MARTINUS NIJHOFF PUBLISHERS

The Law and Practice of International Courts and Tribunals 12 (2013) 365–390

brill.com/lape

Requirements for *Amicus Curiae* Participation in International Investment Arbitration

A Deconstruction of the Procedural Wall Erected in Joint ICSID Cases ARB/10/25 and ARB/10/15[1]

Christian Schliemann
PhD Candidate – Free University Berlin

Abstract
The legal standard on *amicus curiae* participation in international investment arbitration has been forged by the judicial development of legal rules and, in parallel, the modification of normative sources, such as the ICSID Arbitration Rules. Current and future decisions by arbitral tribunals on the participation of *amicus curiae* in a given dispute must abide by this consolidated standard. In June 2012, the arbitral tribunal in Joint ICSID Cases No. ARB/10/15 and No. ARB/10/25 released a procedural order, rejecting an *amicus* petition. This Order contains various deviations from the applicable legal standard and severely restricts the options for *amicus* participation. The recent attempt to strengthen the legitimacy of international investment arbitration by allowing for greater *amicus* participation and the acknowledgement of the interdependence of investment law and other areas of international law is thereby put in peril.

Keywords
international investment arbitration; *amicus curiae*; independence; public interest; significant interest; scope of the dispute; systemic integration

I. Introduction

In the last decade, international investment arbitration tribunals have dealt with various petitions to grant leave to proceed as *amicus curiae*, most of which petitions have been accepted.[2] This practice was followed and

1) *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*, ICSID Case ARB/10/25; *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case ARB/10/15, Procedural Order No. 2, 26 June 2012.

2) Cases in which *amicus* briefs were accepted: *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petition from Third Persons to Intervene as "*Amici Curiae*",

DOI: 10.1163/15718034-12341262

fostered by changes in the legal standards applicable in different investment arbitration contexts. The Free Trade Commission of the North American Free Trade Agreement (NAFTA) issued a Statement on Non-Disputing Party Participation[3] and the ICSID Arbitration Rules now contain a new Rule 37 (2), as well as a new Rule 41 (3) in the ICSID Additional Facility Arbitration Rules that explicitly include the possibility to submit *amicus* briefs.[4] Also, the United Nations Commission on International Trade Law (UNCITRAL) is currently engaged in reviewing its standard of transparency including non-disputing party participation.[5] Moreover, provisions on *amicus* participation in recent Model BITs and, on the basis of these, newly

---

15 January 2001; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to Petition for Transparency and Participation as *Amicus Curiae*, 19 May 2005, Order in Response to a Petition by five non-governmental organizations for permission to make an *amicus curiae* submission, 12 February 2007; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5, 2 February 2007; *Piero Foresti et al. v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/1, Award, 4 August 2010; *Glamis Gold Ltd. v. United States of America*, Award, 8 June 2009 and Decision on Application and Submission by Quechan Indian Nation, 16 December 2005; *Pacific Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Procedural Order No. 8, 23 March 2011; *United Parcel Service of America Inc. v. Government of Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001; *Merrill & Ring Forestry L.P. v. The Government of Canada*, Award, 31 March 2010; *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Hungary*, ICSID Case No. ARB/07/22; *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 1.18; *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20. Cases in which *amicus* petitions were not accepted: *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Letter from President as Response to Petition for *Amicus* Status, 29 January 2003; *Apotex Inc. v. The Government of the United States of America*, Procedural Order No. 2 on the Participation of a Non-Disputing Party, 11 October 2011; *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; *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12 (after order of the Tribunal on *amicus* petition no *amicus* brief was submitted).

3) NAFTA, Statement of the Free Trade Commission on Non-Disputing Party Participation, 7 October 2003, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Nondisputing-en.pdf.

4) ICSID Convention, 575 U.N.T.S. 159, Rule 37 (2) Rules of Procedure for Arbitration Proceedings, Art. 41 (3) Additional Facility Rules, Schedule C, Arbitration.

5) The latest draft: UNCITRAL, Working Group II (Arbitration and Conciliation), Settlement of Commercial Disputes: Preparation of a Legal Standard on Transparency in Treaty-Based Investor-State Arbitration, UN Doc. A/CN.9/WG.II/WP.169, Art. 5, para. 35. The latest discussion on the draft article on third person participation: UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-seventh session, UN Doc. A/CN.9/760, paras. 39–57.

concluded BITs[6] have seen the light of day. Due to these developments, a strong assumption on the emergence of a customary standard on *amicus* participation in international investment arbitration is justified. Arbitral tribunal case law at the same time contributes to and clarifies this legal standard.[7] The repeated assertion in the literature, that, as regards *amicus* participation in investment arbitration, there is no generalized standard, but rather piecemeal work, no longer holds true.

This development, which has taken place over the last ten years, has been accompanied by a growing interest in academic literature discussing the pros and cons of *amicus* participation.[8] The common denominator is

---

6) Canada Model Foreign Investment Promotion and Protection Agreement (FIPA), Art. 39. The provision was included *inter alia* in the Canada-Peru and the Canada-Colombia Free Trade Agreements, see UNCITRAL Transparency in treaty-based investor-State arbitration, Compilation of comments by governments, Canada, UN Doc. AC/CN.9/WG.II/WP.159/Add.1, paras. 27–32. United States Model Bilateral Investment Treaty, Art. 28 (3); the Investment agreements by the United States reflect since 2002 the provisions of the Model BIT with respect to *Amicus Curiae* submission, the text of the Model BIT as well as the BITs concluded since then are listed in UNCITRAL, Transparency in treaty-based investor-State arbitration, Compilation of comments by Governments, USA, UN Doc. A/CN.9/WG.II/WP.159/Add.3, 10, fn. 16. Chile-Australian Free Trade Agreement, Art. 10.20.2; Art. 10.20 (3); CAFTA-Dominican Republic; all Free Trade Agreements by El Salvador except the one with Chile, UNCITRAL, Transparency in treaty-based investor-State arbitration, Compilation of comments by Governments, UN Doc. A/CN.9/WG.II/WP.159/Add.2, 3. Chile included *amicus* provisions in all investment related chapters negotiated as part of Free Trade Agreements since 1997 (Canada, Mexico, USA, Republic of Korea, Japan, Peru, Australia, Colombia), UNCITRAL, Transparency in treaty-based investor-State arbitration, Compilation of comments by Governments, UN Doc. A/CN.9/WG.II/WP.159/Add.4, 2. The Southern African Development Community has elaborated a Model BIT as a Guideline for its 15 member States; the Model BIT includes the possibility of submitting *amicus curiae* briefs and is available at: http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf.

7) On the formation of custom or general principles of international law through BITs and the role of related jurisprudence: Campbell McLachlan, "Investment Treaties and General International Law", 57 *International and Comparative Law Quarterly* (2008), 361–401, 391–398. Note here that, in contrast to substantive issues, the participation of *amicus* as a procedural question is covered by the multilateral ICSID Convention with its 147 Member States.

