Amici Curiae in Investor-State Arbitrations: Two Recent Decisions

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Abstract

In decisions in the joined arbitrations of *von Pezold v Zimbabwe* and *Border Timbers v Zimbabwe* and in the *Apotex v United States* arbitration, investor-state arbitral tribunals rejected applications by non-disputing parties to participate as amici curiae. Some aspects of the reasoning rejecting the requests were entirely orthodox, such as the tribunals' reliance on the lack of assistance that the amici curiae would provide, their lack of an interest in the dispute and their inability to address an issue within the scope of the dispute. However, the decision in *von Pezold/Border Timbers v Zimbabwe* also used an unorthodox reason for rejecting the amici curiae request, namely that amici curiae must satisfy a criterion of 'apparent independence'. In doing so, the tribunal rejected the amici curiae request on a basis which was both unprecedented in investor-state arbitration and questionable in its approach to textual interpretation and the consequences it generated.

I Introduction

The extent to which amici curiae have been able to participate in the different international dispute resolution fora varies according to the procedural rules which govern each particular forum. Amici curiae have thus achieved little success in penetrating the dispute resolution procedures of the International Court of Justice, the World Trade Organization or the International Tribunal for the Law of the Sea.[1] By contrast, amici curiae have received broader participation rights in other fora, such as the European Court of Human Rights and the international criminal tribunals.[2] This diversity of reception of amici curiae is, ultimately, a reflection of Sir Arthur Watts' observation that procedural questions — of

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1 Lance Bartholomeusz, 'The *Amicus Curiae* before International Courts and Tribunals' (2005)5 *Non-State Actors and International Law* 209; Duncan Hollis, 'Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty' (2002) 25 *Boston College International and Comparative Law Review* 235; Petros Mavroidis, '*Amicus Curiae* Briefs before the WTO: Much Ado About Nothing', in Armin Von Bogdandy, Petros C Mavroidis and Yves Mény (eds), *European Integration and International Co-ordination* (Wolters Kluwer, 2002) 317; Dinah Shelton, 'The Participation of Nongovernmental Organizations in International Proceedings' (1994) 88 *American Journal of International Law* 611; Lucas Bastin, 'The *Amicus Curiae* in Investor-State Arbitration' (2012) *Cambridge Journal of International and Comparative Law* 208, 209–11.

2 Sarah Williams and Hannah Woolaver, 'The Role of the *Amicus Curiae* before International Criminal Tribunals' (2006) 6 *International Criminal Law Review* 151; Bartholomeusz, above n 1; Gideon Boas et al, *International Criminal Procedure* (Cambridge University Press, 2011) 166–70; Bastin, above n 1, 211–12.

which the scope granted to amici curiae to participate in international litigation is one — 'can in practice only be pursued on a tribunal-by-tribunal basis'.[3]

Diversity of treatment of amici curiae can also exist within a single category of international dispute resolution. Such is the case for investor-state arbitrations. In these arbitrations, amici curiae have had varying fortunes. The earliest applications by amici curiae to participate in investor-state arbitrations resulted in significant uncertainty about whether and to what extent they should be permitted to participate. In the earliest two applications, amici curiae were granted rights to file written submissions, but no other rights to participate (such as access to case materials or oral hearings).[4] The next attempt to participate was rejected outright.[5] This treatment prompted criticism that the investor-state arbitration system was secretive[6] and, at least partly in response to this criticism,[7] key instruments governing such arbitrations were clarified or amended to allow amici curiae greater access to the system.[8] The result was that, from mid-2006 to mid-2011, amici curiae were almost uniformly successful in acquiring participation rights in investor-state arbitration (albeit typically only the right to file written submissions).[9]

This trend towards increasing tolerance for amici curiae has become a feature of the investor-state system. However, the most recent considerations of amici curiae requests have militated against the trend. In 2011, a number of amici curiae requests were rejected. These rejections, and the reasoning supporting them, were unsurprising in the circumstances of the cases. Thus, for instance, in the *Apotex v United States* arbitration commenced under the UNCITRAL Arbitration Rules, a management consultancy was refused participation rights on the basis that the would-be amicus curiae had 'not pointed to any knowledge, experience or expertise' that it would bring to the arbitration, had 'not

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3 Arthur Watts, 'Enhancing the Effectiveness of Procedures of International Dispute Settlement' (2001) 5 *Max Planck Yearbook of United Nations Law* 21, 21.

