Amici Curiae in Investor-State Arbitration: Eight Recent Trends

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ABSTRACT

This article identifies eight recent trends in the participation of amici curiae in the investor-State arbitration system. In doing so, it relies on a previous review by this author of all case law in which amici curiae requested participation rights in investor-State arbitrations. The eight trends identified are: (1) amici curiae are seeking to participate more regularly; (2) amici curiae are no longer only non-governmental organisations; (3) amici curiae are participating outside the ICSID and NAFTA context; (4) within the NAFTA context, the scope of the requests made by amici curiae, and the procedure used to decide those requests, are now well settled; (5) outside the NAFTA context, the requests made by amici curiae have been consistently ambitious; (6) amici curiae participation favours States; (7) the system has become more permissive of amici curiae; and (8) despite increasing tolerance for amici curiae, the system is still a long way from granting them full participation rights.

I. INTRODUCTION

The success with which amici curiae have penetrated the international dispute resolution system varies according to the international tribunal before which they have sought to appear. In tribunals such as the International Court of Justice, the International Tribunal for the Law of the Sea and the World Trade Organization, amici curiae have had limited success in obtaining participation rights.[1] By contrast, the inclusion of amici curiae has been a notable feature of tribunals such as the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone, the International Criminal Court and the

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1 See: L Bartholomeusz, *The* Amicus Curiae *before International Courts and Tribunals*, 5 Non-State Actors and International Law 209 (2005); D Hollis, *Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty*, 25 B.C. Int'l & Comp. L. Rev. 235 (2002); P Mavroidis, '*Amicus Curiae* Briefs before the WTO: Much Ado About Nothing', in A Bogdandy et al (eds.), *European Integration and International Co-ordination* (2002) 317; D Shelton, *The Participation of Nongovernmental Organizations in International Proceedings*, 88 A.J.I.L. 611 (1994); L Bastin, *The* Amicus Curiae *in Investor-State Arbitration*, 1 Camb. J. Int'l & Comp. L. 208, 210–212 (2012).

ARBITRATION INTERNATIONAL, Vol. 30, No. 1

European Court of Human Rights.[2] While it is broadly accurate that amici curiae have obtained greater access to international tribunals in which States are not the only litigants, the variation between different tribunals is nevertheless a reflection of Sir Arthur Watt's observation that such procedural questions 'can in practice only be pursued on a tribunal-by-tribunal basis'.[3]

In the investor-State arbitration system, amici curiae have met with some success in their attempts to obtain participation rights. As a result of their persistent efforts, the role of amici curiae in that system has been the subject of significant attention from tribunals, arbitral institutions and scholars. There are now well over a dozen decisions of tribunals on the extent to which amici curiae can participate in proceedings before them.[4] Both the International Centre for Settlement of Investment Disputes (ICSID) and the Working Group on Arbitration and Conciliation of the United Nations Commission on Trade Law (UNCITRAL) have recently implemented reforms to their respective arbitral rules to facilitate greater transparency in arbitrations conducted pursuant to those rules, including increased participation by amici curiae.[5] Scholarship has been no less active. A significant amount of literature has been devoted to discussing whether and, if so, to what extent participation rights should be afforded to amici curiae.[6]

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2 See: S –Williams and H –Woolaver, *The Role of the Amicus Curiae before International Criminal Tribunals*, 6 I.C.L.R. 151 (2006); Bartholomeusz, *supra* n. 1; G Boas et al., *International Criminal Procedure* (CUP, 2011) 166–170; Bastin, *supra* n. 1, at 212–213.

3 A Watts, *Enhancing the Effectiveness of Procedures of International Dispute Settlement*, 5 Max Planck Y.B. UN L. 21, 21 (2001).

4 A summary of all such decisions rendered by investor-State arbitral tribunals up until 28 Jun. 2012 is provided in Bastin, *supra* n. 1, at 214–223. This summary covers all decisions on amicus curiae participation up to the date of writing of the present article except that in *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1 (which was issued on 4 Mar. 2013, and is discussed in detail in L Bastin, '*Amici Curiae* in Investor-State arbitration: The Two Recent Decisions' (2013) 20 Austrl. Intl. L. J. (forthcoming)).

5 As discussed below, the ICSID Arbitration Rules were amended on 10 Apr. 2006, while amendments to the UNCITRAL Arbitration Rules to accommodate the Rules on Transparency in Treaty-based Investor-State Arbitration were adopted on 11 Jul. 2013 (and will take effect on 1 Apr. 2014). On ICSID developments, see: A de Lotbinière and A Santens, *ICSID Tribunals Apply New Rules on Amicus Curiae*, 22 Mealey's Int'l Arb. Rev. 18, 18 (2007); A Parra, *The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes*, 41 Intl, Law. 1 (2007). On UNCITRAL developments, see: J Paulsson and G Petrochilos, *A Report: Revision of the UNCITRAL Arbitration Rules* (2009); K Gómez, *Rethinking the Role of the Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest*, 35 Fordham Int'l L. J. 510, 542 (2012); L Peterson, *UN Working Group finalizes UNCITRAL transparency rules, but they won't apply automatically to stockpiles of existing investment treaties*, 14 Feb. 2013, http://www.iareporter.com/articles/20130215_4 (accessed 22 Jul. 2013).

6 Contributions include: E Triantafilou, Amicus *Submissions in Investor-State Arbitration After* Suez v. Argentina, 24 Arb. Int'l 571 (2008); J Viñuales, *Amicus Intervention in Investor–State Arbitration*, 61 Dispute Res. J. 72 (2007); B Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 Vanderbilt J. T. L. 775 (2008); T Ishikawa, *Third party Participation in Investment Treaty Arbitration*, 59 I.C.L.Q. 373 (2010); E Levine, Amicus Curiae *in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 29 Berkeley J. Int'l L. 200 (2011); Gómez, *supra* n. 5; P Friedland, *The Amicus Role in International Arbitration*, Conference Paper at the School of International Arbitration, London, 12 Apr. 2005; J VanDuzer, *Enhancing the Procedural Legitimacy of Investor-State Arbitration through Transparency and Amicus Curiae Participation*, 52 McGill L. J. 681 (2007); F Marshall and H Mann, *Good Governance and the Rule of Law: Express Rules for investor–state Arbitrations Required*, International Institute for Sustainable Development Submissions, Sep. 2006; A Newcombe and A Lemaire, *Should Amici Curiae Participate in Investment Treaty*

