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Defragmenting International Investment Law to Protect Citizen-Consumers: The Role of Amici Curiae and Public Interest Groups

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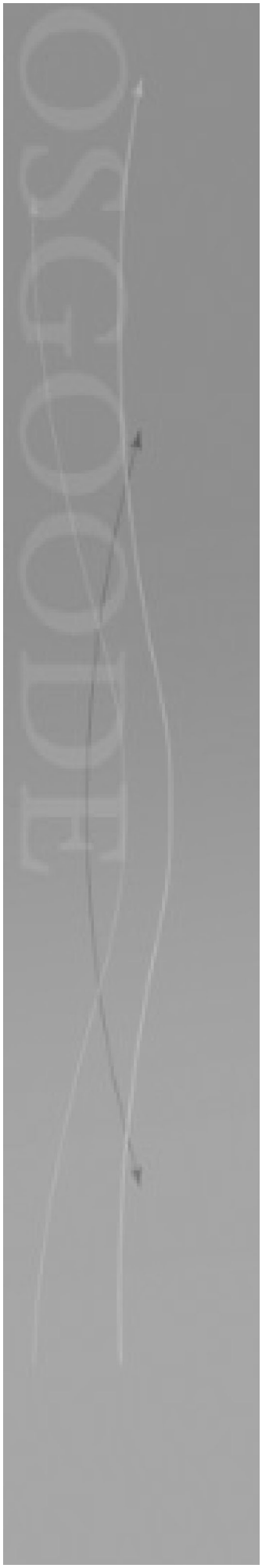

DEFRAGMENTING INTERNATIONAL INVESTMENT LAW TO PROTECT CITIZEN-CONSUMERS: THE ROLE OF *AMICI CURIAE* AND PUBLIC INTEREST GROUPS

ABSTRACT

Investment arbitration decisions are often inconsistent. In particular, complaints about the unpredictability of NAFTA Chapter 11 jurisprudence and the difficulties in balancing foreign investors' interest and public policy are common and unresolved. An examination of the role of interest groups may shed important light on the resolution of that problem as they are involved in the social construction of the meaning and use of NAFTA Chapter 11 through arbitration and public debate. This work discusses the extent to which *amici curiae* empower public interest groups that seek to protect citizen-consumers. It argues that currently *amici curiae* provides an extremely narrow list of participation rights to public interest groups that, coupled with economic and political disadvantages in many cases, result in censoring the views of such groups and playing the political role of symbolic accountability. This work proposes an expansive view of *amici curiae* for public interest groups in light of the potential of the latter to counter the influence corporate interest groups and to contribute to both minimize NAFTA Chapter 11 inconsistencies and strike a more realistic balance between the public interest and foreign investors' interest. The overall impact of such expansive *amici curiae* will probably be the defragmentation of NAFTA Chapter 11, that is to say, public interest groups will be empowered to introduce public interest considerations such as human rights, environmental protection and public health into NAFTA analysis, that are likely to protect the interest of local citizen-consumers. However, that requires not only greater legal powers for public interest groups, but also favorable financial and political conditions for an effective participation of public interest groups in NAFTA disputes. The argument is illustrated with a brief discussion of *amici curiae* in the context of anti-smoking groups and tobacco policies in Canada affecting particularly vulnerable groups with high rates of tobacco consumption such as aboriginal communities and low-income groups.

INTRODUCTION

There is a growing concern about the inconsistencies of investment arbitration decisions in the context of economic globalization. NAFTA Chapter 11 jurisprudence is not an exception. After almost 20 years of NAFTA, the loopholes and uncertainties associated

with the interpretation of, for example, the regulatory expropriation provisions have grown despite the multiple calls for consistency and legitimacy. The resolution of the inconsistencies and unpredictability associated with the application of NAFTA Chapter 11 and the difficulties in balancing foreign investors' interest and public policy is, however, not to be found solely in a self-referential reinterpretation of NAFTA provisions. Placing NAFTA Chapter 11 in context is likely to shed more light into finding solutions to the problems of legal inconsistencies and lack of proper balancing between trade and the public interest. Embedding NAFTA Chapter 11 provisions in the broader institutional environment suggests the need for recognizing, *inter alia*, the role of interest groups in the social construction of the meaning and use of NAFTA provisions through arbitration and public debate. For instance, the idea of public purpose and proportionality of a measure can be socially constructed and interest groups can develop several regulatory expropriation discourses to suit their interests, which may ultimately influence investment tribunals and regulatory decisions by governments and shape public opinion about the ideas of legitimate policies.

An interest group approach to NAFTA Chapter 11 analysis reveals the presence of competing interest groups in the development of investment arbitration. Corporate and public interest groups are central actors in such a process. In particular, given the influential role of corporate groups, an assessment of the ability of public interest groups to balance the influence of foreign investors in the context of NAFTA Chapter 11 appears to be critical. While the development and role of public interest groups depend on multiple social, economic and political factors, NAFTA rules can help promote a

significant role of such groups and then contribute to a better balancing of the interest of foreign investors and the public. Specifically, non-disputing party participation rights or a*mici curiae* are an important institution that mediates in the competition of multiple interest groups that seek to influence the meaning and use of NAFTA Chapter 11.

This work discusses the extent to which *amici curiae* empower public interest groups that seek to protect citizen-consumers. It argues that currently *amici curiae* provide an extremely narrow list of participation rights to public interest groups that, coupled with economic and political disadvantages in many cases, result in both censoring the views of such groups and playing the political role of symbolic accountability. This work proposes an expansive view of *amici curiae* for public interest groups in light of the potential of the latter to counter the influence corporate interest groups and to contribute to both minimize NAFTA Chapter 11 inconsistencies and strike a more realistic balance between the public interest and foreign investors' interest. The overall impact of such expansive *amici curiae* will probably be the defragmentation of NAFTA Chapter 11, that is to say, public interest groups will be empowered to introduce public interest considerations such as human rights, environmental protection and public health into NAFTA analysis that are likely to protect the interest of local citizen-consumers. However, that requires not only greater legal powers for public interest groups, but also favorable financial and political conditions for an effective participation of public interest groups in NAFTA disputes. The argument is illustrated with a brief discussion of *amici curiae* in the context of anti-smoking groups and tobacco policies in Canada affecting particularly vulnerable

groups with high rates of tobacco consumption such as aboriginal communities and low-income groups.

This article is organized as follows. It first reviews the current state of *amici curiae* under NAFTA and raises concerns about the limited participation rights that are accorded to public interest groups. The next section argues that an expansive view of *amici curiae* for public interest groups is warranted in light of its advantages for minimizing the inconsistencies of NAFTA Chapter 11 and better balancing foreign investors' interest and public policy. The last section discusses the example of anti-smoking groups in Canada and the relevance of an expansive view of *amici curiae* particularly for public interest groups seeking to protect vulnerable groups with high rates of tobacco consumption.