4 *Methanex v United States*, UNCITRAL (NAFTA), Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae', 15 January 2001; *UPS v Canada*, UNCITRAL (NAFTA), Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001.

5 *AdT v Bolivia* (ICSID Case No ARB/02/3), Letter from the President of the Tribunal, 29 January 2003.

6 Editorial, 'The Secret Trade Courts', *The New York Times* (online), 27 September 2004, <http://www.nytimes.com/2004/09/27/opinion/27mon3.html>; Earthjustice, 'Secretive World Bank Tribunal Banks Public and Media Participation in Bechtel Lawsuit', (Press Release, 12 February 2003) <http://earthjustice.org/news/press/2003/secretive-world-bank-tribunal-bans-public-and-media-participation-in-bechtel-lawsuit-over-access-to-water>. See generally Barnali Choudhury, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?' (2008) 41 *Vanderbilt Journal of Transnational Law* 775.

7 See Andrew de Lotbinière and Ank Santens, 'ICSID Tribunals Apply New Rules on *Amicus Curiae*', (2007) 22 *Mealey's International Arbitration Reporter* 18.

8 The Arbitration Rules of the International Centre for Settlement of Investment Disputes ('ICSID') were amended on 10 April 2006 to provide for limited participation of non-disputing parties, while the 2003 Statement of the Free Trade Commission ('FTC') of the North-American Free Trade Agreement ('NAFTA') confirmed that amici curiae could participate in Chapter 11 arbitrations and established guidelines for such participation. See Bastin, above n 1, 216–17, 220. In addition, on 11 July 2013, the United Nations Commission on International Trade Law ('UNCITRAL') adopted the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, and made correlative amendments to the UNCITRAL Arbitration Rules, to allow for, inter alia, greater participation by amici curiae in arbitrations conducted pursuant to those Rules. See Lucas Bastin, '*Amicus Curiae* in Investor-State Arbitration: Eight Recent Trends' (2014) 30(1) *Arbitration International* (forthcoming).

9 Only one amicus curiae application to date has received a right beyond the filing of written submissions, namely the right also to access the case materials, in *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 July 2009. For a tabulation of the content of amici curiae requests to date, and the content of the rights granted to them, see Bastin, above n 8, appendix 1.

defined any significant interest in this arbitration', and had 'failed to explain the particular public interest it would be seeking to address'.[10] Comparably, the non-governmental organisations ('NGOs') seeking amicus curiae status in *Chevron v Ecuador* did not receive it because they were deemed ill-equipped to comment on the jurisdictional matters at issue in that arbitration.[11] Reliance on the inability of the amici curiae in these cases to assist the tribunal was an orthodox basis on which to reject their applications to participate — such a basis is, for instance, present in r 37(2) of the ICSID Arbitration Rules and in the NAFTA FTC Statement.[12]

The two most recent decisions on applications by amici curiae to participate have tested not only the trend towards their inclusion in investor-state arbitrations but also the commitment of investor-state tribunals to the conventional means of deciding such applications. These decisions were rendered in the joined arbitrations of *von Pezold v Zimbabwe* and *Border Timbers v Zimbabwe* and in the *Apotex v United States* arbitration commenced pursuant to the ICSID Arbitration Rules. This article first summarises the background to the cases, the content of the amici curiae requests and the content of the decisions refusing those requests. It then provides a critical commentary of the decisions, before offering a brief conclusion.