The purpose of this article is to identify recent trends in amicus curiae participation in the investor-State arbitration system. This article does not summarize each attempt to date by amici curiae to participate in investor-State arbitrations. This author has already completed such a summary elsewhere.[7] Rather, this article relies on that previous summary as a basis on which it can develop a panoptic perspective on the participation of amici curiae in the investor-State arbitration system, and thereby attempt to identify recent trends in that history of participation. This article identifies and discusses eight such trends. In summary, they are: (1) amici curiae are seeking to participate more regularly; (2) amici curiae are no longer only Non-Governmental Organisations (NGOs); (3) amici curiae are participating outside the ICSID and North American Free Trade Agreement (NAFTA) context; (4) within the NAFTA context, the scope of the requests made by amici curiae, and the procedure used to decide those requests, are now well settled; (5) outside the NAFTA context, the requests made by amici curiae have been consistently ambitious; (6) amici curiae participation favours States; (7) the system has become more permissive of amici curiae; and (8) despite increasing tolerance for amici curiae, the system is still a long way from granting them full participation rights.

II. AMICI CURIAE IN INVESTOR-STATE ARBITRATION: EIGHT RECENT TRENDS

When amici curiae seek to participate in investor-State arbitrations, specifics dominate. The terms of the treaty under which the arbitration is brought, the details of the rules that govern the arbitration, the precise ambit of the requested participation, and the potential benefits which participation can offer the tribunal are, *inter alia*, all case-specific matters relevant to deciding whether a particular amicus curiae should obtain participation rights in a particular arbitration. However, once this analysis of the specific of each decision on amici curiae participation has been completed, it is worthwhile to adopt a broader perspective and enquire whether general trends of amici curiae participation can be discerned.

Such a panorama of amici curiae participation highlights numerous trends. Some trends relate to the conduct of the amici curiae themselves. Others relate to the reaction of tribunals to amici curiae. Still others relate to how the system as a whole regards amici curiae. This article discusses eight recent trends which emerge from a review of amici curiae participation to date.

Arbitrations?, 5 Vindobona J. of Int'l Comm. L. & Arb. 22 (2001); K Tienhaara, *Third party Participation in Investment-Environment Disputes: Recent Developments*, 16 Rev. Eur. Comm. and Int'l Env. L. 230 (2007); N Rubins, *Opening the Investment Arbitration Process: At What Cost, for What Benefit?*, 3 TDM 3 (2006); A Boralessa, *The Limitations of party Autonomy in ICSID Arbitration*, 15 Am. Rev. of Int'l Arb. 253 (2004); S Schadendorf, *Human Rights Arguments in* Amicus Curiae *Submissions: Analysis of ICSID and NAFTA Investor-State Arbitration*, 10 TDM 1 (2013); *JC Mowatt and C Mowatt, Border Timbers v. Zimbabwe and von Pezold and Others v. Zimbabwe*, 28(1) ICSID Review – FILJ 33 (2013); Bastin, *supra* n. 1; Bastin, *supra* n. 4.

7 Bastin, *supra* n. 1.

(a) Amici Curiae are Seeking to Participate More Regularly

The first three trends are superficially apparent upon a review of the history of amici curiae participation in investor-State arbitrations. Foremost among them is the trend that amici curiae are now seeking to participate more regularly. Appendix 1 to this article summarizes the requests for amici curiae participation and the level of success they have achieved. As is evident in Appendix 1, after deciding seven amici curiae participation requests from 2000 to 2007, investor-State tribunals have decided relative flurry of requests in the past five years.[8] Since 2008, tribunals have decided eleven requests for amici curiae participation – a rate approximately twice that which prevailed from 2000 to 2007.

However, evidence of the increased efforts of amici curiae to participate is not only systemic. Also apparent is the increased willingness of individual amici curiae to request intervention in multiple investor-State arbitrations. The stand-out amicus curiae is the Center for International Environmental Law (CIEL). CIEL has sought to participate in five investor-State arbitrations,[9] each relevant in some way to issues of environmental conservation or human rights. Given that CIEL believes that '[i]n many cases, investors have aggressively used investment rules in secret investment arbitrations to gain compensation at the expense of local environmental, safety, and human rights laws',[10] its motivation repeatedly to seek participation rights appears to be driven by its organizational mandate. The continuing increase in CIEL's – and, presumably, other organizations' – attempts to obtain participation rights will thus depend on a coincidence of arbitrations which potentially have consequences for issues relevant to these organizations.

(b) Amici Curiae Are No Longer Only NGOs

A second obvious trend arising from amici curiae requests to date is that the entities making the requests are no longer NGOs alone. NGOs started the wave of participation requests at the start of the century. Six of the first seven arbitrations in which amici curiae requests were made received requests from NGOs.[11] This

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8 All figures in this article are based on publicly-available information, and do not incorporate any data arising from investor-State arbitrations which have not been published.

9 See: *Methanex Corporation v. United States of America*, UNCITRAL (NAFTA), Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae', 15 Jan. 2001; *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales v. Argentine Republic*, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as *Amicus Curiae*, 17 Mar. 2006; *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5, 2 Feb. 2007; *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Procedural Order No. 8, 23 Mar. 2011; and *Piero Foresti and Others v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/01, Letter from ICSID regarding non-disputing parties, 5 Oct. 2009.

10 Center for International Environmental Law, *Trade & Sustainable Development Program Current Activities: Investment*, http://www.ciel.org/Trade_Sustainable_Dev/TSD_Current_Activities.html (accessed 22 Jul. 2013).

11 The six arbitrations, in four of which the NGOs were granted participation rights, were *Methanex Corporation v. United States of America*, UNCITRAL (NAFTA), Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae', 15 Jan. 2001; *United Parcel Service of America Inc. v. Canada*, UNCITRAL (NAFTA), Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 Oct. 2001; *Aguas del Tunari, SA v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Letter from the President of the Tribunal, 29

early concentration of requests from NGOs meant that amici curiae participation was often regarded as synonymous with NGO participation.[12]

However, over time a variety of other entities have sought to participate as amici curiae in the investor-State system. The first case in which amici curiae requests were made solely by non-NGOs was *Glamis Gold v. United States*.[13] In that case, the National Mining Association, a mining industry representative body, and the Quechan Indian Nation, an indigenous population whose land rights were potentially affected by the arbitration, were granted rights to file written submissions. This extension of amici curiae status to industry bodies and indigenous populations was repeated in later cases. In *Merrill & Ring v. Canada*, three Canadian labour unions requested participation rights and were granted leave to file a joint written amici curiae submission.[14] Slightly less orthodoxly, in *Grand River v. United States* the National Chief of the Assembly of First Nations in Canada wrote to the tribunal in support of the claimant. The tribunal noted the applicability of the regime for amicus curiae participation in NAFTA Chapter 11 disputes,[15] but ultimately did not decide whether the National Chief was an amicus curiae because the letter entered the record as an exhibit to the claimant's submissions.[16]