8) Patrick Wieland, "Why the *Amicus Curiae* Institution is ill-suited to address indigenous peoples' rights before investor-state arbitration tribunals: *Glamis Gold* and the right of intervention", 3 *Trade, Law and Development* 2 (2011), 334–366; Katia Fach-Gómez, "Rethinking the Role of *Amicus Curiae* in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest", 35 *Fordham Journal of International Law* (2011–2012), 510–564; Alexis Mourre, "Are *Amici Curiae* the Proper Response to the Public's Concerns on Transparency in Investment Arbitration?", 5 *The Law and Practice of International Courts and Tribunals* (2006), 257–271; Tomoko Ishikawa, "Third Party Participation in Investment Treaty Arbitration", 59 *International and Comparative Law Quarterly* 2 (2010), 373–412; Howard Mann, "Opening the Doors, at least a little: Comment on the *Amicus* Decision in *Methanex v. United States*", 10 *Review of European Community*

that investment arbitration can be clearly distinguished from classic commercial arbitration.[9] Certainly, some investment arbitration cases might involve only technical legal aspects, similar to those found in commercial disputes. However, in other cases, companies challenge governmental regulations, in such areas as the supply of basic goods and services, the management of hazardous materials or the use of land and natural resources.[10] The decisions of investment tribunals in those disputes may not only have serious consequences for the citizens of that State, but will also affect the public interests of other communities, in cases involving similar matters.[11] Stronger expectations are therefore justified as regards the transparency of proceedings, in terms of access to documents[12] and the legitimacy of the process, as concerns the intervention of non-disputing persons.[13] Without more transparency and public participation, it is argued, investment treaty arbitration contributes strongly to the democratic deficit on the transnational level.[14] Tribunals recognize this need for more transparency, but

---

and International Environmental Law 2 (2001), 241–245; Loukas A. Mistelis, "Confidentiality and Third Party Participation", 21 *Arbitration International* 2 (2005), 211–232; Jorge E. Vinuales, "Human Rights and Investment Arbitration: The Role of *Amicus Curiae*", 8 *Revista Colombiana de Derecho Internacional* (2006), 231–274; Catherine Yannaca-Small, "Transparency and Third Party Participation in Investor-state Dispute Settlement Procedures", in OECD (ed.), *International Investment Law – A Changing Landscape* (2005), 9–27.

9) Gus van Harten, "The Public-Private Distinction in the International Arbitration of Individual Claims Against the State", 56 *International and Comparative Law Quarterly* (2007), 371–394, 372–373, 378; Nigel Blackaby, "Public Interest and Investment Treaty Arbitration", Transnational Dispute Management 1 (2004), 1.

10) *Vivendi, supra* note 2; *Biwater Gauff, supra* note 2; *Piero Foresti, supra* note 2; *Glamis Gold, supra* note 2.

11) *Methanex, supra* note 2, at para. 49; *Vivendi*, Order of 19 May 2005, *supra* note 2, at paras. 19–20.

12) J. Anthony Vanduzer, "Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and *Amicus Curiae* Participation", 52 *McGill Law Journal* (2007), 681–723, 684–687, 695–697; Ross P. Buckley & Paul Blyschak, "Guarding the Open Door: Non-party Participation Before the International Centre for Settlement of Investment Disputes" (2007), *UNSW Law Research Paper* No. 2007–33, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=989264, 2.

13) On the question of whether and under what conditions legitimacy may actually be increased by *amicus* participation: Amokura Kawharu, "Participation of Non-governmental Organizations in Investment Arbitration as Amici Curiae", in Michael Waibel et al. (eds.), *The Backlash Against Investment Arbitration: Perceptions and Reality* (2010), 275–295, 283–289.

14) Barnali Choudhury, "Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?", 41 *Vanderbilt Journal of Transnational Law* (2008), 775–832, 782–787.

assert that heightened transparency and public participation via *amicus* petitions have to be held in check with the functionality and effectiveness of investment arbitration.[15] Critics add that other reasons, such as the risk of the politicization of disputes, higher costs, and unattractiveness for investors, are also arguments against greater transparency.[16]

Against this background, on 26 June 2012, the arbitral tribunal in Joint ICSID Cases No. ARB/10/15 and No. ARB/10/25 issued Procedural Order No. 2, concerning the application for leave to proceed as *amicus curiae*, submitted jointly by four indigenous communities from Zimbabwe and a European NGO.[17] At the heart of the dispute lies a claim by the investor, alleging a violation of the Bilateral Investment Treaties (BITs) between Germany and Switzerland on the one hand and Zimbabwe on the other, for wrongful expropriation of their land in the course of Zimbabwe's land reform project. The land in dispute was and, contrary to the expropriation, still is used for commercial forestry.[18] At the same time, one group of *amicus* petitioners, the indigenous communities,[19] lay claim to this land as their traditional territory. The petitioners argued with the tribunal that it cannot hand down a decision in this dispute, without necessarily touching upon the rights of these indigenous peoples. In addition, the petitioners

---

15) *UPS, supra* note 2, at para. 69; *Pacific Rim, supra* note 2, at para. (iv); *Piero Foresti, supra* note 2, at 1; *Vivendi*, Order of 19 May 2005, at para. 29.

16) Nigel Blackaby & Caroline Richard, "*Amicus Curiae*: A Panacea for Legitimacy in Investment Arbitration?", in Michael Waibel et al. (eds.), *The Backlash Against Investment Arbitration: Perceptions and Reality* (2010), 253–274, 272–273; Noah Rubins, "Opening the Investment Arbitration Process: At What Cost, for What Benefit?", 3 *Transnational Dispute Management* 3 (2006), 3.

17) See the existing critique of the Procedural Order: Sarah Schadendorf, "Human Rights Arguments in *Amicus Curiae* Submissions: Analysis of ICSID and NAFTA Investor-State Arbitrations", 10 *Transnational Dispute Management* 1 (2010), 1–23, 10–15; L.E. Peterson, "Analysis: Tribunals' reading of *amicus curiae* tests could make life difficult for antagonistic amici – and those seeking to raise novel concerns, such as human rights law", *Investment Arbitration Reporter*, 27 June 2012; Tomaso Ferrando, "Investment Arbitration: Restricted Area", 16 July 2012, available at http://criticallegalthinking.com/.

18) European Center for Constitutional and Human Rights (ECCHR), "Human Rights inapplicable in International Investment Arbitration? – A Commentary on the Non-Admission of ECCHR and Indigenous Communities as Amici Curiae before the ICSID Tribunal", July 2012, available at http://www.ecchr.de/index.php/cr/articles/human-rights-inapplicable-in-international-investment-arbitration.html. On land reform in Zimbabwe: Ian Scoones et al., "Zimbabwe's land reform: challenging the myths", 38 *Journal of Peasant Studies* 5 (2011), 967–993; Sam Moyo, "Three decades of agrarian reform in Zimbabwe", 38 *The Journal of Peasant Studies* 3 (2011), 493–531.

19) Four different communities are affected by the conduct of BTL in the specific area where the company was expropriated: The Chikukwa, the Ngorima, the Nyaruwa and the Chinyai.

aimed to draw the tribunal's attention to the wider impact this case might have, given the notoriety of conflicts between land use by national or transnational corporations and the rights of indigenous peoples to that same land.[20] This issue was the subject of work by the African Commission on Human and Peoples' Rights,[21] the Inter-American Court of Human Rights[22] and the United Nations Human Rights Committee.[23] The tribunal, however, refused to grant leave to proceed as *amicus*.

The article presents, first, the legal standard for access of non-disputing parties to investment arbitration [II]. Secondly, the legal reasoning of the tribunal in Joint ICSID Cases No. ARB/10/15 and ABR/10/25 will be analyzed and compared to the legal standard described in the preceding section [III]. The article concludes with arguments on an arbitral tribunal's approach to *amicus* participation after *von Pezold* [IV].