II The Two Recent Decisions

A *The Decision in* von Pezold/Border Timbers v Zimbabwe

The first of the two recent decisions concerning amicus curiae participation in investor-state arbitrations was rendered in the joined arbitrations of *von Pezold v Zimbabwe* and *Border Timbers v Zimbabwe*.[13] The arbitrations concern complaints that Zimbabwe expropriated the claimants' large agricultural estates allegedly on the basis that they had been targeted as part of the state's well-known land reform process.[14] A few months after the claimants had filed their Memorial on the Merits, an NGO and several Zimbabwean indigenous communities sought permission jointly to participate as amici curiae in the arbitrations. In particular, they sought to file a joint written submission, to access key case materials and to attend the oral hearing and reply to questions posed by the tribunal.[15]

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10 *Apotex Inc v United States*, UNCITRAL (NAFTA), Procedural Order No 2 on the participation of a non-disputing party, 11 October 2011 [23], [28]–[29].

11 *Chevron v Ecuador*, UNCITRAL, Procedural Order No 8, 18 April 2011 [17]–[20].

12 For an explanation of the origins and content of these rules, see Bastin, above n 1, 216–17, 220.

13 *Bernhard von Pezold v Republic of Zimbabwe and Border Timbers Limited v Zimbabwe* (ICSID Case No ARB/10/15 and ICSID Case No ARB/10/25 (joined)) (*von Pezold/Border Timbers v Zimbabwe*) Procedural Order No 2, 26 June 2012. A nascent but growing body of scholarship on this decision exists: Sarah Schadendorf, 'Human Rights Arguments in *Amicus Curiae* Submissions: Analysis of ICSID and NAFTA Investor-State Arbitrations' (2013) 10(1) *Transnational Dispute Management* 1; Cameron Mowatt and Celeste Mowatt, '*Border Timbers v Zimbabwe* and *von Pezold and Others v Zimbabwe*' (2013) 28 *ICSID Review — Foreign Investment Law Journal* 33; Bastin, above n 8; Luke Peterson, 'Analysis: Tribunal's Reading of Amicus Curiae Tests Could Make Life Difficult for Antagonistic Amici', *Investment Arbitration Reporter*, 27 June 2012, <http://www.iareporter.com/articles/20120628>.

14 These cases followed a similar, successful, claim by several claimants in *Bernardus Henricus Funnekotter v Zimbabwe* (ICSID Case No ARB/05/6).

15 *von Pezold/Border Timbers v Zimbabwe* (ICSID Case No ARB/10/15 and ICSID Case No ARB/10/25 (joined)) Petition, 23 May 2012 (not public). The key case materials were 'the Claimants' request for arbitration, the notice of arbitration and statement of defense; any decisions, orders and directions of the Tribunal; the pleadings and written

Both arbitrations had been commenced pursuant to the ICSID Arbitration Rules with the result that r 37(2) applied to determine the request to participate as amici curiae. That Rule allowed tribunals to permit amici curiae to file written submissions 'regarding a matter within the scope of the dispute', after the tribunal considered (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. Rule 37(2) also required the tribunal to ensure that the submission did not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that the parties were able to comment on the submission.

The tribunal rejected the request to participate as amici curiae outright. It did so on two bases. The first was that the would-be amici curiae had not demonstrated 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.[16] This basis for rejecting the request was thus entirely orthodox. It applied the prescribed considerations for the determination of a request to participate as amici curiae in ICSID Arbitration Rule 37(2), and the inability of the NGO and indigenous communities to demonstrate that they satisfied this rule meant that the tribunal was 'not persuaded' to grant them the requested participation rights.[17] However, the second basis on which the tribunal rejected the request was highly unusual. It held that the amici curiae were not 'independent' from the respondent state and thus, for that reason alone, did not satisfy r 37(2). The tribunal first noted the existence of 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] independence or neutrality',[18] after which it held that that it 'is implicit in Rule 37(2)(a)' that an amicus curiae must be independent of the parties.[19] On the basis of this inference, the tribunal held that the 'apparent lack of independence or neutrality of the [amici curiae] is a sufficient ground to deny' their request.[20] The tribunal reached this conclusion despite its observation that the existence of such an implicit requirement of 'apparent independence' necessarily gave rise to 'a latent tension in the Rule 37(2) criteria which require that an [amicus curiae] be independent yet also possess a significant interest in the proceedings'.[21]

