

Guide for Potential *Amici* in International Investment Arbitration

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GUIDE FOR POTENTIAL *AMICI* IN INTERNATIONAL INVESTMENT ARBITRATION

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A. INTRODUCTION

A.1. Who should use this guide?

This guide is aimed at non-governmental organizations (NGOs) who are concerned that a dispute before the International Centre for Settlement of Investment Disputes (ICSID) may have an impact on human rights, labor rights, the environment or any other public interest, and that these potential impacts will not be adequately addressed or taken into account by the ICSID Tribunal hearing a dispute.

Specifically, this guide provides an introduction to the process of intervening as a friend of the court, or *amicus curiae*, in ICSID proceedings. Section B of this guide provides a general introduction to ICSID and places it in the context of international investment law more broadly. Section C provides an overview of how investment arbitration implicates human rights. Section D introduces the *amicus curiae* and explains how this procedural tool can be used to pursue public interest objectives in ICSID proceedings. Section E, “Lessons Learned and Best Practices,” looks at the experience of past *amici curiae* and proposes a framework for maximizing the effectiveness of an *amicus curiae* application and submission. Along the way, there will be boxed case studies that demonstrate how a given principle or concept has been applied in a specific case. Finally, the appendices provide further information on ICSID and its jurisprudence.

A.2. Disclaimer

The information provided here is not legal advice or legal assistance, and the International Human Rights Program (IHRP) at the University of Toronto Faculty of Law cannot provide such advice or assistance. This guide was prepared by law students, not lawyers or students-at-law. It is not exhaustive or updated on a regular basis. The IHRP and the Center for International Environmental Law (CIEL) are not affiliated with ICSID and do not, in producing this guide, endorse engagement with ICSID. ICSID did not assist in developing this guide nor was it requested to endorse its contents. The purpose of this guide is to provide information to NGOs in an accessible format so that they can make informed decisions regarding whether participation in this process is appropriate for them.

A.3. What is international investment arbitration?

ICSID is one of a number of institutions that attempt to resolve disputes between investors and states. ICSID is intended to facilitate the resolution of disputes concerning governmental conduct that affects investments or investors without the necessity of having recourse to national courts. This is an attractive prospect to some parties that wish to avoid the perception of a “home court advantage” in favor of the party in whose domestic court the dispute is launched. Also, arbitration can, in some cases, be less costly than litigation, although ICSID arbitration does turn out to be quite costly.

A.3.1. Distinguishing international commercial arbitration from international investment arbitration

There are two major types of international arbitration that are intended to resolve economic disputes: (a) international commercial arbitration, which aims to resolve disputes over contracts that govern economic activity between parties engaged in commerce, and (b) international investment arbitration, which aims to resolve disputes concerning investments and generally arising from international investment agreements (IIAs). As an example of international commercial arbitration, imagine that Company A, based in Canada, has a contract to supply 50,000 tons of grain to Company B, a pasta firm based in Italy. The companies might agree to put a clause in the contract providing that disputes will be handled at the International Chamber of Commerce, rather than in the courts of Italy or Canada.

International investment arbitration, by contrast, generally arises out of agreements between states. The most common agreement of this sort is the bilateral investment treaty, or BIT. These treaties typically provide protections to investors and their investments, such as the obligation to provide fair and equitable treatment. Where two countries are signatories to a BIT, a company from the first country may bring proceedings against the second country alleging that the treaty has been breached. ICSID provides, among other things, dispute settlement facilities for the resolution of international investment disputes arising out of BITs and similar agreements.

A.3.II. Distinguishing institutional arbitration from ad hoc arbitration

The field of international arbitration may also be divided into institutional arbitration, where parties refer their dispute to an arbitral organization, and ad-hoc arbitration, where parties arrange for arbitration themselves on a one-time basis. Different arbitral institutions provide different services, but these services typically include appointment of an arbitrator where parties cannot agree, and supervision of proceedings.¹ Ad hoc arbitration, by contrast, is carried out entirely by the parties. The parties have discretion to create their own procedural rules to govern the arbitration. This discretion extends to the method of selecting arbitrators, to the size and structure of the tribunal, and to the functioning of this tribunal once constituted. Despite this broad freedom, ad hoc arbitration agreements usually rely on a set of ready-to-use rules, such as the 2010 UN Commission on International Trade Law (UNCITRAL) Arbitration Rules² and the UNCITRAL Rules on the Transparency in Treaty-based Investor-State Arbitration, and rarely design new arbitration systems from the ground up. However, the parties may, in theory, agree to whatever rules suit them.

A.4. Sources of international investment law

When an international investment dispute arises, how does an arbitral tribunal, ICSID or otherwise, make its decision? The sources of international investment law include IIAs such as BITs and investment chapters of free trade agreements, international customary law (used as evidence of a general practice accepted as law), general principles of law, judicial decisions and scholarly writings.³

In the context of investor-state dispute settlement, IIAs set out the rules that constrain the behavior of host states⁴ with respect to foreign investors. For example, the behavior of the Albanian government with respect to an Austrian investor in Albania would be constrained by the Austria-Albania Bilateral Investment Agreement.⁵ When applying these agreements, ICSID tribunals will also make reference to the Convention which established the Centre: The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, (more commonly called the ICSID Convention) and its rules and regulations.

Although IIAs act as the main source of rules governing the behavior of investment parties, arbitral tribunals often turn to other sources of international investment law in interpreting these agreements. International customary law is particularly relevant where the IIA refers explicitly to this type of law and where treaty provisions are subject to competing interpretations.⁶ General principles of law come into play when “no applicable treaty provision or international customary rule exist” and include legal principles such as good faith and unjust enrichment.⁷

International investment law and human rights law, while distinct in their purpose and processes, nonetheless have significant similarities. As such, the arbitral tribunal is not necessarily limited to solely applying the rules and principles of international investment law but rather can refer to international human rights legislation and principles when interpreting investment rules and treaty regulations.⁸ There are three primary ways in which human rights obligations can be brought into the tribunal’s analysis:

1. where the IIA itself makes reference to the applicability of international law,⁹
2. where the law applicable to a state contract, normally that of the host state, “establishes a constitutional link between public international law and the municipal legal order”; and

¹ See, for example, the services provided by the International Court of Arbitration at the International Chamber of Commerce, online: International Chamber of Commerce <<http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-arbitration-procedure/>>.

² See the UNCITRAL website for more information, online: United Nations Commission on International Trade Law <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html>.

³ Moshe Hirsch, *Sources of International Investment Law* (Jerusalem: International Law Forum of the Hebrew University of Jerusalem Law Faculty, 2011), online: Social Science Research Network <papers.ssrn.com> [Hirsch].

⁴ When a company from Country A invests in Country B, B is the host state.

⁵ “Total Number of Bilateral Investment Agreements Concluded, 1 June 2012” presented at the United Nations Conference on Trade and Development (2012), online: United Nations Conference on Trade and Development <<http://unctad.org>>.

⁶ Hirsch, *supra* note 3 at 8-9.

⁷ *Ibid* at 13 and 15.

⁸ Pierre-Marie Dupuy, “Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law” in *Human Rights in International Investment Law and Arbitration* (New York: Oxford University Press, 2009) [Dupuy].

⁹ See e.g. Article 1131 of the NAFTA as referenced in Dupuy, *supra* note 8 at 56: [the tribunal] “shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law” [emphasis added].

3. where “an issue of blatant violation of human rights [is] deemed to be incompatible with ‘transnational public policy’”.¹⁰

With respect to item (2) above, what does it mean for there to be “a constitutional link between public international law and the municipal legal order”? This refers to some sort of mechanism in the state’s domestic law – typically through its constitution – which explicitly links the international and domestic law. For example, the state’s constitution might contain an option in favor of “monism”, meaning that domestic law and public international law are seen as forming a unity.¹¹ As such, it is not only legislation made by the state itself which applies in disputes but also international rules that the state has accepted.

An example of monism can be found in the constitution of The Netherlands. Article 93 states that “[p]rovisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published”.¹² This means that after the Netherlands has signed on to a treaty, that treaty becomes binding in the domestic sphere as well. Moreover, Article 94 states that “[s]tatutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions”.¹³ This means that international law is given primacy in situations where the application of domestic law conflicts with treaty provisions or resolutions by international institutions. Constitutional provisions such as these provide an opportunity for the incorporation of international human rights law into investment arbitration.

With respect to item (3), it is important to have an understanding of what is meant by transnational public policy. It involves “the identification of principles that are commonly recognized by political and legal systems around the world”.¹⁴ International human rights legislation and principles establish the content of some of these commonly recognized principles. When the case before an international investment tribunal involves a blatant violation of human rights, human rights norms can be used to establish how the issues of the arbitration relate to transnational public policy.

There is no strict system of precedent in ICSID arbitration. That is, tribunals are not required to follow the example of previous arbitration awards.¹⁵ This is partly a consequence of the fact that each investment treaty is unique; however, even when interpreting the same treaty, tribunals are not bound by prior cases.¹⁶ Nevertheless, these tribunals can and do look to existing jurisprudence for guidance.¹⁷ While ICSID tribunals tend to confine themselves to past decisions of ICSID tribunals, they may also look to decisions from tribunals established under other sets of rules, such as the UNCITRAL rules. Scholarly writings are also commonly used by investment arbitral tribunals in their decision-making process. Arbitrators may use publications in interpreting treaty provisions and clarifying the scope of rules of international customary law.¹⁸

CASE STUDY

*Tecnicas Medioambientales Tecmed SA v The United Mexican States*¹⁹

This claim was brought in relation to a Mexican regulation pertaining to environmental protection which resulted in a refusal to renew the investor’s landfill operating permit. The investor sought damages and restitution in kind through the granting of permits enabling it to operate the landfill until the end of its useful life. In making its decision, the arbitral tribunal used a form of a proportionality test, weighing the harm to the investor as a result of the regulation and the severity of the environmental and public health risks. In establishing this methodology, the arbitrators explicitly referenced decisions made by the European Court of Human Rights. Although the tribunal decided in favor of the investor, this is an example of how arbitral tribunals have used international human rights principles and case law in their process of judicial interpretation.

¹⁰ Dupuy, *supra* note 8 at 56, 59 and 60.

¹¹ Dupuy, *supra* note 8 at 59.

¹² *The Constitution of the Kingdom of the Netherlands 2002*, 2002, c 5 at Article 93.

¹³ *Ibid* at Article 94.

¹⁴ Martin Hunter and Gui Conde e Silva, “Transnational Public Policy and its Application in Investment Arbitrations”, 4:3 *The Journal of World Investment* 367 at 367.

¹⁵ Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (New York: Oxford University Press, 2008) at 3.84.

¹⁶ *Ibid* at 3.85.

¹⁷ *Ibid* at 3.83.

¹⁸ Hirsch, *supra* note 3 at 22.

¹⁹ *Tecnicas Medioambientales Tecmed SA v The United Mexican States* (2003), Case No ARB (AF)/00/2 (International Centre for the Settlement of Investment Disputes), all documents online: Investment Treaty Arbitration <<http://www.italaw.com>> [Tecmed].

B. THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

B.1. What is ICSID and how does it operate?

ICSID is one of the five institutions of the World Group, and it is dedicated to the resolution of international investment disputes. ICSID specializes in resolving disputes between governments and companies, or other private actors.

B.1.I. History of ICSID

The ICSID Convention was one of several mid-twentieth century initiatives aimed at promoting economic development in the so-called Third World. These initiatives came in response to the destruction and economic instability left following the end of World War II and the subsequent decolonization of much of the non-European world.²⁰ A number of organizations and scholars believed that the solution to this situation was an increase in private international investment in developing countries. This prompted a number of different individuals and organizations to propose ways to encourage foreign investment by reducing political risks associated with it. Among these organizations was the World Bank, which, after finding a consensus on standards of investment protection too difficult to reach, settled on a dispute settlement approach to reduce the risk of foreign investment. This approach resulted in the drafting of the ICSID Convention, which created ICSID on October 14, 1966.

B.1.II. Mandate and jurisdiction

ICSID exists to promote private international investment by settling disputes that arise out of investment agreements such as BITs. In order for the Centre to hear a dispute, it must be legal in nature and must arise directly from an investment. A dispute falls within the jurisdiction of the Centre if:

1. The state party to the dispute is a contracting state to the ICSID Convention²¹
2. The non-state party is a national of a contracting state²²
3. Both parties have consented to the jurisdiction of the Centre.²³ In most cases, this consent is contained in an investment agreement (usually a BIT) between the host state (the country where the investor has invested) and the home state (the country of which the investor is a national).

If only one party to the dispute is an ICSID contracting state, or is the national of an ICSID contracting state, then the Additional Facility Arbitration Rules may apply.²⁴ In such situations, the provisions of the ICSID Convention do not apply.²⁵

B.1.III. Structure²⁶

While ICSID tribunals are established to adjudicate specific legal disputes, the Centre itself is a permanent institution composed of an Administrative Council and a Secretariat.

The Administrative Council, ICSID's governing body, is made up of one member from each contracting state, with the President of the World Bank acting ex officio as Chairman. Its responsibilities include the election of the Secretary-General and the Deputy Secretary-General, oversight of ICSID rules and procedures, adoption of the ICSID budget, and approval of the annual ICSID operations report.

The Secretariat, led by the Secretary-General, handles the day-to-day business of the Centre: registering proceedings, providing institutional support and maintaining ICSID's panel of preferred arbitrators and conciliators.

²⁰ Antonio R Parra, *The History of ICSID* (New York: Oxford University Press, 2012) at 13.

²¹ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, entered into force October 14, 1966, online: <<https://icsid.worldbank.org>>, Article 25(1) [ICSID Convention] "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State..."

