunal Denies *Amicus Curiae* Participation by Third Parties

In this context, on October 12, 2021, the Center for International Environmental Law (CIEL) and the Sociedad Cooperativa de Producción Pesquera Puerto Chale (the Cooperativa) [filed an *amicus curiae*](#)⁵ brief

¹ Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/76/238, para. 26, accessible at <https://undocs.org/A/76/238>; N. Perrone, “The ‘invisible’ local communities: foreign investor obligations, inclusiveness, and the international investment regime,” *American Journal of International Law Unbound*, vol. 113 (2019), pp. 16-21.

² Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/76/238, para. 17.

³ S.W. Schill, V. Djanic, “Wherefore Art Thou? Towards a Public Interest-Based Justification of International Investment Law,” *ICSID review* 33/1 (2018), p. 48: “There is little doubt that a system that deals with important public law issues needs to provide sufficient openness so that everybody who could potentially be affected has access to the relevant information and is able to have a voice in influencing the decision-making process.”

⁴ *Odyssey Marine Exploration, Inc. (USA) v. United Mexican States*, ICSID Case No. UNCT/20/1, Procedural Order No. 6, Professor Sands’ Dissenting Opinion, para. 6.

⁵ An *amicus curiae* is, according to Black’s Law Dictionary, “a person with strong interest in or views on the subject matter of an action, [who] may petition the court for permission to file a brief, ostensibly on behalf of a party but actually to suggest a rationale consistent with its own views.” Such *amicus curiae* briefs are commonly filed in appeals concerning matters of broad public interest.

in the ISDS case *Odyssey Marine Exploration, Inc. v. United Mexican States* (ICSID No. UNCT/20/1). The case concerns the Don Diego Project, a seabed mining project off of the coast of Mexico's Baja California Peninsula. The aim of this submission was to put forward important factual and legal elements regarding the environmental and socio-economic risks that the project represents for communities, and its implications in international law.

The *amicus curiae* submission combined the Cooperativa's first-hand experience in the region and knowledge of the risks, alongside CIEL's expertise on human rights and international environmental law, particularly in the context of international investment law and arbitration. The submission clearly outlined that the Don Diego Project poses a risk both to the marine environment of the Gulf of Ulloa and the local population, particularly the Gulf of Ulloa's fisherfolk.

On December 20, the arbitration tribunal, by a majority, [denied](#) CIEL and the Cooperativa's Application for Leave. It did so by reasoning that neither CIEL nor the Cooperativa had significant interest in the arbitration, and finding that neither of the applicants would bring a particular knowledge or insight different from that of the disputing parties. The majority decision failed to properly examine CIEL and the Cooperativa's arguments or adequately address the contributions that were laid out in the submissions. This has been highlighted by one of the arbitrators, Professor Philippe Sands, who dissented from the tribunal's majority decision. In opposing the arbitral decision, he stresses that the "unique perspective [of the Cooperativa] would have been extremely valuable, and [it is] deeply regrettable that the Majority has decided that it does not wish to hear from a community that is directly affected by the outcome of the proceedings. Such a decision will only serve to undermine perceptions as the legitimacy of these proceedings."⁶

The Importance of Allowing *Amicus Curiae* Participation in Investor-State Disputes

The majority of past arbitral cases where *amici* have been involved touched upon "some type of public interests," such as public health, environmental concerns, sustainable development, or the protection of cultural heritage.⁷ *Amicus curiae* are admitted under strict conditions in order to protect the equal rights of all parties in the dispute. The admission of *amici curiae* may lend legitimacy to the investment arbitration process for two reasons:

- (i) Contrary to commercial arbitration — which is about settling private disputes — investment arbitration is about reviewing governmental conduct. Therefore, ISDS fundamentally affects the public's interests, even though it follows the rules and culture of private arbitration. Because ISDS

⁶ *Odyssey Marine Exploration, Inc. (USA) v. United Mexican States*, ICSID Case No. UNCT/20/1, Procedural Order No. 6, Professor Sands' Dissenting Opinion, para. 5.

⁷ See, e.g., *Methanex Corporation v. United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as 'amici curiae,' para. 49; *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No ARB/09/12, Submission of Member Organizations of La Mesa as Amicus Curiae; *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No ARB/05/22, Award, para. 366; *Grand River Enterprises Six Nations, Ltd, et al v. United States of America*, UNCITRAL, Award, para. 60.

is confidential and ignores third-party interventions, it “does not allow the public interest to be taken into account, and even less to be represented.”⁸

(ii) As expressed by an Organisation for Economic Co-operation and Development (OECD) working paper, public opinion will not tolerate unknown and unelected people to dispose of the destiny of nations in dark and secret rooms.⁹

