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ICSID Tribunals Apply New Rules on Amicus Curiae

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I. Introduction

As the authors describe in an earlier article, much talked about amendments to the International Centre for Settlement of Investment Disputes ("ICSID") Rules of Procedure for Arbitration Proceedings (the "ICSID Arbitration Rules" or the "Rules") took effect on April 10, 2006.¹ These amendments were made in the face of criticism of ICSID (such as a 2004 *New York Times* editorial entitled "The Secret Trade Courts") resulting from the perceived impact of investor-state arbitration on public interests.² In response to such criticism, some of the amendments provide for the ability of non-parties to intervene and participate in ICSID arbitration proceedings. More specifically, new Rule 37(2) deals with written amicus curiae (meaning friend of the court) submissions, and new Rule 32(2) deals with the attendance of non-parties at hearings.³

In two very recent rulings, ICSID Tribunals have considered and applied these new Rules.

On 2 February 2007, in *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22 ("*Biwater*"), the ICSID Tribunal in its Procedural Order No. 5 ("*Biwater Order*") granted five non-governmental organizations ("NGOs") authorization

to file a joint written amicus curiae submission pursuant to new Rule 37(2). At the same time, the Tribunal denied for the time being the NGOs' application for access to documents in the arbitration, as well as their request pursuant to new Rule 32(2) to attend the hearings in the case.⁴

Ten days later, on 12 February 2007, in *Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19 ("*Suez*"), a different ICSID Tribunal in its Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an Amicus Curiae Submission ("*Suez Order*") reached a very similar result.⁵ The five NGOs (one of which was also an applicant in *Biwater*) were granted authorization to file a joint written amicus curiae submission with reference to new Rule 37(2), even though the new Rules are not applicable in that arbitration. At the same time, the Tribunal denied the NGOs' application for access to the arbitration documents. The Tribunal had already denied the NGOs' request to attend the hearings in that case in a previous decision prior to the new Rules.⁶

These two publicly available rulings are of particular interest because they are the first ones known to the authors that

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consider and apply new Rule 37(2) and, in the case of the *Biwater* Order, new Rule 32(2). They will no doubt serve as guidance for other ICSID Tribunals considering similar amicus curiae requests.

II. The *Biwater* Order

A. Background

The *Biwater* case arises out of Tanzania's privatization of the supply of water and sewage services to its capital, Dar es Salaam, in 2003. Dissatisfied with the services of Biwater, a private UK company, the Tanzanian government terminated its two-year old contract with Biwater in 2005. Biwater responded by initiating ICSID arbitration under the dispute resolution provisions of the UK-Tanzania bilateral investment treaty ("BIT").⁷

The arbitration was started well before the amendments to the ICSID Arbitration Rules took effect in April 2006. However, the parties had agreed that the proceedings would, as of the date of the entry into force of the amendments, be conducted in accordance with the new Rules, including, specifically, the amicus curiae Rules.⁸

On November 27, 2006, five NGOs filed a joint "Petition for Amicus Curiae Status" ("*Biwater* Petition"). Three of the NGOs are Tanzania-based—The Lawyers' Environmental Action Team (LEAT), The Legal and Human Rights Centre (LHRC), and The Tanzania Gender Networking Programme (TGNP). The other two are international NGOs active in the investment arbitration field—The Center for International Environmental Law (CIEL) and The International Institute for Sustainable Development (IISD).⁹

The NGOs sought the following orders: (i) status as amicus curiae in the arbitration; (ii) access to the key arbitration documents; and (iii) permission to attend any hearings and to reply to any specific questions of the Tribunal on the written submissions.¹⁰

The NGOs considered that the arbitration raised "a number of issues of vital concern to the local community in Tanzania, and a wide range of potential issues of concern to developing countries...that have privatized, or are contemplating a possible

privatization of, water or other infrastructure services...[and] issues from a broader sustainable development perspective."¹¹ The NGOs position was that the arbitration "has a substantial influence on the population's ability to enjoy basic human rights."¹² The NGOs assured the Tribunal that their "[i]nterest...in all of these public concerns is, without question, longstanding, genuine, and supported by their well-recognized expertise on these issues."¹³

In addition to explaining why they considered their Petition should be accepted on the basis of the tests set out in new Rule 37(2), the NGOs stated that "there is a history of practice by amici that is growing in investor-state arbitrations" and "there is no recorded instance of abuse of the process by any petitioner or accepted amicus curiae."¹⁴ They also emphasized "the importance of public access to such arbitrations from a different perspective; the credibility of the arbitration process in the eyes of the public," stating that "the public perception [of investor-state arbitration] can be one of a system unfolding in a secret environment that is anathema in a democratic context."¹⁵

