

A CRITIQUE OF ICSID’S AMICUS CURIAE DECISIONS IN PHILIP MORRIS V. URUGUAY: REVIEW OF AMICUS SUBMISSIONS IN A FRAGMENTED WORLD

*Pei-kan Yang**

ABSTRACT

The amicus curiae submissions have become increasingly prevalent in high-profile international investment disputes. Proper use of the amicus curiae mechanism can not only alleviate harsh criticisms of the lack of transparency and legitimacy of the investor-state dispute settlement (ISDS) system, but also assist the International Centre for Settlement of Investment Disputes (hereinafter “ICSID”) tribunals in adjudicating an investment dispute involved with multiple public interests protected under fragmented international legal regimes. A tribunal’s permission for an amicus submission becomes a more prominent procedural linchpin especially when the dispute involves compelling public interests and the tribunal is highly reliant on external experts’ contributions to the final judgement. As a vivid example, the Tribunal in Philip Morris v. Uruguay made an award in favor of Uruguay based almost exclusively on amicus submissions by the World Health Organization (WHO) and Pan American Health Organization (PAHO) rather than those from the Avaaz and Inter-American Association of Intellectual Property (ASIPI). After examining the ICSID Arbitration Rule 37, which provides the tribunal with ultimate discretion on the admission of amicus curiae briefs requested by non-disputing parties, this paper argues that

*Associate Professor of Law, Department of International Business, College of Commerce, National Chengchi University, Taipei, Taiwan (R.O.C.). The author can be reached at: pkyang@nccu.edu.tw.

the Tribunal's amicus decisions failed to apply the Rule to the latter two amicus requests in a consistent manner and provided insufficient reasoning to accommodate multiple public interests protected under fragmented international legal regimes. This paper suggests that the Tribunal could have adopted a holistic or coordinated approach to evaluate legal criteria for admitting amicus requests under Rule 37 by referring to Article 5.3 of the Framework Convention on Tobacco Control (FCTC) for a more persuasive and coherent reasoning in reaching a negative decision on amicus requests.

KEYWORDS: *amicus curiae, investor-state dispute settlement (ISDS), international investment law, fragmentation, tobacco control, ICSID, arbitration rule, WHO, FCTC, non-disputing party participation*