²² *Ibid.*

²³ *Ibid.* "... which the parties to the dispute consent in writing to submit to the Centre."

²⁴ ICSID, *Additional Facility Rules* (April 2006), online: The International Centre for the Settlement of Investment Disputes <<https://icsid.worldbank.org>>, Article 2(a).

²⁵ *Ibid.*, Article 3.

²⁶ ICSID, *Organizational Structure of ICSID* (retrieved 23 January 2013), online: The International Centre for the Settlement of Investment Disputes <<https://icsid.worldbank.org>>.

ICSID does not perform arbitral functions. When a request for arbitration is made, unless the Secretary General finds that the dispute is “manifestly outside the jurisdiction of the Centre”,²⁷ a tribunal will be constituted. The Convention allows parties wide discretion as to how to constitute this tribunal. If the parties agree, the tribunal may consist of “a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree.” In cases where the disputing parties cannot agree on how to constitute a tribunal, Article 37(2)(b) of the Convention applies. In such cases, each disputing party appoints one tribunal arbitrator, leaving a third to be appointed by agreement of the parties.²⁸ If, after 90 days, the parties cannot agree on this third arbitrator, either party may request that the ICSID Chairman make an appointment²⁹ from ICSID’s Panel of Arbitrators.³⁰

B.1.IV Powers of the tribunals

The ICSID’s arbitral tribunals have the power to make binding and enforceable awards of monetary damages.³¹ They also have the power to take “provisional measures”³² to preserve the rights of the parties. In particular, tribunals have the power to determine the limits of their own competence³³ and marshal evidence.³⁴ Most importantly for the purposes of this guide, ICSID tribunals have the discretion to allow a non-disputing party (that is, someone other than the company or state involved in the dispute) to submit a written argument.³⁵ If the disputing parties agree, the Tribunal also has the power to allow a non-disputing party to attend proceedings.³⁶

²⁷ ICSID Convention, *supra* note 26, Art 36(3).

²⁸ *Ibid*, art 36(7)(b).

²⁹ *Ibid*, art 38.

³⁰ *Ibid*, art 40.

³¹ *Ibid*, art 54(1).

³² *Ibid*, art 47.

³³ *Ibid*, art 41.

³⁴ *Ibid*, art 43.

³⁵ ICSID, *Rules of Procedure for Arbitration Proceedings (Arbitration Rules)*, r 37(2), online: International Centre for the Settlement of Investment Disputes <<https://icsid.worldbank.org>> [Arbitration Rules].

³⁶ *Ibid*, Rule 32(2).

C. HOW INVESTMENT ARBITRATION IMPLICATES HUMAN RIGHTS

C.1. Relevance

Human rights often will be engaged in the context of investment disputes, especially when disputes engage issues like equitable land reform, aboriginal rights, access to water or access to a clean environment.³⁷ We would expect investment treaties and investment arbitrators to pay attention to such concerns. Yet it turns out that human rights issues have difficulty gaining traction within international investment law.

Emblematic is the ruling in *Biloune v Ghana*.³⁸ The dispute concerned the unusual circumstance of an investor claiming an independent right to damages under treaty for being arbitrarily detained and deported, resulting in a denial of “fundamental human rights.” The arbitration tribunal passed on the opportunity to assess this aspect of the claim. The tribunal reasoned that it was not “competent to pass upon every type of departure from the minimum standard to which foreign nationals are entitled, or that this Tribunal is authorized to deal with allegations of violations of fundamental human rights.”³⁹

The dominant understanding is well articulated by Clara Reiner and Christoph Schreuer: references to human rights in investment arbitration are “sparse and infrequent” and, in the text of an investment treaty, “highly unlikely.”⁴⁰ In “practice,” Bruno Simma observes, “human rights-based claims have not overrun the dockets of foreign investment tribunals.”⁴¹ This is consistent with the observations of others, including the United Nations Conference on Trade and Development (UNCTAD).⁴²

It is inaccurate to conclude that human rights have no presence in international investment disputes, however.⁴³ It is more likely the case that their presence has not been fully acknowledged or well-articulated. Occasionally, for instance, such claims get intermingled with national constitutional claims or are framed as claims about a “sovereign right to regulate.”⁴⁴

C.2. Investor grounds

At a very basic level, it has to be acknowledged that a form of property rights is engaged in almost every investment dispute.⁴⁵ This is precisely how investment claims are often described.⁴⁶ Yet, the *Biloune* case aside, investors have exhibited little interest in framing their claims in human rights terms.⁴⁷ This might be explained by the lack of clarity in international human rights instruments or the fact that there is no expectation that investors do so. Nor is there much incentive: investor rights, after all, are given sufficiently wide interpretation by tribunals. Indeed, some have concluded that outcomes in investment arbitration are entirely in sync with international human rights obligations.⁴⁸

Foreign investors, furthermore, take on no direct obligations under an investment treaty connected to human rights. When they are implicated, typically this will be under soft law instruments that refer to principles and voluntary measures such as the UN’s Global Compact.⁴⁹ National constitutional obligations may apply to private actors in some contexts, but these obligations appear to have little or no place in investment treaty arbitration. The regime of investment law, after all, is meant to remove the resolution of disputes from national courts.

³⁷ Luke Eric Peterson, *Human Rights and Bilateral Investment Treaties: Mapping the Role of Human Rights Law Within Investor-State Arbitration* (Montreal: International Centre for Human Rights and Democratic Development, 2009) online: <<http://publications.gc.ca>> [Peterson].

³⁸ *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana* (1989), Award on Jurisdiction and Liability, 95 ILR 184.

³⁹ *Ibid* at 203.

⁴⁰ C Reiner and C Schreuer, “Human Rights and International Investment Arbitration” in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni, eds, *Human Rights in International Investment Law and Arbitration* [Human Rights in International Investment Law and Arbitration] (New York: Oxford University Press, 2009) [Reiner and Schreuer] at 82.

⁴¹ Bruno Simma, “Foreign Investment Arbitration: A Place for Human Rights?” (2011) 60 ICLQ 573 [Simma] at 578.

⁴² United Nations Conference on Trade and Development, “Selected Recent Developments in IIA Arbitration and Human Rights” (2009) International Investment Agreement Monitor No. 2.

⁴³ Susan L Karamanian, “The relationship between international trade law and international human rights law” in Erika de Wet and Jure Vidmar, eds, *Hierarchy in international law: the place of human rights* (New York: Oxford University Press, 2012) 272 [Karamanian].

⁴⁴ J.E. Alvarez, “The Public International Law Regime Governing International Investment” (2011) 344 Recueil des Cours 193 at 459.

⁴⁵ Reiner and Schreuer, *supra* note 40 at 83.

⁴⁶ For an example, see Zachary Douglas, *The International Law of Investment Claims* (Cambridge: Cambridge University Press, 2009) at 52.

⁴⁷ *Ibid* at 88.

⁴⁸ Timothy G. Nelson, “Human Rights Law and BIT Protection: Areas of Convergence” (2011) 12 J World Investment & Trade 27; James D Fry, “International Human Rights Law in Investment Arbitration: Evidence of International Law’s Unity” (2007) 18 Duke J Comp & Int’l L 77 [Fry]; Charles H Brower II, “Structure, Legitimacy, and NAFTA’s Investment Chapter” (2003) 36 Vand J Transnat’l L 37 [Brower II].

⁴⁹ United Nations, Economic and Social Council, Commission on Human Rights, *Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, E/CN.4/2006/97 (Special Representative: John Gerald Ruggie) (22 February 2006).

C.3. State grounds

Host states may find it to their advantage to invoke international human rights obligations as a means of fending off investor claims, but rarely do so.⁵⁰ There are impediments even to these sorts of arguments arising. States may not want to admit that they initially were implicated in projects that had negative human rights consequences.⁵¹ Nor might states wish to admit before an international tribunal that, if they had not taken action, they would not be living up to international minimum standards. It looks, moreover, like states have not very well articulated human rights claims before investment tribunals.

CASE STUDY

Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic^{52 53}

This claim was one of more than 40 disputes launched against Argentina as a result of measures taken in response to the economic meltdown of 2000–01. The impugned measures included delinking the Argentinian peso to the US dollar (pesification) and de-indexing of rates to the US purchasing price index. Argentina sought to justify the taking of such measures on the basis that it was satisfying the “right to water”. The tribunal, however, declined to find that the right to water “somehow trumps” obligations under the BIT, nor did it “implicitly give Argentina the authority to take actions in disregard of its BIT obligations.” The implication of the tribunal’s reasons is that the state provided no compelling explanation of how the right to water could enter into the interpretation of the Argentine-US BIT.

C.4. The text

BITs usually will not refer to international or national human rights obligations, other than obliquely to investor property rights and to equality rights. Obligations, moreover, are owed only to foreign investors and not to nationals who might have an interest in the enforcement of international human rights obligations.⁵⁴ BITs signed by the United States and Canada make reference to non-investment obligations like “health” and the “environment” but without acknowledging any linkage to international human rights obligations.

It turns out that the principal means by which human rights will enter into international investment law will be via treaty interpretation. In addition, even if not expressly mentioned in treaty text, human rights norms can enter into tribunal consideration as a matter of “applicable law.” It will be in the course of determining, for instance, whether a measure is “tantamount” to expropriation or amounts to a denial of “fair and equitable treatment” that international human rights obligations may have a point of entry as a relevant source of law under the treaty.⁵⁵ The task has been described as finding “windows for the direct application of non-investment international law,” including international human rights law.⁵⁶ Others have proposed the rapid adoption of proportionality analysis in respect of all investment disciplines in order that state objectives, including international human rights obligations, are weighed in determining whether a breach of an investment treaty obligation has occurred.⁵⁷ There appears to be, in other words, increasing consensus among scholars, at least, that human rights can in these ways have a role to play within the interpretation of BITs.

⁵⁰ Anne Van Aaken, “Fragmentation of International Law: The Case of International Investment Law” (2006) 17 *Finnish Yearbook of International Investment Law* 91 [Van Aaken] at 118.

⁵¹ *Ibid* at 89; M Sornarajah, *The international law on foreign investment* (New York: Cambridge University Press, 2010) [Sornarajah] at 228.

⁵² *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic* (2007), Order in Response to a Petition by Five Non-Governmental Organizations for Permission to make an *amicus curiae* submission, Case No ARB/03/19 (International Centre for the Settlement of Investment Disputes), online: Investment Treaty Arbitration <<http://www.italaw.com>> [*Suez Petition Response*].

⁵³ This arbitration generally is referred to below as *Suez v Argentina*. All documents related to this dispute can be found online: Investment Treaty Arbitration <<http://www.italaw.com/cases/1057>>.

⁵⁴ Ursula Kriebaum “Privatizing Human Rights: The Interface Between International Investment Protection and Human Rights” in August Reinsch and Ursula Kriebaum, eds, *The Law of International Relations – Liber Amicorum Hanspeter Neuhold* (Netherlands: Eleven International, 2007) 165 [Kriebaum].

⁵⁵ J Krommendijk and J Morijn, “‘Proportional’ by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration” in *Human Rights in International Investment Law and Arbitration* (*supra* note 40) 422 [Krommendijk and Morijn].

⁵⁶ *Ibid*.

⁵⁷ *Ibid*; Benedict Kingsbury and Stephan Schill, “Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law” in Benedict Kingsbury et al, eds, *El Nuevo Derecho Administrativo Global en América Latina: Desafíos Para las Inversiones Extranjeras, La Regulación Nacional y el Financiamiento Para el Desarrollo* (Buenos Aires: RPA, 2009) 221, online: Global Administrative Law Project <www.iilj.org/GAL/documents/GALBAbook.pdf> [Kingsbury and Schill].

The principal disagreement is the degree of intensity with which this will be accomplished. Some expect arbitrators to do no more than to “technically” take “into account” these sorts of “external obligations”⁵⁸ or to have human rights norms “fulfill no more than an ancillary role” in treaty interpretation.⁵⁹ Others propose a more “systemic integration” between investment law and other international legal obligations.⁶⁰ According to some, human rights norms amount to binding legal obligations that are “constitutional” and so temper investment treaty obligations.⁶¹ Bruno Simma declares that an investment tribunal confronted with a human rights matter that “neglected to consider” such norms would be providing “insufficient” reasons and so its decision would be susceptible to annulment under the ICSID Convention.⁶²

How have investment tribunals responded to this challenge in practice? Luke Peterson observes that arbitrators generally “have not grappled to the same extent” with claims raised by states or NGOs.⁶³ Moshe Hirsch, like Peterson, undertakes a qualitative analysis of some of the important cases and concludes that tribunals quite consistently treat international human rights law as not very significant.⁶⁴ A review of awards by Reiner and Schreuer indicates tribunals’ “reluctance” to grapple with human rights concerns, preferring to dismiss claims based upon procedural grounds.⁶⁵

C.5. The Critical Role of the *Amicus*

It is for these reasons critical to the future of international investment law that NGOs seek *amicus* standing to make submissions before investment tribunals. The frequency with which such submissions are made may help to speed up the entry of international human rights norms into the investment treaty context. There is, as mentioned, an increasing openness to considering international human rights, at least on the part of scholars working in the area. There is good reason, nevertheless, to be cautious about this outcome. It may be more realistic to expect resistance, at least in the short term, to this reception of human rights into investment law. We consider the *amicus* submission by a group of five environmental NGOs in *Biwater Gauff v Tanzania*⁶⁶ (appended to this report) as a model for intervention. Yet it appears to have had little or no impact on the tribunal’s reasoning. Indeed, the tribunal had earlier issued a ruling regarding the confidentiality of the proceedings that severely hampered the NGOs’ ability to contribute to the tribunal’s resolution of the dispute.⁶⁷ The lesson to be drawn from this dispute and others is that there is a lot of work yet to be done to facilitate human rights considerations in the context of investment disputes. It turns out that the *amicus* brief, perhaps, is the primary vehicle to make this happen.