The diversity of amici curiae flourished. In the *Apotex v. United States* UNCITRAL arbitration, a management consultancy sought participation rights. Arguing that it had special knowledge on whether the venture capital raised by the claimant in the arbitration constituted an 'investment' the consultancy sought to file a written submission. The tribunal rejected the request, finding that the would-be amicus curiae had 'not pointed to any knowledge, experience or expertise' which it would bring to the arbitration, had 'not defined any significant interest in this arbitration', and had 'failed to explain the particular public interest it would be seeking to address'.[17]

Jan. 2003; *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, 19 May 2005; *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales v. Argentine Republic*, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as *Amicus Curiae*, 17 Mar. 2006; *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5, 2 Feb. 2007.

12 See Levine, *supra* n. 6, at 209–214.

13 *Glamis Gold Ltd v. United States of America*, UNCITRAL (NAFTA), Award, 8 Jun. 2009, para. 286.

14 *Merrill & Ring Forestry LP v. Canada*, UNCITRAL (NAFTA), Award, 31 Mar. 2010, paras. 22–25. Labour unions were also *amici curiae* in *United Parcel Service of America Inc. v. Canada*, UNCITRAL (NAFTA), Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 Oct. 2001.

15 Statement of the Free Trade Commission on non-disputing party participation, 7 Oct. 2003, http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Nondisputing-en.pdf (accessed 22 Jul. 2013).

16 An individual also sought to participate as amicus curiae in the *Apotex v. United States* ICSID arbitration. The tribunal refused permission on the basis that he did not fulfil the requirements discussed in Section II(d) below: *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of the Applicant Mr Barry Appleton, as a Non-Disputing Party, 4 Mar. 2013.

17 *Apotex Inc v. The Government of the United States of America*, UNCITRAL (NAFTA), Procedural Order No. 2 on the participation of a non-disputing party, 11 Oct. 2011, paras. 23, 28–29. The same consultancy sought to participate in the *Apotex v. United States* ICSID arbitration, and was refused permission on similar grounds:

However, the grant of amici curiae rights was not limited to non-government or private organizations. In a significant development, public bodies have also obtained standing as amici curiae in investor-State arbitrations. This expansion of the scope of amici curiae participation began when the Commission of the European Union (EU) was afforded amicus curiae participation rights in *AES v. Hungary* and *Electrabel v. Hungary*. In both instances, the Commission sought to participate on the basis that it regarded power purchase agreements signed by Hungary with the claimants in those arbitrations as unlawful under EU law. Both tribunals granted the Commission amicus curiae status and permitted it to file written submissions.[18]

However, the involvement of public bodies did not end with these two instances. In *Eureko v. Slovak Republic*, the tribunal itself, quite atypically, requested amici curiae submissions from two entities. The first was the EU Commission, on the basis that its views would assist the tribunal in a context where the claimant was invoking protections under a BIT concluded by two EU Member States (i.e., an intra-EU BIT). The second entity was the Kingdom of the Netherlands,[19] from which the tribunal sought input on certain issues of interpretation, given that it was the other State party to the BIT invoked by the claimant. In doing so, the tribunal became not only the first investor-State tribunal to request amici curiae submission *propio motu*, but also the first to receive such a submission from a State.

As the foregoing indicates, the types of entities obtaining amici curiae status in investor-State arbitration have increased over time. Participation as amici curiae is no longer the exclusive preserve of NGOs, and the increase in the array of bodies acquiring participation rights is a key trend in recent arbitrations.

(c) Amici Curiae are Participating Outside the ICSID and NAFTA Context

Also manifest from a review of the decisions on amici curiae participation is the trend that amici curiae no longer limit their attempts to participate to arbitrations conducted pursuant to either the NAFTA and the UNCITRAL Arbitration Rules, or a bilateral investment treaty (BIT) and the ICSID Arbitration Rules. A decade after the initial request for amicus curiae participation in *Methanex v. United States*, would-be amici curiae have also started to seek participation rights in arbitrations conducted under other combinations of consent to arbitrate and arbitral rules.

To date, there are four examples of such participation. In *Pac Rim v. El Salvador*, the claimant asserted that regulatory measures taken by El Salvador prevented it from developing gold mining rights in breach of the investment protections in the

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Apotex Holdings Inc. and Apotex Inc. v. United States of America, ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of the Applicant, BNM, as a Non-Disputing Party, 4 Mar. 2013.

18 *AES Summit Generation Limited & Another v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 Sep. 2010, para. 8.2; *Electrabel SA v. Republic of Hungary*, ICSID Case No. ARB/07/19, para. 1.18.

19 Note that this example of a State participating as an amicus curiae is different to instances where a State other than the respondent participates as a third party in an arbitration pursuant to a right granted to it in the treaty containing the consent to arbitrate (for example, Article 10.20.3 of the Central America-United States-Dominican Republic Free Trade Agreement). The latter instance falls outside the ambit of this article, and is thus not considered.

Central America-United States-Dominican Republic Free Trade Agreement (CAFTA-DR). The arbitration proceeded under the ICSID Arbitration Rules. A coalition of NGOs sought permission jointly to file written and make oral submissions as amici curiae. Relying on provisions in the CAFTA-DR and the ICSID Arbitration Rules, the tribunal granted leave to the NGOs to submit a joint written submission but refused them permission to appear and make oral submissions.