II. The Common Legal Standard

The legal standard applicable to *amicus* participation in ICSID arbitrations is based on Rule 37 (2) of the ICSID Arbitration Rules. According to Rule 37 (2) of the ICSID Arbitration Rules, prospective *amici* should bring a new and special legal or factual perspective [A]; a significant interest of the petitioner and/or a public interest should be involved in the arbitration proceeding [B]; their arguments should be within the scope of the dispute [C]; they should have the relevant expertise and experience and should be independent [D]; and finally they should not cause an undue burden or unfair prejudice to one of the parties [E]. Rule 37 (2) reflects prior jurisprudence by arbitral tribunals. This jurisprudence also encompasses cases dealt with

---

20) ECCHR, *supra* note 18, at 1.

21) African Commission on Human and Peoples' Rights, Case No. 155/96, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, paras. 55–58.

22) Inter-American Court of Human Rights, *Comunidad Indígena Sawhoyamaxa v. Paraguay*, Merits, Series C. No. 146 (2006); Inter-American Court of Human Rights, *Pueblo Saramaka v. Suriname*, Merits, Series C. No. 172 (2007); Inter-American Court of Human Rights, *Pueblo Indígena Kichwa de Sarayaku v. Ecuador*, Merits, Series C. No. 245 (2012).

23) Human Rights Committee, Concluding Comments on the Periodic Report of Chile, in Annual Report of the Human Rights Committee 2007, UN Doc. A/62/40 (Vol. I), 42–47, 46, para. 19.

under the UNCITRAL Rules that rely on BITs, as well as other treaties, such as, in particular, NAFTA.[24]

A. *To Bring a New and Special Legal or Factual Perspective*

In arbitral decisions, it is held that *amici* may provide a particular insight on the issues under dispute, on the basis of either substantive knowledge or relevant expertise or experience that goes beyond, or differs in some respect from, that of the disputing parties.[25] *Amicus* petitioners must, therefore, as a first requirement, adduce a new, special legal or factual perspective in order to fulfill the role ascribed to them.

The importance of receiving factual information through *amicus* participation was highlighted in the UNCITRAL elaboration process on the new standard for transparency.[26] Organizations which, due to their membership or grass roots activity, can provide salient data about the actual public impact of company activities or regulatory State action that is hard to obtain otherwise are most appropriate to participate.[27] Taking into account the procedural limitation of ICSID tribunals that do not investigate on their own and rely entirely on the information provided by the parties, the value of additional factual information may sometimes become essential for a tribunal's evaluation of the facts.[28] In relation to legal arguments, the tribunal in the *Aguas Provinciales* case highlighted that: "The traditional role of an *amicus curiae* in an adversary proceeding is to help the decision maker arrive at its decision, by providing the decision maker with arguments, perspectives, and expertise that the litigating parties may not provide."[29]

In conclusion, it can be said that the special perspective required from an *amicus* brief might relate to law, facts, or the application of the law to

---

24) For example, *Vivendi,* Order of 12 February 2007, *supra* note 2, at paras. 13–15; *Aguas Provinciales de Santa Fe*, *supra* note 2, at para. 24.

25) *Apotex, supra* note 2, at paras. 21–22.

26) UNCITRAL, Report of Working Group II, *supra* note 5, at para. 52.

27) Epaminontas E. Triantafilou, "Is a Connection to the 'Public Interest' a Meaningful Prerequisite of Third Party Participation in Investment Arbitration?", 5 *Berkeley Journal of International Law* (2010) 38–46, 44.

28) In this sense: Buckley & Blyschak, *supra* note 12, at 12.

29) *Aguas Provinciales de Santa Fe, supra* note 2, at para. 13. In a similar vein highlighting the special perspective of *amici* as concerns questions of law: *UPS, supra* note 2, at para. 62.

the facts.[30] The perspective is new and special when it is different from, rather than a repetition of, what the parties have argued.[31] Finally, in order to strengthen the arbitral process, this requirement must be interpreted widely so as to ensure that all angles on, and all interests in, a given dispute are properly canvassed.[32]

B. *Public Interest and/or Significant Interest of Petitioner*

As a second requirement, tribunals have to ascertain whether either a public interest and/or a significant interest of the petitioner are involved in an investment arbitration.

Rule 37 (2) of the ICSID Arbitration Rules stipulates that the petitioner must have a significant interest in the proceeding and specifies that, on a general level, a personal stake in the proceedings is not an argument for refusing the petition, but, on the contrary, is an argument in favor of participation rights. More concretely, it can be inferred from existing cases who is considered to have a significant interest. In the *Glamis Gold* arbitration, the Indian Quechan Nation argued that their own rights, the rights of indigenous peoples, to protect their sacred sites and cultural heritage were at stake, and the tribunal deemed this sufficient to satisfy the criteria for *amicus* participation.[33] Anyone who is directly or indirectly affected by the decision of an arbitral tribunal is thus deemed to have a significant personal interest in the case.

This was also an argument used by the Canadian Union of Postal Workers in their *amicus* petition in the *UPS* arbitration, which was accepted by the tribunal.[34] The tribunal in *Apotex* comes closest to a definition and supports the affected rights approach, insofar as it ruled out the participation of an *amicus* petitioner on the grounds, that "it [the petitioner] has

---

30) *Vivendi*, Order of 12 February 2007, *supra* note 2, at para. 20.

31) Andrew Newcombe & Axelle Lemaire, "Should Amici Curiae Participate in Investment Treaty Arbitrations?", 5 *Vindobona Journal of International Commercial Law and Arbitration* 1 (2001), 22–40, 36–37. Newcombe and Lemaire also point to the practice of the US Supreme Court as concerns this requirement. Rule 37 (1) of the Rules of the United States Supreme Court states: "An *Amicus curiae* brief that brings to the attention of the Court relevant matter *not already brought to its attention by the parties* may be of considerable help to the Court" (author's italics).

32) *Apotex, supra* note 2, at paras. 21–22.

33) *Glamis Gold, supra* note 2.

34) *UPS, supra* note 2, at paras. 3, 70. The case also involved a matter of public interest.

not explained how the rights or principles it may represent or defend might be directly or indirectly affected by [...] the outcome of the overall proceedings".[35] These cases show that the approach held by scholars that mere proof of a private legal interest does not suffice for *amicus curiae* status[36] is not tenable anymore, as it is in contradiction to ICSID Rule 37 (2) and the aforementioned case law.

Tribunals also frequently require that the dispute be a matter of public interest, although this is not provided for in ICSID Rule 37 (2), nor the UNCITRAL draft.[37] When it comes to the notion of public interest in investment arbitration, in its first order in the *Vivendi* case, the tribunal held that, because governmental measures and the responsibility of the State as such were at stake, the dispute did indeed entail public interest, as, however, do all investment arbitrations.[38] The tribunal went on to highlight the fact that, in addition, the concrete proceedings did involve more than the regular public interest, as the dispute centered on a basic public service to millions of people and that, as a result, it "may raise a variety of complex public and international law questions, including human rights considerations. Any decision rendered in this case, whether in favor of the claimants or the respondent, has the potential to affect the operation of those systems and thereby the public they serve".[39] This is a form of definition that recurs in other decisions. According to the tribunal in *Aguas Provinciales de Santa Fe*, a matter is deemed to be of public interest when the final decision in an investment dispute has the potential to affect, directly or indirectly, persons beyond those immediately involved as parties in the case.[40] Scholars have attempted to specify this approach by proposing a twofold notion of public interest. On the one hand, the public interest can be thought of in terms of the interest of the State and its constituents and, on the other hand, it can implicate issues that encapsulate the common interest of mankind, such as the environment or human rights.[41]

---

35) *Apotex, supra* note 2, at para. 28.