AMICI CURIAE AND THE LIMITED LEGAL POWER OF PUBLIC INTEREST GROUPS

Participation rights for non-disputing parties are one important mechanism that can encourage a greater role of public interest groups. This may entail a redesign of the NAFTA rules of the *amici curiae* institution. In *Methanex Corp. v. United States*, a 2001 decision on *amicus curiae*,[1] a tribunal proclaimed its powers to accept *amicus* submissions in investment arbitration for the first time[2] on the basis of its interpretation

[1] *Methanex Corp. v. United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae" (NAFTA Arb., Jan. 15, 2001), http://www.naftaclaims.com/Disputes/USA/Methanex/MethanexDecisionReAuthorityAmicus.pdf [hereinafter *Methanex*, Amici Curiae Decision]

[2] Other NAFTA tribunals have also allowed *amicus curiae* in arbitration. See *United Parcel Serv. of Am., Inc. v. Canada*, Decision on Petitions for Intervention and Participation as Amici Curiae, (NAFTA Arb.

of article 15(1) of the UNCITRAL Rules, which is substantially similar to Article 44 of the ICSID Convention[3]. According to the 2003 *Statement of the Free Trade Commission on Non-disputing Party Participation*, the NAFTA agreement does not limit "a Tribunal's discretion to accept written submissions from a person or entity that is not a disputing party (a "non-disputing party")"[4]. In the Statement, the FTC recommends Tribunals to adopt a number of procedural rules concerning non-disputing party participation. While this is an important progress in the right direction, several of such recommendations restrict the ability of non-disputing parties to exert a significant influence on arbitration decisions and public debate more generally. These restrictions to the submissions of *amici curiae* include a short page limit, no obligation on the Tribunal to consider that submission, lack of permission for further submissions and no access to documents:

> 3. The submission filed by a non-disputing party will:
> (b) be concise, and in no case longer than 20 typed pages, including any appendices;
> …
> 9. The granting of leave to file a non-disputing party submission does not require the Tribunal to address that submission at any point in the arbitration. The granting of leave to file a non-disputing party submission does not entitle the non-disputing party that filed the submission to make further submissions in the arbitration.

2001), paras. 63, 64, 66 ("…articles 1128 and 1133 of NAFTA do not preclude the existence of a power under article 15(1) [of the UNCITRAL Arbitration Rules] to allow a third party to make *amicus* submissions. …") and 73 ("The Tribunal declares that it has power to accept written *amicus* briefs from the Petitioners"), http://www.naftaclaims.com/Disputes/Canada/UPS/UPSDecisionReParticipationAmiciCuriae.pdf.; *Glamis Gold Ltd. v. United States,* Decision on Application and Submission by Quechan Indian Nation, (NAFTA Arb., September 16, 2005), pars. 13, http://www.naftaclaims.com/Disputes/USA/Glamis/Glamis-Amicus-Decision--16-09-05.pdf

[3] *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v. Argentina,* ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae* (May 19, 2005), para. 14 (noting that similarity), http://juris.prod.advomatic.com/files/free_pdfs/Suez%20v%20Argentina%20-Response%20Amicus.pdf.

[4] *Statement of the Free Trade Commission on Non-disputing Party Participation*

> 10. Access to documents by non-disputing parties that file applications under these procedures will be governed by the FTC's Note of July 31, 2001.[5]

It is also important to note that in *Methanex Corp. v. United States*, Decision on *amicus curiae*,[6] the tribunal, while admitting non-disputing parties[7], rejected their request to attend oral hearings of the arbitration.[8] Non-NAFTA tribunals have also rejected requests to attend oral hearings.[9] Likewise, the *Methanex* tribunal also indicated that "[a]s *amici* have no rights under Chapter 11 of NAFTA to receive any materials generated within the arbitration (or indeed any rights at all), they are to be treated by the Tribunal as any other members of the public."[10] More generally, the tribunal stated that:

> ... in the Tribunal's view, its receipt of written submissions from a person other than the Disputing Parties is not equivalent to adding that person as a party to the arbitration. The rights of the Disputing Parties in the arbitration and the limited rights of a Non-Disputing Party under Article 1128 of NAFTA are not thereby acquired by such a third person. Their rights, both procedural and substantive, remain juridically exactly the same before and after receipt of such submissions; and the third person acquires no rights at all. The legal nature of the arbitration remains wholly unchanged.[11]

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[5] *Statement of the Free Trade Commission on Non-disputing Party Participation*.
[6] *Methanex Corp. v. United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae" (NAFTA Arb., Jan. 15, 2001), http://www.naftaclaims.com/Disputes/USA/Methanex/MethanexDecisionReAuthorityAmicus.pdf [hereinafter *Methanex*, Amici Curiae Decision]
[7] Par. 53 (the Petitions for *amicus curiae* submissions were accepted by the Tribunal subject to procedural limitations)
[8] Par. 42 and 47 ("The Tribunal also concludes that it has no power to accept the Petitioners' requests to receive materials generated within the arbitration or to attend oral hearings of the arbitration.").
[9] See e.g. *Biwater Gauff, Ltd. v. Tanzania*, ICSID (World Bank) Case No. ARB/05/22, Procedural Order No 5 (February 2, 2007), para. 71 ("…Claimant objects to the presence of the Petitioners at the hearing. The Arbitral tribunal therefore has no power to permit the Petitioners' presence or participation at the hearing, and must accordingly reject its application in this regard"); *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v. Argentina,* ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae* (May 19, 2005), para. 33 ("…the Tribunal has unanimously decided to: …deny Petitioners' request to attend the hearings of this case"), http://juris.prod.advomatic.com/files/free_pdfs/Suez%20v%20Argentina%20-Response%20Amicus.pdf.
[10] Par. 46 and 47.
[11] Par. 30.

That narrow view of *amici curiae* as set out in the FTC Statement and *Methanex* has been upheld by more recent decisions. In *Glamis Gold Ltd. v. United States*,[12] the NAFTA tribunal, dismissing regulatory expropriation and fair and equitable treatment claims, dealt with several *amicus curiae* submissions by the National Mining Association, the Quechan Indian Nation, Sierra Club and Earthworks, and Friends of the Earth. Confirming its earlier decision to accept each submission,[13] the tribunal reinforced the restrictions on non-disputing parties recommended in the FTC Statement as follows:

> … The Tribunal expressed its view that it should apply strictly the requirements specified in the FTC Statement, for example restrictions as to length or limitations as to the matters to be addressed, but that, given the public and remedial purposes of non-disputing submissions, leave to file and acceptance of submissions should be granted liberally. ... In accepting each submission, the Tribunal noted Section (B)(9) of the FTC Statement, which states that acceptance of a non-disputing submission does not require the Tribunal to consider that submission at any point in the arbitration, nor does it entitle the non-disputing party to make any further submissions. Finally, the Tribunal expressed its intent to ensure that the incorporation of any submission, or parts thereof, would not unduly burden the Parties or delay the proceedings.[14]

Clearly, those limitations of the participation rights of *amici* are in themselves problematic. But even such a modest list of participation rights may not materialize at all for non-disputing parties seeking to participate in arbitration. Upon a request for *amicus curiae* status, tribunals can deny it as they have the power and discretion, but not the

[12] Award (NAFTA Arb., June 8, 2009), http://www.naftaclaims.com/Disputes/USA/Glamis/Glamis-USA-Award.pdf.