In *Chevron v. Ecuador*, the claimants alleged that domestic proceedings in Ecuadorian courts regarding remedial measures taken by them after their exit from an oil concession consortium violated the Ecuador-United States BIT. The arbitration proceeded under the UNCITRAL Arbitration Rules. Two NGOs jointly sought permission as amici curiae to file a written submission, attend the hearing and either present oral submissions or respond to the tribunal's questions, and access key documents. The tribunal rejected the requests on the bases that access to the hearing was precluded by the prescription of *in camera* hearings in Article 25(4) of the UNCITRAL Arbitration Rules, and that NGOs were in any event ill-equipped to comment on the jurisdictional matters being decided.[20]

The third case is *Eureko v. Slovak Republic*. The claimant alleged that regulatory measures taken by the State reversed an earlier liberalization of the Slovak health industry market which had prompted the claimant to invest, and thereby breached the Netherlands-Slovak Republic BIT. As in *Chevron v. Ecuador*, the consent to arbitrate in a BIT was relied upon in an arbitration applying the UNCITRAL Arbitration Rules. As noted above, the tribunal itself requested written amici curiae submissions from the EU Commission and the Netherlands. It did so without recording in its decision the basis in the UNCITRAL Arbitration Rules on which it issued such an invitation.[21]

The final case in this category is the *Apotex v. United States* ICSID arbitration. The claimants complained that import restrictions imposed by the United States breached the National Treatment, Most-Favoured Nation Treatment and Minimum Standard of Treatment provisions in the NAFTA. Somewhat remarkably, given the amount of time which had elapsed since the first request for amicus curiae participation in *Methanex v. United States*, this was the first time *amici curiae* sought to participate in an arbitration in which the consent to arbitrate was located in the NAFTA and which applied the ICSID Additional Facility Arbitration Rules. An individual lawyer and a management consultancy sought permission to file written submissions as amici curiae. The tribunal rejected both requests on various bases, including the lack of the ability of the amici curiae to

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[20] This decision, and its reliance on Article 25(4) of the UNCITRAL Rules, pre-dates the adoption by UNCITRAL on 11 Jul. 2013 of its Rules on Transparency in Treaty-based Investor-State Arbitration. As noted below, these Rules on Transparency will have an impact upon the participation rights of *amici curiae* in investor-State arbitrations conducted pursuant to the UNCITRAL Rules.

[21] The parties to the dispute consented to the tribunal's issue of the invitation: *Eureko v. Slovak Republic*, UNCITRAL, Award on Jurisdiction, Arbitrability and Suspension, 26 Oct. 2010, para. 154.

assist the tribunal or to show that they had a significant interest in the arbitration.[22]

As these recent examples indicate, amici curiae are now seeking to participate in non-BIT/ICSID and non-NAFTA/UNCITRAL arbitrations. They are looking beyond the obvious institutions of ICSID and NAFTA and identifying arbitrations of interest to them which are commenced pursuant to other combinations of a consent to arbitrate and arbitral rules. Such a trend indicates that amici curiae are developing sophistication and diversity which allows them to track, and seek to participate in, the investor-State arbitration system more fulsomely than ever before.

(d) Within the NAFTA Context, the Scope of the Requests Made by Amici Curiae, and the Procedure Used to Decide Those Requests, Are Well-Settled

A fourth trend which emerges from a review of amici curiae participation is that the scope of the requests in the NAFTA context, and the procedure used to decide them, are well settled. The key reason for this consistency is the promulgation in 2003 by the NAFTA Free Trade Commission of a statement (FTC Statement) confirming that amici curiae could apply for leave to submit written submissions in NAFTA arbitrations.

The FTC Statement was issued after the earliest decisions on amici curiae participation in *Methanex v. United States* and *UPS v. Canada*. Articulating a position reflective of the decisions in those two cases, the FTC Statement set guidelines regarding the acceptance by tribunals of written amici curiae submissions. The FTC Statement was silent on the issue of granting amici curiae leave to appear and make oral submissions at hearings. Key guidelines were that tribunals, when deciding whether to grant leave to an amicus curiae to file a written submission, should consider whether: (i) the submission would assist it in determining a factual or legal issue by bringing a perspective, particular knowledge or insight different from the parties'; (ii) the submission would address matters within the scope of the dispute; (iii) the would-be amicus curiae has a significant interest in the arbitration; and (iv) there is a public interest in the subject-matter of the arbitration. The FTC Statement also required the tribunal to ensure that the submission will not disrupt the arbitration, and that neither party is unduly burdened or unfairly prejudiced by the submission.

Although the FTC Statement contained 'recommendations' only, NAFTA tribunals have in practice followed them closely. Requests to participate as amici curiae since 2003 have been resolved through a careful application of the FTC

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[22] *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of the Applicant, BNM, as a Non-Disputing Party, 4 Mar. 2013; *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of the Applicant Mr Barry Appleton, as a Non-Disputing Party, 4 Mar. 2013. These decisions are discussed in detail in Bastin, *supra* n. 4.

Statement.[23] Similarly, would-be amici curiae have themselves, since the issuance of the FTC Statement, sought leave only to file written submissions, and have justified their request by reference to the content of the FTC Statement. The only exceptional instance whereby a potential amicus curiae placed a written document before a NAFTA tribunal without seeking amicus curiae status and without invoking the FTC Statement was in the aforementioned *Grand River v. United States*. In that case, the National Chief simply wrote a letter to the tribunal in support of the claimant. Although the tribunal noted that the FTC Statement would apply to determine any request for amicus curiae status, it did not decide the issue, and the letter was simply exhibited by the claimant.

The result of this consistency is that the scope of requests for amicus curiae participation in the NAFTA context, as well as the procedure tribunals use in order to determine whether to permit such participation, are well settled. Would-be amici curiae can readily discern what type of participation they can reasonably expect to receive, and how to substantiate a request to receive it. This trend towards consistency is a positive aspect of amici curiae participation in NAFTA arbitrations. However, it is not a trend that necessarily translates into the rest of the investor-State arbitration system.

(e) Outside the NAFTA Context, the Requests Made by Amici Curiae Have Been Consistently Ambitious

The FTC Statement applies only in respect of disputes under Chapter 11 of the NAFTA. In all other investor-State arbitrations, the 'recommendations' in the FTC Statement are largely ignored. This extends both to the reasoning of tribunals accepting or rejecting amici curiae requests, and to the scope of the requests which those amici curiae make. As a result of the absence of such detailed guidelines, the trend in non-NAFTA arbitrations is for amici curiae to make requests for participation which are more ambitious in scope.

Outside the NAFTA context, amici curiae have thus consistently sought leave not only to file written submissions, but also to access case materials and to attend and be heard at hearings (either by making oral submissions or by responding to questions posed by the tribunal). As Appendix 1 illustrates, since the promulgation of the FTC Statement, amici curiae in the non-NAFTA context have consistently sought a greater scope of participation rights than amici curiae in the NAFTA context. Indeed, more than half the amici curiae requests in non-NAFTA arbitrations have requested permission to file written submissions, access case materials, attend the hearing and be heard in some fashion at that hearing.[24]

Part of the reason for this divergence of the trend outside the NAFTA context from that within the NAFTA context is the amendment of the ICSID Arbitration Rules on 10 April 2006. Apparently in response to criticisms of the lack of

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[23] See *Glamis Gold Ltd v. United States of America*, UNCITRAL (NAFTA); *Merrill & Ring Forestry LP v. Canada*, UNCITRAL (NAFTA); *Apotex Inc. v. United States of America*, UNCITRAL (NAFTA); and *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1.