B *The Decision in* Apotex v United States

The second of the two recent decisions concerning amicus curiae participation in investor-state arbitrations was rendered in *Apotex v United States*.[22] The dispute arose out of a

memorials of the Parties; and relevant witness statements and transcripts of any witness examinations': Procedural Order No 2, 26 June 2012, [15].

16 *von Pezold/Border Timbers v Zimbabwe* (ICSID Case No ARB/10/15 and ICSID Case No ARB/10/25 (joined)) Procedural Order No 2, 26 June 2012 [57]–[61].

17 Ibid [56].

18 Ibid.

19 Ibid.

20 Ibid [49].

21 Ibid [62].

22 The decision was rendered in the arbitration commenced against the United States by Apotex Holdings Inc and Apotex Inc on 29 February 2012 pursuant to the ICSID Arbitration Rules. This is different to the parallel

measure taken by the United States Food and Drug Administration which allegedly prevented, between August 2009 and July 2011, the Canadian claimants from exporting to one of Apotex Inc's subsidiaries in the United States drugs produced in their Canadian facilities.[23] Two would-be amici curiae applied to participate in the arbitration. The first was an individual, Mr Barry Appleton, a lawyer experienced in investor-state arbitration, who sought permission to file a written submission.[24] The second was a management consultancy which claims a 'mission … to support a strong financial industry, investor opportunity, capital formation, job creation, and economic growth, while building not only trust and confidence in the financial markets, but also making a substantial difference in emerging and frontier countries as well as in poor areas in developed countries.'[25] It also sought permission to file a written submission.

The arbitration arose under the NAFTA and was to be determined by application of the ICSID Arbitration Rules.[26] The result of this combination was that both the requirements for participation of amici curiae in the ICSID Arbitration Rules and the NAFTA FTC Statement applied. The tribunal reviewed both sets of rules and held that the application of the FTC Statement when determining whether amici curiae should be granted permission to participate would also comply with the ICSID Arbitration Rules.[27] Similar to the ICSID Arbitration Rules, the FTC Statement requires a tribunal when deciding whether to allow amici curiae to file written submissions to 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 requires 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.[28]

The tribunal applied the FTC Statement and rejected the amici curiae requests. In respect of Mr Appleton's request, the tribunal held that he did not satisfy all of the requirements in the FTC Statement.[29] While it acknowledged that his submission would

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arbitration commenced against the United States by Apotex Inc on 10 December 2008 pursuant to the UNCITRAL Arbitration Rules. On issues relating to amici curiae in that earlier arbitration, see Bastin, above n 1, 221.

23 *Apotex Holdings Inc and Apotex Inc v United States* (ICSID Case No ARB(AF)/12/1) Request for Arbitration, 29 February 2012 [2].

24 *Apotex Holdings Inc and Apotex Inc v United States* (ICSID Case No ARB(AF)/12/1) Petition for Leave to Submit Non Disputing Party (*Amicus Curiae*) Submission, 8 February 2013 (not public).

25 *Apotex Holdings Inc and Apotex Inc v United States* (ICSID Case No ARB(AF)/12/1) Application for Leave to File a Non-Disputing Party Submission, 7 February 2013 [8] (not public).

26 Strictly, it was to be determined by application of the ICSID Additional Facility Arbitration Rules, r 41(3) of which is identical to ICSID Arbitration r 37(2), discussed above. Given the identical content of the two rules, this article will not further distinguish between them.