⁵⁸ Pierre-Marie Dupuy, “Is There A Role for Human Rights in Investor-State Arbitration and International Economic Adjudication?” in *Human Rights in International Investment Law and Arbitration* (supra note 40) 45 [Dupuy] at 54, 59.

⁵⁹ Simma, supra note 41 at 578; see also Marcos A. Orellana, *Health, Safety & Environmental Measures and International Economic Law* (Michigan: ProQuest LLC, 2009), online: ProQuest <www.proquest.com>.

⁶⁰ Campbell McLachlan, “The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention” (2005) 54 ICLQ 279 [McLachlan 2005] at 318.

⁶¹ Menno T. Kamminga, “Final Report on the Impact of International Human Rights Law on General International Law” in Menno T. Kamminga and Martin Scheinin, eds., *The Impact of International Human Rights Law on General International Law* (Oxford: Oxford University Press, 2009) 7 at 29.

⁶² Simma, supra note 41 at 591.

⁶³ Peterson, supra note 37 at 9; UNCTAD supra note 42.

⁶⁴ Moshe Hirsch, “Investment Tribunals and Human Rights: Divergent Paths” in *Human Rights in International Investment Law and Arbitration* (supra note 40) 97 at 106.

⁶⁵ Reiner and Schreuer, supra note 40.

⁶⁶ *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* (2008), Case No ARB/05/22 (International Centre for the Settlement of Investment Disputes), all documents online: Investment Treaty Arbitration <<http://www.italaw.com/cases/157>> [*Biwater v Tanzania*].

⁶⁷ Fiona Marshall, “The Precarious State of Sunshine: Case Comment on the Procedural Orders in the *Biwater Gauff (Tanzania) Ltd. V. Tanzania Investor-State Arbitration*” (2007) 3 McGill International Journal of Sustainable Development Law and Policy 181 at 185.

D.1. What is an *amicus curiae*?

Amici curiae, or “friends of the court,” participate in dispute resolution proceedings as interested third parties. In the context of international investment arbitration, NGOs have most traditionally sought *amicus* status; however, increasingly diverse groups are seeking access to proceedings as *amicus curiae*. For example, the tribunal in *Glamis Gold Ltd. v United States of America*, governed by the UNCITRAL Arbitration Rules, accepted written submissions from the Quechan Indian Nation.

D.2. *Amici curiae* in ICSID proceedings

Participation as *amicus curiae* in an arbitration proceeding is not equivalent to participation as a direct party: that is, *amicus curiae* submissions are limited to the matters at issue in the dispute (i.e., they are not able to introduce new issues) and must represent interests different from that of the parties. As such, the role of *amicus curiae* is centered on assisting a tribunal by providing expertise, perspectives and arguments that the parties themselves may not present.

The ability of investment tribunals to hear *amicus curiae* submissions can be found in both the 2006 amended ICSID Rules of Arbitration as well as in some investment treaties.⁶⁸

D.3. The goal of *amicus* intervention for NGOs

One of the key goals of *amicus* intervention for NGOs has been to ensure that tribunal decisions take into account human rights law obligations and/or take into account the perspective of rights holders impacted by the decision.

International investment arbitration, by definition, implicates the public interest, and tribunals are often tasked with assessing state execution of state duties.⁶⁹ Given the public impact of disputes, tensions emerge where the arbitration proceedings are conducted behind closed doors.⁷⁰ For example, and at its most basic, arbitral outcomes and monetary awards adverse to a state party will most likely be paid through the use of public tax revenues.⁷¹

In light of the impact that investment arbitration has on stakeholders beyond the two direct parties to the dispute, there is a critical space to be filled by NGO *amici*. NGOs can highlight the public interest implications in disputes that may have an impact on international human rights such as health, indigenous rights and the right to a healthy environment. Effective third-party participation can increase the transparency and openness of international investment arbitration and international economic dispute settlement.⁷²

D.4. Acting as *amicus*

Non-disputing parties in ICSID arbitration are frequently referred to as having *amicus curiae* “status,” but, as the tribunal in *Biwater v Tanzania* made clear, rather than providing generally for such “status,” “the ICSID Arbitration Rules expressly regulate two specific – and carefully delimited – types of participation by non-parties, namely: (a) the filing of a written submission (Rule 37(2)) and (b) the attendance at hearings (Rule 32(2)).”⁷³ Therefore, participating in ICSID proceedings as *amicus curiae* involves two steps: first, the party seeking to participate as *amicus* must petition the Tribunal for leave to intervene as a “non-disputing party”; and second, if the Tribunal grants the leave application, the *amicus* may file written submissions. Rule 37(2) of ICSID’s Rules and Regulations governs both steps of the process.

⁶⁸ For an example, see Article 20.11 of The Dominican Republic–Central America–United States Free Trade Agreement, which specifically provides for third party participation (online: Office of the United States Trade Representative <http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file85_3940.pdf>).

⁶⁹ Eric De Brabandere, “NGOs and the ‘Public Interest’: The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes” (2011) 12 Chi J Int’l L 85 [De Brabandere] at 102.

⁷⁰ *Ibid* at 109.

⁷¹ Eugenia Levine, “*Amicus Curiae* in International Investment Arbitration: Implications of an Increase in Third-Party Participation” (2011) 29 Berkeley J Int’l L 200 at 206.

⁷² De Brabandere, *supra* note 69 at 102.

⁷³ *Biwater v Tanzania*, *supra* note 66, Procedural Order No 5 at para 46.

D.4.I. Rule 37 and criteria for admitting *amici curiae*

Procedurally, NGOs interested in participating in ICSID arbitral proceedings as *amicus* must first petition the Tribunal for leave to make a written submission. (An application to participate as an *amicus curiae* is also known as a “petition”, and applicants are referred to as “petitioners”. In the discussion here, we will use these terms interchangeably.) The Tribunal will then consider factors set out in Rule 37(2) in determining whether to grant leave to intervene.

It is important to note that Rule 37(2) only allows petitions for written *amicus* submissions. As well, unless the *amicus* submission is jointly written, the Tribunal’s decision to accept one *amicus* submission in a proceeding does not necessarily mean that other *amici curiae* are automatically allowed to participate.

Generally, the petition must persuade the Tribunal that the submission will address a subject matter “within the scope of the dispute”.⁷⁴ An *amicus curiae* petition often includes a brief description of the party applying for *amicus* status, background information regarding the dispute, the *amicus*’ interest in the dispute, and the requests they would like the Tribunal to grant. These requests may include substantive issues the petitioners would like the Tribunal to consider, as well as procedural requests such as attending oral hearings under Rule 32. Finally, petitions should strategically cite previous ICSID decisions to show that the Tribunal has the power to grant *amicus* status to the petitioners under the ICSID rules.

Ultimately, the petition to intervene must address the factors set out in Rule 37(2) (a) through (c): assistance to the tribunal, relevance to the dispute and significant interest.⁷⁵ These factors are discussed in detail below. The Arbitration Rules provide that the Tribunal will consider these factors “among other things,” but does not explicitly say what these “other things” are.⁷⁶ The final paragraph of Rule 37(2) expresses a concern that the *amicus curiae* submissions not “disrupt the proceeding or unduly burden or unfairly prejudice either party,” which suggests that the “other things” referred to earlier in 37(2) can also relate to fairness to the parties. The jurisprudence reinforces this suggestion.⁷⁷

D.4.II. Consultation with the disputing parties

Prior to examining whether or not an *amicus* submission fulfills the requirements as set out in Rule 37(2)(a) through (c), the Tribunal must consult both disputing parties involved in the proceeding. Rule 37(2) provides disputing parties with the opportunity to comment on a proposed *amicus curiae*’s request for leave to file a written submission; however, neither party has a veto right with respect to the granting of such an application. For example, *amicus* requests for leave to file submissions were granted in both the cases of *Biwater v Tanzania*⁷⁸ as well as *Suez v Argentina*,⁷⁹ in spite of objections by the investor.⁸⁰

D.4.III. Assistance to the Tribunal

Rule 37(2)(a) states that the purpose of *amicus* submissions is to assist the Tribunal to determine a factual or legal issue “related to the proceeding”. The petition must impart “a perspective, particular knowledge or insight” to the Tribunal that is “different from that of the disputing parties”.

In short, the applicant for *amicus* status must persuade the Tribunal that its submissions are sufficiently “related to the proceeding” and that allowing participation from a non-disputing party is not only appropriate in the circumstances but will also be helpful. The petitioner should also present itself as a suitable participant in the proceedings by demonstrating that it has expertise, experience and independence in the scope of the dispute. This can be accomplished through a brief description of the petitioner’s organization, its history, and its objectives.

⁷⁴ *Arbitration Rules*, *supra* note 35 at r 37(2)(b).

⁷⁵ *Ibid*, r 37(2)(a-c).

⁷⁶ *Ibid*, r 37(2).

⁷⁷ *Suez v Argentina*, *supra* note 53; *Biwater v Tanzania*, *supra* note 66, Procedural Order No 5; *Border Timbers Limited, Border Timbers International (Private) Limited*, Case No ARB/10/15 and *Hangani Development Co (Private) Limited v Republic of Zimbabwe*, Case No ARB/10/25 (2012), Procedural Order No 2 (International Centre for Settlement of Investment Disputes), online: <www.italaw.com> [*Border Timbers and Hangani*].

⁷⁸ *Biwater Gauff v Tanzania*, *supra* note 66.

⁷⁹ See *Suez* Petition Response, *supra* note 52.

⁸⁰ Andrew de Lotbiniere McDougall and Ank Santens, “ICSID Tribunals Apply New Rules on Amicus Curiae” (2007) 22 Mealey’s International Arbitration Report at 9.

D.4.IV Within scope of dispute

The petition for leave to intervene as a non-disputing party must address a “matter within the scope of the dispute.”⁸¹ It is difficult to predict how tribunals will apply this requirement. In *Biwater v Tanzania*, the Claimant argued for a strict definition of the “scope of the dispute,” seemingly claiming that the Tribunal must be directly considering a human rights or environmental issue in order for an *amicus* submission to be considered “within the scope of the dispute.”⁸² However, the Tribunal rejected this interpretation, accepting as sufficient the petitioners’ assurance that their argument would be relevant and reserving for itself the right to disregard any part of the submission that was not relevant.⁸³

D.4.V. Interest

Closely related to the scope of the dispute is the third prong of Rule 37(2), which requires the non-disputing party to show a “significant interest” in the proceeding. This factor is often addressed in the brief description of each petitioner, as set out in the petition for *amicus* status. In framing its interest, the petitioner should ensure that its interest is not tangential to the dispute. Importantly, “significant interest” does not require a financial interest in the proceedings.

D.4.VI. General provisions for procedural fairness

Because of the wording in Rule 37(2), the requirements outlined in (a) through (c) are not exhaustive. This means the Tribunal can look to other factors in deciding whether or not to allow an *amicus* intervention. For example, the Tribunal will assess the impact of the *amicus*’ participation on the proceedings. The Tribunal will not accept submissions that will disrupt proceedings or unfairly prejudice the disputing parties. For example, a submission on the merits presented days before a hearing on the merits may be considered by the tribunal and the parties to disrupt the proceedings. It is thus a good strategy for petitioners to address the procedural implications, if any, that arise by reason of their participation in the dispute.

D.5. Drafting the submission

If the petition for *amicus* status is successful, the *amicus* must then draft a written submission elaborating on the issues addressed in the petition. In practice, however, potential *amicus* often submit both the petition for *amicus* status and the written submission in one package. The Tribunal will open the written submission only upon the granting of *amicus* status.

Like the initial application for *amicus* status, the written submission must show that the *amicus* brings a particular knowledge or insight that is within the scope of the dispute, and demonstrates a significant interest in the dispute. While these are requirements that would have already been addressed in the application for *amicus* status, the written submission must present full and compelling arguments that help the Tribunal place the dispute in context. The submission should not only address “broad policy issues” but also detail the legal implications arising from these issues.

Specifically, reiterating Rule 37(2), the *amicus* submission should:

- (a) Assist the Tribunal to determine a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties,
- (b) Address matter(s) within the scope of the dispute, and
- (c) Show a significant interest in the proceeding.

Elaborating on the issues raised in the initial application for *amicus* status, the written submission should be parsed into the various issues that the Tribunal should have an awareness of and take into consideration. The *amicus* submission, however, is not expected to support the arguments of any disputing party nor does it necessarily have to advise the Tribunal on how to weigh on the arguments presented by the disputing parties. Again, the written submission should provide the Tribunal with “a perspective, particular knowledge or insight”⁸⁴ that is different from the disputing parties.

⁸¹ *Arbitration Rules*, *supra* note 35 at r 37(2)(b).

⁸² *Biwater v Tanzania*, *supra* note 66, Procedural Order No 5 at paras 32-34.

⁸³ *Ibid* at para 50.

⁸⁴ *Arbitration Rules*, *supra* note 35 at r 37(2)(a).

All disputing parties have the opportunity to submit observations on the *amicus* submission. The Tribunal may request follow-up submissions from the *amicus curiae* in response to questions and comments.

The first ICSID decision to apply Rule 37(2) was the 2006 decision in *Biwater Gauff*. Biwater, a UK company, sued Tanzania for terminating its contract to supply water and sewage services to the capital of Dar es Salaam. Five NGOs filed a joint written submission for participation as non-disputing parties. These NGOs raised human rights, environmental and sustainable development concerns. Their initial petition sought three orders: (1) standing as *amici* in the dispute, (2) access to key arbitration materials, and (3) leave to attend and pose questions during oral proceedings that might have resulted from the written submission.