36) Newcombe & Lemaire, *supra* note 31, at 37. For another case: *Pacific Rim, supra* note 2, and the argumentation in the *amicus* petition itself of 2 March 2011, 2.

37) *Biwater Gauff, supra* note 2, at paras. 51–53 and footnotes below.

38) *Vivendi, supra* note 2, Order of 19 May 2005, at para. 19; *Biwater Gauff, supra* note 2, at paras. 51–52; *Methanex, supra* note 2, at para. 49.

39) *Vivendi, supra* note 2, Order of 19 May 2005, at para. 20.

40) *Aguas Provinciales de Santa Fe, supra* note 2, at para. 18.

41) Choudhury, *supra* note 14, at 791.

In conclusion, as Bartholomeusz notes in the context of the European Court of Human Rights, the interests invoked by *amicus* petitioners and required by tribunals provide two different justifications for participation.[42] On the one hand, there are non-local actors, usually NGOs with an interest in certain topics, such as the protection of the environment, business and human rights, or the rights of refugees on an abstract level, not related to any specific community.[43] They justify their access to ICSID arbitration, because they defend a public interest by representing various and changing persons or collectives, affected "only" by a paradigmatic action, embodied in a given, concrete dispute.[44]

On the other hand, local or regional actors may be representing those who are directly affected by a dispute, but they are not primarily or necessarily engaged in furthering the objectives of a public interest elsewhere. The same applies to regional organizations that monitor their member States' compliance with norms established by the organization.[45] For these organizations, the category of a significant personal interest is essential.

Finally, tribunals will regularly inquire whether both interests are present in cases involving *amicus* petitions.[46] Either interest alone may, however, independently present sufficient justification for the participation of non-disputing parties, as both serve a specific legal purpose in securing the rights of persons who are directly affected or for protecting the wider interests of the polity or communities in a comparable situation.

C. *Within the Scope of the Dispute*

Thirdly, *amici curiae* have to address issues that are within the scope of the dispute.[47] This requirement presents the outer boundary of the special perspective that *amici curiae* are supposedly to adduce. Interpreted according to its literal meaning, it can mean nothing less than the arguments

---

42) Lance Bartholomeusz, "The *Amicus Curiae* before International Courts and Tribunals", 5 *Non-State Actors and International Law* (2005), 209–286, 241.

43) For example, Friends of the Earth in the *Glamis Gold* arbitration or the International Institute for Sustainable Development in the *Biwater* or *Vivendi* arbitrations.

44) Buckley & Blyschak, *supra* note 12, at 15–16.

45) *Electrabel, supra* note 2, at 4.92.

46) *Apotex, supra* note 2, at paras. 28–31.

47) UNCITRAL, Working Group II, *supra* note 5, Art. 5 (1) (4) (d); NAFTA, Statement of the Free Trade Commission, *supra* note 3, B (3) (d).

ventured by the petitioners should be related to the substantive legal questions to be resolved in the arbitration. According to this interpretation, arbitral tribunals have explicitly classified procedural questions as unsuitable content for *amicus* petitions.[48] Other tribunals have not followed that approach, but, conversely, have expressly required arguments on jurisdiction,[49] or simply accepted them.[50] The tribunal in *Apotex* concludes on that issue that there is no hard and fast rule that excludes jurisdiction from *amicus* submissions. On the contrary, it is "perfectly conceivable that issues of jurisdiction might raise matters of public interest in themselves, on which non-disputing parties might be well-placed to provide assistance and perspective or insights beyond those of the disputing parties".[51]

The scope of the substantive legal arguments that are admissible in *amicus* briefs raises the general problem of applicable law in international investment disputes. On the basis of Art. 42 (1) of the ICSID Convention, a "tribunal shall decide a dispute in accordance with such rules of law as may be agreed upon by the parties, as well as that in the absence of such agreement, the tribunal shall apply the law of the Contracting State party to the dispute, and such rules of international law as may be applicable". Regularly, the first legal source to be considered is the BIT governing the investment relationship between host State and the State where the company is domiciled. But most BITs also include provisions on the legal sources for the decisions of investment tribunals. According to the two BITs underlying the dispute in the *von Pezold* arbitration, a tribunal decides, pursuant to the BIT itself, on the basis of any treaties in force between the Contracting Parties, such rules of general international law as may be applicable, and the domestic law of the Contracting Party in the territory in which the investment in question is situated.[52] Various other sources are therefore potentially applicable in addition to the BIT. Given that context, international investment arbitration is one of the areas in which the fragmentation of international law creates challenges with respect to the application

48) *UPS*, *supra* note 2, at para. 71. This approach was followed by the tribunal in *AES, supra* note 2, as can be deduced by the arguments submitted by the European Commission in its *amicus* brief. European Commission, Written Submission Pursuant to Art. 37 (2) ICSID Arbitration Rules, 15 January 2009, JURM (2009) 10001, para. 11.
49) *Pacific Rim, supra* note 2, at para. (ii).
50) *Electrabel, supra* note 2, at para. 5.32.
51) *Apotex, supra* note 2, at para. 33.
52) Germany-Zimbabwe BIT, Art. 11.2; Swiss-Zimbabwe BIT, Art. 10.3.

of general norms of international law, such as the Vienna Convention on the Law of Treaties (VCLT), but also as regards special norms, such as the law of the World Trade Organization or human rights law.[53] This warrants the question of what is meant by the reference to rules of general international law contained in the ICSID Convention and BITs, and under which circumstances these rules actually apply.

As for the first part of the question, the term "general international law" refers to Art. 38 of the Statute of the International Court of Justice and includes customary law, conventions and general principles of international law.[54] Hence, from an abstract perspective, bilateral investment treaties may incorporate the whole body of the traditional sources of international law. It is merely a question of the circumstances under which concrete norms should be applied and by which methodological means. Does the reference to international law require a direct applicability, or is it rather a means of interpreting the norms of the BIT itself? Some basic assumptions are accepted in answer to these questions that apply generally to the harmonization of fragmented areas of international law.[55] One such assumption relies on the hierarchy of international law.[56] Peremptory norms of international law do apply directly, as long as investment law norms are not themselves considered to be of a peremptory nature.[57] When it comes to customary law and contracts outside the field of international investment law, direct application does not, however, seem to be the rule.[58] Investment tribunals have resorted to those norms as an

---

53) Anne van Aaken, "Fragmentation of International Law: The Case of International Investment Protection", *University of St. Gallen Law and Economics Research Paper Series* (2008), available at http://ssrn.com/abstract=1097529.

54) Christoph H. Schreuer, *The ICSID Convention – A Commentary* (2nd ed., 2009), Art. 42, paras. 169–170.

55) Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law, UN Doc. A/CN.4/L.682, 13 April 2006.

56) Moshe Hirsch, "Interactions between Investment and Non-Investment Obligations", in Peter Muchlinski et al. (eds.), *The Oxford Handbook of International Investment Law* (2008), 154–181, 157–160.

57) Art. 53 Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331. On the content of *ius cogens* see the examples given by the International Law Commission, Draft Articles on State Responsibility, Commentary on Art. 40, in Official Records of the General Assembly, Fifty-Sixth Session, UN Doc. A/56/10, pp. 283–284, paras. 4–6.