[24] See Appendix 1.

transparency in investor-State arbitrations,[25] a number of amendments to the Rules sought to regulate the participation of amici curiae. The newly-inserted Arbitration Rule 37(2) allowed tribunals to permit amici curiae to file written submissions 'regarding a matter within the scope of the dispute', after the tribunal considers (non-exhaustively) whether: (i) the submission would assist it in determining a factual or legal issue related to the proceedings by bringing a perspective or particular knowledge or insight different from that of the parties; (ii) the submission would address a matter within the scope of the dispute; and (iii) the amicus curiae has a significant interest in the proceeding. Arbitration Rule 37(2) also requires the tribunal to ensure that the submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that the parties are able to comment on the submission. In addition, Arbitration Rule 32(2) was reworded to allow the parties to veto the access of amici curiae to the hearing (absent which the tribunal would decide the matter).

The ICSID Arbitration Rules, as amended, are less restrictive than the FTC Statement.[26] ICSID Arbitration Rule 32(2), for example, presumes that amici curiae are able to make oral submissions at a hearing, provided that neither party objects and the tribunal so permits. This presumption exists nowhere in the FTC Statement, and since its issuance no amicus curiae in a NAFTA arbitration has requested the right appear and make submissions at the hearing. Likely sensing this greater latitude for potential participation, amici curiae outside the NAFTA context have, therefore, set a trend of being more ambitious in their requests.

It remains an open question, however, as to whether this ambition on the part of amici curiae will continue in the context of arbitrations under the UNCITRAL Arbitration Rules. The recently adopted (on 11 July 2013), but not yet in force (until 1 April 2014), UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration will likely have an impact. Although these Rules provide for greater public access to such arbitrations, they extend participation rights to amici curiae only insofar as they allow tribunals to accept written *amicus* submissions after taking into account a non-exhaustive list of considerations.[27] The Rules do not contemplate, as ICSID Arbitration Rule 32(2) does, that amici curiae will have any active role in hearings. Such specificity of participation rights in the Rules on Transparency suggests that practice in arbitrations in which they apply may follow the practice in arbitrations in which the FTC Statement applies – namely, an acceptance by amici curiae that the scope of their participation is limited to the filing of written submissions, with the result that they refrain from requesting participation rights beyond that limitation.

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[25] de Lotbinière and Santens, *supra* n. 5, at 18.

[26] However, compare: *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of the Applicant, BNM, as a Non-Disputing Party, 4 Mar. 2013, paras. 15–19; *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of the Applicant Mr Barry Appleton, as a Non-Disputing Party, 4 Mar. 2013, paras. 23–27.

[27] *Amici curiae* would also benefit from the publication of case materials, for which the Rules on Transparency make provision.

(f) Amici Curiae Participation Favours States

Another trend which becomes apparent on reviewing the amici curiae requests to date is that their participation in the investor-State arbitration system is, on the whole, favourable to States. The classic paradigm of amicus curiae participation is an NGO seeking to voice its support of the right of the State to take the regulatory measures which are impugned in the arbitration. There are exceptions to this paradigm. As discussed above, amici curiae are now not limited to NGOs, and there are a number of instances where amici curiae have advanced arguments supportive of the claimant. However, exceptions notwithstanding, the trend is still discernible.

Both case law and scholarship support the existence of this trend. In the case law, no amicus curiae has ever explicitly adopted the submissions of a party to the dispute. Beyond this superficial position, however, the reasons advanced by amici curiae for seeking participation, and their submissions when granted a right to participate, are generally favourable to respondent States. Often the support for the State derives from the typical amicus curiae argument that the arbitration will affect the public interests and rights of the civic community in the host State. More than simply justifying the participation of amici curiae, such an argument usually entails the additional arguments that the State's impugned measures vis-à-vis the investment were pursued in a legitimate public interest and should not give rise to responsibility under the applicable investment treaty, and that a finding to the contrary would strike at the heart of the State's ability to regulate its domestic affairs. This line of argument is evident in requests for participation made by amici curiae in *AdT v. Bolivia*,[28] *Suez/Vivendi v. Argentina*,[29] *Suez/InterAguas v. Argentina*,[30] *Biwater v. Tanzania*,[31] *Piero Foresti v. South Africa*,[32] *Methanex v. United States*,[33] *Pac Rim v. El Salvador*[34] and *Chevron v. Ecuador*.[35]

Although amici curiae participation which favours States is the most common situation, there are instances when it either favours claimant investors or is neutral. The instances where the requests to participate were clearly in favour of the claimant are *Grand River v. United States* and both the *Apotex v. United States*

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[28] *Aguas del Tunari, SA v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Petition, 29 Aug. 2002, para. 2.

[29] *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, 19 May 2005, para. 1.

[30] *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales v. Argentine Republic*, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae, 17 Mar. 2006, para. 18.

[31] *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Petition for Amicus Curiae Status, 27 Nov. 2006, s. 4.

[32] *Piero Foresti and Others v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/01, Petition for Limited Participation as Non-Disputing Parties, 17 Jul. 2009, s. 4.

[33] *Methanex Corporation v. United States of America*, UNCITRAL (NAFTA), Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae', 15 Jan. 2001, paras 5 and 8.

[34] *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Application for Permission to Proceed as Amicus Curiae, 2 Mar. 2011, at 1–2 and 13–16.

[35] *Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador*, UNCITRAL, Submission of Amici, 5 November 2010, section 1.

arbitrations. In the former, the National Chief's letter to the tribunal, albeit not a formal request for amicus curiae status, was explicitly filed in support of the claimant investor.[36] Similarly, the attempts of the management consultancy to participate in the *Apotex v. United States* arbitrations were favourable to the investor, given that it wished to advocate a broad definition of the notion of an 'investment'.[37] In a few instances, the participation of amici curiae has been neutral, truly focusing on elucidating a legal issue for the tribunal rather than supporting a claimant's endeavours or a State's right to regulate. In each of *AES v. Hungary*, *Electrabel v. Hungary* and *Eureko v. Slovak Republic*, the amici curiae participated in order to clarify an issue relating to EU law or to the interpretation of the applicable investment treaty.[38] While the resolution of these issues undoubtedly had consequences for the parties in each arbitration, the purpose of the amici curiae participation was not to advocate for an interest which they shared with one of the parties, but rather only to articulate a legal position.