Per Rule 37(2), the Tribunal invited the disputing parties to make observations on the written submission. Both disputing parties commented on the NGOs' petition to participate, with Biwater opposing the petition and Tanzania supporting it.

After canvassing the factors in Rule 37(2), the Tribunal decided that the NGOs: (1) could participate as non-disputing parties in the proceedings,⁸⁵ (2) did not need documents from the arbitration because “[t]he broad policy issues on which the Petitioners [were] especially qualified are ones which are in the public domain, and about which each Petitioner is already very well acquainted”,⁸⁶ and (3) could not participate during oral proceedings.⁸⁷

D.6. Access to proceedings

Amici curiae cannot attend oral proceedings without the consent of the disputing parties.

In their initial petition, potential *amicus curiae* may request leave to attend oral proceedings under Rule 32(2).⁸⁸ However, the Tribunal requires both disputing parties' consent in order to grant this request.⁸⁹ No ICSID Tribunal has yet granted an *amicus curiae* permission to attend the oral hearings. Unlike Rule 37(2), which gives the Tribunal exclusive discretion to allow *amicus curiae* submissions, Rule 32(2) gives each disputing party a veto on allowing an *amicus* to attend proceedings and provides the Tribunal no discretion to overrule this.⁹⁰ This power makes gaining leave to attend oral proceedings difficult, as at least one of the disputing parties nearly always objects.⁹¹

Certain investment treaties, such as the Dominican Republic–Central America–United States Free Trade Agreement (CAFTA-DR), require open hearings.⁹² For example, in *Pac Rim Cayman LLC v Republic of El Salvador* (discussed directly below) the treaty required that the proceedings be “open”.⁹³ This requirement, it was decided, was best fulfilled by webcasting. This degree of openness, however, is exceptional in ICSID arbitration.

⁸⁵ *Biwater v Tanzania*, *supra* note 66, Procedural Order No 5 at para 60.

⁸⁶ *Ibid* at para 65.

⁸⁷ *Ibid* at para 71.

⁸⁸ *Arbitration Rules*, *supra* note 35 at r 32(2).

⁸⁹ *Ibid*.

⁹⁰ *Ibid*.

⁹¹ See, e.g., *Biwater v Tanzania*, *supra* note 66, Procedural Order No 5 at paras 69-71; *Border Timbers and Hanganí*, *supra* note 77, Procedural Order No 2 at para 63.

⁹² *The Dominican Republic–Central America–United States Free Trade Agreement*, United States, Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua (5 August 2004) online: Office of the United States Trade Representative <<http://www.ustr.gov>>, art 10.21 and 10.17.2(a) [CAFTA-DR].

⁹³ *Pac Rim Cayman LLC v Republic of El Salvador* (ongoing), Case No ARB/09/12 (International Centre for the Settlement of Investment Disputes), online: Investment Treaty Arbitration <<http://www.italaw.com>> [*Pac Rim*].

WEBCASTING AT ICSID: TRANSPARENCY CONCERNS REACHING BOILING POINT, OR A JUST FLASH IN THE PAN?

*Pac Rim Cayman LLC v The Republic of El Salvador*⁹⁴

Some small rejoicing in human rights circles accompanied an ICSID Tribunal's 2010 decision to webcast arbitral proceedings in the yet-unresolved dispute between Pac Rim Cayman LLC, an affiliated company of Canadian mining firm Pac Rim Mining Corp., and the Republic of El Salvador. The confidentiality of arbitral proceedings at ICSID—one of the reasons many economic disputes are resolved in arbitration rather than through litigation—has long been a source of frustration for organizations seeking to promote accountability in investment arbitration. A CIEL report called the decision “a major step towards increasing transparency in investor-State arbitrations...”⁹⁵ The adoption of webcasting in more investor-state arbitration disputes would be beneficial to *amici curiae*, whose submissions could be more tailored to the issues if proceedings were publicly available. Webcasting would also be beneficial in enhancing public awareness and access to arbitral proceedings.

However, webcasting advocates must temper both their optimism and their expectations. It is important to note that the Tribunal's decision in *Pac Rim v El Salvador* was based primarily on a requirement in the investment treaty it was interpreting. The Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR), out of which the dispute between Pac Rim and El Salvador arose, contains a provision that requires proceedings be open to the public. Article 10.21.2 provides that “The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements.”⁹⁶

D.7. Costs associated with intervening

D.7.I. Translation

The official languages of ICSID are English, French, and Spanish. Per Rule 22(1), parties in each dispute can agree on one or two official language(s) in which to conduct the proceedings. As well, Rule 22(2) allows submissions to be filed in either language if two languages are chosen. Parties can elect to submit documents in both languages.

ICSID also allows proceedings to be conducted in a non-official language as long as the Tribunal, after consulting ICSID's Secretary-General, gives its approval.

D.7.II. Counsel

Non-disputing parties are required to provide their own legal counsel. ICSID is not responsible for appointing counsel to represent *amici curiae*. While the cost of hiring legal counsel throughout the proceedings could be prohibitive, there may be legal NGO partners who can provide assistance in terms of preparing the leave applications, written submission, and/or attending the hearing.

⁹⁴ *Pac Rim*, *supra* note 93.

⁹⁵ Center for International Environmental Law, *Webcasting as a Tool to Increase Transparency in Dispute Settlement Proceedings* (Washington, DC: Center for International Environmental Law, 2010) at 1.

⁹⁶ CAFTA-DR, *supra* note 92.

E. LESSONS LEARNED AND BEST PRACTICES

It is difficult to predict whether an application for *amicus* standing will be granted in any given case. It is equally hard to predict the effect an *amicus* brief will have on a tribunal's ultimate findings. As a threshold matter, ICSID tribunals are not formally bound by prior decisions. Moreover, the law in this area is still developing. However, by observing the success and failure of past *amici* and by keeping the interests of all parties in mind, this report proposes the following framework for approaching *amicus curiae* participation. *Amicus* participation involves certain costs, both financial and otherwise. The petition for *amicus* status should show that the *amicus* is able to minimize those costs while maximizing benefits.

E.1. The petition

The petition for *amicus* status should demonstrate four things: (1) the Tribunal's discretion to allow third-party participation in suitable disputes; (2) the suitability of the dispute at hand for public interest intervention; (3) the suitability of the specific petitioner in terms of presenting the public interest aspects to the Tribunal; and (4) the desirability of allowing the petitioner to intervene in the dispute at hand. The first two criteria demonstrate that the Tribunal has the authority to allow the *amicus* to participate, while the last two are designed to persuade the Tribunal of the benefits of participation by the applicants.

E.1.I. The Tribunal's power to permit participation by non-disputing parties

Rule 37(2) of the ICSID Arbitration Rules gives tribunals the discretion to accept written submissions from non-disputing parties. In exercising this discretion, the Tribunal must consult the disputing parties, but the disputing parties do not have a veto on the decision. That is, the Tribunal may allow a written submission even if both parties are opposed to it. Despite the Tribunal's discretion in this matter, it is likely to give significant weight to the parties' positions on an *amicus* petition. This is due to the arbitral culture that puts the arbitration in the hands of the contending parties, within the parameters of the arbitration rules and the ICSID Convention. Consequently, to the extent possible, the petition to file an *amicus* submission should attempt to convince the parties as well as the Tribunal that the *amicus* should be allowed to file such a submission.

A well-composed petition will remind the Tribunal of its discretion to accept written submissions and point to the history of the practice to demonstrate that allowing such submissions is now part of standard international arbitration practice. Most submissions will point to *Methanex*⁹⁷ (below, Appendix A), a decision made under the UNCITRAL rules and the first tribunal to allow an *amicus curiae* submission. Other important decisions are *Suez v Argentina*, *Biwater Gauff* and *Pac Rim Cayman*, all of which allowed submissions from non-disputing parties. However, when making reference to these decisions, it is important to remember that ICSID tribunals are not bound by precedent the way that domestic courts are in common law systems, so they may choose not to follow the example of past tribunals. The relevant excerpts from these decisions are reproduced in Appendix A.

Many petitioners request access to arbitral proceedings in addition to permission to file a written submission. Such access may include permission to be present at oral hearings, permission to make oral arguments, or access to dispute documents. While this kind of participation is theoretically possible, it is elusive in practice. The general rule regarding access to the proceedings is that it is contingent on the disputing parties' consent. However, the situation will vary depending on the IIA that the Tribunal is interpreting and the way the proceedings are structured.

In sum, do not take for granted the Tribunal's knowledge of its own jurisdiction. The petition for *amicus* status should specifically demonstrate that the Tribunal has the power to accept *amici* in its own discretion and should cite the growth of this practice.

E.1.II. Public interest dimension of the dispute

In making the case for why an *amicus* submission should be accepted, consider detailing why the public interest dimensions of the dispute in question are greater than those that arise simply due to the nature of investor-state arbitration. That is, since states are assumed to act in the public interest and to therefore represent the public interest, arbitral tribunals may want to see a special public interest involved in the dispute.

⁹⁷ *Methanex Corporation v United States of America* (2005), Final Award (United Nations Commission on International Trade Law), online: Investment Treaty Arbitration <<http://www.italaw.com>> [*Methanex*].

When determining whether a given dispute has that something “extra” to justify allowing an *amicus* brief, tribunals tend to consider the importance of the public interest and the closeness of the connection between the public interest concern and the dispute. For example, in *Suez v Argentina*, the Tribunal permitted filing of an *amicus* brief on the basis that the dispute had the potential to affect “basic public services” to millions of people. In this case, the concern for the public interest was severe. The Tribunal in *Biwater* also used this reasoning in granting *amicus* status to CIEL and a number of other organizations. In these cases, it was helpful that the petitioners were able to tie their claim to a legally-binding human right.

E.1.III. Suitability of petitioner

An effective petition will demonstrate that the organization requesting *amicus* status is well-suited to present the public interest concern to the Tribunal. When formulating this part of the petition the organization should demonstrate that it is well-suited to comment on the dispute. The petitioners in *Biwater* did this effectively: Lawyers’ Environmental Action Team (LEAT) described itself as the “first and premier public interest environmental law organization in Tanzania” (Proc. Order No. 5). By describing itself this way, LEAT established its interest and relevant expertise. An organization seeking *amicus* status can demonstrate its suitability by showing that it has (a) recognized expertise, (b) an established interest, and (c) independence.

THE INDEPENDENCE REQUIREMENT

*Border Timbers et al v Republic of Zimbabwe*⁹⁸

The Tribunal’s rejection of the petitioners’ petition to appear as an *amicus curiae* in this case demonstrates the strict criteria applied to such applications. Several Zimbabwean indigenous groups and the European Centre for Constitutional and Human Rights (ECCHR) requested permission to participate as *amici* in a dispute over land to which the indigenous groups claimed ancestral title.⁹⁹ The indigenous groups had received “support from the [Nyahode Union Learning Centre] in the nature of facilitating communications between the ECCHR and the indigenous communities, the production of affidavits and the holding of meetings to discuss the Application.”¹⁰⁰

The Tribunal denied the application, finding that a Mr. Sacco, a central figure in the activities of the NULC, was strongly allied with the Respondent Zimbabwe’s land resettlement policies. This was found to “give rise to legitimate doubts as to the independence or neutrality of the Petitioners” sufficient to defeat the petition.¹⁰¹

E.1.IV. The desirability of participation and importance of the *amicus*’ contribution

The petition for *amicus* status should establish that it is in the Tribunal’s best interest to allow the organization’s participation. From the Tribunal’s perspective, there are costs and benefits to allowing *amicus curiae* participation. An effective *amicus* application will demonstrate to the Tribunal that the benefits outweigh the costs.

First, consider the interests of the Tribunal:

1. fairness to the parties
2. legitimacy of the institution
3. adherence to the relevant law

Allowing an organization to intervene can have different effects on these interests depending on the context, but in most cases the Tribunal has to perform the same balancing act, weighing the benefits of legitimacy that come with allowing third-party participation (discussed further below) against the potential burden on one or both of the disputing parties. In most cases, the most significant articulated burden on the parties will be the added cost of allowing *amicus curiae* participation. The arbitration facilities at ICSID are expensive, and both states and investors often employ large teams of lawyers for the length of the dispute. Parties may argue that the additional financial burden on them created by the *amicus* submission is undue.

⁹⁸ *Border Timbers and Hanganai*, *supra* note 77.

⁹⁹ *Ibid*, Procedural Order No 2 at para 21.

¹⁰⁰ *Ibid* at para 54.

¹⁰¹ *Ibid* at para 56.

In cases that involve the public interest, the benefits of allowing intervention are relatively consistent. Tribunals have acknowledged repeatedly that allowing a submission from *amici curiae* have the benefits of supporting ICSID's legitimacy by increasing transparency, demonstrating a concern for the public interest and thus "securing wider confidence in the arbitral process itself".¹⁰² Tribunals have also noted that this practice may assist the Tribunal in discharging its mandate by ensuring that all relevant issues are taken into account. After reminding the Tribunal of these benefits, the petition for *amicus* status should try to tip the scales by showing the low cost of *amicus curiae* intervention. The main cost to the Tribunal of allowing an *amicus* submission is the risk that proceedings will be disrupted or delayed, or that the submission will create a bias in favor of one party. Therefore, the petition should give compelling reasons why such concerns are unwarranted. In *Biwater*, the petitioners cited the record of *amicus* submissions in investor-state arbitration and pointed out how past submissions have not disrupted proceedings. The organization seeking *amicus* status could demonstrate how the difficulties potentially imposed on the tribunal in the case are less severe than those in *Biwater*, for example, where the Tribunal did accept the brief.