58) Note the exception: *Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada*, UNCITRAL, Award of 2 August 2010, paras. 135–139.

interpretive tool,[59] making use of the principle of "systemic integration",[60] based on Art. 31 (3) (c) of the Vienna Convention on the Law of Treaties. According to that principle, arbitrators may resort to other norms of public international law, in order to construe investment treaty provisions, such as the notion of fair and equitable treatment, non-discriminatory measure or indirect expropriation. *Amicus* petitioners have repeatedly argued in that direction. In *Foresti, amici* argued that a governmental measure introducing a minimum threshold of 26% ownership for historically disadvantaged South Africans in the mining industry[61] is legally justified by the right to substantive equality.[62] In *Biwater, amicus curiae* introduced, as a legally relevant factor, investor responsibilities, deduced from human rights obligations. The tribunal accepted that line of reasoning.[63]

In summary, legal arguments that have a value as interpretive tools for the application of investment treaties are generally included in the scope of the dispute. In that regard, it is necessary to highlight the distinction between the jurisdictional basis of a tribunal and the substantive question of which law is applicable in a dispute. As the International Law Commission concludes: "The jurisdiction of most international tribunals is limited to particular types of disputes or disputes arising under particular treaties. A limited jurisdiction does not, however, imply a limitation of the scope of the law applicable in the interpretation and application of those treaties".[64]

---

59) In this regard see the first ICSID treaty arbitration: *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award of 27 June 1990, paras. 21–22.

60) McLachlan, *supra* note 7, at 369–374; ILC, Fragmentation of International Law, *supra* note 55, at para. 413 et seq.; But see the recent refusal that such a customary norm of systemic integration existed under international law in: *Electrabel, supra* note 2, at para. 4.130. The tribunal did, however, take into account non investment law (Law of the European Union), but for different methodological reasons.

61) Under the label Black Economic Empowerment, which is already used in the petition: *Ibid.,* at para. 4.1. A more detailed account of this case as part of the black economic empowerment strategy: Matthew Coleman & Kevin Williams, "South Africa's Bilateral Investment Treaties, Black Economic Empowerment and Mining: a Fragmented Meeting?" 9 *Business Law International* 1 (2008), 56–94.

62) *Piero Foresti, supra* note 2, at paras. 4.7, 4.11–4.13. The tribunal did not address this issue as the dispute was settled through agreement.

63) Biwater, *supra* note 2, Award of 24 July 2008, para. 601 and *Amicus Curiae* Submission of 26 March 2007.

64) ILC, Fragmentation of International Law, *supra* note 55, at para. 45.

D. *Experience, Independence, Expertise*

Another important criterion allows for the rejection of petitioners who are not experienced, independent, or without expertise.

As regards required experience and expertise, only in one case did prior jurisprudence dismiss an *amicus* petition on grounds of lack of experience and expertise. One of the petitioners, an NGO, failed to provide the tribunal with specific information on the nature and size of its membership, the qualifications of its leadership, the expertise of its staff, and its activities. The tribunal held that, for a non-governmental organization, it is not enough to justify an *amicus* submission on the general grounds that it represents civil society or that it is devoted to humanitarian concerns.[65] Further, three individual petitioners failed to provide a detailed *curriculum vitae* on each of them, which would have enabled the tribunal to judge whether they actually possessed the requisite expertise and experience.[66] On the basis of this decision, it is clear that prospective *amici* should have an established area of work, with a clear focus on a legal, political or social subject matter and that their engagement in this work has to be presented to the tribunal in the petition, by describing the aforementioned characteristics of the organization or individual.[67]

Regarding independence, although it is not explicitly envisaged in Rule 37 (2) of the ICSID Arbitration Rules, tribunals have applied an independence test, as it is explicitly included in the NAFTA Free Trade Commission Statement, as well as in the draft UNCITRAL standard. Within the elaboration process of the new UNCITRAL standard on transparency, it was pointed out that *amici* are not experts.[68] Also the tribunal in the *Methanex* arbitration highlighted the difference by stating that "*Amici* are not experts, such third persons are advocates (in the non-pejorative sense) and not 'independent' in that they advance a particular case to a tribunal."[69] This is only logical, given that *amici* are also required to have a significant interest in the case. However, this does not mean that the criterion is devoid

---

65) *Ibid.*, at para. 33.

66) *Aguas Provinciales de Santa Fe, supra* note 2, at para. 30. The tribunal however granted petitioners the right to refine their description and to apply again, para. 34.

67) *Vivendi, supra* note 2, Order of 12 February 2007, at para. 15.

68) UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-third session, UN Doc. A/CN.9/712, para. 50.

69) *Methanex, supra* note 2, para. 38.

of sense. To allow an informed decision of the tribunal on the petitioners' independence, prospective *amici* should provide in their application letter information on: the identity of the petitioner, including, where relevant, its membership and legal status; its general objectives, the nature of its activities, and any parent organization; whether or not the third party has any affiliation, direct or indirect, with any disputing party and information on any government, person or organization that has provided any financial or other assistance in preparing the submission.[70] Not every kind of minor financial or factual relationship is, however, considered to be detrimental to independence. Under the UNCITRAL draft, 20% of the annual revenue is given as an indicative threshold that should not be exceeded in order to be considered as independent.[71] It was, however, decided not to include that strict threshold in the official text, in order to leave room for reasonable discretion by the tribunal.[72] Regarding existing jurisprudence, the *amicus* petition of the US Chamber of Commerce in the *UPS* case is quite enlightening, in that it explicitly stated that it had received a payment of $100,000 from UPS, which was a total of 12% of its annual budget prior to filing its *amicus* brief.[73] The tribunal did not consider this to be sufficient grounds to reject petitioners for lack of independence. Similarly, collaboration with one of the parties on a non-material level, is also not grounds for rejecting *amicus curiae*, as illustrated by the case of a Tanzanian NGO, accepted as joint *amicus* in the *Biwater* case, although the petitioners explicitly stated that they seek to work with the government and governmental agencies in the area of their expertise.[74] On the contrary, even the explicit identification with one of the parties was at times accepted by tribunals. The Chamber of Commerce, for example, stated in its *amicus* petition in the *UPS* case, that

---

70) UNCITRAL, Working Group II, *supra* note 5, Art. 5 (2), para. 35; NAFTA Statement of the Free Trade Commission, *supra* note 3, at para. 2 (c)–(e); *Aguas Provinciales de Santa Fe, supra* note 2, at paras. 24, 29, 32.

71) UNCITRAL, Report of Working Group II, *supra* note 5, at para. 49.

72) *Ibid.*, at paras. 49–51.

73) *UPS*, *supra* note 2, *Amicus* Submission of the US Chamber of Commerce, 20 October 2005, available at: http://naftaclaims.com/Disputes/Canada/UPS/UPS-USCC_Amicus_Submission-20-10-05.pdf, at para. 9.

74) *Biwater Gauff, supra* note 2, The Lawyers' Environmental Action Team and others, Petition for *Amicus Curiae* Status in Case No. ARB/05/22 before the ICSID, 27 November 2006, available at: http://italaw.com/sites/default/files/case-documents/ita0090.pdf, 3.

its principal function was to represent the interests of its members and that it therefore wished to intervene as *amicus* to support its member, UPS.[75]

In conclusion, the quoted jurisprudence shows that a relationship to the parties is no impediment to *amicus* status being granted. The relevant question to assess whether an *amicus* petitioner remains independent is, therefore, whether a relationship of control or the determinative influence of a party to the dispute on the writing of an *amicus* brief and therefore on its content can be ascertained.