The trend of amici curiae participation favouring States has been identified previously in scholarship, albeit not explicitly based on a review of all the case law, and instead predicated on the impression or practical experience of the author. To this end, some authors expressly state that amici curiae participation favours States. Rubins, for instance, draws on experience as a practitioner to analyse the various advantages and disadvantages of allowing amicus curiae participation, and opines that the 'respondent stands to benefit from the intervention of non-party actors, who tend to support the host-State position.'[39] A similar belief is held by Viñuales who, writing from the viewpoint of an established academic with a history of practical experience, observed that the desire of amici curiae to be heard on public aspects of investment disputes prompted one to 'infer' that such participation 'may be less likely to be on the investor's side than on the State's side'.[40] Gómez, too, from a multi-jurisdictional academic perspective, indicates that the role of amici curiae in investor-State arbitrations and their ability to contribute to the advancement of the public interest therein means that 'amicus submissions raise greater concerns for the investors initiating intentional arbitration proceedings' than for respondent States.[41] Similar views are implicit in the positions taken by other authors. The focus of some on the contribution which amici curiae participation can make to the 'public interest' implies that, in the

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36 *Grand River Enterprises Six Nations Ltd and Others v. United States of America*, UNCITRAL (NAFTA), Letter, 19 Jan. 2009, at 2–3.

37 *Apotex Inc. v. United States of America*, UNCITRAL (NAFTA), Procedural Order No. 2 on the Participation of a Non-Disputing Party, 11 Oct. 2011, para. 10; *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of the Applicant, BNM, as a Non-Disputing Party, 4 Mar. 2013, paras 25.

38 *AES Summit Generation Limited & Another v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 Sep. 2010, paras. 6.5.4 and 8.2; *Electrabel SA v. Republic of Hungary*, ICSID Case No. ARB/07/19, paras 4.89-4.110; *Eureko v. Slovak Republic*, UNCITRAL, Award on Jurisdiction, Arbitrability and Suspension, 26 Oct. 2010, section V.

39 Rubins, *supra* n. 6, at 11.

40 Viñuales, *supra* n. 6, at 75.

41 Gómez, *supra* n. 5, at 543.

context of an arbitration where one party is a private entity seeking to pursue its own interests and the other is a public entity seeking to pursue interests on behalf of a collective, amici curiae typically promote the interests of the latter and oppose those of the former. For example, such a position is implicit in the argument that amici curiae participation 'promote[s] a general interest in procedural openness and ensure[s] that the broader public does not perceive the arbitration process as "secretive"',[42] and thereby helps to rescue a system which places its 'legitimacy in peril',[43] contributes to 'the democratic deficit'[44] and constitutes 'an assault on the ability of governments to regulate investment'.[45]

The review of the history of amici curiae participation in investor-State arbitrations confirms the impressions which scholarship had previously articulated. It is a trend according to which amici curiae participation will favour the interests of respondent States and, on the whole, provide fewer benefits to claimant investors.

(g) The System Has Become More Permissive of Amici Curiae

The penultimate trend evident in the case law is that the investor-State arbitration system has become more permissive of amici curiae requests to participate in investor-State arbitrations. After some early uncertainty about the status of amici curiae, they have tended to receive limited participation rights in investor-State arbitrations.

Some of the early uncertainties, however, produced dramatic feedback. After the tribunal in *AdT v. Bolivia* rejected one of the earliest requests to participate it (and the first in an arbitration conducted pursuant to the ICSID Arbitration Rules) the 'transparency' of the investor-State arbitration system was the subject of heavy criticism. *The New York Times* labelled ICSID tribunals as 'Secret Trade Courts',[46] while commentators criticized the lack of transparency of, and civil society's access to, the arbitrations.[47] One NGO denied amicus curiae status lambasted the decision as 'profoundly undemocratic', 'inexcusable', a 'closed-door process' and an 'extreme example of excessive power granted to corporations'.[48]

Criticism prompted change. The system of investor-State arbitration began to permit greater – but not unlimited – access to amici curiae. Some States signed investment or free trade treaties, or promulgated models of such treaties, which allowed amici curiae to participate in arbitrations brought under those treaties. As noted above, Article 37(2) of the ICSID Arbitration Rules was inserted to allow

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42 Levine, *supra* n. 6, at 217. See also VanDuzer, *supra* n. 6.

43 Marshall and Mann, *supra* n. 6, at 3.

44 Choudhury, *supra* n. 6.

45 As paraphrased in Newcombe and Lemaire, *supra* n. 6, at 30.

46 Editorial, 'The Secret Trade Courts', *The New York Times*, 27 Sep. 2004, http://www.nytimes.com/2004/09/27/opinion/27mon3.html (accessed 22 Jul. 2013).

47 See, for example, Choudhury, *supra* n. 6.

48 Earthjustice, 'Secretive World Bank Tribunal Banks Public and Media Participation in Bechtel Lawsuit', Press Release, 12 Feb. 2003, http://earthjustice.org/news/press/2003/secretive-world-bank-tribunal-bans-public-and-media-participation-in-bechtel-lawsuit-over-access-to-water (accessed 22 Jul. 2013).

amici curiae to file submissions in certain circumstances, the NAFTA States issued the FTC Statement establishing guidelines for the acceptance of submissions, and UNCITRAL adopted its Rules on Transparency similarly providing for the acceptance of submissions. And tribunals began to allow amici curiae to participate, in limited ways, in the cases before them.

By the end of 2009, putting aside the decision in *AdT v. Bolivia*, only one request to participate as amicus curiae had been rejected by an investor-State arbitral tribunal.[49] The other nine arbitrations up until that date in which requests were made resulted in the amici curiae receiving at least some rights to participate. In all of them, the amici curiae were afforded the right to file written submissions in the arbitration. In one of them, amici curiae were also afforded the right to access documentation filed in the arbitration. As Appendix 1 illustrates, amici curiae have in total obtained participation rights in eleven of eighteen attempts to date. The trend in recent years has therefore been for tribunals to permit rather than reject the requests of amici curiae.