B. Observations By The Parties

In its summary of the procedural history of the *Biwater* Petition in the *Biwater* Order, the Tribunal noted that the parties had been invited to comment on the NGOs' request for participation in the written phase of the proceedings in accordance with Rule 37(2) (which provides that the Tribunal may allow an amicus curiae submission "[a]fter consulting both parties") and on the NGOs' attending or observing all or part of any forthcoming hearing in the case in accordance with Rule 32(2) (which provides for the possibility of such attendance "[u]nless either party objects").¹⁶

Both parties submitted observations. The investor Claimant resisted the *Biwater* Petition, while the state Respondent did not.¹⁷

The *Biwater* Order indicates that an issue was raised as to whether the parties' observations on the *Biwater* Petition should be provided to the NGOs prior to the Tribunal rendering its ruling.¹⁸ This was urged by the Respondent, but objected to by the Claimant. The *Biwater* Order does not contain an express ruling by the Tribunal on this issue but

indicates that, shortly after the issue was raised, the Tribunal informed the parties “that it was sufficiently informed about the Petition and that it would render its decision soon.”¹⁹ This implies that the Tribunal was not inclined to go so far as to order that the parties’ observations on the *Bewater* Petition be provided to the NGOs prior to the Tribunal’s ruling.

C. General Approach To Be Used In Applying Rules 32(2) And 37(2)

In the “Decision” section of the *Bewater* Order,²⁰ the Tribunal first addressed the fact that the NGOs had requested to be granted “status as amicus curiae in the present arbitration.” The Tribunal clarified that the ICSID Arbitration Rules do not, as the term “status as amicus curiae” might denote, give a non-party “a standing in the overall arbitration akin to that of a party, with the full range of procedural privileges that that might entail.”²¹ Rather, the Rules allow two specific and narrow instances of non-party participation: (i) “to file a written submission with the Tribunal regarding a matter within the scope of the dispute” (Rule 37(2); emphasis added); and (ii) “to attend or observe all or part of the hearings” (Rule 32(2)).²²

The Tribunal considered that each of these types of participation is to be addressed on an ad hoc or case-by-case basis. For instance, one amicus curiae submission by a petitioner might be accepted, while another in the same arbitration might be denied. The Tribunal lists these considerations in general language which suggests that the Tribunal has sought to establish a precedent as to how Rules 32(2) and 37(2) are to be approached generally by any ICSID Tribunal. It will of course be interesting to see whether other ICSID Tribunals indeed follow the approach to these provisions set out in the *Bewater* Order.

D. Request To File A Written Submission Was Granted With Procedural Safeguards

The Tribunal stated that the test to determine whether to allow an amicus curiae submission is set out in Rule 37(2) and that it had carefully considered the conditions in subsections (a), (b) and (c) of that Rule.²³ Rule 37(2) provides that:

“[i]n 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; [and] (c) the non-disputing party has a significant interest in the proceeding.”²⁴

The Tribunal found that the NGOs had satisfied each of these tests and that the Tribunal might benefit from a written submission by them.²⁵ The Tribunal also noted that “allowing for the making of such submission by these entities in these proceedings is an important element in the overall discharge of the Arbitral Tribunal’s mandate, and in securing wider confidence in the arbitral process itself.”²⁶ The Tribunal then expanded upon this transparency rationale and quoted extensively from previous decisions accepting amicus curiae submissions in two other investor-state arbitrations (one the well-known *Methanex* NAFTA case and the other the *Suez* ICSID case considered later in this article). In doing so, the Tribunal emphasized the inevitable public interest in investor-state arbitrations given their subject matter and the wider concerns they raise, and the resulting importance of increased transparency in investor-state arbitration.²⁷

The Tribunal therefore granted the NGOs’ request to file a written submission in the arbitral proceedings pursuant to Rule 37(2), subject however to certain procedural safeguards.²⁸ Indeed, Rule 37(2) specifically directs the Tribunal to ensure that the amicus curiae submission “does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the...submission.”²⁹ The Claimant had pointed out that, while the existence of the case was publicly known since about August 2005, the *Bewater* Petition was brought only at the end of November 2006 and the substantive hearing had already been scheduled for April 2007 (only two months after the February 2007 *Bewater* Order).³⁰ The Tribunal called these points “[v]ery serious concerns” for which it had “great sympathy.”³¹ The Tribunal referred again to the decisions in *Methanex* and *Suez*, this time in support of the position that the additional burden on the parties should be minimized

and special consideration should be given to the procedural protection of the party whose position is more likely to be countered by the amicus curiae submission.³²

As a result, the Tribunal established a detailed timetable and adopted a flexible two-stage procedure for the amicus curiae submission, specifying, among other things, that it should be a single joint submission, of a maximum length of 50 pages double-spaced, and that evidence or documentation on which the NGOs wished to rely should not be attached but could be identified and the Tribunal would request it on its own initiative if it considered such documentation necessary. In accordance with Rule 37(2), the Tribunal allowed both parties an opportunity to present their observations on the written submission that would be filed and also gave the parties the opportunity to do so after the scheduled hearing if they preferred.³³