E. *No Undue Burden or Unfair Prejudice to One of the Parties*

A final criterion that has enjoyed widespread attention within the decisions handed down by tribunals[76] requires *amicus curiae* not to create an undue burden on or unfair prejudice to one of the parties. To properly deal with that requirement, tribunals have to distinguish the substantive and the procedural impact of an *amicus* submission.[77] From the procedural angle, any tribunal can ensure that non-disputing party participation does not overly burden the proceedings by establishing procedural safeguards, such as time limits.[78] The tribunal in the *UPS* arbitration mitigated the burden by resorting to various procedural guarantees, including a limitation on the length of the submission, a requirement for timely submission, and a denial of the right to call witnesses in order to avoid additional costs of cross examination.[79] This approach is widely shared in the jurisprudence of other tribunals.[80]

As concerns the substantive impact of submissions, concluded and pending cases involving *amicus* petitions show that petitioners usually take a clear position in favor of one of the parties. The *Glamis Gold* arbitration – which in some aspects is very similar to the *von Pezold* arbitration discussed below – provides a useful illustration of this dynamic. The *amicus* submission by the Quechan Indian Nation claimed that the contested environmental

---

75) *Amicus* Submission of the US Chamber of Commerce, *supra* note 73, at paras. A 4, B 9.

76) *Glamis Gold*, *supra* note 2, at para. 269; *Pacific Rim, supra* note 2, at IV; *Vivendi*, Order of 12 February 2007, *supra* note 2, at para. 26; *UPS*, *supra* note 2, at para. 69.

77) UNCITRAL, Report of Working Group II, *supra* note 5, at para. 77.

78) *Ibid*., at para. 77.

79) *UPS, supra* note 2, at para. 69.

80) For a similar reasoning, see: *Vivendi*, Order of 12 February 2007, *supra* note 2, paras. 21, 27; *Biwater Gauff*, Procedural Order No. 5, *supra* note 2, at paras. 59–60; *Aguas Provinciales de Santa Fe*, *supra* note 2, at para. 15; *Methanex, supra* note 2, at paras. 36–37.

regulation on the operation of open pit mines was legitimate, as it was necessary to protect their sacred sites and cultural heritage. The tribunal accepted the submission, without assuming an unfair prejudice to the corporate party, although the arguments clashed directly with the primary position of the company, which claimed that these measures amounted to an expropriation.[81] However, petitioners favoring one of the parties do not always prejudice the company side; various petitioners have explicitly supported the companies involved in disputes.[82]

Often the degree to which non-disputing party participation will substantively impact on the proceedings to the benefit of one or the other party simply depends on the content of each case. Reflecting on the practice of *amicus* participation and its substantive impact, the UNCITRAL documents therefore only state that both parties should be given the opportunity to present their observations on the submissions by the third party.[83] Further requirements to avoid an undue burden on a substantive level are not envisaged. In fact, in *Aguas Provinciales* the tribunal held that *any* undue burden could be avoided by establishing procedural safeguards.[84] An unfair or undue burden on the procedural or the substantive level is therefore not a danger, as long as the procedural safeguards put in place by any tribunal are respected by *amicus curiae*.

III. The Legal Reasoning of the Tribunal in the *von Pezold* Arbitration in Contrast to the Common Legal Standard

In the *von Pezold* arbitration, the tribunal rejected the petition to proceed as *amicus curiae* for non-fulfillment of almost all of the requirements currently in place for the regulation of *amicus* participation. The tribunal's statements on the respective elements will be presented in this section and

81) *Glamis Gold, supra* note 2.

82) *Amicus* Submission of the US Chamber of Commerce, *supra* note 73, 1. In *Grand River Enterprises, supra* note 2, the Assembly of First Nations intervened explicitly expressing its support for the claimant company, Office of the National Chief, Assembly of First Nations, *Amicus* submission, 19 January 2009, available at: http://www.state.gov/documents/organization/117812.pdf. *Glamis Gold, supra* note 2, Application for leave to file a non-disputing party submission by the national mining association, 13 October 2006.

83) UNCITRAL, Report of Working Group II, *supra* note 5, at para. 77.

84) *Aguas Provinciales de Santa Fe, supra* note 2, at para. 15 (author's italics).

contrasted with the findings on the commonly applicable standard, described above.

A. *The Scope of the Dispute*

A recurring problem in the decision of the tribunal in the *von Pezold* case is the limitation of the scope of the dispute, which has consequences on various procedural requirements to be fulfilled in order to participate as *amicus*. The tribunal prepares the terrain by claiming that: "The Arbitral tribunals agree in this regard with the claimants that the reference to 'such rules of general international law as may be applicable' in the BITs does not incorporate the universe of international law into the BITs or into disputes arising under the BITs."[85] Coming closer to the case at hand, the tribunal lends its voice, again, to the claimant and asserts the following: "As regards the indigenous communities, the claimants themselves recognize that they [the indigenous communities] have some interest in the land, over which the claimants assert full legal title and therefore have historically granted them access to parts of the Border Estate. It may therefore well be that the determinations of the arbitral tribunals in these proceedings will have an impact on the interest of the indigenous communities."[86] Nevertheless the arbitrators conclude that: "they would need to consider and decide whether the indigenous communities constitute 'indigenous peoples' [...], the decision itself is clearly outside of the scope of the dispute".[87]

The tribunal completely rejects the application of international law outside the investment context, in contravention of the standard on direct applicability of norms prevalent in hierarchy as well as systemic integration of other relevant norms via interpretation. A thorough examination of the petitioner's claims may have led the tribunal to reflect on this issue and the hierarchical status of the rights of indigenous peoples to self-determination, including their traditional lands. Suffice it to say that, as regards the rights of indigenous peoples, couched in terms of the right to self-determination, a reference to a potential *ius cogens* status is possible[88]

---

85) *Bernhard von Pezold and others*, *supra* note 1, at para. 57.
86) *Ibid.*, at para. 62.
87) *Ibid.*, at para. 60.
88) Self-determination is one of the examples given in the list of the ILC, *supra* note 57, at para. 5. Whether indigenous peoples enjoy the same right to self-determination as peoples in general is contested. Art. 3 of the United Nations Declaration on the Rights of Indigenous Peoples however

and therefore is a reference to a direct applicability. Moreover, even if the rights of indigenous peoples were not considered to be of a peremptory nature, the tribunal in the *von Pezold* case also declines to take into account human rights law on indigenous peoples via interpretation. The tribunal is not convinced that consideration of Art. 26 of the UN Declaration on the Rights of Indigenous Peoples and other customary international law norms on indigenous peoples is in fact part of their mandate,[89] thereby deliberately leaving aside the fact that the rights of indigenous peoples may have had an influence on the determination of the legality of the expropriation. This is, however, a reasonable argument, taking into account that the Court of the Southern African Development Community has clarified in a decision on Zimbabwe, that the land reform project might be legitimate, if the benefits of the expropriation were indeed distributed to poor, landless and other disadvantaged and marginalized individuals or groups.[90] Furthermore, the tribunal in *von Pezold* omits any reference to other norms mentioned by the petitioners in their application,[91] such as the International Covenant for Civil and Political Rights (ICCPR), the UN Convention for the Elimination of All Forms of Racial Discrimination (CERD) and the African Charter on Human and Peoples' Rights, which include land and consultation rights of indigenous peoples and which are clearly binding on Zimbabwe. In fact the ICCPR and CERD are also binding on Germany and Switzerland,[92] the other parties to the underlying BITs and therefore to be included in the set

---

uses the same language as Art. 1 of the International Covenant on Civil and Political Rights: "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development". On this: Erica-Irene Daes, Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples (1993), UN Doc. E/CN.4/Sub.2/1993/26/Add.1, para. 12; James Anaya, "The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era", in Claire Charters & Rodolfo Stavenhagen (eds.), *Making the Declaration Work* (2009), 184–198.