E.2. The submission

If the petition for *amicus* status is successful, the organization will be allowed to file a written submission. Note that the organization may request more than just permission to file a written brief. Many petitioners have requested access to the proceedings and other participatory concessions. However, in most cases, the submission will be the extent of the *amicus*' participation in the dispute, so it should comprehensively set out the organization's argument. A good submission will present arguments that are directly related to the dispute and grounded in law relevant to the dispute. It should also clearly state what the *amicus* is asking of the Tribunal.

E.2.I. Make specific requests

Before writing the submission, the organization should clearly identify the purpose of its *amicus* submission. This may be simply to have the Tribunal consider binding human rights law or public interest considerations when making its decision. Or, it may be that the *amicus* wishes the Tribunal to structure its analysis in particular ways that enable a fair consideration of human rights concerns. Compelling submissions will advocate for a specific outcome or a set of outcomes in order of preference. The *amici* in *Biwater Gauff* made specific arguments concerning how the dispute should be resolved. They claimed that the Tribunal could (a) "find the underlying investment contract invalid and thus dismiss the claims on the basis of a lack of jurisdiction or justiciability;" (b) "find that reproachable investor conduct affects the finding of a breach and ultimately deny the claim on the merits; or" (c) "reduce the damages award in consideration of the investor's conduct."¹⁰³

E.2.II. Make legal arguments

Tribunals may be deeply moved by strong ethical claims, but unless they are grounded in legal argument Tribunals have no jurisdiction to address them. Often the difference between a purely moral and a legal claim is as simple as a few words. Rather than saying, for example, "the citizens will not have access to water" say "the citizens' legally binding right to health will be implicated/contravened." An even stronger argument would be to find a norm in international investment law itself that supports the *amicus*' claim as discussed in Section E.2.III. below.

E.2.III. Use applicable law

The *amicus*' argument should demonstrate in as much detail as possible why the law applicable to the dispute results in the outcomes requested in the submission. While Tribunals may make occasional reference to international human rights law, they have traditionally been hesitant to assume jurisdiction over such matters and make findings based on international human rights law. As such, it is the job of the *amicus* to tie human rights law and principles to the international investment law governing the dispute.

¹⁰² *Biwater v Tanzania*, *supra* note 66, Procedural Order No 5 at para 50.

¹⁰³ *Biwater v Tanzania*, *supra* note 66, Amicus Curiae Submission (appended below) at paras 44-45.

Human rights legislation and principles can play a key role in treaty interpretation, particularly through the principle of systemic integration.¹⁰⁴ Systemic integration is the process whereby international obligations are interpreted such that, in the case of investment arbitration, the relevant rules of international law should inform the interpretation of the investment law.

Human rights legislation and principles are thus of significant assistance when establishing the meaning of party obligations under the IIA at issue. For example, some investment agreements will, in their preamble, state their objectives in relation to sustainable development as opposed to solely economic growth.¹⁰⁵ The *amicus* can use human rights treaties to illustrate international rules and norms in order to aid in the interpretation of what is meant by “sustainable development”. This in turn provides an opportunity for the *amicus* to show that the parties involved in the IIA or the dispute are subject to certain human rights obligations. From there, the *amicus* can use its submission to provide further detail on what these obligations entail.

Human rights conventions can also be used to illustrate that a violation has occurred which is incompatible with transnational public policy. An example is found in *World Duty Free Co Ltd v Republic of Kenya*, where the ICSID tribunal examined domestic laws and international conventions related to corruption and used their findings to conclude that “claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal”.¹⁰⁶ Anti-corruption norms thus presented an international public order. Although this analysis was undertaken by the tribunal itself and not advanced by an *amicus*, it provides an example of how human rights laws and norms can be brought into arbitration disputes.

¹⁰⁴ Orellana, *supra* note 59 at 11.

¹⁰⁵ *Ibid* at 171.

¹⁰⁶ *World Duty Free Co Ltd v Republic of Kenya* (2006), Case No ARB (AF)/00/7 (International Centre for the Settlement of Investment Disputes), all documents online: International Trade Arbitration <italaw.com> at 157.

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**PETITION FOR TRANSPARENCY AND PARTICIPATION
AS AMICUS CURIAE***

(Unofficial Translation from Spanish Original)

**In case No. ARB/03/19 before the
International Centre for Settlement of Investment Disputes**

Between

**Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A.
and Vivendi Universal, S.A.**

And

The Republic of Argentina

Applicants

**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
Unión de Usuarios y Consumidores**

* This is an unofficial translation from the Spanish original available at www.cels.org.ar and www.ciel.org

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4. Petition

1. INTRODUCTION

The present case discusses the appropriateness of damages claimed by the company *Aguas Argentinas S.A.* in relation to the alleged harm caused to its business on account of certain general measures adopted by the Argentine Government in response to the 2002 economic crisis¹. Such economic policy measures included the devaluation of the Argentine currency, tariff freeze and a ban on tariff indexation according to the US price index². The company considers that such measures breach the Agreement between the Government of the Republic of Argentina and the Government of the Republic of France for the Mutual Promotion and Protection of Investments dated July 3, 1991³ (hereinafter “Argentina – France BIT”).

The measures questioned by *Aguas Argentinas S.A.* in the present case involve general measures adopted by the Argentine State in the exercise of its regulatory power. These measures have a direct impact on inhabitants’ ability to have access to essential public services like drinking water and sanitation. Thus, the decision adopted by this tribunal will directly affect the protection of fundamental rights of the people living in the service concession area.

Because of the clear public interest involved in this case, the applicants believe that the procedure should be conducted with transparency and the participation of the people interested in its resolution. The transparency of the process translates into free access to the documents produced by the parties and to the hearings. Likewise, civil society participation translates into the possibility of submitting arguments that are substantial to the resolution of the case as *amicus curiae*.

We believe that the Tribunal should, in construing the extent of the rights of the parties to the dispute, take into account principles of international and domestic law relating to public health, essential services, adequate quality of life, housing, and consumers’ defense. The close relation existing between the effective protection and the exercise of such rights, and the provision of drinking water and sanitation under discussion in this case justifies our interest in participating in the case.

¹ The information we have available on the subject matter of the dispute arises from journalistic versions, as the case filed by the company is not public.

² That is, according to the simple average between the Producer Price Index – Industrial Commodities and the Consumer Price Index – Water & Sewage Maintenance as was the case.

³ Accord entre le Gouvernement de la République française et le Gouvernement de la République Argentine sur l’encouragement et la protection réciproques des investissements, signé à Paris le 3 juillet 1991.

2. THE APPLICANTS

The Association for Equality and Justice (ACIJ) is a non-profit organization whose mission is to contribute to the strengthening of democratic institutions in Argentina and to defend the basic rights of disadvantaged groups. In particular, ACIJ has legal authority in Argentina to take legal action in defense of user and consumer rights, in accordance with the provisions of article 42 and 43 of the Argentine Constitution.

The Center for Legal and Social Studies (CELS) is a non-governmental organization that has worked since 1979 for the promotion and protection of human rights in Argentina.

Consumidores Libres Cooperativa Ltda. de Provisión de Servicios de Acción Comunitaria (Cooperative for the provision of community action services) is an organization devoted to the defense and protection of Argentine users and consumers' rights.

The *Unión de Usuarios y Consumidores* (Users and Consumers' Union) is an organization devoted to the defense and protection of Argentine users and consumers that has been active for ten years and is a member of Consumers International.

The Center for International Environmental Law (CIEL) is a nonprofit organization working to provide legal support to persons and civil society agencies around the world. CIEL's Trade and Sustainable Development Program seeks to reform the global framework of economic law, in order to promote human development and a healthy environment.

3. – BASIS OF THE PETITION FOR TRANSPARENCY AND PARTICIPATION

The grounds that support our petition for transparency and participation are clear and concrete:

First, the controversial subject matter of this arbitration, in which a constitutional and democratic State is a party, involves a clear public content, that will directly affect the fundamental human rights of the entire population. The legitimacy of the decision and the arbitration is affected by the secrecy applied to the proceedings. In that regard, by virtue of fundamental democratic principles that lead to the enjoyment of human rights, the public decisions that affect millions of people cannot be adopted in secrecy nor exclude the opinion of the affected population.

Second, the petitions for transparency and participation are appropriate both under the Argentina – France BIT, the norms of the ICSID Convention, and the

arbitration rules of the international Centre for Settlement of Investment Disputes (ICSID).

Third, the Argentine legislation, including international human rights treaties that have constitutional status, guarantee the participation of civil society organizations in legal and non-legal proceedings that may affect collective incidence rights.

Fourth, the arbitral tribunal has inherent powers that vest it with jurisdiction to recognize the rights to participation and transparency that the applicants request.

Fifth, the close relationship between ICSID and other “World Bank Group” institutions, especially the International Finance Corporation (IFC) and the International Bank for Reconstruction and Development (IBRD), demands that the proceedings be made public.

Sixth, a trend exists in other international tribunals and international organizations to recognize the value of transparency and the participation of users, environmentalists, and other organizations that represent affected people, in cases where disputes concern the public interest; therefore ICSID is in no position to justify the need for secrecy in cases of this sort.

3.1. The Public and Institutional Significance of the Case

This case does not merely discuss private commercial interests, but rather issues of major public importance. The subject matter of the dispute under arbitration concerns the Argentine State’s freedom to regulate the supply of essential public services and, therefore, this arbitration affects the entire population of the country. Likewise, the case directly affects the ability of millions of people living in the Greater Buenos Aires –the claimant’s service concession area– to access water and sanitation services.

The government’s decisions questioned by *Aguas Argentinas S.A.* in the present case involve general economic measures adopted by the Argentine State to face a sizable economic crisis. The scope and application of such measures, albeit involving consequences to the complainant and to all the economic activities conducted in Argentina, also determine the way in which inhabitants have access to, and enjoy an essential public service like drinking water and sanitation.

The measures at issue in this arbitration, particularly the tariff freeze and the ban on tariff indexation according to the U.S. price index, relate directly to the fundamental human right of access to essential services. In such sense, it should be mentioned that a recent World Bank report specifically mentions that the practice of indexing public service tariffs according to the U.S. price index,

rendered such services practically inaccessible to many Argentines, a situation that –as stated– could worsen should new tariff increases be approved.⁴

The public interest and institutional dimension of this case are heightened by the close relationship that exists between the discussions generated within its framework and the renegotiation process of the *Aguas Argentinas S.A.* contract, which is a parallel process in course in Argentina. Such connection is evidenced both by the Ministry of Finance’s decision to exclude those companies that file a submission before an arbitral tribunal from the renegotiation process,⁵ and by the recent agreement between *Aguas Argentinas S.A.* and the Argentine Government whereby the proceedings in this case shall be suspended while a temporary agreement concluded during the renegotiation remains in force,⁶ i.e. until December 31, 2004.

An additional factor for concern is the way in which *Aguas Argentinas S.A.* is invoking this case and the provisions of the Argentina-France BIT to pressure the Government, so that it will refrain from taking certain measures of public relevance that might affect the investor’s interests.⁷ The utilization of the ICSID mechanism as a means of pressuring the Government and obtain benefits is promoted by the lawyers that advise foreign investors. In line with this, a major law firm that works in this field representing some of the companies that have sued Argentina before ICSID expressly recognizes that the use of international arbitration under a bilateral investment treaty, or the threat of so

⁴ “Residential services that were quite attainable in 1997 are now very expensive, especially in relation to the income of first quintile homes (due to, among other things, the rates indexed to the US dollar).” The “economic crisis the country is experiencing has significantly worsened the attainability of water and energy services, which currently absorb 22% of the income of first quintile homes, a ratio that could increase if the raise in service rates is approved...” and consequently, it states the need to avoid “that the expenditures on the three most essential services (water, electricity, and natural gas) exceed a threshold of 15% for the poorest sectors of the population.” Vivien Foster, *Hacia una Política Social para los Sectores de Infraestructura en Argentina: Evaluando el Pasado y Explorando el Futuro*. Produced by the World Bank Office for Argentina, Chile, Paraguay and Uruguay in collaboration with the Department of Finance, Private Sector and Infrastructure, Working Document 10/03, December 2003 in http://www.bancomundial.org.ar/archivos/Documento_de_Trabajo10_Hacia_una_Politica_Social.pdf

Regarding water and sanitation services in particular, the current regressive tariff scheme implies remarkable inequality concerning service costs for users living in the Greater Buenos Aires area. Actually, for the 10% higher income population, the resources used to pay such services account for only 1.3% of their income while for the poorest 10% such payment requires 9% of their already deteriorated income. (Cfr. Aspiazu, Daniel and Forcinito, Karina, *Historia de un fracaso: la privatización del sistema de agua y saneamiento en el área Metropolitana de Buenos Aires*).

⁵ Ministry of Finance Resolution, No. 308/02 art 11.

⁶ Until December 31, 2004

⁷ As derived from the whereas clauses of Resolution ETOSS 86/03, the Concessionary company rejected the notification it received to constitute the trust fund agreed on the Five-year Review Minute dated 01/09/01, stating that forcing it to do so would imply “another” serious violation of the Argentine State to the rights protected by the bilateral investment treaty enacted by Law 24100.

doing, constitutes the best option for foreign investors to put pressure on defaulting host states and obtain satisfactory contract renegotiation.⁸

In this manner, the discussions that have taken place under the ICSID framework –from which the public has been excluded–, may be critical in relation to the positions and decisions that, with respect to the future services regime, may be adopted in the concession contract renegotiation process. It is clear that the final decision adopted as a result of such process, as much as the positions adopted by the Argentine Government before this Tribunal, will have an impact beyond the rights and interests of the parties to the dispute. It is also equally clear that this process and the resulting decisions should not be conducted in secrecy, without civil society participation, particularly of those who are directly affected.