E. Request For Access To Key Arbitration Documents Was Denied (For The Time Being)

In its Procedural Order No. three in the *Bewater* case, the Tribunal had imposed certain limitations on the disclosure of documents to the public to preserve the integrity of the process. The NGOs had argued that, in order for them to be able to supply the Tribunal with a useful amicus curiae submission, they required access to certain key documents in the arbitration, such as the pleadings and any witness statements.³⁴

The Tribunal noted first that, given the qualifications of the NGOs and the basis for their intervention stated in the *Bewater* Petition, it envisaged that the NGOs would address broad policy issues concerning sustainable development, environment, human rights and governmental policy, all areas within the ambit of Rule 37(2). However, the Tribunal did not expect the NGOs to consider themselves as simply in the same position as either party's lawyers or to suggest to the Tribunal how issues of fact or law presented by the parties ought to be determined.³⁵

The dispute had been widely reported and the broad policy issues on which the Tribunal expected the NGOs to report were in the public domain and well known to the NGOs. As these were the very issues that had led the NGOs to file the *Bewater* Petition,

the Tribunal did not see the need to allow disclosure of documents from the arbitration for the time being.³⁶ The Tribunal announced, however, that this issue could be revisited after the conclusion of the April 2007 hearing.³⁷

Accordingly, for the time being, the Tribunal denied this request by the NGOs.³⁸

F. Request To Attend The Hearings Was Denied

As to the NGOs' request that they be allowed to attend the hearings and to reply to any specific questions of the Tribunal on their written amicus curiae submission, the Tribunal pointed out that the "opening words" "[u]nless either party objects" of Rule 32(2) "are clear, and condition the Arbitral Tribunal's powers" with respect to allowing non-parties to attend the hearings.³⁹

As the authors point out in an earlier article, a suggestion by public interest advocates that the ICSID Arbitration Rules be amended to give tribunals the power to allow attendance at hearings of non-parties over the objection of a party was not followed, and Rule 32(2) still gives each party a veto right in this respect.⁴⁰

After quoting Rule 32(2), the Tribunal accordingly concluded that, since the Claimant had objected in its observations on the *Bewater* Petition to the presence of the NGOs at the hearing, the Tribunal had no power to permit the NGOs' presence or participation at the hearing and was accordingly required to reject the application.⁴¹ The Tribunal did, however, reserve the right to ask the NGOs specific questions in relation to their written submission, and to request the filing of further written submissions and/or documents or other evidence, whether before or after the hearing.⁴²

III. The Suez Order

A. Background

Like the *Bewater* case, the *Suez* case arises out of the privatization of water services, more particularly Argentina's privatization of water and waste water services in the 1990s. In 1989, Argentina declared the country's public services in a state of emergency

and proposed a broad privatization to remedy the situation. Argentina took measures to attract private foreign investment, including pegging the Argentine peso to the US Dollar and entering into several BITs. Water and waste water services were among the areas slated for privatization. In the early 1990s, a consortium comprised of, among others, Suez, a French company, Sociedad General de Aguas de Barcelona, S.A. (“AGBAR”), a Spanish company, and Vivendi Universal S.A. (“Vivendi”), a French company (the “Suez Claimants”) won a thirty-year concession to operate the water and waste water services systems in the City of Buenos Aires and surrounding municipalities.

When Argentina experienced a severe economic and financial crisis in 1999, the Argentine government adopted various measures, including de-linking the Argentine peso from the US Dollar, which resulted in a significant depreciation of the Argentine peso. The Suez Claimants claimed that these measures injured their investments, violating earlier commitments, and sought to obtain from the Argentine government adjustments in the tariffs for water distribution and waste water services and modifications of other operating conditions. When negotiations remained fruitless, the Suez Claimants initiated ICSID arbitration in April 2003 under the France-Argentina BIT (Suez and Vivendi) and the Spain-Argentina BIT (AGBAR).⁴³

B. The Suez Tribunal’s May 2005 Decision

On January 8, 2005, five NGOs filed a joint “Petition for Transparency and Participation as Amicus Curiae” (“First Suez Petition”).⁴⁴ The five NGOs consisted of CIEL, known from the above discussion of the *Bewater* case, and four local NGOs—Asociación Civil por la Igualdad y la Justicia (ACIJ), Centro de Estudios Legales y Sociales (CELS), Consumidores Libres Cooperative Ltda. de Provisión de Servicios de Acción Comunitaria, and Unión de Usuarios y Consumidores.⁴⁵