However, this trend towards permissiveness was curtailed in the recent *von Pezold v. Zimbabwe* decision concerning a request to participate as amici curiae. In that case, an NGO and several indigenous communities sought permission to file written submissions, to access key case materials and to attend the oral hearing and reply to questions posed by the tribunal. The tribunal, conducting the arbitration pursuant to the ICSID Arbitration Rules, rejected the requests outright. It did so on two bases. One was that the would-be amici curiae did not demonstrate that their submission would assist the tribunal in determining a factual or legal issue related to the proceedings, would address a matter within the scope of the dispute, or would flow from any significant interest they had in the proceeding.[50] As noted above, each of these are mandatory considerations for a tribunal deciding whether to permit amicus curiae participation in an ICSID arbitration. The inability of the amici curiae to demonstrate these points meant that the tribunal was 'not persuaded' to grant them the participation rights they sought.[51] The other, and more contentious, basis on which the tribunal rejected the requests was that the amici curiae were not 'independent' from the respondent State. While noting several aspects of the amici curiae's submissions and their relationship with the respondent State that appeared to 'give rise to legitimate doubts as to the[ir]

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[49] See *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales v. Argentine Republic*, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae, 17 Mar. 2006. The circumstances of this rejection were unusual, as discussed in Bastin, *supra* n. 1, at 216.

[50] *Bernhard von Pezold & Others v. Republic of Zimbabwe* and *Border Timbers Limited & Others v. Zimbabwe*, ICSID Case No. ARB/10/15 and ICSID Case No. ARB/10/25 (joined), Procedural Order No. 2, 26 Jun. 2012, paras. 57–61. A nascent but growing body of scholarship on this decision exists: S Schadendorf, *Human Rights Arguments in* Amicus Curiae *Submissions: Analysis of ICSID and NAFTA Investor-State Arbitration*, 10 TDM 1 (2013); JC Mowatt and C Mowatt, Border Timbers v Zimbabwe *and* von Pezold and Others v Zimbabwe, 28(1) ICSID Review – FILJ 33 (2013); Bastin, *supra* n. 4; L Peterson, *Analysis: Tribunal's Reading of Amicus Curiae Tests Could Make Life Difficult for Antagonistic Amici*, Investment Arbitration Reporter, 27 Jun. 2012, http://www.iareporter.com/articles/20120628 (accessed 22 Jul. 2013).

[51] *Ibid*, para. 56.

independence or neutrality',[52] the tribunal held that it 'is implicit in Rule 37(2)(a)' that an amicus curiae must be independent of the parties.[53] On the basis of this unprecedented inference of an implicit requirement of 'independence' in Rule 37(2),[54] the tribunal held that the 'apparent lack of independence or neutrality of the [amici curiae] is a sufficient ground to deny' their requests.[55]

The tribunal's interpretation of Rule 37(2) as containing an implicit requirement of 'apparent independence' is easily the most restrictive interpretation of that provision to date. It is not mandated by the text of Rule 37(2), and the tribunal offered no definition of either the term 'independence' or the concept of 'apparent' independence. It thus places would-be amici curiae in an unenviable position, whereby they can never be sure whether a connection they have with a disputing party, no matter how remote or tenuous, might disqualify them from participating in the arbitration. The requirement to 'appear' independent is especially onerous in this regard. Indeed, given the tribunal's view that a possible 'conflict' between the amici curiae's claims to the land at issue in the arbitration and the development rights of the investor to the same land was evidence of an 'apparent lack of independence',[56] it appears likely that many amici curiae which seek to participate in the arbitration for the purposes of advancing or protecting their own interests will fail to satisfy the implicit requirement. Such a result seems difficult to justify. It contradicts the purpose of introducing Rule 37(2) into the ICSID Arbitration Rules.[57] It would, if applied by previous tribunals, have excluded numerous previous amici curiae.[58] Most significantly, the tribunal's finding runs contrary to the text of Rule 37(2)(c), pursuant to which the existence of 'a significant interest in the proceeding' militates in favour of granting the applicant amicus curiae status.[59] The tribunal appears to realize the significance of this last point in the final paragraph of its reasoning, stating that '[t]here is a latent tension in the Rule 37(2) criteria which require that an [amicus curiae] be

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52 *Ibid*, para. 56.

53 *Ibid*, para. 56.

54 The tribunal invoked the decision in *Suez/InterAguas v. Argentina* in support of its inference: *Bernhard von Pezold & Others v. Republic of Zimbabwe* and *Border Timbers Limited & Others v. Zimbabwe*, ICSID Case No. ARB/10/15 and ICSID Case No. ARB/10/25 (joined), Procedural Order No. 2, 26 Jun. 2012, para. 49. However, even putting aside the marginal weight placed by that tribunal on the issue of independence, the fact that it was decided before ICSID Arbitration Rule 37(2) had been inserted fundamentally undermines its utility as support for the existence of any 'implicit' criteria for amicus curiae participation in Rule 37(2).

55 *Ibid*, para. 49.

56 *Ibid*, para. 51 and 56.

57 Scholarship identifies that part of the motivation for amending the ICSID Arbitration Rules was to increase transparency of arbitrations, including to make provision for *amici curiae* participation: de Lotbinière and Santens, *supra* n. 5, at 18.

58 The decision is particularly at odds with *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Procedural Order No. 8, 23 Mar. 2011, in which *amici curiae* were afforded participation rights notwithstanding that they had publicly campaigned against the investment at issue.

59 See *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5, 2 Feb. 2007, para. 22; *Electrabel SA v. Republic of Hungary*, ICSID Case No. ARB/07/19, para. 4.92.

independent yet also possess a significant interest in the proceedings'.[60] However, in truth, no such tension, latent or patent, exists in Rule 37(2). The tribunal's inference of an 'implicit' requirement of 'apparent independence' is the sole source of that tension, and thus of the significant negative consequences for amici curiae seeking to gain participation rights in arbitrations conducted pursuant to the ICSID Arbitration Rules.

The decision in *von Pezold v. Zimbabwe* constitutes not only a departure from previous case law and, arguably, from principle, but also a curtailment of the trend which had been previously evident in the investor-State arbitration system. While it remains generally true that the system has over time become more permissive of amici curiae requests to participate, it is a trend which has been retarded, and potentially even reversed, by the decision in *von Pezold v. Zimbabwe*.

(h) Despite Increasing Tolerance for Amici Curiae, the System Is a Long Way from Granting Them Full Participation Rights

The trend towards permissiveness vis-à-vis amici curiae in investor-State arbitration is not so strong that it excludes the identification of another, countervailing trend in the case law. This final trend evident in the jurisprudence is that, despite increasing tolerance for amici curiae, the investor-State arbitration system is a long way from granting them full participation rights.