The decision adopted by this Arbitral tribunal will have a substantial impact on the ability of the inhabitants of Buenos Aires City and Greater Buenos Aires to access indispensable basic services of water and sanitation. Such services are necessary to exercise the right to an adequate quality of life and other fundamental human rights such as health, food, housing and education, all of which have constitutional rank in Argentina's institutional system. Such a situation is even more serious in the context of the widespread and unprecedented poverty faced by Argentina.

As has been shown, this arbitration process goes far beyond merely resolving commercial or private conflicts, and, rather, it has a substantial influence on the populations' ability to enjoy basic human rights. This aspect of the case means that the process should be transparent and permit citizens' participation and monitoring. Decisions that impact on a State's public policy-making should not be adopted in settings devoid of the checks and balances that characterize democratic institutions and lend legitimacy to government measures.

In that regard, the arbitral tribunal in the *Methanex* Case –which involved California inhabitants' access to drinking water– recognized the public interest in such investment dispute, and allowed the participation of the public as *amicus curiae*, because, as stated by tribunal,

“[t]here is undoubtedly a public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties... There is also a broader argument... the Chapter 11 arbitral process could

⁸“The Argentine crisis - foreign investors rights” at <http://www.freshfields.com/places/latinamerica/publications/pdfs/2431.pdf>

benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive.”⁹

This presentation and the petitions that we submit to the Tribunal are a necessary and unavoidable consequence of the clear institutional relevance of the case and should not, in good faith, be denied or minimized. On this basis, in our role as Civil Society Organizations, devoted to the defense of fundamental human rights, promoting transparency and participation in accordance with the democratic rule of law, and to contribute to the institutional strengthening of Argentina, we request access to the process and the right to submit arguments.

3.2. The Petition for Transparency and Participation is Appropriate under the Argentina – France BIT, the ICSID Convention, and the ICSID Arbitration Rules.

The properness of this request for transparency and participation finds normative support both in the international and domestic law that this tribunal should apply, and in the rules that control the resolution of disputes under ICSID.

First, it should be pointed out that by virtue of Article 8.4 of the Argentina – France BIT, this dispute should be decided by resorting to, *inter alia*, Argentine law rules, and that such rules require the transparency of the arbitration and the participation of all persons interested in the resolution of the case. Indeed, fundamental rules of the Republic of Argentina –examined in the next section–including its Political Constitution and its international human rights obligations recognize citizens’ participation and access to information as basic principles of the State’s institutional legal order.

Second, with respect to procedural issues, Article 44 of the ICSID Convention should be observed, which requires the application of the Argentine regulations. Article 44 establishes that “If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question”. Given that the ICSID Convention and the arbitration rules are silent on the question of transparency and participation, the Tribunal should resort to Argentine law as the rules agreed by the parties, and eventually resolve possible legal lacunae in favor of the principles of transparency and participation that inspire the democratic order of the Argentine State.

Likewise, the ICSID Convention contains no clause calling for the confidentiality of the proceedings. The only provision that has given rise to

⁹ *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions for Intervention and Participation as “Amici Curiae”, paragraph. 49, (January 15, 2001). (unofficial translation).

certain doubts is Article 48(5) of the ICSID Convention, which states, “the Center shall not publish the award without the consent of the parties.” In practice, however, most of the decisions are published, if not by the Center, by third parties. In fact, as has been recently pointed out by the ICSID Secretariat, “The notion that [Article 48(5)] connotes wider confidentiality or privacy obligations, beyond those of ICSID itself, is not supported by current arbitral practice.”¹⁰

Further, an analysis of the ICSID Arbitration Rules confirms the absence of legal obstacles to the transparency of the proceedings and the participation of the public. As for transparency, nothing in the arbitration rules indicates that the documents produced in the arbitration process should be kept secret. With regard to *amicus curiae* presentations, the Tribunal is not prevented from accepting information from third parties. Rather, the contrary applies: Article 34 of the Arbitration Rules establishes that “the Tribunal may, if it deems it necessary at any stage of the proceeding: (b) visit any place connected with the dispute or conduct inquiries there.”

As noted, Article 34 of the ICSID Arbitration Rules expressly allows the Tribunal to receive information from persons and groups other than the parties to the dispute. As explained below, a similar provision in the World Trade Organization’s *Dispute Settlement Understanding* has been construed by said institution’s Appellate Body as allowing dispute resolution panels to accept *amicus curiae* briefs.

Also, with respect to open hearings, Article 32 of the Arbitration Rules, that regulates who can attend oral hearings, far from establishing a prohibition to the participation of non-disputing parties, allows such possibility by expressly regulating the procedure that the Tribunal should follow.

Already two investment arbitrations administered by ICSID, *Methanex* and *UPS*, hearings have been open to the public. ICSID has not had logistical problems in managing the opening of hearings to the public. Moreover, some of the new generation investment treaties –analyzed below- explicitly recognize the public’s right to attend the hearings.

Thus, no contradiction exists between the fundamental principles of transparency and participation considered in the Argentine norms and the procedural standards applicable to the resolution of this dispute.

In conclusion, the Argentina – France BIT, and applicable norms provide that the Tribunal should handle this arbitration with transparency and with the participation of the applicants. Moreover, nothing in the ICSID convention or

¹⁰ ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration*, 22 October 2004, Paragraph 14, available at <http://www.worldbank.org/icsid/improve-arb.pdf> (unofficial translation).

the ICSID Arbitration Rules prevents transparency or participation. De rigueur, the ICSID Convention allows the Tribunal to decide on procedural matters that are not expressly regulated. And the Arbitration Rules empower the Tribunal to carry out enquiries in the place related to the dispute –i.e. where the applicants are located- and receive information from non-disputing third parties. Therefore, according to the juridical instruments that control this arbitration, the Tribunal is fully empowered to conduct the arbitration in the open light, before the public.

Finally, it should be pointed out that opening the proceedings to the public shall by no means affect the orderly conduct of this arbitration or jeopardize due process, but on the contrary it would contribute to attach further legitimacy to the decision adopted.

3.4 The Argentine Laws that the Tribunal Should Apply

As mentioned in the preceding Section, under both article 8.4 of the Argentina – France BIT, and article 44 of the ICSID Convention, this Tribunal must resolve issues of form and substance applying, *inter alia*, the rules of Argentine law.

The Argentine legislation, in particular the National Constitution in articles 42¹¹ and 43¹², Consumer Defense Law 24.24,0¹³, and the regulation that provides for public participation in administrative instances, recognize that the applicants have the right to participate whenever decisions that will affect the supply of public services are discussed, and also to have access to information relevant thereto.

¹¹ Art. 42 of the Argentine National Constitution establishes that “(1) As regards consumption, consumers and users of goods and services have the right to the protection of their health, safety, and economic interests; to adequate and truthful information; to freedom of choice and equitable and reliable treatment. The authorities shall provide for the protection of said rights...” It also provides that “Legislation shall establish efficient procedures for conflict prevention and settlement, as well as regulations for national public utilities. Such legislation shall take into account the necessary participation of consumer and user associations and of the interested provinces in the control entities...”

¹² In its second paragraph this article provides that summary proceedings may be filed “against any form of discrimination and about rights protecting the environment, competition, users and consumers, as well as about rights of general public interest, shall be filed by the damaged party, the ombudsman and the associations which foster such ends ...”.

¹³ Particularly articles 52, 55 and 56. Article 52 establishes that “the consumer and user may bring judicial actions when their interests are affected or threatened”. “The action shall be brought by the consumer or user, consumer associations constituted as corporate persons, the national or local application authority and the public prosecutor’s office”. Article 55 provides that “consumer associations constituted as corporate persons are entitled to act when consumers’ interests are objectively affected or threatened” and Article 56 provides, among the purposes of such associations, *inter alia*: i) Defend and represent the interests of the consumers, before the justice system, application authority and/or other official or private agencies; ii) Advise consumers on goods consumption and/or use of services, prices, purchase conditions, quality and other matters of interest; and iii) Organize, perform and disseminate surveys on markets, quality control, price statistics and provide all information of interest to consumers.

According to the above, both in the administrative jurisdiction, through their participation in public hearings, or in the judicial jurisdiction, through their standing both to bring legal actions and to participate as interested parties in cases brought by other social actors, the associations that defend users' and consumers' rights (representing Argentine users and consumers) under Argentina's domestic law are empowered to participate in proceedings that may affect the rights they represent.

Additionally, such norms have crystallized, through numerous judicial decisions, the recognition of standing for users' and consumers' associations in judicial proceedings where aspects related to the supply of public services are at stake.¹⁴ Therefore, the standing of consumers defense associations to sue in the defense of users' interests and rights is not only clearly established in the National Constitution and in National Law No. 24240, but furthermore is non-controversial in local jurisprudence.

Given that at issue in this case are measures that directly affect the interest of current and future public service users, and that the State's regulatory power is at stake, if the applicants were not allowed to participate in this proceeding, an undue restriction to their rights would be imposed as well as an unjustified breach of the applicable law.

Besides the previously mentioned rule that specifically applies to issues relating to access to public services, our petition is also supported by other articles of the National Constitution and international human rights treaties, which in Argentina are granted constitutional rank.¹⁵ Among them are the International Covenant on Civil and Political Rights and the American Convention on Human Rights (ACHR) that especially guarantee the right of access to information, to an effective recourse, and to due legal process.

¹⁴ Conf. "Youssefian, Martin v/ National State - Communications Secretariat w/o protection Law 16.986", National Trial Court of Administrative Affairs n° 9 and which resolution constitutes a condition prior to the operability of decree 264/98, with resolution of the court, Room IV, 06/23/98, "Consumidores Libres Cooperativa Limitada de Provision de Servicios de Accion Comunitaria v/ Telefonica de Argentina S.A., Telecom Argentina S.A., Stet-France Telecom and Telintar S.A.. w/o court record", National Trial Court of Administrative Affairs N° 7, Secretariat N° 13 - Room IV; "Consumidores Libres Cooperativa Limitada de Provision de Servicios de Accion Comunitaria w/o protection", National Trial Court of Administrative Affairs N° 9, Secretariat N° 17 - Room V; "Consumidores Libres Cooperativa Limitada de Provision de Servicios de Accion Comunitaria v/ E.N.- Presidency of the Nation - Communications Secretariat and others w/o protection, Expeditious Proceeding", National Trial Court of Administrative Affairs N° 10, Secretariat N° 19 - Room V, Case 9/99 "ADECUA v/PEN (Tax Law) DTO. 1517/98", among others.

¹⁵ Article 75, paragraph 22 of the National Constitution grants constitutional status to a long list of international treaties on human rights.

The right of access to information is provided for in Article 14 of the National Constitution,¹⁶ which in harmony with Article 1 of the same legal text¹⁷, establish the principle of publicity of governmental acts. This right is also approached in Article 13 of the American Convention on Human Rights¹⁸ and Article 19 of the International Covenant on Civil and Political Rights.¹⁹ Finally, this right has been broadly defined and regulated through the National Executive Power decree N° 1172/2003 of Access to Public Information.²⁰

The right of every person to participate and make their voice heard in cases where the decisions may affect their rights and interests is an integral part of the principles that secure the right to an effective recourse and the guarantee to due legal process. Such guarantees are expressed both in article 18 of the National Constitution²¹ and in the most important international law human rights instruments, as the International Covenant on Civil and Political Rights (Art. 14 and 25)²² and the American Convention on Human Rights (Art. 8 and 25).

¹⁶ Article 14 provides that " All the inhabitants of the Nation are entitled to the following rights, in accordance with the laws that regulate their exercise, namely: ...to petition the authorities; ... to publish their ideas through the press without previous censorship..."

¹⁷ Article 1 provides: "The Argentine Nation adopts the federal republican representative form of government, as this Constitution establishes". This article, while establishing a republican and democratic form of government, places on citizens a central role in the management of public issues. Citizens elect the government and rule through their representatives, but they also permanently collaborate, participate and oversee the public issues.

¹⁸ Article 13.1 establishes: "Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice". The Inter American Court of Human Rights in construing the scope of such right has adopted a broad notion of freedom of expression which involves not only everyone's right to try to communicate to others his/her points of view but also everyone's right to receive opinions and news. The Court has held that "For the citizen in the street becoming aware of others' opinions or the information available to others is as important as the right to disseminate their own" (Inter American Court of Human Rights, Consultative Opinion =C-5/85 of 13/11/1985).

¹⁹ Article 19.2 provides "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice".

²⁰ Enacted on December 4, 2003. The text of the decree recognizes that "public information constitutes a citizens' participation act whereby everyone exercises their right to seek, consult and receive information..." and that "the purpose of access to public information is to allow and promote effective citizens' participation, through a complete, appropriate, timely and truthful supply of information". Annex VII, articles 3 and 4.

²¹ Article 18 provides among other guarantees that " The defense by trial of persons and rights may not be violated".

²² Article 14 provides that "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". "The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a

Finally, it should be mentioned that the Supreme Court of Justice of Argentina has recently regulated the “Friend-of-the-Court” (*amicus curiae*) instrument as one meant to, among other purposes, allow citizens’ participation in the administration of justice in cases involving institutionally relevant issues, or that concern the public interest.²³ Indeed, as the Supreme Court has stated,

“Physical or corporate persons that are not parties to the dispute may appear before the Supreme Court of Justice of the Nation as Friend-of-the-Court in all judicial proceedings corresponding to original or appeals jurisdiction where collective or general interest issues are debated.”

3.4 The Inherent Powers of an Arbitral Tribunal Empower it to Recognize Collective Participation and Transparency Rights.