The Suez Tribunal ruled on the First Suez Petition in its “Order in Response to a Petition for Transparency and Participation as Amicus Curiae” dated May 19, 2005 (“Initial Suez Order”). This ruling, while very interesting and in many ways a precursor to the two rulings that are the focus of this article, was issued almost a year before the new ICSID

Rules took effect. However, to understand the February 2007 Suez Order that is the subject of this article, it is important to note the following points as regards the First Suez Petition and the Initial Suez Order:

- The NGOs requested the following relief: (a) access to the hearings in the case; (b) an opportunity to present legal arguments as amicus curiae; and (c) timely, sufficient, and unrestricted access to all the documents in the case.⁴⁶
- The Suez Claimants and the Respondent were given an opportunity to submit their observations on the First Suez Petition. The Suez Claimants rejected the First Suez Petition in its entirety whereas the Respondent approved of it.⁴⁷
- The Suez Tribunal denied the NGOs’ request for access to the hearings in the case on the basis of old Rule 32(2), which provided:

“The tribunal shall decide, *with the consent of the parties*, which other persons besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal may attend the hearings.” (Emphasis added)

The Tribunal held that this Rule was clear and that no persons other than those specifically named in the Rule could attend the hearings unless both the Suez Claimants and the Respondent affirmatively agreed to their attendance. The Tribunal noted that, although it had certain inherent powers with respect to the arbitral procedure, it did not have authority to exercise such power in opposition to a clear directive in the ICSID Arbitration Rules. As the Suez Claimants had objected to the NGOs’ attendance at the hearings in the case, “[t]he crucial element of consent by both parties to the dispute [was] absent in this case,” and the Tribunal was required to deny the NGOs’ request to have access to and attend the hearings.⁴⁸

- Regarding the NGOs’ request for permission to file an amicus curiae submission, the Tribunal found, among other things, as follows:
 - (i) As the old ICSID Arbitration Rules did not contain a provision on amicus curiae submissions

and therefore neither expressly permitted nor expressly denied such submissions, the Tribunal found that it had the power to accept amicus curiae submissions under the last sentence of Article 44 of the ICSID Convention, which provides in relevant part: “[i]f any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.”⁴⁹

(ii) Amicus curiae submissions were not appropriate in the then ongoing jurisdictional stage of the proceedings, because they would not assist the Tribunal in its task of assessing jurisdiction as all issues regarding jurisdiction had been competently and comprehensively argued by the parties.⁵⁰

(iii) Whether an amicus curiae submission should be accepted in an ICSID arbitration depends on three basic criteria: (a) the appropriateness of the subject matter of the case; (b) the suitability of a given non-party to act as amicus curiae in that case; and (c) the procedure by which the amicus curiae submission is made and considered.⁵¹

(iv) As to criterion (a), the Tribunal found that, despite the Suez Claimants’ observation that the case was simply about their alleged right to compensation for claimed violations of their rights by the Respondent, the case potentially involved matters of public interest. The Tribunal stated that:

“[t]he factor that gives this case particular public interest is that the investment dispute centers around the water distribution and sewage systems of a large metropolitan area, the city of Buenos Aires and surrounding municipalities. These systems provide basic public services to millions of people and as a result may raise a variety of complex public and international law questions, including human rights considerations. Any decision rendered in this case, whether in favor of the Claimants or the Respondent, has the potential to affect the operation of those systems and thereby the public they serve.”⁵²

This is one of the *Suez* quotes relied on in the *Biwater* Order. (*See supra*, p. 3.) The Tribunal also stated that “[t]he acceptance of *amicus* submissions would have the additional desirable consequence of increasing the transparency of investor-state arbitration. Public acceptance of the legitimacy of international arbitral processes, particularly when they involve states and matters of public interest, is strengthened by increased openness and increased knowledge as to how these processes function.”⁵³

For these reasons, the Tribunal concluded that the subject matter of the case was appropriate for amicus curiae submissions.⁵⁴

(v) As to criterion (b), the Tribunal stated that it would accept amicus curiae submissions only from persons who established to the Tribunal’s satisfaction that they had the expertise, experience, and independence to be of assistance in the case. Therefore, the Tribunal concluded, each non-party wishing to submit an amicus curiae brief must first apply to the Tribunal for leave to make such a submission.⁵⁵

(vi) The Tribunal announced that, upon a grant of leave to file an amicus curiae submission to a particular party, it would at that time determine the appropriate procedure to govern the submission, to enable the amicus curiae to present its view and at the same time to protect the substantive and procedural rights of the parties. The Tribunal stated that it would endeavor to establish a procedure which would safeguard due process and equal treatment as well as the efficiency of the proceedings.⁵⁶

- The Tribunal announced that the NGOs’ “broad request for all documentation in the case raises difficult and delicate questions because of certain constraints in the ICSID Convention and Rules and in the practice of the Centre.”⁵⁷ However, in view of its earlier ruling that a non-party must first file an application to make amicus curiae submissions, the Tribunal decided to defer a decision on the issue of documentary access until such time as it might grant leave to a particular non-party to file an amicus curiae brief.⁵⁸