[13] On February 15, 2007, the Tribunal issued its decisions on the non-disputing party applications to file submissions in separate letters to each of the mentioned groups. The Tribunal decided to accept each submission. See para. 286.

[14] Para. 286. See also *Glamis Gold Ltd. v. United States*, Decision on Application and Submission by Quechan Indian Nation (Sept. 16, 2005), paras. 10-15 (following the FTC Statement, the granting of leave to file *amicus curiae* submissions do not require the Tribunal to address the submission at any point in the arbitration, nor does it entitle a non-disputing party to make further submissions).

duty, to allow *amicus curiae*.[15] Even if tribunals do allow *amicus curiae* submissions, they can further restrict the participation rights of non-disputing parties. The tribunal in *United Parcel Serv. of Am., Inc. v. Canada* asserted:

> …The power of the Tribunal to permit *amicus* submissions is not to be used in a way which is unduly burdensome for the parties or which unnecessarily complicates the Tribunal process. The Tribunal envisages that it will place limits on the submissions to be made in writing in terms for instance of the length. The third parties would not have the opportunity to call witnesses …with the result that the disputing parties would not face the need to cross-examine them or call contradictory evidence. …[16]
>
> The submissions are to relate to issues raised by the disputing parties and cannot introduce new issues in the litigation or go beyond the scope of the case as defined by the disputing parties.[17]
>
> …The Tribunal does not expect that it will give leave to file submissions which are longer than twenty pages (including schedules).[18]

Thus, *amici curiae* currently offer a narrow list of legal rights to non-disputing parties to participate in NAFTA arbitrations. These legal limitations become even more problematic when such a narrow view of *amici curiae* is applied in the context of unorganized, financially weak or politically disadvantaged public interest groups. Ultimately, this may result in both censoring the views of such groups and playing the political role of symbolic accountability of investment arbitrations.

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[15] *United Parcel Serv. of Am., Inc. v. Canada*, Decision on Petitions for Intervention and Participation as Amici Curiae, (NAFTA Arb. 2001), paras. 63 and 64 (tribunals have the power -but no duty- to receive third party submissions), http://www.naftaclaims.com/Disputes/Canada/UPS/UPSDecisionReParticipationAmiciCuriae.pdf.

[16] *United Parcel Serv. of Am., Inc. v. Canada*, Decision on Petitions for Intervention and Participation as Amici Curiae, (NAFTA Arb. 2001), para. 69. See also para. 73 ("The Tribunal declares that it has power to accept written *amicus* briefs from the Petitioners. It will consider receiving them at the merits stage of the arbitration following consultation with the parties, exercising its discretion in the way indicated in this decision…"). For further details on such restrictions, see *United Parcel Serv. of Am., Inc. v. Canada*, Direction of the Tribunal on the Participation of *Amici Curiae*, (NAFTA Arb., August 1, 2003), par. 3 ("The Order is limited to written briefs. It does not extend to the adducing of evidence…"), http://naftaclaims.com/Disputes/Canada/UPS/UPSFurtherOrderReAmicusSubs.pdf

[17] *United Parcel Serv. of Am., Inc. v. Canada*, Direction of the Tribunal on the Participation of *Amici Curiae*, (NAFTA Arb., August 1, 2003), par. 5.

[18] *United Parcel Serv. of Am., Inc. v. Canada*, Direction of the Tribunal on the Participation of *Amici Curiae*, (NAFTA Arb., August 1, 2003), par. 8.

It is therefore important to consider relaxing such restrictions and assigning more participation rights to non-disputing parties particularly public interest groups that advocate the protection of, for instance, public health such as anti-smoking citizen-consumer groups. The proper defense of public health from the position of *amicus* may require a pleading of more than 20 pages, submissions of scientific evidence and access to the records in order to respond to the parties' evidence and claims. Such non-disputing parties should thus have the right to make longer written submissions such as in recent decisions between 30 and 50 pages[19] as well as further written submissions and other evidence;[20] access to the evidentiary record and the disputing parties' submissions;[21] and the right to attend hearings and make oral submissions. In fact, most non-disputing

[19] See e.g. *Biwater Gauff, Ltd. v. Tanzania*, ICSID (World Bank) Case No. ARB/05/22, Procedural Order No 5 (February 2, 2007), para. 60 (accepting a request of several groups for an *amicus curiae* participation, the Tribunal stated that "…the Petitioners, jointly, should file a single, initial written submission, …, but limited to a maximum of 50 pages (double-spaced)…."), http://juris.prod.advomatic.com/files/free_pdfs/Biwater%20v%20Tanzania%20-%20Procedural%20Order%20No.%205.pdf; Epaminontas Triantafilou, *A More Expansive Role for Amici Curiae in Investment Arbitration?*, KLUWER ARB. BLOG (May 11, 2009), http://kluwerarbitrationblog.com/blog/2009/05/11/a-more-expansive-role-foramici-curiae-in-investment-arbitration/.

[20] Tribunals have considered requesting further submissions from non-disputing parties. See e.g. *Biwater Gauff, Ltd. v. Tanzania*, ICSID (World Bank) Case No. ARB/05/22, Procedural Order No 5 (February 2, 2007), para. 72 ("…the Arbitral Tribunal reserves the right to ask the Petitioners specific questions in relation to their written submission, and to request the filing of further written submissions and/or documents or other evidence, …").

[21] Some tribunals have considered the possibility of allowing non-disputing parties to have access to documents filed by parties. See e.g. *Biwater Gauff, Ltd. v. Tanzania*, ICSID (World Bank) Case No. ARB/05/22 (2007), Procedural Order No 5, para. 66 ("…Once the April hearing has been concluded, however, the concerns with respect to procedural integrity may be altered, and if so, there may then be less impediment to the disclosure of documents to non-disputing parties. …"), http://juris.prod.advomatic.com/files/free_pdfs/Biwater%20v%20Tanzania%20-%20Procedural%20Order%20No.%205.pdf.

parties have requested a similar list of participation rights in several NAFTA cases in which they were granted *amicus curiae* status.[22] This expansive non-disputing party participation becomes even more important for improving the consistency and public accountability of the NAFTA tribunal's decisions in light of the fact that Chapter 11 tribunals' decisions are not subject to judicial review on their merits.[23]

The value of such expansive non-disputing party participation is not limited to improving the decisions of tribunals and, more generally, the transparency and the legitimacy of NAFTA arbitration mechanism, as most scholars argue.[24] It also serves to legally empower public interest groups to balance the influence of foreign investors on domestic