89) *Von Pezold, supra* note 1, at para. 58.

90) *Mike Campbell (Pty) Ltd and William Michael Campbell v. The Republic of Zimbabwe*, SADC (T) 2/07, 28 November 2008, 53. For a detailed account of the case against the background of the land reform: Memory Dube & Rob Midgley, "Land Reform in Zimbabwe: context, process, legal and constitutional issues and implications for the SADC region", in Konrad Adenauer Stiftung (ed.), *Monitoring Regional Integration in Southern Africa Yearbook*, Vol. 8, 2008, 303–341.

91) ECCHR, Human Rights inapplicable in International Investment Arbitration?, *supra* note 18, at 5.

92) Zimbabwe ratified the CERD on 13 May 1991 and the ICCPR on 13 May 1991, Germany ratified the CERD on 16 May 1969 and the ICCPR on 17 December 1973, Switzerland ratified the CERD on 29 November 1994 and the ICCPR on 18 June 1992.

of applicable norms. The tribunal's decision in the *von Pezold* case fosters the fragmentation of international law and violates applicable legal standards of investment arbitration and treaty interpretation.

B. *A Special Legal or Factual Perspective*

Bearing in mind this restrictive approach to the substantive scope of the dispute, the requirement to bring a new and special legal or factual perspective cannot be fulfilled at all, as the arguments adduced by *amicus curiae* often revolve around other norms of international law, such as the protection of the environment and the human rights of various persons and collectives. It is no surprise that, according to the tribunal, petitioners' *amicus* brief would not assist the tribunal in the determination of a factual or legal issue related to the proceedings.[93] The tribunal elaborates that "neither Party has put the identity and/or treatment of indigenous peoples, or the indigenous communities in particular, under international law, including human rights law on indigenous peoples, in issue in these proceedings".[94] It requires petitioners thereby to rely on arguments already raised by the parties, which inverts the very meaning of an *amicus* petition. Moreover, by using this line of argument, the tribunal limits its ability to receive further factual information, which is an important and highlighted benefit of *amicus* participation, at no cost. In *von Pezold* the tribunal may have benefitted from further information on the indigenous peoples, on their actual situation in Zimbabwe and thereby on the factual impact of the land reform. This information might have been helpful in evaluating whether the governmental measure that formed the basis of the expropriation serves a public interest and is non-discriminatory, as done by the SADC tribunal in the decision mentioned above.

C. *The Significant Interest of the Petitioners*

Another ground for refusing petitioners' request was the European NGO's lack of a significant interest. The tribunal considered the petitioners separately and, as noted above, in relation to the indigenous communities, the tribunal accepted that they have an interest in this case.[95] As regards the

---

93) *Von Pezold, supra* note 1, at para. 57.
94) *Ibid.*, paras. 57, 59.
95) *Supra* note 86.

European NGO, the tribunal stated that the NGO includes in its mission a focus on corporate responsibilities for human rights abuses.[96] It also acknowledges a petitioner's reference to the wider impact the dispute will have, namely the negative impacts of land use and acquisition by TNCs on local communities' land use and community consultation in relation to that land,[97] but then simply states: "However, [the European NGO]'s mission and experience do not, in the context of these proceedings, as presently constituted, satisfy the requirement of a significant interest in the proceedings."[98]

The tribunal thereby engaged the significant interest only for the indigenous communities and accepted that interest, which, however, had no consequences insofar as the rights of indigenous peoples were already deemed outside the scope of the dispute. The tribunal also applied the significant interest test to the public interest-driven NGO and could not find it, employing a method that resembles a self-fulfilling prophecy. This contravenes the applicable legal standard and prior jurisprudence, in which, regularly, a combined test or in some cases either the significant interest of the petitioners or a public interest analysis is carried out, whatever interest factually applies. It has been accepted that a significant interest is held to exist when the dispute directly or indirectly affects the interests of third parties, such as in the *Glamis Gold* case, which also involved the land rights of indigenous peoples. A public interest was accepted when the governmental measure at stake, in the case in hand the land reform project in Zimbabwe, had repercussions on a great number of people (the population of Zimbabwe), thereby displaying a general character appearing in similar cases and the petitioner content-wise engages in solutions for this general problem (interaction between commercial land use by investors and natural resources regulation by States). By splitting up the consideration of the interests, of the communities on the one hand and the NGO on the other, while at the same time not recognizing the individual causes motivating both actors, the tribunal intentionally shuts the door to participation.

96) *Von Pezold, supra* note 1, at para. 61.
97) *Ibid.*
98) *Ibid.*

D. *Independence*

Another argument for refusing *amicus* status in the *von Pezold* case was the lack of independence of the petitioners. The tribunal first accepted that indigenous communities and their chiefs are not organs of the State or under their control.[99] They further considered an annual governmental budgetary support to a local NGO facilitating communication between the petitioners in Europe and Zimbabwe of approximately 10% to be within the limits of neutrality.[100] In addition to these assertions, the tribunal relied on the claimants' evidence on the political ideas of the director of that local NGO and, further, on an article published by that same person on land reform and the witness testimony of one of the claimants, which found him to be in support of the resettlement of land in Zimbabwe and the respondent's land reform policies.[101] This fact was subsequently considered to be sufficient grounds to refuse petitioners' request for lack of independence.[102]

Relying on the immaterial alignment with government policies, the tribunal considered the petitioners not to be independent. Such an approach to independence is neither foreseen in existing rules, nor reflected or applied in prior jurisprudence, in which several petitioners have explicitly asserted from the outset that they are in full support of one or the other of the party's claims. Moreover, it neglects the fact that the State's responsibility towards the indigenous peoples was also an argument in the petition. As a relationship of control or a party's determinative impact on the content of the petition could not be established, it seems that independence was lacking because of the rejection of the ideas submitted.

E. *No Undue Burden or Unfair Prejudice*

Finally, the tribunal was of the opinion that the petition unfairly prejudiced the claimants.[103] The tribunal does not explain this prejudice further; it does however submit, in a separate section of the Order, that the indigenous communities appear to lay claim over or in relation to some of the lands, with respect to which the claimants assert a right to full, unencumbered

99) *Ibid.*, at paras. 52–53.
100) *Ibid.*, at para. 54.
101) *Ibid.*, at para. 55.
102) *Ibid.*, at para. 56.
103) *Ibid.*, at para. 62.

legal title and exclusive control. Based on this fact, the tribunal concludes that the indigenous communities appear to be in conflict with the claimants' primary position in the proceedings.[104] The tribunal therefore construed the requirement not to cause an undue burden or unfair prejudice, in a way so as to extend this requirement to the substantive legal arguments of the petitioners. This is contrary to the interpretation given in prior arbitral jurisprudence that focused on procedural equality. The tribunal did not take into account that the substantive impact on the position of one of the parties is simply a matter of fact, translated into law through rights granted in international conventions. If such petitioners are indigenous peoples, as the tribunal was requested to acknowledge, and if they traditionally inhabit the contested land, then they enjoy internationally safeguarded rights. In a cynical way, this may well be considered as an "unfair burden" on the parties. Legally however, this fact simply presents a mandate for consideration of these rights by an international tribunal exercising judicial powers. The arbitrators, moreover, did not recognize that *all amicus* interventions to date have sided with the substantive arguments of one of the parties. In addition, the tribunal did not even attempt to mitigate any burden caused, by applying an approach common in prior jurisprudence that circumvents or at least alleviates that burden by imposing procedural safeguards.