C. The *Suez* Order Dated February 12, 2007

1. Background

On December 1, 2006, the same five NGOs filed with the *Suez* Tribunal a “Solicitud de Autorización para Realizar una Presentación en Calidad de Amicus Curiae” (Petition for Permission to Make an Amicus Curiae Submission) (the “Second *Suez* Petition”).⁵⁹

In the Second *Suez* Petition, the NGOs requested leave to make a single, joint amicus curiae submission because of the matters of public interest presented by the case. The NGOs made two specific requests:

(i) to be granted an opportunity to present a written amicus curiae submission in the form and time that the Tribunal deemed appropriate in order to provide arguments and perspectives that might contribute to a better and more comprehensive solution of the case; and

(ii) to be given timely, sufficient, and unrestricted access to the documents produced during the course of the arbitration to focus their submission on the questions most pertinent to the case, or, in the alternative, access to the parties’ pleadings.⁶⁰

2. Observations By The Parties

As the Tribunal had announced in the Initial *Suez* Order, both the *Suez* Claimants and the Respondent were provided an opportunity to comment on the Second *Suez* Petition.⁶¹

The *Suez* Claimants opposed both requests, while the Respondent had no objection.⁶²

3. Request To File A Written Submission Was Granted With Procedural Safeguards

In the *Suez* Order, the Tribunal first turned to the NGOs’ request for leave to file a joint amicus curiae submission.

The Tribunal noted at the outset that, after the Initial *Suez* Order, new Rule 37(2) had come into effect and it quoted the text of the Rule.⁶³ Though stating that “this new Rule does not apply to this case,” the Tribunal took care to point out that the new Rule accorded with the three criteria announced in

the Initial *Suez* Order for determining whether to grant leave to file an amicus curiae submission (*see supra*, p. 6) and the three factors set forth in that Order respecting the suitability of a non-party to make an amicus curiae submission (expertise, experience and independence, *see supra*, p. 6).⁶⁴

The Tribunal then found that the NGOs had demonstrated their suitability to make amicus curiae submissions in the case, because they had provided sufficient information to show that they are respected NGOs and had as a group developed an expertise in and experience with matters of human rights, the environment, and the provision of public services. The Tribunal also noted that the *Suez* Claimants had not challenged the NGOs’ assertion that they were independent of each party in the arbitration.⁶⁵

As to the appropriateness of the subject matter of the case, the Tribunal noted as follows:

“Even if its decision is limited to ruling on a monetary claim, to make such a ruling the Tribunal will have to assess the international responsibility of Argentina. In this respect, it will have to consider matters involving the provision of ‘basic public services to millions of people’. To do so, it may have to resolve ‘complex public and international law questions, including human rights considerations’ (Order of May 19, 2005, para. 19). It is true that the forthcoming decision will not be binding on the current operator of the water and sewage system of Buenos Aires. It may nonetheless have an impact on how that system should and will be operated. More generally, because of the high stakes in this arbitration and the wide publicity of ICSID awards, one cannot rule out that the forthcoming decision may have some influence on how governments and foreign investor operators of the water industry approach concessions and interact when faced with difficulties.”⁶⁶

In response to the *Suez* Claimants’ argument that the NGOs sought not to offer new factual elements but only to make legal arguments inappropriate for a non-party, the Tribunal stated that an amicus curiae could bring arguments, perspectives and expertise that the litigation parties might not provide and that such arguments, perspectives and expertise could relate to law, facts, or the application of the law to the facts. This conclusion, the Tribunal stated, is further

supported by new Rule 37(2) which refers to the amicus assisting the Tribunal “in the determination of a factual or legal issue.”⁶⁷

The Tribunal also disagreed with the Suez Claimants’ tardiness argument. While the Second *Suez* Petition was brought four months after the time when it could first have been brought (the date of the Tribunal’s decision on jurisdiction), an amicus curiae submission at this time would not impede the progress of the case as the written phase was scheduled to last until August 2007 and the hearing was scheduled only for the end of October 2007. There was sufficient time to allow an amicus curiae submission by the NGOs and to receive the parties’ observations thereon well before the beginning of the hearings, thus integrating the amicus curiae process into the general course of the arbitration. The Tribunal would ensure this through procedural safeguards.⁶⁸

The Tribunal then considered the procedure for submitting and considering amicus curiae submissions. The Tribunal noted in this regard the directive in new Rule 37(2) to ICSID Tribunals “to ensure that the amicus curiae submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the...submission.”⁶⁹