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[22] See *Methanex Corp. v. United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae" (NAFTA Arb., Jan. 15, 2001), paras. 5 and 7, http://www.naftaclaims.com/Disputes/USA/Methanex/MethanexDecisionReAuthorityAmicus.pdf [hereinafter *Methanex*, Amici Curiae Decision]; *United Parcel Serv. of Am., Inc. v. Canada*, Decision on Petitions for Intervention and Participation as Amici Curiae, (NAFTA Arb., October 17, 2001), par. 4, http://www.naftaclaims.com/Disputes/Canada/UPS/UPSDecisionReParticipation AmiciCuriae.pdf; *Glamis Gold Ltd. v. United States,* Award (NAFTA Arb., June 8, 2009), para. 290 (various non-disputing parties requested access to the hearing and the Tribunal invited the Quechan to view the proceedings from a different location), http://www.naftaclaims.com/Disputes/USA/Glamis/Glamis-USA-Award.pdf; see also documents in which the request for access to the hearings was made: Letter to the Tribunal from Earthjustice (Apr. 25, 2007); Letter to the Tribunal from Courtney Ann Coyle, Esq. (June 26, 2007) (requesting the ability of the Quechan to view all aspects of the proceedings so as to monitor the protection of tribal cultural resources confidentiality).

[23] NAFTA, arts. 201 T 2, 1136 6. Although domestic courts are not allowed to review tribunals' application of the law, they can only set aside NAFTA tribunal decisions that went beyond the scope of its jurisdiction. *See* Mexico v. Metalclad Corp., [2001] 89 B.C.L.R.3d 359, 2001 BCSC 664 IT 67, 99 (Can.) (to the British Columbia Supreme Court, acting as the appeal court, the issue was "whether the Tribunal made decisions on matters beyond the scope of the submission to arbitration by deciding upon matters outside Chapter 11"); *see also* INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, PRIVATE RIGHTS, PUBLIC PROBLEMS: A GUIDE TO NAFTA's CONTROVERSIAL CHAPTER ON INVESTOR RIGHTS 41 (2001), *available at* http://www.iisd.org/pdf/tradecitizensguide.pdf, Julie Soloway, *NAFTA's Chapter 11: Investor Protection, Integration, and the Public Interest, in* SUSTAINABILITY, CIVIL SOCIETY AND INTERNATIONAL GOVERNANCE, at 137, 140 ("[A] domestic court will not be entitled to review a decision on its merits, but rather, it may only rule on the much narrower legal question of whether the tribunal exceeded its jurisdiction in any way.").

[24] See generally e.g. Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT'L L. 775, 809 (2008) ("transparency through public access to the investment arbitration process or involvement of amici curiae on public interest issues …adds to the credibility of this decision making process and helps to legitimize the process in the eyes of the public.")

policy-making in and beyond arbitration. In particular, public interest groups will be in a better position to contribute to the determination of the public purpose and the proportionality of government measures and offset the over-influence of the corporate discourse.

Past attempts by public interest groups to influence NAFTA arbitrations, even under a narrow approach to *amici curiae,* show the potential of non-disputing party participation. In *Methanex Corp. v. United States*, Decision on *amicus curiae*,[25] the tribunal dealt with petitions by the International Institute for Sustainable Development, Communities for a Better Environment, the Bluewater Network of Earth Island Institute and the Center for International Environmental Law, requesting to appear as *amici curiae* on the basis of the immense public importance of the case. The Institute also contended that "the interpretation of Chapter 11 of NAFTA should reflect legal principles underlying the concept of sustainable development; and that the Institute could assist the Tribunal in this respect".[26] Furthermore, the Institute argued that "there was an increased urgency in the need for *amicus* participation in the light of the award … in *Metalclad Corporation v. United Mexican States* and an alleged failure to consider environmental and sustainable development goals in that NAFTA arbitration."[27] The *Methanex* tribunal, accepting the petitions and even adopting a narrow view of *amicus curiae*,[28] recognized the relevance

[25] *Methanex Corp. v. United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae" (NAFTA Arb., Jan. 15, 2001), http://www.naftaclaims.com/Disputes/USA/Methanex/MethanexDecisionReAuthorityAmicus.pdf [hereinafter *Methanex*, Amici Curiae Decision]
[26] Par. 5.
[27] Par. 6
[28] Par. 53.

of allowing such groups to participate in a Chapter 11 arbitration in which the public interest was at stake:

> There is an undoubted public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between private parties. This is not merely because one of the disputing parties is a State … The public interest in this arbitration arises from its subject matter, as powerfully suggested in the Petitions. There is also a broader argument, as suggested by the [United States] and Canada: the Chapter 11 arbitral process could benefit from being perceived as more open or transparent, or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's willingness to receive *amicus* submissions might support the process in general and this arbitration in particular, whereas a blanket refusal could do positive harm.[29]

Interestingly, departing from *Metalclad* and deciding on the main issue, the *Methanex* tribunal held the view that the public purpose behind the regulatory measure was paramount and trumped all, making the regulation a lawful one and thus permitted under NAFTA.[30] The public purpose was decisive, finding no expropriation and no obligation to compensate.[31]

Similarly, in *United Parcel Serv. of Am., Inc. v. Canada*, decision on *amicus curiae*,[32] the Canadian Union of Postal Workers and the Council of Canadians, seeking expansive *amicus curiae* rights, contended that there was a public interest in that arbitration and

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[29] *Methanex Corp. v. United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae" (NAFTA Arb., Jan. 15, 2001), par. 49, http://www.naftaclaims.com/Disputes/USA/Methanex/MethanexDecisionReAuthorityAmicus.pdf [hereinafter *Methanex*, Amici Curiae Decision]. This reasoning has been followed by non-NAFTA tribunals. See e.g. *Biwater Gauff, Ltd. v. Tanzania*, ICSID (World Bank) Case No. ARB/05/22, Procedural Order No 5 (February 2, 2007), para. 51.

[30] *Methanex Corp. v. United States*, 44 I.L.M. 1345, pt IV, 15 (NAFTA/UNCITRAL Arb. Trib. 2005).