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

28 Statement of the Free Trade Commission on non-disputing party participation, 7 October 2003, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Nondisputing-en.pdf>.

29 *Apotex Holdings Inc and Apotex Inc v United States* (ICSID Case No ARB(AF)/12/1) Procedural Order on the Participation of the Applicant, Mr Barry Appleton, as a Non-Disputing Party, 4 March 2013 [36].

address a matter within the scope of the dispute, the tribunal held that he would not provide a particular perspective or insight different to those offered by the disputing parties.[30] It also held that Mr Appleton did not have a significant interest in the dispute simply by virtue of his representation of clients who might be involved in similar disputes,[31] and that the only 'public interest' with which Mr Appleton was concerned was the impact of the arbitration on his and his clients' professional interests.[32] The tribunal also stated that allowing Mr Appleton to submit an amicus curiae submission would create unnecessary work and expense for the disputing parties.[33] In respect of the consultancy's request to participate as amicus curiae, the tribunal was even less persuaded, concluding that the consultancy had failed to satisfy any of the requirements in the FTC Statement. It held: that the consultancy would not provide a material perspective or insight different to the disputing parties';[34] that the consultancy's submission on whether a particular type of application to the United States Food and Drug Administration was an investment 'addresses a non-issue outside the scope of the … dispute';[35] that the consultancy failed to demonstrate either a significant interest in the subject matter of the arbitration or a public interest warranting its participation;[36] and that the consultancy's involvement would be 'materially disruptive and would unduly burden' the parties.[37]

III The Orthodox and the Unorthodox: An Analysis of the Two Recent Decisions

Some aspects of the reasoning in the *von Pezold/Border Timbers v Zimbabwe* and *Apotex v United States* decisions apply the law relating to amicus curiae participation in investor-state arbitrations in an orthodox fashion. Other aspects, however, are thoroughly unorthodox. Both types of aspects are worthy of attention, not only to assess the legal merit of the decisions but also to assess whether they stand as persuasive authority for subsequent investor-state tribunals.

A *The Orthodox*

Orthodoxy in the reasoning of the two decisions is evident when *von Pezold/Border Timbers v Zimbabwe* applied the principles in ICSID Arbitration Rule 37(2), and *Apotex v United States* those in the FTC Statement, in order to reject the amici curiae requests for participation. In each decision, the relevant tribunal relied on matters such as the assistance which it would or would not derive from the amicus curiae submission, the interest which the would-be amicus curiae had in the dispute, and whether the amicus curiae submission would address an issue within the scope of the dispute when rejecting the requests. In doing so, the tribunals applied the explicit precepts in r 37(2)(a)–(c) and para 6 of the FTC Statement without invoking any 'implicit' requirements putatively contained therein. For that reason,

30 Ibid [33].
31 Ibid [40].
32 Ibid [43].
33 Ibid [44].
34 *Apotex Holdings Inc and Apotex Inc v United States* (ICSID Case No ARB(AF)/12/1) Procedural Order on the Participation of the Applicant, BNM, as a Non-Disputing Party, 4 March 2013 [24].
35 Ibid [30].
36 Ibid [33], [36].
37 Ibid [37].

this aspect of the tribunals' reasoning is conventional and beyond impeachment. It requires no further analysis.

More interesting, however, is the result produced by this mainstream application of the requirements in r 37(2) and the FTC Statement. Contrary to the prevailing trend over the past decade towards granting amici curiae participation requests by reference to the requirements of r 37(2) and the FTC Statement,[38] the two decisions rejected the requests. In doing so, they added to a small spate of recent decisions which have used established principles to refuse such requests.[39] This use of orthodoxy to achieve a result different to that which had been reached by most earlier decisions suggests that the nature of the amici curiae requests in these later arbitrations was different to the nature of those in the earlier arbitrations. Arguably, it is unsurprising that an individual lawyer and a management consultancy struggled to attain amicus curiae status in *Apotex v United States*. Neither had a meaningful connection with the arbitration and each was unable to demonstrate how they would assist the tribunal. Both represented a very different paradigm of amicus curiae to the classic paradigm in which an NGO with specialist experience in an area of policy implicated in the arbitration requests permission to impart that expertise to the tribunal.[40]