With this guideline in mind, the Tribunal ordered the following procedural safeguards: (i) the NGOs were allowed to file by a certain deadline a single joint amicus curiae submission; (ii) of a maximum length of 30 pages double-spaced in 12 point font; (iii) in both English and Spanish (as opposed to the Second *Suez* Petition which apparently was filed in Spanish only); and (iv) without annexes, it being understood that the Tribunal itself would ask the amicus curiae for any referenced documents that the Tribunal might wish to review. The Tribunal also provided both parties with an opportunity to comment on the amicus curiae submission.⁷⁰

4. Request For Access To Arbitration Documents Was Denied

The Tribunal noted that new Rule 37(2) provides no guidance with respect to the amicus curiae’s access to the arbitration record. As a general proposition, the Tribunal stated, an amicus curiae must have sufficient

information on the subject matter of the dispute to provide perspectives, expertise and arguments that are pertinent and thus likely to be of assistance to the Tribunal.⁷¹

The Tribunal found that, in the present case, the NGOs had sufficient information for this purpose, and that, therefore, the Tribunal did not need to resolve the general question of whether an amicus curiae can have access to the arbitration record. The Tribunal noted that it was apparent from the Second *Suez* Petition that the NGOs had already gained much information about the case from other sources. Moreover, the Tribunal’s Decision on Jurisdiction, publicly available on the ICSID website, contained information about the nature of the Suez Claimants’ claims.⁷²

Finally, the Tribunal considered that the NGOs proposed to offer their views on general issues which per se do not require comprehensive information on the factual basis of the case, and that the role of an amicus curiae is not to challenge arguments or evidence put forward by the parties.⁷³

IV. Conclusion

Two entirely different ICSID tribunals⁷⁴ have thus reached very similar results when faced with similar amicus curiae requests. To the authors’ knowledge, these are the first rulings on amicus curiae since new Rule 37(2) came into effect. As such, they can be expected to be referred to and considered in other ICSID arbitrations where amicus curiae requests are made.

With respect to Rule 37(2), the *Bewater* and *Suez* Orders affirm a number of points:

- (1) A non-party that desires to file a written amicus curiae submission must first file a request for leave to file such a submission. This is not expressly stated in new Rule 37(2) but is implied as the Tribunal is authorized by that Rule to “allow a [non-party] to file a written submission,” after consulting both parties. Accordingly, in both *Bewater* and *Suez*, the NGOs filed a petition for leave to file a written submission, and in the Initial *Suez* Order the Tribunal specifically held that this should always be done.⁷⁵

(2) As expressly provided in Rule 37(2), both parties must have an opportunity to comment on the proposed amicus curiae's request for leave to file an amicus curiae submission. However, neither party has a veto right in respect of granting such an application, and, in fact, in both *Bivater* and *Suez*, the request for leave to file a written submission was granted over the objection of the investor claimants.⁷⁶

(3) The question of whether the parties' comments on an application by a non-party to make an amicus curiae submission should be provided to the non-party prior to the Tribunal ruling on the application was not expressly resolved, although the *Bivater* Order suggests that the Tribunal in that case was not prepared to order this where one party objected.⁷⁷

(4) Rule 37(2) is rather narrow in scope and is only about the filing of "a written submission" (emphasis added). Rule 37(2) does not envision granting a proposed amicus curiae permanent status in the case, and, while one request of a proposed amicus curiae to file a written submission could be granted, another such request in the same case could be denied.⁷⁸

(5) Even though Rule 37(2) does not specify this, a written submission under that Rule can be made jointly by a number of amici curiae.⁷⁹

(6) In determining a request by a non-party for leave to file a written submission under Rule 37(2), an ICSID Tribunal must consider the three factors set forth in that provision: (a) whether the 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 parties; (b) whether the submission would address a matter within the scope of the dispute; and (c) whether the non-party has a significant interest in the proceeding.⁸⁰

(7) Rule 37(2) requires the Tribunal to ensure, through specific procedural directions (such as deadlines, a maximum length, no exhibits, etc.), that the submission does not disrupt the proceedings or cause undue burden or unfair prejudice to either party.⁸¹

(8) A grant of leave to file a written amicus curiae submission under Rule 37(2) does not ipso facto entail a grant of access to the arbitration record. To the contrary, such a request was denied in both *Bivater* and *Suez* on the grounds that the NGOs already had sufficient information from the public domain to address the general and broad public interest issues that they proposed, and were well positioned, to address.⁸² The *Bivater* Tribunal stated that this issue could be revisited after the April 2007 hearing.⁸³ However, the *Suez* Tribunal noted that the request for access to the arbitration record raised "difficult and delicate questions because of certain constraints in the ICSID Convention and Rules and in the practice of the Centre,"⁸⁴ and that "[t]he revision of the ICSID Arbitration Rules which introduced Rule 37(2) did not deal with the amicus curiae's access to the record and thus provides no guidance."⁸⁵ The *Suez* Tribunal seemed relieved that, because in the case at hand the NGOs had sufficient information without access to the arbitration record, it could "dispense with resolving the general question of a non-party's access to the record."⁸⁶