[31] *Id.*

[32] *United Parcel Serv. of Am., Inc. v. Canada*, Decision on Petitions for Intervention and Participation as Amici Curiae, (NAFTA Arb., October 17, 2001), http://www.naftaclaims.com/Disputes/Canada/UPS/UPSDecisionReParticipationAmiciCuriae.pdf.

they have real interest in adding a perspective that clearly departs from the view of foreign investors:

> …the claim raises issues of broad public interest which extend well beyond postal services to other public and social services. Further, the expansive interpretation of NAFTA urged by the Investor would dramatically expand the scope for foreign investor claims and put at risk a broad diversity of government measures that should not be vulnerable to such claims. … They say that they are uniquely qualified to contribute a perspective on these matters of broader public interest, a perspective which would otherwise be absent.[33]

Non-NAFTA tribunals have also allowed *amicus curiae* participation by public interest groups[34] because of their potential contribution to improve the tribunal decisions on matters affecting the public interest, human rights and consumers rights. For example, in *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v. Argentina*,[35] five non-governmental organizations requested *amicus curiae* participation, namely Asociación Civil por la Igualdad y la Justicia (ACIJ), Centro de Estudios Legales y Sociales (CELS), Center for International Environmental Law (CIEL), Consumidores Libres Cooperativa Ltda. de Provisión de Servicios de Acción Comunitaria, and Unión de Usuarios y Consumidores. The *Aguas Argentinas* tribunal noted that the public interest warranted allowing NGOs to participate as *amicus* and recognized that non-parties can provide a perspective that can help decide a matter that will affect millions of citizens-consumers and will also have an impact on human rights:

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[33] Par. 14.

[34] See e.g. V. Vadi, *Critical Comparisons: The Role of Comparative Law in Investment Treaty Arbitration*, Denv. J. Int'l L. & Pol'y, (2010) ("Increasingly, investment arbitration tribunals have allowed public interest groups to present amicus curiae briefs or have access to the arbitral process. …"), V. Vadi, *Cultural Diversity Disputes and The Judicial Function in International Investment Law*, Syracuse J. Int'l L. & Com., (2011) (noting the same).

[35] ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae* (May 19, 2005)

> …The factor that gives this case particular public interest is that the investment dispute centers around the water distribution and sewage systems of a large metropolitan area, the city of Buenos Aires and surrounding municipalities. Those systems provide basic public services to millions of people and as a result may raise a variety of complex public and international law questions, including human rights considerations. Any decision rendered in this case, whether in favor of the Claimants or the Respondent, has the potential to affect the operation of those systems and thereby the public they serve.
> These factors lead the Tribunal to conclude that this case does involve matters of public interest of such a nature that have traditionally led courts and other tribunals to receive *amicus* submissions from suitable nonparties. …
> Given the public interest in the subject matter of this case, it is possible that appropriate nonparties may be able to afford the Tribunal perspectives, arguments, and expertise that will help it arrive at a correct decision. …[36]

Similarly, in *Biwater Gauff, Ltd. v. Tanzania*,[37] five petitioners filed a petition for *amicus curiae* status: the Lawyers' Environmental Action Team, the Legal and Human Rights Centre, the Tanzania Gender Networking Programme, the Center for International Environmental Law and the International Institute for Sustainable Development.[38] The Petitioners stated that the privatization at issue in that arbitration was conceived to work towards the goal of halving the proportion of people who are unable to reach or to afford safe drinking water as committed by the international community in the UN Millennium Declaration.[39] They further claimed that the arbitration "has a substantial influence on the population's ability to enjoy basic human rights."[40] Allowing the petitioners to make limited *amicus* submissions,[41] the tribunal envisaged "that the Petitioners will address

[36] *Ibid*. paras. 19-21.
[37] ICSID (World Bank) Case No. ARB/05/22 (2007), Procedural Order No 5, paras. 1, 55, http://juris.prod.advomatic.com/files/free_pdfs/Biwater%20v%20Tanzania%20-%20Procedural%20Order%20No.%205.pdf.
[38] *Ibid*. para. 1.
[39] *Ibid*. para. 13.
[40] *Ibid*. para. 14.
[41] For example, the Tribunal rejected their request to attend oral hearings and open access to documents was not granted.

broad policy issues concerning sustainable development, environment, human rights and governmental policy".[42]

Public interest groups can also help establish the proportionality of a measure. For instance, public pressure by public interest groups may be an important consideration in legally legitimizing bona fide, non-discriminatory regulatory measures for pressing public purposes. "In *Tecmed,* the tribunal reasoned that the social and political circumstances that surround a regulatory decision are also important factors in assessing the proportionality of the measure and establishing unlawful expropriation. In particular, the tribunal suggest that an otherwise expropriatory regulation will not be categorized as expropriation where it is implemented in proportional response to a serious urgent situation or social emergency."[43]

A regulatory response and an urgent situation or social emergency are to some extent socially constructed and interest groups play an important role in both constructing such a situation or emergency and pressing for a regulatory response. Thus, the presence or absence of active interest groups is likely to determine the NAFTA legitimacy of a regulatory action as they are involved in the social construction of the response and the urgent situation or social emergency. It follows that, in the case of tobacco regulation and with an expansive *amicus curiae*, public interest groups advocating appropriate measures to reduce extremely high levels of tobacco consumption among, for example, aboriginal communities may be in a stronger position to demonstrate the urgency of the situation

[42] *Ibid*. para. 64.
[43] Alberto Salazar V., "NAFTA Chapter 11, Regulatory Expropriation and Domestic Counter-Advertising Law" (2010) 27 Arizona Journal of International and Comparative Law 31 at 80.

and disseminate information about the proportionality and public purpose of a measure in and outside an arbitration.

Furthermore, expansive non-disputing party participation will reduce the chilling effect of foreign investors' use of NAFTA Chapter 11 suits. Public interest groups empowered with greater participation rights can be perceived as strong advocates of public health before, during and after an arbitration, which may discourage excessive threat of NAFTA lawsuits by foreign investors. This will create an institutional environment that favors a more balanced use of NAFTA Chapter 11 in which public policy and the interest of investors are better balanced even without reaching arbitration.

Moreover, an expansive non-disputing party participation is likely to induce the growth and the greater engagement of public interest groups with investment arbitrations and public debate as spheres of promoting public policy. Such groups may be encouraged by an expansive *amicus curiae* to seek more participation in arbitration cases as they may feel that their views can be communicated more effectively and be influential. The possibility that *amici curiae* can increase the participation of public interest groups is real. In fact, that was the fear of Methanex Corporation that raised that concern to oppose the granting of a (narrow) *amicus curiae* status to several public interest groups in *Methanex*.[44] Such increased participation of public interest groups in arbitration will in turn incentivize them to further engage in domestic policy-making and challenge the

[44] See *Methanex Corp. v. United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae" (NAFTA Arb., Jan. 15, 2001), par. 14 ("…An undesirable precedent would be set and other groups might be encouraged to seek to appear as *amici* in arbitrations under Chapter 11 of NAFTA"),http://www.naftaclaims.com/Disputes/USA/Methanex/MethanexDecisionReAuthorityAmicus.pdf [hereinafter *Methanex*, Amici Curiae Decision]

influence of corporate groups. From this perspective, *amici curiae* turn out to be an important legal institution that mediates in the broader competition between interest groups involved in public policy-making under the pressures of economic globalization. Needless to say, such impact of an expansive *amici* not only will help fix the democratic deficit of NAFTA but also contribute to improve the democratic nature of domestic law and policy making.