As stated by renowned arbitrator Alexis Mourre, “[i]ndeed, in cases where the [decision] can have deep impacts on such issues of general interest, it would be outrageous for the tribunal to bluntly ignore any offer of assistance made by third parties claiming to voice the interest of the public.”¹⁰ The intervention of *amici curiae* is thus appropriate to render the process more transparent, and to build public trust in the legitimacy of international arbitration in investment matters.¹¹

On occasions when both the investor and the state are perpetrators of human rights abuses, states are often silent about human rights elements that may be relevant in the dispute. According to international environmental law, foreign investment projects should also be assessed from an environmental and social perspective. *Amicus curiae* submissions are often the only opportunity that affected communities and legal experts focusing on environmental and human rights have to bring concerns to the attention of the tribunal. For instance, in *Odyssey v. Mexico*, important context includes a motion passed by the World Conservation Congress of the International Union for the Conservation of Nature (IUCN) calling on its more than 170 members to establish a moratorium on seabed mining exploitation. The motion was approved with overwhelming support in September 2021.¹² More recently, 622 marine science and policy experts from over 44 countries released a Statement Calling for a Pause to Deep-Sea Mining.¹³

In spite of how promising the *amicus curiae* “tool” seems on paper, there are several obstacles that affected communities and other interested non-disputing parties may need to overcome to reach the distant and isolated forum of the arbitral tribunal and effectively participate in the arbitral procedure. The recent

⁸ A. Mourre, Are amici curiae the proper response to the public’s concerns on transparency in investment arbitration?, *The Law and Practice of International Courts and Tribunals* (2006), Koninklijke Brill NV, Leiden, The Netherlands, p. 265, accessible at https://www.josemigueljudice-arbitration.com/xms/files/02_TEXTOS_ARBTRAGEM/09_Confidencialidade_e_Transparencia/Mourre_-_Are_amici_curiae_the_proper_response_to_public_concerns_on_transparency_in_investment_arb.pdf.

⁹ “The traditional manner in which governmental measures are reviewed for compliance with international law in a private setting, i.e. confidential in camera proceedings, has come under increased scrutiny and criticism,” OECD, *Transparency and Third Party Participation in Investor State Dispute Settlement Procedures*, Statement by the OECD Investment Committee (June 2005), accessible at <http://www.oecd.org/dataoecd/25/3/34786913.pdf>.

¹⁰ A. Mourre, p. 266.

¹¹ See, e.g., *Methanex v. USA*, paras. 22, 49, 70.

¹² Among the governments and government agencies that spoke on the motion, 81 voted in favor of the moratorium (including the Mexican State), with 18 against and 28 abstentions, 069 - Protection of deep-ocean ecosystems and biodiversity through a moratorium on seabed mining (2021), World Conservation Congress, Marseille, accessible at <https://www.iucncongress2020.org/motion/069>. “The IUCN World Conservation Congress, at its session in Marseille, France: Calls on all State Members, individually and through relevant international fora, to: a. support and implement a moratorium on deep seabed mining [...]”

¹³ Marine Expert Statement Calling for a Pause to Deep-Sea Mining, accessible at <https://www.seabedminingsciencstatement.org/>.

decision of the tribunal in the case *Odyssey v. Mexico* represents a good framework to visualize those obstacles in practice and assess how public interests are represented in practice.

Conditions to Be Admitted as *Amicus Curiae*

The main elements that the arbitral tribunal will consider in assessing *amicus* submissions are laid out under article 37(2) of the ICSID Convention Arbitration Rules. Article 37(2) reads as follows:

"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."*¹⁴

The North American Free Trade Agreement (NAFTA) Statement of the Free Trade Commission on non-disputing party participation¹⁵ explicitly adds another element: "(d) and there is a public interest in the subject-matter of the arbitration."¹⁶

In assessing the *Odyssey v. Mexico* case using the above criteria, the case is clearly one of public interest because the Don Diego Project:

(i) overlaps and is incompatible with both the fishing refuge zone dedicated to the protection of certain species and the fishing concession zone that supports the livelihoods of the Cooperativa fisherfolk,

(ii) will have serious adverse impacts on the flora and fauna comprising the region's biodiversity, and

¹⁴ ICSID Convention Arbitration Rules, Art. 37(2).

¹⁵ Statement of the Free Trade Commission on non-disputing party participation dated 7 October 2003, accessible at http://www.sice.oas.org/tpd/nafta/commission/nondispute_e.pdf.

¹⁶ The "public interest" element could also be read already in the 37(2)(c) of the ICSID Convention Arbitration Rules: "As a second requirement, tribunals have to ascertain whether either a public interest and/or a significant interest of the petitioner are involved in an investment arbitration;" C. Schliemann, Requirements for Amicus Curiae Participation in International Investment Arbitration A Deconstruction of the Procedural Wall Erected in Joint ICSID Cases ARB/10/25 and ARB/10/151, *The Law & Practice of International Courts and Tribunals* (2013), accessible at https://www.ecchr.eu/fileadmin/Kommentare_Konferenzberichte>Weiteres/Artikel_Requirements_for_amicus_curiae_participation_2013.pdf.