The inherent powers of this Arbitral Tribunal empower it to recognize the participation and access to information rights that inhabitants enjoy on issues concerning essential public services. By virtue of its inherent jurisdiction, the tribunal is empowered to allow for the transparency of its procedures on account of the public interest involved in this arbitration.

The inherent power doctrine has been articulated by several international tribunals in the specific context of judicial dispute resolution mechanisms, including the International Court of Justice (ICJ), International Criminal Tribunal for the Former Yugoslavia (ICTY), and several arbitral tribunals, including the one constituted for the *Rainbow Warrior*²⁴ arbitration between France and New Zealand, and recently the tribunal that, under the framework of ICSID, dealt with the *Enron v. the Republic of Argentina*²⁵ case.

The inherent powers doctrine has been applied in several issues that are central to the exercise of jurisdiction, for instance, the tribunal’s decision about its own

criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children”. Article 25 provides: “Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country”.

²³ Ruling by the Supreme Court of the Nation N° 28/2004, (Regulations, Art. 1). It is also provided that “The *amicus curiae* shall be a physical or corporate person knowledgeable in the issue under discussion.”

²⁴ *Rainbow Warrior*, R.I.A.A., Vol. XX, 1990, p. 217, at 270.

²⁵ *Enron and Ponderosa Assets v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (January 14, 2004).

jurisdiction (Kompetenz-Kompetenz),²⁶ as well as the characterization of the nature of the dispute.²⁷ *A fortiori*, this Tribunal is fully empowered, by virtue of its inherent jurisdiction, to order the transparency of the proceeding in matters relating to the public interest.

The ICJ, in the *Nuclear Tests case*, pointed out that the court possesses an inherent jurisdiction, derived from its existence as a judicial organ, to make whatever findings necessary to provide for the orderly settlement of all matters in dispute.²⁸ The ICTY Court of Appeals, in the 1995 *Tadic case*, has also recognized that the inherent power doctrine is a necessary component in the exercise of the judicial function, and need not be expressly provided for in the constitutive documents of the tribunals.²⁹ In applying these principles, transparency and participation need not be expressly mentioned, and may be recognized by the Tribunal under its inherent jurisdiction.

In the *Rainbow Warrior case*, the tribunal considered that its inherent powers empowered it to order the cessation of a continuing illegal act.³⁰ Such decision influenced the *Enron v. Argentina case*, where the arbitral tribunal considered that its inherent powers authorized it not only to exercise declaratory powers, but also to order measures involving performance of certain acts.³¹ As readily seen, these matters go well beyond mere procedural issues, and find their place at the limits of the tribunal's jurisdiction. Therefore, a procedural question, inspired on principles of justice and equality and geared to guarantee the transparency of the arbitration when the public interest is at stake, cannot but remain covered by an international tribunal's inherent powers.

3.5 The Close Relationship between the Institutions of the World Bank Group Demands Transparency and Participation

In the current arbitration, there is close relationship between ICSID and other institutions that are part of the World Bank Group³² which have a specific interest in the resolution of the dispute, particularly the International Bank for Reconstruction and Development (IBRD) and the International Finance

²⁶ CIJ, *Nottebohm Case*, (preliminary objections), [1953] ICJ Reports 111,119.

²⁷ CIJ, *Fisheries Jurisdiction Case* 1998 (Spain v. Canada), Jurisdiction, General List No. 96, paras. 30-31 (Dec. 4, 1998), available at <http://www.icj-cij.org>; *Atún Aleta Azul Case* (Australia & N.Z. v. Japan), Award on Jurisdiction and Admissibility, para. 48 (Aug. 4, 2000), available at <http://www.worldbank.org/icsid>.

²⁸ CIJ, *Nuclear Tests Case*, ICJ Reports 1974, pp. 259-260, para. 23, quote CIJ, *Northern Cameroons case*, ICJ Reports 1963, p.29.

²⁹ ICTY Appeals Chamber, *Tadic (Jurisdiction) -- Prosecutor v. Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), Case IT-94-1, 2 October 1995.

³⁰ Case *Rainbow Warrior*, cit., paragraph 114.

³¹ Case *Enron*, cit., paragraphs. 75-81.

³² The World Bank website states that the World Bank Group includes five closely linked institutions: the International Bank for Reconstruction and Development ("IBRD"); the International Development Association ("IDA"); the International Finance Corporation ("IFC"); the Multilateral Investment Guarantee Agency ("MIGA") and the ICSID.

Corporation (IFC). The IBRD has played a key role in the design of the regulatory framework for public services under concession and in the privatization process, and the IFC holds a percentage of *Aguas Argentinas S.A* equity shares.

This relationship clearly creates a source of potential conflict of interests. Such a clear institutional relationship demands that the ICSID arbitral tribunals provide for full transparency in cases where other World Bank Group members are involved, as is the case in this arbitration.

To illustrate the close institutional relationship between ICSID and other World Bank Group agencies, we should first mention that ICSID offices are located in the IBRD headquarters in Washington, DC³³ (Art. 2 of the ICSID Convention), and that the members of the ICSID –Administrative Council and Secretariat (Art. 3 of the Convention)- are related to the World Bank.

Furthermore, the President of the World Bank is *ex officio* Chairman of the ICSID Administrative Council (Art. 5 of the Convention).³⁴ This fact is relevant if one considers that the Chairman of the Administrative Council could play a decisive role in the outcome of arbitrations and conciliations.³⁵ And even though this Tribunal has been constituted by agreement of the parties, nothing can ensure that a future vacancy may need to be filled and that the parties do not reach agreement.

The IBRD and IFC interest in solving the case is undeniable. The IBRD has exerted enormous influence in the characteristics adopted by the privatization process of drinking water and sanitation services in Argentina. In particular, the IBRD has influenced the regulatory framework of the claimant's concession contract, whose interpretation and scope are essential to the resolution of the instant dispute.

It should also be mentioned, first, that after the mission that visited the country between November 1991 and October 1992, the Bank recommended, in order “to render more attractive the sale of public companies”, the adoption of an official program that included the following, *inter alia*: that privatized services' prices and tariffs be established following international prices, and that

³³ International Centre for Settlement of Investment Disputes (ICSID) 1818 H Street, N.W. Washington, D.C. 20433.

³⁴ The Chairman shall serve without remuneration from the Centre (art. 8 of the Convention), as his position in the Centre is *ex officio* and the remuneration for his “*ex officio*” work is covered by the World Bank.

³⁵ In fact, the Chairman of the ICSID Administrative Council shall, at the request of either party and after consulting both parties as far as possible, appoint the conciliator or conciliators not yet appointed; If a conciliator or arbitrator appointed by a party resigned without the consent of the Commission or Tribunal of which he was a member, the Chairman shall appoint a person from the appropriate Panel to fill the resulting vacancy; shall fill the vacancy at the request of either party, should the vacancy not have been filled after 45 days. Cfr. arts. 30, 38, 56, and 58 of the ICSID Convention.

indexation be adjusted according to the U.S. price index.³⁶ It becomes entirely clear that both the impact on access to essential services of this recommendation, as well as the measures adopted by the Government to guarantee the population's supply of water and sanitation, are in question in this arbitration.

Another report elaborated by the IBRD Operation Evaluation Department, analyzing the assistance to Argentina in a loan for water and sanitation services, shows that external consultants hired through the World Bank were responsible for drafting the regulatory framework and preparing the privatization documents, and that said consultants then held major positions in the privatized corporate service providers.³⁷

Also, several reports of the Bank demonstrate the participation of its institutions in the Argentine privatization process. A report elaborated in July 2000 by the Bank's Operation Evaluation Department with respect to the assistance to Argentina, expressly states the role of the IFC in promoting privatizations in Argentina, particularly in sectors such as water, sanitation and health.³⁸ Additionally, a memorandum elaborated in 2001 by the IBRD and the IFC for the Bank Executive Directors, concerning the progress of the *Country Assistance Strategy* (Report 22049-AR), clearly indicates that the Bank supported the water privatization process.

Besides the role played by the IBRD in the factual setting of the arbitration, several of the claims brought against Argentina before the ICSID were brought by private multinational companies that received funding from the IFC.³⁹ *Aguas Argentinas S.A.* is one of them. As of December 2001, the IFC was the

³⁶ Argentina: From Insolvency to Growth (World Bank Country Study).

³⁷ World Bank Operations Evaluation Department, Implementation Completion Report Number 18014, dated June 16, 1998.

³⁸ Report of the Independent Evaluation Department to the World Bank Board and President evaluating the assistance to Argentina. OED, Country Assistance Evaluation, Report No. 20719.

³⁹ Some of the examples we could mention in this respect are: ENRON (projects funded by the IFC in Dominican Republic and Colombia); CMS GAS (projects funded by the IFC in Chile, Mongolia and Ghana); SIEMENS (multiple projects funded by the IFC throughout the world); AES (projects funded by the IFC in Cameroon, Uganda, Salvador, Georgia, Mexico and Pakistan); CAMUZZI (participates in the water concessions privatizations in Argentina. The IFC funds projects of other Camuzzi shareholding companies); PAN AMERICAN ENERGY (projects funded by IFC in Turkey, Madagascar, Algeria, Baku, Mali, Romania, Mauritania, Kenya, South Africa and others); EL PASO ENERGY (projects funded by IFC in Mexico); AGUAS PROVINCIALES DE SANTA FE (projects funded by IFC in Argentina); TELEFONICA (projects funded by IFC in Venezuela, Bolivia and Morocco); ENERSIS (projects funded by IFC in Brazil); SUEZ -majority shareholder of Aguas Argentinas- (projects funded by IFC in Egypt, Bolivia, Cambodia, Chile, Zambia, Argentina and Bolivia); EDF (projects funded by IFC in Mexico and Egypt); UNISYS CORP. (projects funded by IFC in Philippines). For more details see: <http://ifcln001.worldbank.org/>.

creditor to 20% of the company's international debt⁴⁰, and the holder of 5% of its equity shares⁴¹.

Finally, it should be highlighted that the World Bank, as sponsor of the establishment of ICSID through a decision of its Executive Directors, has facilitated funds for the Centre to finance its expenses.⁴² ICSID's economic dependency on the World Bank Group also implicates potential problems, thus highlighting the relevance of transparency.

In conclusion, the close relationship between the five World Bank Group institutions covers with a cloak of doubts the impartiality and independence of the mechanisms used to resolve disputes that particularly derive from the Bank's operations. This dark cloak also affects the perception of this arbitration's legitimacy by Argentine citizens' and the global public opinion. The transparency of this arbitration, that is, access to information and public participation, would clear many doubts and contribute to clarify the linkages between the different World Bank Group institutions.

3.6 The Trend Towards Openness of other Tribunals and International Organizations Demonstrates the Value of Transparency and Participation in the Progressive Development of International Law

Over the last few decades, the democratic principles that support our petition for transparency and participation have found a space in the progressive development of international law. Such development towards an international democratic order where fundamental human rights may be realized becomes apparent both in the operation of dispute resolution mechanisms and in the practices of international agencies, as in new conventional instruments. In effect, various international tribunals and agencies have taken notice of the public component involved in certain commercial disputes, and have allowed and facilitated the participation of third parties.

First, we should refer to ICSID, whose Secretariat has elaborated a document to improve arbitrations through transparency and participation. The document elaborated by the ICSID Secretariat points out that it would be useful to make clear that the tribunals have the authority to accept and consider submissions by the public.⁴³ The ICSID Secretariat (rightly) speaks about "clarifying" the arbitration rules, because, as shown above, no ICSID provision precludes transparency or participation.

⁴⁰ As at December 2001 Aguas Argentinas SA owed the IFC U\$S 50.092 (current debt) and U\$S 74.517 (non current debt).

⁴¹ Aguas Argentinas S.A. website, <available at <http://www.aguasargentinas.com.ar>> Also, according to the information furnished by the *Consejo Federal de Entidades de Servicios Sanitarios* (COFES), in <http://www.cofes.org.ar/infosector/gestion servicios.htm>

⁴² General Provisión No. 17 of the Executive Directors' Report about the Convention.

⁴³ ICSID Secretariat, Possible Improvements of the Framework for ICSID Arbitration, 22 October 2004, Paragraph. 13, available at <<http://www.worldbank.org/icsid/improve-arb.pdf>>

In the context of international investment law, it is timely to mention the development towards transparency and participation in the North American Free Trade Agreement (NAFTA). Firstly, two arbitral tribunals have already admitted written presentations by civil society organizations as *amicus curiae*. Secondly, the NAFTA “Free Trade Commission”, whose role is to supervise the implementation of NAFTA and issue binding interpretations on investment disciplines,⁴⁴ has prepared “interpretation notes” and “declarations” that recognize the importance of transparency and participation. This development is further analyzed below.

Both in the *Methanex Corporation vs. United States of America*, and the *United Parcel Service of America Inc. vs. Government of Canada (UPS)* cases, the arbitral tribunals recognized their power to allow for transparency and the participation of civil society organizations.⁴⁵ Among the factors that these investment arbitral tribunals considered important in evaluating whether to accept the presentations made by civil society organizations, the following were included:

- a) the potential of the respective presentations in assisting the Tribunal decide the dispute,
- b) the public significance of the matter under discussion, and the eventual impact of the decision beyond the specific facts of the case and the parties to the process; in other words, the public interest involved in the cases under analysis, and
- c) the possible contribution that such transparency and participation could provide to enhance the legitimacy of NAFTA Chapter 11, which has been openly criticized because of its secrecy; and conversely, the harm that rejecting such presentations could cause.