The limitations of the tolerance are illustrated clearly in Appendix 1. On a simple quantitative review, seven of the eighteen requests to participate as amici curiae have been rejected outright. Even allowing for the unusual circumstances of the National Chief's involvement in *Grand River v. United States*, this represents a rejection of over a third of all amici curiae requests to date. In addition, amici curiae have been almost uniformly unsuccessful at gaining participation rights beyond the filing of written submissions. The only exception to this was in *Piero Foresti v. South Africa*, where the amici curiae received rights not only to file written submission but also to access key case materials.[61] Apart from this sole instance, the quality of amici curiae participation has been significantly more circumscribed than amici curiae, at least outside the NAFTA context, have requested.

Both the quantity and quality of amici curiae participation has thus been limited in case law to date. It will be a matter for future attention whether the regularity and scope of amici curiae participation will be restrained by the reasoning in *von Pezold v. Zimbabwe*, or whether the difficulties in that decision's reasoning will marginalize its influence on future tribunals. Any doubts over the 'apparent

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60 *Bernhard von Pezold & Others v. Republic of Zimbabwe* and *Border Timbers Limited & Others v. Zimbabwe*, ICSID Case No. ARB/10/15 and ICSID Case No. ARB/10/25 (joined), Procedural Order No. 2, 26 Jun. 2012, paras. 62.

61 *Piero Foresti and Others v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/01, Letter from ICSID regarding non-disputing parties, 5 Oct. 2009, at 2. Note also, in this context, the pre-emptive language of a recent procedural order of the tribunal in *DIBC v. Canada*: "*Amicus curiae* have no standing in the arbitration, and will have no special access to documents filed in the arbitration, different from any other member of the public. Their briefs must be limited to argument, and may not introduce new evidence": *Detroit International Bridge Company v. Canada*, UNCITRAL (NAFTA), Procedural Order No. 3, 27 Mar. 2013, para. 29.

independence' of amici curiae will of course be added to oft-cited concerns about the potential for their involvement to increase costs and delays for the parties, subvert the consensual nature of the arbitration and re-politicize the dispute.[62] The accumulation of these concerns is currently the source of the refusal of tribunals to grant amici curiae full participation rights in investor-State arbitration – a trend which appears likely to continue in the future.

III. CONCLUSION

After an uncertain start, the overall trend in the investor-State arbitration system has been to allow amici curiae to participate in arbitrations, albeit to a watchfully circumscribed extent. Tribunals have generally welcomed the input of eligible amici curiae, but have refused to allow the arbitral process to be overwhelmed by them. Amici curiae, for their part, have regularly exercised the capacity to participate. They have established a reasonable success rate in obtaining permission to file written submissions. In one instance, they have also been granted broader participation rights, which may stand as an example for tribunals inclined to allow amici curiae to have access to case materials or even to have a role at oral hearings in the future. Accordingly, from a panoptic review, it is evident that amici curiae have generally succeeded in winning participation rights in the investor-State arbitration system. Certainly they have had more success participating in this type of international litigation than in litigation before State-State fora or in international commercial arbitration.

However, with the pendulum having swung towards inclusiveness for the first decade of amici curiae participation, the pendulum may now be starting to swing in the other direction. Central to this nascent reversal of fortune is the decision in *von Pezold v. Zimbabwe*. The requirement that amici curiae must be and appear independent may usher in a new era of exclusiveness, at least in arbitrations conducted pursuant to the ICSID Arbitration Rules. The endorsement of the reasoning in *von Pezold v. Zimbabwe* would likely result in would-be amici curiae with even a distant connection to one of the disputing parties, or with an interest in the arbitration which runs contrary to the interests of one the disputing parties, being refused participation rights in that arbitration. Were such a development to occur, several of the eight recent trends discussed above would warrant careful reconsideration.

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[62] The substance of these concerns, and a review of the literature which communicates them, is in Bastin, *supra* n. 1, at 225–226.

APPENDIX 1 *AMICI CURIAE* REQUESTS IN INVESTOR-STATE ARBITRATIONS AND THEIR LEVELS OF SUCCESS (AS OF 22 JULY 2013)

Key:

A	Request to file written submissions
B	Request to access case materials
C	Request to attend oral hearing
D	Request to make oral submissions at hearing (including answering tribunal's questions)
E	Request to cross-examine witnesses at hearing
✓	Request granted
×	Request denied
	Request not made

Case (Date of decision on amicus curiae)	**A**	**B**	**C**	**D**	**E**
BIT/ICSID Cases					
1. *AdT v. Bolivia* (29/1/2003)	×	×	×	×	
2. *Suez/Vivendi v. Argentina* (19/5/2005)	✓	×	×	×	
3. *Suez/InterAguas v. Argentina* (17/3/2006)	×	×	×	×	
4. *Biwater Gauff v. Tanzania* (2/1/2007)	✓	×	×	×	
5. *AES v. Hungary* (26/11/2008)	✓	×			
6. *Electrabel v. Hungary* (28/4/2009)	✓				
7. *Piero Foresti v. South Africa* (5/10/2009)	✓	✓	×	×	
8. *Pezold/Border v. Zimbabwe* (26/6/2012)	×	×	×	×	
NAFTA/UNCITRAL Cases					
9. *Methanex v. US* (15/1/2001)	✓	×	×	×	
10. *UPS v. Canada* (17/10/2001)	✓	×	×	×	

Case (Date of decision on amicus curiae)	**A**	**B**	**C**	**D**	**E**
BIT/ICSID Cases					
11. *Glamis Gold v. US* (16/9/2005)	✓	-*			
12. *Merrill Ring v. Canada* (2/10/2008)	✓	-			
13. *Grand River v. US* (12/1/2011)					
14. *Apotex v. US* (UNCITRAL) (11/10/2011)	×	-			
Other Cases					
15. *Eureko v. Slovak Republic* (24/4/2010)+	✓				
16. *Pac Rim v. El Salvador* (2/2/2011)	✓		×		
17. *Chevron v. Ecuador* (18/4/2011)	×	×	×	×	
18. *Apotex v. US* (ICSID) (4/3/2013)	×				

* Due to the NAFTA States' practice of publicity, *amici curiae* in NAFTA cases do not request access to materials.
\+ The Tribunal in this case invited the *amici curiae* to file written submissions.