(iii) will infringe upon human rights, namely the right to work, the right to health, the right to a healthy environment, and the right of every person to take part in cultural life.

Additionally, in the tribunal's majority view, because "the Claimant is not seeking the restitution of the project at issue but a compensation arising out of the alleged breaches of NAFTA, the Tribunal does not consider Cooperativa as having a significant interest in this dispute."¹⁷ However, as highlighted by Sands, "[t]o suggest, as the Majority appears to, that the impact of the project is irrelevant and that the dispute concerns only the legality of the decision to refuse operating permits is not persuasive. The two issues are intrinsically connected, **and a conclusion on the latter cannot be reached without consideration of the former**" (emphasis added).¹⁸

Furthermore, Sands can be said to have legitimized CIEL and the Cooperativa's application, placing the leave to intervene in a broader perspective by stressing that "amicus curiae submissions have the potential to improve both the quality and the legitimacy of the final award, even if the tribunal ultimately disagrees with the reasoning of those submissions."¹⁹ He reiterated that "[i]t is incumbent upon arbitrators to have regard for the need to consider the impact on the legitimacy of the final award in light of both (a) general legitimacy concerns in relation investment treaty arbitration, and (b) specific local community interests that are engaged by a particular case. Regrettably, **the Majority's decision indicates no awareness of these considerations, and has in effect overridden the views of the Respondent, which contributed to the drafting of FTC statement**" (emphasis added).²⁰

The Tribunal's Power to Admit Amici

It is clear, and confirmed by Sands, that the above criteria were met, and that the tribunal failed to observe the importance of public interest representation in this particular case. This failure raises another underlying concern and again calls the legitimacy of investment arbitration into question.

Tribunals have long stated that acceptance of *amicus* submissions was "a matter of its power rather than of third party right."²¹ In effect, the *amicus* mechanism authorizes but does not require tribunals to accept submissions from third parties, and tribunals have full discretion in their decision. This means *amicus curiae* submissions "have the potential to improve both the quality and the legitimacy of the final award, even if the tribunal ultimately disagrees with the reasoning of those submissions."²² In other words, the tribunal had

¹⁷ *Odyssey Marine Exploration, Inc. (USA) v. United Mexican States*, ICSID Case No. UNCT/20/1, Procedural Order No. 6, para. 18.

¹⁸ *Odyssey Marine Exploration, Inc. (USA) v. United Mexican States*, ICSID Case No. UNCT/20/1, Procedural Order No. 6, Professor Sands' Dissenting Opinion, para. 5.

¹⁹ *Odyssey Marine Exploration, Inc. (USA) v. United Mexican States*, ICSID Case No. UNCT/20/1, Procedural Order No. 6, Professor Sands' Dissenting Opinion, para. 1.

²⁰ *Ibid.*

²¹ *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, para. 61.

²² *Odyssey Marine Exploration, Inc. (USA) v. United Mexican States*, ICSID Case No. UNCT/20/1, Procedural Order No. 6, Professor Sands' Dissenting Opinion, para. 1.

the option to admit CIEL and the Cooperativa's submission without having to agree with its reasoning or take it into account in the final decision.

This dichotomy is at the core of the ISDS system's disregard for affected communities and underrepresentation of the public interest. The present "discretionary power to authorize" the representation of public interests in arbitral proceedings, instead of the "duty to recognise" the representation of public interests when certain criteria are met, gives tribunals leeway that leads to arbitral decisions like the one in *Odyssey v. Mexico*, where public interests are not only dismissed, but where the reasons for such dismissals are also lacking proper argumentation.²³

This leeway also demonstrates a general lack of recognition by some arbitrators of the reality of the broader impacts of investment treaty arbitration, and in particular within the framework of human rights and the environment.

Ultimately, the decision in *Odyssey v. Mexico* is a bitter reminder of how little attention arbitral tribunals tend to award to environmental and human rights considerations within investment arbitration proceedings. They are missing the opportunity "to place disputes in the context of broader debates and developments in international law."²⁴ Such missed opportunities are only widening the gap between international investment and environmental and human rights issues, while continuing to decrease the legitimacy of the current investment regime.



Center for International Environmental Law (CIEL) uses the power of law to protect the environment, promote human rights, and ensure a just and sustainable society. CIEL seeks a world where the law reflects the interconnection between humans and the environment, respects the limits of the planet, protects the dignity and equality of each person, and encourages all of earth's inhabitants to live in balance with each other.

²³ *Odyssey Marine Exploration, Inc. (USA) v. United Mexican States*, ICSID Case No. UNCT/20/1, Procedural Order No. 6, Professor Sands' Dissenting Opinion, para. 2.

²⁴ *Ibid*, para. 6.