Of greater surprise was the inability of the NGO and indigenous communities to obtain amici curiae rights in *von Pezold/Border Timbers v Zimbabwe*, even on an orthodox application of ICSID Arbitration Rule 37(2). NGOs and indigenous communities had previously been successful in demonstrating their satisfaction of the requirements of r 37(2). Six of the first seven arbitrations in which amici curiae requests were made received requests from NGOs (four of which were granted),[41] while an indigenous community had been granted amicus curiae status in one earlier arbitration.[42] The basis on which these requests were made and, for the most part, granted, revolved broadly around the ability of the amici curiae to demonstrate that they could assist tribunals without unduly delaying arbitrations or burdening the disputing parties.[43] By contrast, the tribunal in *von Pezold/Border Timbers v Zimbabwe* held that the would-be amici curiae had satisfied none of the requirements in r 37(2). Their attempt to highlight to the tribunal the rights of the indigenous communities,

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38 See Bastin, above n 8.

39 See *Apotex Inc v United States*, UNCITRAL (NAFTA), Procedural Order No 2, 11 October 2011; *Chevron v Ecuador*, UNCITRAL, Procedural Order No 8, 18 April 2011.

40 This classic paradigm is discussed in Eugenia Levine, '*Amicus Curiae* in International Investment Arbitration: The Implications of an Increase in Third-Party Participation' (2011) 29 *Berkeley Journal of International Law* 200.

41 The six arbitrations were: *Methanex Corporation v United States*, UNCITRAL (NAFTA), Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae', 15 January 2001 (granted); *United Parcel Service of America Inc v Canada*, UNCITRAL (NAFTA), Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001 (granted); *Aguas del Tunari, SA v Bolivia* (ICSID Case No ARB/02/3) Letter from the President of the Tribunal, 29 January 2003 (refused); *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v Argentina*m (ICSID Case No ARB/03/19) Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, 19 May 2005 (granted); *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales v Argentina* (ICSID Case No ARB/03/17) Order in Response to a Petition for Participation as *Amicus Curiae*, 17 March 2006 (refused); *Biwater Gauff (Tanzania) Ltd v Tanzania*, (ICSID Case No ARB/05/22) Procedural Order No 5, 2 February 2007 (granted).

42 *Glamis Gold Ltd v United States*, UNCITRAL (NAFTA), Award, 8 June 2009 [286]. See also *Grand River v United States*, UNCITRAL (NAFTA), Letter from the Tribunal to the Parties, 27 January [60], in which the tribunal did not decide formally whether a letter from the National Chief of the Assembly of First Nations in Canada constituted an amicus curiae submission, but noted that the claimants 'included the National Chief's letter as a supporting exhibit ... [and] in that context, it was read and considered by the Tribunal'.

43 A full explanation of the basis on which the requests were made and granted or rejected in each of these cases (including vis-à-vis r 37(2), where applicable) is provided in Bastin, above n 1.

and the obligations of Zimbabwe vis-à-vis those rights, was deemed to provide no assistance in determining a factual or legal issue related to the proceeding, to address no matter within the scope of the dispute, and to result from no significant interest in the arbitration.[44] The tribunal's conclusion that the expertise of the would-be amici curiae in matters of human rights and corporate responsibility was irrelevant was a credible outcome of the traditional application of r 37(2). However, it is also one which produced a result arguably harsher than previous treatment received by NGOs seeking to participate as amici curiae in investor-state arbitrations. As one commentator observed, the decision 'would seem to put many traditional amicus curiae on their heels'.[45]

The determination of the amici curiae applications in *von Pezold/Border Timbers v Zimbabwe* and *Apotex v United States* on the basis of the orthodox requirements for a successful application may have retarded the trend towards widespread amici curiae participation, but it did so in a way which could hardly be regarded as novel or unprincipled. The more contentious point was the alternative basis on which the tribunal in *von Pezold/Border Timbers v Zimbabwe* rejected the amici curiae request. That basis, as this article now discusses, was both unorthodox and problematic.