Finally, by assuming an unfair burden on the company, the tribunal demonstrated a fundamental misunderstanding of the legal nature of the rights of indigenous peoples, which are primarily contained in norms addressed to the State. It is the State that incurs responsibility to protect these rights, including from the actions of third parties, e.g. investors.[105] These obligations are accompanied by legal standards addressing companies, such as the OECD Guidelines or the UN-Guiding principles.[106] However, this does not abrogate the obligations of the State. Zimbabwe incurs primary responsibility both in the event that the property is not returned to the claimant *and*, importantly, also in the event that the property *is* returned to the claimant. The finding of the tribunal, that the burden lies solely with

---

104) *Ibid*., at para. 51.

105) *Supra* notes 21, 22, 23.

106) UN- Guiding Principles on Business and Human Rights, UN Doc. A/HRC/17/31, Principles 12, 18 and Commentary; OECD Guidelines for Multinational Enterprises – Recommendations for Responsible Business Conduct in a Global Context, adopted on 25 May 2011, Part. I, Chapter IV and Commentary.

the investors, is therefore not based on any reasonable interpretation of human rights law. On any account, the tribunal deliberately rejected the opportunity to remind both parties of their respective human rights obligations, contrary to the standards established in other *amicus* petitions.

F. *Conclusion*

In the *Glamis Gold* arbitration, the tribunal noted that there is no binding effect of arbitral awards for future cases. Nevertheless, there is a certain standard of precedence that requires tribunals wishing to deviate from established jurisprudential practice to provide thorough reasoning for having done so.[107] As shown above, the *von Pezold* tribunal's interpretation of the legal requirements for *amicus* participation is at odds with the interpretations given to these requirements by practically all prior arbitral jurisprudence. On that basis, the tribunal should have supplied a thorough reasoning for its deliberate divergence from established jurisprudential practice as required by the tribunal in *Glamis Gold*. Without such reasoning, the decision simply seems arbitrary, overly restrictive, and devoid of any legal justification.

IV. Future *Amicus* Participation after *von Pezold*?

In cases such as *von Pezold*, where investment law has to be interpreted in light of other norms of international law and arbitrators do not feel confident in doing so, a possible and appropriate solution could have been simply to refuse jurisdiction.[108] As routes to review or appeal from arbitral decisions are available only in limited scenarios under the ICSID rules,[109]

---

107) *Glamis Gold, supra* note 2, at para. 8; on the different approaches to precedent: Andrés Rigo Sureda, "Precedent in Investment Treaty Arbitration", in Christina Binder et al. (eds.), *International Investment Law for the 21st Century – Essays in Honour of Christoph Schreuer*, 830–842, with a section on *amicus* participation.

108) This argument is taken even further, when it is recommended that as a system of private international governance investment arbitrators are not guardians of the public interest and therefore should not decide investment disputes that implicate broader political and economic issues at all. Choudhury, *supra* note 14, 779.

109) Art. 51 (1) (c) (ii) ICSID Arbitration Rules provides for judicial review, when a tribunal has manifestly exceeded its powers, which is construed as being applicable in the event of a general failure to apply international law, as part of the applicable law, or when it comes to the non-application of individual rules, where these rules are fundamental rules such as peremptory

there are serious repercussions for affected non-disputing parties when their participation is denied. Arbitral tribunals thereby hoist the responsibility for a harmonious approach to international law onto other institutions, such as regional human rights bodies. These may be called upon in order to challenge State actions that are taken as an enforcement measure of arbitral tribunal awards, because these awards did not appropriately take into account applicable human rights law. The Inter-American Court has dealt with the relationship between obligations stemming from investment treaties and those based on human rights treaties in a case concerning indigenous peoples in Paraguay and decided in the specific litigation to give priority to the latter.[110] On the basis of the approach chosen in *von Pezold*, further cases of review of arbitral tribunals' decisions are likely to arise in the future.

Taking into account that *amicus* submissions were often accepted but generally[111] never reflected in the final award,[112] investment tribunals' praise for transparency[113] by allowing greater non-disputing party participation serves as merely window dressing. This has now been aggravated by the severe restriction of participation rights in the *von Pezold* case. Investment arbitration is, however, based on the engagement of State sovereignty through the conclusion of BITs[114] and a clear expectation by a rising number of States to allow for non-disputing party participation is becoming visible, through the rules on third-party participation in the ICSID Arbitration Rules and an increasing number of BITs, which directly and explicitly foresee the possibility of *amicus* participation.[115] As Van Duzer has argued,

---

norms of international law. The problem with this review process from the perspective of a third party is that only parties to the dispute may call for a review via the annulment procedure. Schreuer, *supra* note 54, Art. 52, at para. 263.

110) *Sawhoyamaxa Indigenous Community v. Paraguay, supra* note 22, at para. 140.

111) An exception is the *amicus* submission of the EU Commission that features prominently in the decision on jurisdiction in *Electrabel*, *supra* note 2. In *AES* arguments were taken into account but no explicit discussion of the Commission's petition took place. *AES, supra* note 2.

112) Consideration of *amicus* petitions in final awards is rare. It was only in *Biwater* that the tribunal took the arguments explicitly into account: *Biwater Gauff, supra* note 2, at para. 601. In *Pacific Rim* the tribunal rejected an argument of the petitioner and referred to them once more in a general way: *Pacific Rim, supra* note 2, at paras. 2.43, 5.85. In *Glamis* the tribunal stated that it would take arguments into account in the award but it did not do so: *Glamis Gold, supra* note 2, at para. 8. Mention of *amicus* arguments in all decisions does not exist.

113) *Biwater Gauff, supra* note 2, at para. 54.

114) Van Harten, *supra* note 9, at 327–328.

115) *Supra* note 6.

these treaties and the legal possibility to accept and use *amicus* petitions are not only recommendations, such as the NAFTA Free Trade Commission's Statement, but are legally binding and require tribunals actually to follow these rules.[116] Tribunals should abide by the intention of their founders and apply procedural norms more consistently and in good faith. Moreover, they should actually take the *amicus* petitions into account by at least summarizing the arguments contained therein and providing an explanation as to why they have or have not used those arguments within their legal reasoning. To conclude, a quote from the arbitrators in the short but well-reasoned refusal to proceed with *amicus* in the *Aguas del Tunari* case seems appropriate: "The tribunal appreciates that you, and the organizations and individuals with whom you work, are concerned with the resolution of this dispute. The duties of the tribunal, however, derive from the treaties which govern this particular dispute. It has been reported that the new bilateral investment treaty between Singapore and the United States contains provisions for the *amicus* participation of non-governmental organizations. The duty of a tribunal in any case that arises under that instrument will be to follow its dictates."[117]

116) Vanduzer, *supra* note 12, at 720.
117) *Aguas del Tunari, supra* note 2, at 2.