The overall impact of such expansive view of *amici curiae* will probably be the defragmentation of NAFTA Chapter 11, that is to say, public interest groups will be empowered to introduce public interest considerations such as human rights, environmental protection and public health into NAFTA analysis that are likely to protect the interest of local citizen-consumers. However, the effectiveness of an expansive *amicus curiae* requires not only greater legal powers for public interest groups. It also needs to pay attention to the financial and political conditions that will favor an effective participation of public interest groups in NAFTA disputes.

AMICI CURIAE IN CONTEXT: TOBACCO REGULATION AND COMPETING INTEREST GROUPS IN CANADA

The role of public interest groups in the development of tobacco control policies in Canada provides an interesting example of the significance of the social context of *amici curiae* in NAFTA disputes. In particular, a close examination of the attempts to introduce plain packaging legislation in Canada and the role of competing interest groups reveals

that unfavorable financial and political conditions may hinder the ability of public interest groups to participate in NAFTA disputes and policy-making more generally.

There is some evidence that the tobacco industry has been engaging in several strategies to influence the meaning of NAFTA expropriation provisions and the perception and beliefs associated with what constitutes a NAFTA-based legitimate tobacco control measure, as part of their broader strategies to influence tobacco consumption and its regulation in society. In "May 10, 1994. Carla Hills (on behalf of Philip Morris and RJ Reynolds) tells the Standing Committee that Plain Packaging would be an infringement of GATT, NAFTA and the Paris Convention."[45] The plain packaging initiative in Canada ultimately failed in 1995 when the Supreme Court of Canada invalidated the Canadian Tobacco Products Control Act. It is widely believed that RJR's NAFTA suit threat deterred the Canadian government from instituting plain packaging before the Court ruling.[46]

Similarly, Phillip Morris engaged in a campaign to oppose the attempt of Canada's government to regulate the wording of cigarette marketing. In 2001, the Government of Canada proposed a regulation to "prohibit the display of 'light' and 'mild' descriptors on tobacco packaging."[47] Phillip Morris International Inc. protested the ban on the basis of

[45] Physicians for Smoke-Free Canada "The Plot Against Plain Packaging How multinational tobacco companies colluded to use trade arguments they knew were phoney to oppose plain packaging. And how health ministers in Canada and Australia fell for their chicanery." (2008), http://www.smoke-free.ca/pdf_1/plotagainstplainpackaging-apr1'.pdf

[46] http://jurist.org/forum/2011/12/allyn-taylor-tobacco-suit.php

[47] See Tobacco.org, Philip Morris Submission to Canada on NAFTA 's Chapter 11 Provision, http://www.tobacco.org/Documents/0203pmnafta.html). See also Alberto Salazar V., "NAFTA Chapter 11, Regulatory Expropriation and Domestic Counter-Advertising Law" (2010) 27 Arizona Journal of International and Comparative Law 31 at 69-70.

Chapter 11 arguing that, "the ban would be tantamount to an expropriation of tobacco trademarks containing descriptive terms."[48] The proposed regulation was never fully developed. The threat of a NAFTA Chapter 11 lawsuit convinced Canada to back down from instituting plain packaging with health warnings for cigarettes.[49]

The debate over plain packaging of cigarettes has gained momentum in Canada with the recent decision of Australia's Supreme Court to uphold such legislation which has come into force on December 1, 2012.[50] Plain packaging legislation will bar tobacco companies from displaying their brand designs, colours and logos on cigarette packs which will instead feature bigger health warnings and strong anti-smoking images. In Canada, the tobacco industry and anti-smoking groups have reinvigorated their opposite views. For example, the Canadian Cancer Society, the Non-Smokers' Rights Association and Physicians for a Smoke-Free Canada are urging the adoption of plain packaging laws

[48] *Id*. *See also* Donald W. Zeigler, *International Trade Agreements Challenge Tobacco and Alcohol Control Policies*, 25 DRUG & ALCOHOL REV. 567, 568 (2006) (explaining that "Philip Morris used [a technical barrier to trade] argument[] to contest a Canadian ban on use of the terms 'mild' and 'light' in cigarette promotion, because the corporation said that a ban was not the least trade restrictive alternative to reduce tobacco-related problems.").

[49] See Physicians for Smoke-Free Canada "The Plot Against Plain Packaging How multinational tobacco companies colluded to use trade arguments they knew were phoney to oppose plain packaging. And how health ministers in Canada and Australia fell for their chicanery." (2008), http://www.smoke-free.ca/pdf_1/plotagainstplainpackaging-apr1'.pdf
"2002: Canadian proposals to ban 'light' descriptors
Philip Morris filed a notice claiming that any bans on trademarks would be an expropriation, inconsistent with Chapter 11 of NAFTA, saying that they had "invested substantial sums to develop brand identity and consumer loyalty for these low yield products." Canada has yet to impose regulations banning these terms, although a voluntary agreement was reached with Philip Morris' subsidiary and other tobacco companies." See also ROBERT WEISSMAN, INTERNATIONAL TRADE AGREEMENTS AND TOBACCO CONTROL: THREATS TO PUBLIC HEALTH AND THE CASE FOR EXCLUDING TOBACCO FROM TRADE AGREEMENTS (2003); E.R. Shaffer, J.E. Brenner & T.P. Houston, *International Trade Agreements: A Threat to Tobacco Control Policy*, 14 TOBACCO CONTROL (SUPPLEMENT II) ii19, ii22 (2005); Ellen Gould, *Trade Treaties and Alcohol Advertising Policy*, 26 J. PUB. HEALTH POL'Y 359 (2005); Interview by Runako Kumbula with Cynthia Callard, Executive Director, Physicians for a Smoke Free Canada (Apr. 1, 2002).

[50] "Cigarette plain packaging laws come into force in Australia. Smoking warnings and diseased body parts emblazoned on dull green boxes that are the same for all tobacco brands" *The Guardian* (Saturday 1 December 2012), http://www.guardian.co.uk/world/2012/dec/01/plain-packaging-australian-cigarette-tobacco.

following Australia's precedent.[51] On the other hand, Imperial Tobacco Canada, a subsidiary of British American Tobacco and one of the companies that has challenged the Australian legislation, has questioned the effectiveness of plain packaging of tobacco products in discouraging youth initiation or encouraging cessation by existing smokers.[52] This debate is expected to grow and NAFTA arguments against plain packaging legislation will probably be a central part of that debate. Indeed, trade objections to such legislation have recently been raised by Philip Morris Asia that is challenging Australia's plain packaging legislation under the 1993 bilateral investment treaty between Australia and Hong Kong.