(9) As to the contents of a written amicus curiae submission, new Rule 37(2) provides that the submission must be "regarding a matter within the scope of the dispute" and should "assist the Tribunal in the determination of a factual or legal issue related to the proceedings." The *Bivater* and *Suez* Tribunals both considered that this language encompassed a submission on broad policy issues such as environment, human rights, sustainable development and governmental policy.⁸⁷ The *Bivater* Tribunal specified that what was not expected was for the petitioners either to act as a further advocate on behalf of one of the parties or to suggest to the Tribunal how issues of fact or law presented by the parties ought to be determined.⁸⁸ The *Suez* Tribunal similarly noted that the role of an amicus curiae is not to challenge arguments or evidence put forward by the parties, but that, under new Rule 37(2), an amicus curiae could provide arguments, perspectives and expertise relating to the law, the facts or the application of the law to the facts.⁸⁹

(10) Pursuant to Rule 37(2), both parties must be given an opportunity to comment on the written submission filed by an amicus curiae after having been granted leave to do so.⁹⁰

As to Rule 32(2), the *Bivater* and *Suez* Orders would appear to confirm public interest advocates' fear that, as long as any party is entitled to object to a non-party's attendance at the hearings, attendance of non-parties at ICSID hearings will be rare. The importance of the difference between the requirement for the Tribunal to consult the parties (as in the case of an application for leave to file an amicus curiae submission under Rule 37(2)) and giving each party a veto right (as in the case of an application to attend the hearing under Rule 32(2)) is clearly demonstrated by the *Bivater* and *Suez* Orders: while the claimants in both cases objected to both the request to file a written submission and the request to attend the hearings, the NGOs in both cases were granted their request to file a written submission but not their request to attend the hearings. It could be said that attendance at hearings is more intrusive than the filing of a written submission, especially where non-parties are not granted access to the arbitration record (as was the case in both *Bivater* and *Suez*).

In conclusion, the *Bivater* and *Suez* Orders are interesting balancing acts between competing interests—the private interests of the parties to those arbitrations and the public interests represented by the applicant NGOs. In each case, the balancing act by the Tribunal lead to the same result. The NGOs in each case are now allowed to file a written submission in an arbitration to which they are not a party. On the other hand, the NGOs in *Bivater* were denied a “permanent” amicus curiae status in the case, and the NGOs in both cases have not been given access to the arbitration documents or the right to attend the hearings. Thus, as reported on the website of The International Institute for Sustainable Development (IISD) with respect to the *Bivater* decision, “[t]he decision is therefore an important one for the applicants, and the first one under the ICSID arbitration rules, but is not quite a full victory.”⁹¹

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- 1 Andrew de Lotbinière McDougall and Ank Santens, *ICSID Amends its Arbitration Rules*, [2006] Int'l. A.L.R. 4, pp. 119-22.
- 2 *Id.* at 119.
- 3 *Id.* at 120; <http://www.worldbank.org/icsid/basicdoc/partF.htm>.
- 4 See *Bivater* Order (available at <http://www.worldbank.org/icsid/cases/awards.htm#awardarb0522>, case 58, Procedural Order No. five).
- 5 See *Suez* Order (available at <http://ita.law.uvic.ca/documents/SuezVivendiamici.pdf>).
- 6 *Suez*, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, May 19, 2005, paras. 4-7 (available at <http://www.worldbank.org/icsid/cases/awards.htm#awardarb0522>, case 50).
- 7 John Vidal, *Flagship water privatization fails in Tanzania*, *The Guardian*, May 25, 2005 (available at <http://politics.guardian.co.uk/development/story/0,15709,1491602,00.html>); *Bivater*, Procedural Order No. one, March 31, 2006 (available at <http://www.worldbank.org/icsid/cases/arb0522-ProceduralOrderone.pdf>); <http://www.iisd.org/investment/itn/documents.asp>.
- 8 *Bivater*, Minutes of the First Session of the Arbitral Tribunal, March 23, 2006, Sections I.5 and II.20 (available at http://www.investmentclaims.com/decisions/BGT-Tanzania-Meeting_Minutes-23_March_2006.pdf).
- 9 See *Bivater* Petition (available at http://ita.law.uvic.ca/documents/investment_petition_arb0522.pdf).
- 10 *Id.* at 2.
- 11 *Id.* at 7.
- 12 *Id.* at 8.
- 13 *Id.* at 9.
- 14 *Id.* at 13.
- 15 *Id.* at 14.
- 16 *Bivater* Order, para. 3; *supra* note 3.
- 17 See *Bivater* Order, Section III (“The Parties’ Observations”).
- 18 *Id.* at paras. 8-9.
- 19 *Id.* at para. 10.
- 20 *Id.* at Section IV (“Decision of the Arbitral Tribunal”).
- 21 *Id.* at paras. 46-47.
- 22 *Supra* note 3.
- 23 *Id.* at paras. 49-50.
- 24 *Supra* note 3.
- 25 *Bivater* Order, para. 50.
- 26 *Id.*