B *The Unorthodox*

The use by the tribunal in *von Pezold/Border Timbers v Zimbabwe* of 'apparent lack of independence' as an 'implicit' criterion of amicus curiae participation in investor-state arbitrations conducted under the ICSID Arbitration Rules was unprecedented and questionable.

Regarding the first of these issues, the degree of precedent for the recognition of an 'implicit' criterion of 'apparent independence' was inadequately addressed by the tribunal. Eschewing a fuller analysis which would have revealed the novelty of the 'apparent independence' criterion, the tribunal invoked only one prior decision in support of its position. It stated that:

> '[amici curiae] should also be independent of the Parties. This is implicit in Rule 37(2)(a), which requires that the [amicus curiae] bring a perspective, particular knowledge or insight that is different from that of the Parties. Other ICSID tribunals have also considered this to be a requirement … to admit *amicus* submissions (see eg. *Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae, 17 March 2006):
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> "The Suitability of Specific Nonparties to Act as Amici Curiae: The purpose of amicus submissions is to help the Tribunal arrive at a correct decision by providing it with arguments, and expertise and perspectives that the parties may not have provided. The Tribunal will therefore only accept amicus submissions from persons

[44] *von Pezold/Border Timbers v Zimbabwe* (ICSID Case No ARB/10/15 and ICSID Case No ARB/10/25 (joined)), Procedural Order No 2, 26 June 2012 [57]–[61].

[45] Peterson, above n 13.

> who establish to the Tribunal's satisfaction that they have the expertise, experience, and independence to be of assistance in this case. …".'[46]

No further support for the 'apparent independence' criterion was cited. This is unfortunate, for the *Suez/Interaguas v Argentina* decision only weakly substantiates the tribunal's conclusion. Although the earlier tribunal did require amici curiae to possess 'expertise, experience, and independence', its decision was rendered before r 37(2) had been introduced into the ICSID Arbitration Rules. It was deciding the amicus curiae application by reference to the version of the ICSID Arbitration Rules which existed prior to the amendments of 10 April 2006, which provided no specific guidance relating to the receipt of amicus curiae submissions.[47] Given that the text of the (amended) arbitral rules from which the tribunal in *von Pezold/Border Timbers v Zimbabwe* inferred an 'implicit' requirement did not exist at the time of the *Suez/Interaguas v Argentina* decision, the tribunal's conclusion is thus properly characterised as unprecedented in investor-state arbitration.

However, lack of precedent does not render reasoning weak per se. In addition to its novelty, the reasoning of *von Pezold/Border Timbers v Zimbabwe* is questionable because of both its approach to textual interpretation and the consequences it generates.

On the former, the tribunal's interpretation of r 37(2) as requiring 'apparent independence' of would-be amici curiae is not mandated by the text of that rule. In finding that the criterion of 'apparent independence' was nonetheless 'implicit' in r 37(2), the tribunal inferred the existence of a substantive and onerous precondition for amicus curiae participation. The unorthodoxy of such hermeneutics was compounded by the tribunal's failure to explain the meaning of the 'apparent independence' criterion. Its decision defined neither the term 'independence' nor the concept of 'apparent' independence. The absence of explanation is particularly regrettable in light of additional problems of interpretation evident in the tribunal's decision. Foremost among these is the internal contradiction which it introduces into r 37(2). As noted above, r 37(2)(c) requires that an amicus curiae possess a significant interest in the arbitration if it wishes to participate. Such an explicit requirement is self-evidently at odds with any implicit requirement that the amicus curiae be 'independent' — that is, that it have no interest, let alone a significant one, in the arbitration.[48] By introducing a precondition of 'apparent independence' the tribunal thus also introduces an internal inconsistency into r 37(2). An additional, though less acute, inadequacy in the tribunal's interpretation is that it contradicts the general purpose of r 37(2). The rule was introduced in order to specify the means by which amici curiae could participate in investor-state arbitrations conducted pursuant to the ICSID Arbitration Rules.[49] By inferring additional substantive preconditions to that participation, the tribunal