While the tobacco industry is actively influencing the meaning and use of NAFTA Chapter 11 and appears to have succeeded in deterring plain packaging legislation, anti-smoking groups and other public interest groups are not necessarily in the same position to exert such degree of influence. Such groups often lack the financial resources and

[51] "Canadian anti-smoking advocates urge plain packaging laws. Tobacco companies say current labelling laws infringe on rights" *CBC News* (August 15, 2012), http://www.cbc.ca/news/canada/story/2012/08/15/tobacco-plain-packaging-laws-canadian-reaction.html; Carly Weeks "Canada's cigarette warning labels could still go further, report finds" *The Globe and Mail* (November 14, 2012), (reporting that Rob Cunningham, an analyst with the Canadian Cancer Society, has indicated that "[w]e urge the federal government to take steps toward implementing plain packaging in Canada …If Australia can do it and other countries are actively looking at it, Canada can similarly make steps to move forward"; "Given that Canada was the first country to introduce graphic warnings on cigarette packages, there's no reason to delay implementing plain packaging here, said Neil Collishaw, research director of Physicians for a Smoke-Free Canada."), http://www.theglobeandmail.com/life/health-and-fitness/health/canadas-cigarette-warning-labels-could-still-go-further-report-finds/article5253202/

[52] "Canadian anti-smoking advocates urge plain packaging laws. Tobacco companies say current labelling laws infringe on rights" *CBC News* (August 15, 2012), (reporting comments by Caroline Ferland, vice-president of corporate and regulatory affairs for Imperial Tobacco Canada) http://www.cbc.ca/news/canada/story/2012/08/15/tobacco-plain-packaging-laws-canadian-reaction.html; Omid Ghoreishi "Canada Urged to Follow Australia's New Cigarette Packaging Law. No proof that plain packaging will deter smoking, says tobacco company" *The EpochTimes* (August 22, 2012) (reporting the same).

ability to launch massive campaigns and lobby governments for further intervention to reduce tobacco consumption.

That problem has recently become more evident with the decision of the government of Canada to cut funding for anti-smoking groups. The Non-Smokers' Rights Association, for example, is taking a 40 per cent hit to its budget because of the cuts to the grants program.[53] Health groups and tobacco control advocates are of course appalled. Garfield Mahood, founding executive director of the Non-Smokers' Rights Association, has raised concerns about the impact of such decision indicating that the *only* winner is really Big Tobacco. [54] "By slashing funding to health groups, the Harper government has virtually assured that tobacco companies will have the upper hand in influencing federal policy decisions." [55] The funding grants to anti-smoking groups have "helped counter the influence of tobacco companies and their lobbying efforts … and have helped with the research behind successful campaigns and policy initiatives."[56]

What is most concerning is that these funding cuts may undermine anti-smoking groups that seek to represent vulnerable groups with high tobacco consumption rates. For

[53] "Anti-smoking groups decry cuts by Health Canada. Groups say health of Canadians at risk" (CBC News, Apr 17, 2012), http://www.cbc.ca/news/canada/ottawa/story/2012/04/17/pol-0tobacco-cuts.html

[54] Geoffrey Lansdell, "How the Conservatives are gutting tobacco control", *Macleans*, Friday, May 18, 2012, online: http://www2.macleans.ca/2012/05/18/how-the-conservatives-are-gutting-tobacco-control/ (October 11, 2012)

[55] Geoffrey Lansdell, "How the Conservatives are gutting tobacco control", *Macleans*, Friday, May 18, 2012, online: http://www2.macleans.ca/2012/05/18/how-the-conservatives-are-gutting-tobacco-control/ (October 11, 2012). See also "Anti-smoking groups decry cuts by Health Canada. Groups say health of Canadians at risk" (CBC News, Apr 17, 2012), http://www.cbc.ca/news/canada/ottawa/story/2012/04/17/pol-0tobacco-cuts.html (raising the same concerns).

[56] "Anti-smoking groups decry cuts by Health Canada. Groups say health of Canadians at risk" (CBC News, Apr 17, 2012), http://www.cbc.ca/news/canada/ottawa/story/2012/04/17/pol-0tobacco-cuts.html

instance, smoking rates are out of control among aboriginal populations. "Tobacco-related illnesses and diseases are urgent issues in First Nations and Inuit communities, where smoking rates are more than triple the rate for the rest of Canada".[57] Similar concerns are expressed for other groups with high prevalence of tobacco consumption such as youth, ethnic minorities and low income people.[58] This should not be surprising because "smoking is now clearly associated with disadvantage and inequity."[59] Although approximately 20% of the Canadian population smokes, certain subpopulations have higher prevalence, including Aboriginals, low-income people, and homeless people.[60] Recent estimates indicate that the smoking rate in Canada's aboriginal population is close to 50 per cent.[61] Despite the general funding cuts to health groups, it is reported that there will still be $7 million in this year's $38-million budget for grants and contributions to health groups, but the government intends to direct that money mostly to aboriginal

[57] Health Canada, First Nations & Inuit Health > Substance Use & Treatment of Addictions, online: http://www.hc-sc.gc.ca/fniah-spnia/substan/tobac-tabac/index-eng.php (October 11, 2012)

[58] Heart and Stroke Foundation of Canada Position Statement, BECOMING OR REMAINING TOBACCO-FREE, online: http://www.heartandstroke.com/site/c.ikIQLcMWJtE/b.3799307/k.E453/Position_Statements__Tobacco_Position_Statement.htm (October 19, 2012)

[59] Lorraine Greaves, PhD1 Natasha Jategaonkar, MSc1, Joy Johnson, PhD, RN2 Melissa McGowan, MHK1 Joan Bottorff, PhD, RN3 Lucy McCullough, BSc1, Susan Kirkland, PhD4 Lupin Battersby, MA1, "What Are the Effects of Tobacco Policies on Vulnerable Populations? A Better Practices Review" JULY – AUGUST 2006, VOLUME **97**, NO. **4** CANADIAN JOURNAL OF PUBLIC HEALTH 310, at 310

[60] Lorraine Greaves, PhD1 Natasha Jategaonkar, MSc1, Joy Johnson, PhD, RN2 Melissa McGowan, MHK1 Joan Bottorff, PhD, RN3 Lucy McCullough, BSc1, Susan Kirkland, PhD4 Lupin Battersby, MA1, "What Are the Effects of Tobacco Policies on Vulnerable Populations? A Better Practices Review" JULY – AUGUST 2006, VOLUME **97**, NO. **4** CANADIAN JOURNAL OF PUBLIC HEALTH 310, at 310 (indicating the following smoking rates: Aboriginals (70%), low-income people (23%), and homeless people (69-75%).)