ICSID Tribunals Apply New Rules on Amicus Curiae

- 27 *Id.* at paras. 51-52 (quoting from *Methanex Corporation v. United States of America*, NAFTA, Decision of the Tribunal on Petitions from Third Persons to Intervene as “Amici Curiae”, January 15, 2001, para. 49 (available at <http://naftaclaims.com/Disputes/USA/Methanex/MethanexDecisionReAuthorityAmicus.pdf>), and *Suez*, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, May 19, 2005, paras. 19-21).
- 28 *Biwater* Order, paras. 55-60.
- 29 *Supra* note 3.
- 30 *Biwater* Order, paras. 36 and 59.
- 31 *Id.* at para. 59.
- 32 *Id.*
- 33 *Id.* at para. 60.
- 34 *Biwater* Petition, pp. 11-12, 15.
- 35 *Biwater* Order, para. 64.
- 36 *Id.* at para. 65.
- 37 *Id.* at paras. 66-67.
- 38 *Id.* at para. 68.
- 39 *Id.* at para. 70.
- 40 *Supra* note 1, p. 120.
- 41 *Biwater* Order, para. 71.
- 42 *Id.* at para. 72.
- 43 *Suez*, Decision on Jurisdiction, August 3, 2006, pp. 2, 10-13 (available at http://www.worldbank.org/icsid/cases/pdf/ARB0319_DecisiononJurisdiction03-19.pdf).
- 44 *Suez*, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, May 19, 2005, para. 1 (available at <http://www.worldbank.org/icsid/cases/ARB0319-AC-en.pdf>).
- 45 *Id.*
- 46 *Id.*
- 47 *Id.* at paras. 2 and 3.
- 48 *Id.* at paras. 4-7.
- 49 *Id.* at paras. 8-16.
- 50 *Id.* at paras. 28, 32.
- 51 *Id.* at para. 17.
- 52 *Id.* at paras. 18-19.
- 53 *Id.* at para. 22.
- 54 *Id.* at para. 23.
- 55 *Id.* at para. 24.
- 56 *Id.* at para. 29.
- 57 *Id.* at para. 30.
- 58 *Id.* at para. 31.
- 59 *See Suez* Order, para. 7 (available at <http://ita.law.uvic.ca/documents/SuezVivendiamici.pdf>).
- 60 *Id.*
- 61 *Id.* at para. 8.
- 62 *Id.* at paras. 9-10.
- 63 *Id.* at para. 14.
- 64 *Id.* at paras. 12-13, 15.
- 65 *Id.* at para. 16.
- 66 *Id.* at para. 18.
- 67 *Id.* at para. 20.
- 68 *Id.* at para. 21.
- 69 *Supra* note 3.
- 70 *Suez* Order, para. 27.
- 71 *Id.* at para. 24.
- 72 *Id.*
- 73 *Id.* at para. 25.
- 74 The *Biwater* Tribunal consists of Professor Bernard Hanotiau (Belgium, Chair), Mr. Gary Born (US) and Mr. Toby Landau (UK). The members of the *Suez* Tribunal are Professor Jeswald W. Salacuse (US, Chair), Professor Gabrielle Kaufmann-Kohler (Switzerland), and Professor Pedro Nikken (Venezuela).
- 75 *See Biwater* Petition; First *Suez* Petition; Second *Suez* Petition; Initial *Suez* Order, para. 25.
- 76 *See supra* note 3; *Biwater* Order; *Suez* Order.
- 77 *Biwater* Order, paras. 8-10.
- 78 *Biwater* Order, paras. 46-47.
- 79 *See Biwater* Order; *Suez* Order.
- 80 *See supra* note 3; *Biwater* Order, paras. 49-50.
- 81 *See supra* note 3; *Biwater* Order, paras. 56-60; *Suez* Order, paras. 26-27.
- 82 *Biwater* Order, paras. 62-28; *Suez* Order, paras. 23-25.
- 83 *Biwater* Order, para. 66.
- 84 Initial *Suez* Order, para. 30.
- 85 *Suez* Order, para. 24.
- 86 *Id.*
- 87 *Biwater* Order, para. 64; *Suez* Order, para. 16.
- 88 *Biwater* Order, para. 64.
- 89 *Suez* Order, paras. 20, 25.
- 90 *See supra*, note 3; *Biwater* Order, paras. 49-50.
- 91 <http://www.iisd.org/investment>.