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[46] *von Pezold/Border Timbers v Zimbabwe* (ICSID Case No ARB/10/15 and ICSID Case No ARB/10/25 (joined)) Procedural Order No 2, 26 June 2012 [49].

[47] The tribunal in *Suez/Interaguas v Argentina* relied on its general procedural power in art 44 of the *ICSID Convention* to decide the request for amicus curiae participation.

[48] The tribunal seeks to gloss this point by describing this contradiction as merely a 'latent tension' in r 37(2), but provides no reasoning or support for its view: *von Pezold/Border Timbers v Zimbabwe* (ICSID Case No ARB/10/15 and ICSID Case No ARB/10/25 (joined)) Procedural Order No 2, 26 June 2012 [62].

[49] See: Lotbinière and Santens, above n 7; Tomoko Ishikawa, 'Third party Participation in Investment Treaty Arbitration' (2010) 59 *International and Comparative Law Quarterly* 373, 384.

undermines the attempt in r 37(2) to bring greater, albeit admittedly non-exhaustive,[50] specificity to this aspect of arbitral procedure.

For these reasons, the interpretation of r 37(2) offered by the tribunal in *von Pezold/Border Timbers v Zimbabwe* is questionable. Additional scepticism must attend the decision, however, due to the practical consequences it generates. The most obvious is that it imposes a significant burden on would-be amici curiae. The obligation to 'appear' independent is arguably the harshest element of the tribunal's implicit 'apparent independence' criterion. Even a remote connection to one of the disputing parties, or the articulation of an argument which supports one party more than the other, could create an 'appearance' of non-independence.[51] A high standard of proof thus seems necessary for would-be amici curiae to demonstrate their 'apparent independence'. It in effect requires a would-be amicus curiae to prove a negative, namely, that it has no disqualifying connection to the parties or the arbitration. Such a standard would be difficult to satisfy, and indeed is made no more readily attainable by the tribunal's failure to give any explanation of the term 'apparent independence'. The result of the tribunal's unorthodoxy, if adopted by future tribunals, would thus likely be the exclusion of many amici curiae from the investor-state arbitration system. Such a consequence would hardly conform with the purpose of r 37(2).

IV Conclusion

The tribunals in the *von Pezold/Border Timbers v Zimbabwe* and *Apotex v United States* arbitrations rejected requests by would-be amici curiae to participate in the arbitrations before them. Aspects of the reasoning rejecting the requests were entirely orthodox. The tribunals undoubtedly conformed to principle when rejecting the requests on the bases that the would-be amici curiae would not assist the respective tribunal, did not have an interest in the dispute and would not address an issue within the scope of the dispute. However, the decision in *von Pezold/Border Timbers v Zimbabwe* also endorsed a starkly unorthodox reason for rejecting the amici curiae requests in that arbitration. By reading into ICSID Arbitration Rule 37(2) a criterion of 'apparent independence', the tribunal rejected the amici curiae request on a basis which was both unprecedented in investor-state arbitration and also questionable in its approach to textual interpretation and in the consequences it generated.

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50 Rule 37(2) states that the prescribed considerations shall be taken into account 'among other things'.

51 See Schadendorf, above n 13, 13. Schadendorf also identifies and discusses the implications of the decision for attempts by amici curiae to introduce human rights concerns into investor-state arbitrations.