[61] "Anti-smoking groups decry cuts by Health Canada. Groups say health of Canadians at risk" (CBC News, Apr 17, 2012), ("While the national smoking rate is at 17 per cent, the smoking rate in Canada's aboriginal population is close to 50 per cent."), http://www.cbc.ca/news/canada/ottawa/story/2012/04/17/pol-0tobacco-cuts.html; Paul Taylor, "Ottawa under fire for cutting funding to anti-smoking program", *The Globe and Mail* (September 6, 2012) (reporting the same smoking rate for aboriginal groups), http://m.theglobeandmail.com/life/health-and-fitness/ottawa-under-fire-for-cutting-funding-to-anti-smoking-program/article4101107/?service=mobile

groups,[62] which reportedly will be the new focus of the anti-smoking program.[63] It is important to remember, however, that in 2006 the government "suspended" $10 million in annual funding for the First Nations and Inuit Tobacco Control Strategy.[64]

Groups with high prevalence of tobacco consumption may need organized representation and engage in advocacy to promote favorable tobacco control policies. Yet, they have also been financially weakened by funding cuts for anti-smoking groups. Moreover, recent general funding cuts are further weakening the ability of such groups to advocate, *inter alia*, tobacco policies that meet their needs. For instance, the government is drastically reducing general funding for aboriginal communities. "The core funding of the Federation of Saskatchewan Indian Nations will be cut to $500,000 per year from the current $1.6 million by 2013-14. Tribal councils will face cuts of 20 to 40 per cent. The Metis Nation – Saskatchewan … is also being cut."[65] First Nations in Northern Ontario are currently preparing for looming federal funding cuts and caps that could slash their budgets in half.[66] First Nations leaders believe that such funding cuts seek to weaken

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[62] "Anti-smoking groups decry cuts by Health Canada. Groups say health of Canadians at risk" (CBC News, Apr 17, 2012), http://www.cbc.ca/news/canada/ottawa/story/2012/04/17/pol-0tobacco-cuts.html

[63] Paul Taylor, "Ottawa under fire for cutting funding to anti-smoking program", *The Globe and Mail* (September 6, 2012) ("…now is the time to make changes that focus on those populations that are smoking far more than the national average," Health Minster [sic] Leona Aglukkaq said in a statement. "In particular, aboriginal populations within Canada have rates as high as 50 per cent."), http://m.theglobeandmail.com/life/health-and-fitness/ottawa-under-fire-for-cutting-funding-to-anti-smoking-program/article4101107/?service=mobile

[64] Geoffrey Lansdell, "How the Conservatives are gutting tobacco control", *Macleans*, Friday, May 18, 2012, online: http://www2.macleans.ca/2012/05/18/how-the-conservatives-are-gutting-tobacco-control/ (October 11, 2012)

[65] http://www.thestarphoenix.com/news/Feds+funding+native+groups/7204178/story.html

[66] "First Nations brace for 'nefarious' funding cuts. Grand Chief says cuts could "bankrupt" Nishnawbe Aski Nation" (CBC News, Nov 14, 2012), http://www.cbc.ca/news/canada/sudbury/story/2012/11/14/tby-first-nation-funding-cuts.html.

their capacity to deal with environmental assessments, companies and business agreements. [67]

The interest and voice of groups with high rates of tobacco consumption are thus likely to be both underrepresented in tobacco policy-making and debilitated for defending a favorable policy from NAFTA challenges. In such a context, it will be easier for governments to continue neglecting the needs of such groups and for the tobacco industry to expand their influence on NAFTA-based tobacco policies and their market share associated with such groups. Indeed, for example, tobacco advertising received via US media sources increasingly targets vulnerable groups such as youth, women, ethnocultural groups and gays and lesbians.[68]

Thus, public interest groups such as anti-smoking groups are not only financially and politically disadvantaged, but also their current legal rights to participate as *amicus curiae* in NAFTA arbitrations are severely limited. This in practice censors their views and influence that in turn worsens the public accountability of NAFTA arbitration and further empowers the views of foreign investors to the detriment of the public interest. It is then difficult to expect a significant improvement in the balancing of foreign investors' interest and public policy and, more generally, in the democratic nature of policy-making. Given the erosion of the financial basis of public interest groups and the modest rights of

[67] "First Nations brace for 'nefarious' funding cuts. Grand Chief says cuts could "bankrupt" Nishnawbe Aski Nation" (CBC News, Nov 14, 2012), http://www.cbc.ca/news/canada/sudbury/story/2012/11/14/tby-first-nation-funding-cuts.html.

[68] Lorraine Greaves, PhD1 Natasha Jategaonkar, MSc1, Joy Johnson, PhD, RN2 Melissa McGowan, MHK1 Joan Bottorff, PhD, RN3 Lucy McCullough, BSc1, Susan Kirkland, PhD4 Lupin Battersby, MA1, "What Are the Effects of Tobacco Policies on Vulnerable Populations? A Better Practices Review" JULY – AUGUST 2006, VOLUME **97**, NO. **4** CANADIAN JOURNAL OF PUBLIC HEALTH 310, at 310

non-disputing parties, *amici curiae* is of little help for such groups and rather play the symbolic role of legitimizing the predominance of trade and foreign investors' interest by giving the appearance of public accountability.

While expansive *amici curiae* appear to be important for anti-smoking groups in the context of defending a policy from NAFTA challenges before, during or after an arbitration, the economic and political conditions for public interest groups to participate in NAFTA disputes should not be underestimated. Indeed, an *amicus curiae* institution may provide broader participation rights, but the lack of financial or political resources may prevent civil society groups to effectively participate in NAFTA disputes as *amicus curiae*. A defragmentation project seeking to protect local citizen-consumers via *amici curiae* thus requires not only a facilitative legal framework but also financially and politically strong public interest groups capable of advocating the public interest in the face of influential corporate discourses. Moreover, considerations should be given to the need to develop a duty of governments and foreign investors to not interfere with the growth of relevant public interest groups that are likely to participate as non-disputing parties in NAFTA Chapter 11 disputes. This might include the government's obligation to provide basic funding for public interest groups working in the area of, for example, public health.

CONCLUSION

Concerns about the inconsistency and unpredictability associated with the application of NAFTA Chapter 11 and the difficulties in balancing foreign investors' interest and public policy are common and unresolved. The institutional environment suggests that interest groups also play a role in the social construction of the meaning and use of NAFTA Chapter 11 through arbitration and public debate. This work discusses the extent to which *amici curiae* empower public interest groups such as citizen-consumer groups. It argued that currently *amici curiae* provide an extremely narrow list of participation rights to public interest groups that, coupled with economic and political disadvantages in many cases, result in both censoring the views of such groups and playing the political role of symbolic accountability. This work proposes an expansive view of *amici curiae* for public interest groups in light of the potential of the latter to counter the influence of corporate interest groups and to contribute to both minimize the NAFTA Chapter 11 inconsistencies and strike a more realistic balance between the public interest and foreign investors' interest. Ultimately, such a view of *amici curiae* is likely to help defragment NAFTA Chapter 11 as public interest groups will be in a stronger position to introduce considerations other than trade and foreign investors' economic interest provided favorable financial and political conditions. A brief discussion of *amici curiae* in the context of anti-smoking groups in Canada provided a good example of the potential and limits of an expansive view of *amici curiae*. Further investigation is needed to establish more precisely the extent to which public interest groups can influence NAFTA Chapter 11 arbitration decisions under an expansive regime of *amici curiae*.