Besides the decisions adopted in the *Methanex* and *UPS* cases, the public relevance of many of the investment disputes brought under the NAFTA, as well as the consequent need to generate a broader opening of the procedure, had also been recognized at institutional level by the NAFTA Free Trade Commission.⁴⁶ In July 2001, the Commission issued an interpretation note to NAFTA Chapter 11, binding on NAFTA arbitral tribunals, that provides,

“Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and, subject to the application of Article 1137(4) [regarding the publication of awards], nothing in the NAFTA precludes the

⁴⁴ NAFTA, Articles 2001 and 1131.

⁴⁵ In both cases the Tribunals held that their ability to accept the *amici curiae* presentation was by virtue of the powers vested upon arbitrators in paragraph 1, article 15 of the *Arbitration Rules of the United Nations Commission on International Trade Law* to conduct the arbitration in such manner as they consider appropriate

⁴⁶ [from now on, the Commission]

Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal.”⁴⁷.

Such an important step in favor of opening the procedure was complemented by the Commission in its 10th Meeting, held on October 7, 2003, where it issued a Declaration on the Participation of Non-disputing Parties. Such Declaration states that, “No provision of the North American Free Trade Agreement (“NAFTA”) limits a Tribunal’s discretion to accept written submissions from a person or entity that is not a disputing party (a “non-disputing party”).”⁴⁸

In the light of such developments, a new generation of bilateral investment agreements expressly incorporates transparency and regulates the participation of non-disputing parties. For instance, the Chile - United States BIT, the Singapore - United States BIT, and the Central America Free Trade Agreement, provide that the proceedings shall be open to the public.⁴⁹ In particular, such agreements establish the publicity of the hearings, the written submissions of each party, the written versions of their oral depositions, and the written responses to a request or questions of an arbitral tribunal. Likewise, such agreements provide that the arbitral tribunal shall consider the requests to contribute written opinions related to the dispute from non-governmental entities.

Besides the experiences in the sphere of international investment law, precedents showing participation also exist in other dispute resolution mechanisms where commercial issues involve the public interest. Such is the case of the World Trade Organization (WTO), for instance, where, as a result of repeated attempts by civil society, the Appellate Body admitted the participation of non-disputing parties in proceedings.

At least, three cases demonstrate the WTO’s acceptance of transparency and participation. In the *Shrimp/Turtle* case,⁵⁰ the Appellate Body interpreted the provisions of the *Dispute Settlement Understanding (Understanding)* so as to allow dispute settlement panels to accept and consider *amicus curiae*. The Appellate Body extended such interpretation of the *Understanding* to its *Working Procedures for Appellate Review* in the *Bismuth Carbon Steel* case, even where such

⁴⁷ Interpretation note of the NAFTA Free Trade Commission (July 31, 2001), available at the Mexican government website, http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/nota_interpretativa/interpretacion_clc_espanol.pdf

⁴⁸ Statement by the Free Trade Commission on the Participation of non-disputing parties, October 7, 2003, available at the Mexican government website, http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/nuevos/participacion.pdf

⁴⁹ See for all, Article 22.10 of the Chile-US Free Trade Agreement, available at http://www.aduana.cl/p4_principal/antialone.html?page=http://www.aduana.cl/p4_principal/site/artic/20040108/pags/20040108121000.html

⁵⁰ United States - Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia, AB-2001-4, Report of the Appellate Body, October 12, 1998. WT/DS58/AB/R..

procedural rules do not explicitly authorize it to consider information that is not supplied by the parties to the proceedings.⁵¹ Finally, in the *Asbestos* case, the Appellate Body, “in the interest of equity and order of the proceedings”, adopted an additional process, applicable only to that case, whereby it would, “accept written communications received by the Appellate Body from persons other than the parties or third parties to the present dispute”.⁵²

Other fields of international law have been more open to recognize rights to information and participation. The International Court of Justice, for instance, even though explicitly limited in its acceptance of information in contentious proceedings, it has considered, when the special circumstances of the case have so justified, that it is empowered to take into account and use information obtained from informal sources and through methods not regulated by the Courts’ procedural rules.⁵³

It should also be mentioned that the European Court of Justice has accepted *amici curiae* presentations when the result of the case could affect the legal or economic position of individuals or associations representing collective interests. For instance, the European Court of Justice has recognized the interest and right of the Italian Consumers’ Union to intervene in competition cases, because of the effect that free competition has on consumers.⁵⁴ Likewise, the said Court admitted that the Consultative Committee of the European Association of Lawyers participate in a private case where the issue was the mandatory publicity of certain documents, upon consideration that its decision could affect the rules governing the legal profession in the Community, and thus have a general impact on all lawyers.⁵⁵

Finally, regional human-rights protection mechanisms both in Europe and the Americas presently accept the direct participation of human rights victims in the international proceedings, as well as that of *amicus curiae*. The Inter American Court of Human Rights, for instance, has admitted *amicus curiae*

⁵¹ United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, Report of the Appellate Body, May 1, 2000. WT/DS138/8.

⁵² European Communities - Measures Affecting Asbestos and Asbestos-Containing Products - Communication from the Appellate Body, November 8, 2000. WT/DS135/9.

⁵³ It did so in the case *Nicaragua vs. United States*, Merits 1986, Rep. 14, par. 31, in which facing the denial of the United States to participate in the process bringing the petitions and evidence in the way stipulated by the rules of proceeding, the Court considered it was entitled to make use of other kind of material and documentation that had been obtained through informal means. (In this respect, see Dinah Shelton, “The Participation of Non-governmental Organizations in International Judicial Proceedings”, *The American Journal of International Law*, Vol. 88:611, p. 628).

⁵⁴ See Dinah Shelton, “The Participation of Nongovernmental Organizations in International Judicial Proceedings”, *The American Journal of International Law*, Vol. 88:611, p. 630.

⁵⁵ *Ibid.*

briefs in numerous cases, for instance the *Awas Tingni (Mayagna Sumo)* case on indigenous communities' property rights over their lands.⁵⁶

The trend towards openness, transparency, and public participation in international disputes on investment, trade, environment, or human rights, reflects the democratic values of an international order where fundamental human rights may be exercised, as established in the United Nations Universal Declaration of Human Rights. The background examined above illustrates the global trend towards accepting the participation of third parties interested in the result of the proceedings, especially when issues of public significance are at stake. Also, in this particular case, no legal obstacles exist to transparency and participation. Furthermore, as previously discussed, the domestic legislation of the Republic of Argentina, including human rights treaties, recognizes the applicants' rights to participate and to have access to the information produced in this arbitration.

⁵⁶ Case *Awas Tingni Mayagna (Sumo) Indigenous Community vs The Republic of Nicaragua*, Inter. American Court of Human Rights Decision on August 31, 2001. Several organizations and private individuals submitted *amicus curiae* in this case, among them the International Human Rights Law Group (IHRIG) together with Center for International Environmental Law (CIEL).

5.- PETITION

As a result of all the above, we request this Tribunal the following:

a.- to concede the applicants timely, sufficient, and unrestricted access to the documents of the arbitration, namely, the parties' submissions, transcripts of the hearings, statements of witnesses and experts, and any other document produced in this arbitration.

b.- to concede the applicants access to the hearings.

c.- to allow the applicants sufficient opportunity to present legal arguments, as *amicus curiae*.

Yours Sincerely,

For ASOCIACIÓN CIVIL POR LA IGUALDAD Y LA JUSTICIA (ACIJ),

Gustavo Maurino, Lawyer

For CENTRO DE ESTUDIOS LEGALES Y SOCIALES (CELS),

Victor Abramovich, Carolina Fairstein, Jimena Garrote, Lawyers

For CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW (CIEL),

**Marcos A. Orellana
Lawyer**

**For CONSUMIDORES LIBRES COOPERATIVA LTDA. DE PROVISIÓN DE
SERVICIOS DE ACCIÓN COMUNITARIA,**

Ariel Caplan, Lawyer

For UNIÓN DE USUARIOS Y CONSUMIDORES,

Horacio Bersten, Lawyer

Buenos Aires, January 27, 2005

Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A.

(Claimants)

v.

The Argentine Republic

(Respondent)

ICSID Case No. ARB/03/19

**ORDER IN RESPONSE TO A PETITION BY FIVE NON-GOVERNMENTAL
ORGANIZATIONS FOR PERMISSION TO MAKE AN AMICUS CURIAE
SUBMISSION**

Members of the Tribunal

Professor Jeswald W. Salacuse, President

Professor Gabrielle Kaufmann-Kohler

Professor Pedro Nikken

Secretary of the Tribunal

Mr. Gonzalo Flores

DATE: February 12, 2007

I. Introduction

1. On January 28, 2005, five non-governmental organizations, 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 [hereinafter Petitioners] filed a “Petition for Transparency and Participation as Amicus Curiae” with ICSID in the above-entitled case. Asserting that the case involved matters of basic public interest and the fundamental rights of people living in the area affected by the dispute in the case, the Petitioners asked the Tribunal to grant three requests:

- a. to allow Petitioners access to the hearings in the case;
- b. to allow Petitioners opportunity to present legal arguments as *amicus curiae*; and
- c. to allow Petitioners timely, sufficient, and unrestricted access to all of the documents in the case.

2. After receiving the observations of the Claimants and the Respondents on this request, the Tribunal issued an Order in Response to a Petition for Transparency and Participation as Amicus Curiae of May 19, 2005 (available at ICSID’s website at www.worldbank.org/icsid/cases/ARB0319-AC-en.pdf) in which it found that under Article 44 of the ICSID Convention the Tribunal had the power to grant suitable parties the opportunity to make submissions as *amicus curiae* in appropriate cases and granted the petitioners an opportunity to apply for leave to make *amicus curiae* submissions in accordance with certain stated conditions. In applying its power to

permit *amicus* submissions, the Tribunal stated that it had to take into account three basic criteria: a) the appropriateness of the subject matter of the case; b) the suitability of a given nonparty to act as *amicus curiae* in that case, and c) the procedure by which the *amicus* submission is made and considered (para. 17).

3. With respect to the first criteria, the Tribunal concluded that this case “involved matters of public interest of such a nature that have traditionally led courts and other tribunals to receive *amicus* submissions from suitable nonparties.”(para. 20). To support its conclusion, the Tribunal stated at paragraph 19 of the Order:

“In examining the issues at stake in the present case, the Tribunal finds that the present case potentially involves matters of public interest. This case will consider the legality under international law, not domestic private law, of various actions and measures taken by governments. The international responsibility of a state, the Argentine Republic, is also at stake, as opposed to the liability of a corporation arising out of private law. While these factors are certainly matters of public interest, they are present in virtually all cases of investment treaty arbitration under ICSID jurisdiction. 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.”

4. In the same Order, the Tribunal denied Petitioners' request to attend the hearings in this case and deferred a decision on Petitioners' request for access to documents until such time as the Tribunal granted leave to a non-disputing party to file an *amicus curiae* brief (para. 33) . The Tribunal also stated that in view of the fact that the Parties had competently and comprehensively argued all issues regarding jurisdiction, *amicus* submissions on jurisdictional questions would not be appropriate, under the standards set forth previously in paragraph 17 of the Order, as they would not assist the Tribunal in assessing jurisdiction (para 28).

5. On April 14, 2006, the Tribunal, at the request of the Claimant Aguas Argentinas S.A. (AASA) and with the approval of the Respondent, issued Procedural Order no. 1 Concerning the Discontinuance of Proceedings with Respect to Aguas Argentinas S.A. (available at www.worldbank.org/icsid/cases/ARB-03-19-PO-NO1.pdf) directing the discontinuance of the arbitral proceeding with respect to AASA, which the Claimant shareholders were then in the process of selling, while affirming that the case should continue in all other respects.

6. On August 3, 2006, the Tribunal issued a Decision on Jurisdiction (available at worldbank.org/icsid/cases/pdf/ARB0319_DecisiononJurisdiction03-19.pdf) in which it rejected all of the Respondent's objections to jurisdiction and directed that the case proceed on the merits.

7. On December 1, 2006, the Petitioners filed with the Tribunal a *Solicitud de Autorización para Realizar una Presentación en Calidad de Amicus Curiae* (Petition for Permission to Make an Amicus Curiae Submission) [hereinafter the Petition] in which the five non-governmental organizations asked to make a single, joint *amicus*

curiae submission because of the matters of public interest presented by this case. In the Petition, the Petitioners made two specific requests: 1) to be granted an opportunity to present a written *amicus curiae* submission in the form and time that the Tribunal deems appropriate in order to provide arguments and perspectives that may contribute to a better and more comprehensive solution of the case, and 2) to be given timely, sufficient, and unrestricted access to the documents produced during the course of the arbitration in order to focus their *amicus* submission on the questions most pertinent to the case. Alternatively, in the event that the Tribunal would reject such request, the Petitioners asked that they be granted access to the Parties' pleadings.

8. On December 4, 2006, the Secretary of the Tribunal, at the direction of the Tribunal President, sent copies of the Petition to the Claimants and Respondent and requested them to submit their observations.

9. The Tribunal received observations from both parties. In their observations of December 18, 2006, the Claimants asked the Tribunal to reject the Petition for the following reasons: a) any decision in this case no longer has the potential to affect the operation of the water and sewage system of Buenos Aires and the public they serve since AASA is no longer a party to the case; b) the former concessionaire AASA is no longer a party to the case and even if there was any residual public interest after the termination of the concession, the proper forum for the Petitioners are the Argentine domestic courts, where some of them already participate in proceedings; c) the Petitioners offer no new factual elements to the arbitration and will only make inappropriate legal arguments that the Parties are fully competent to make; d) none of

the issues which the Petitioners propose to raise concern the public interest identified by the Tribunal in its earlier Order or fall within the subject matter of the dispute; e) the Petition has been filed too late and its timing is likely to cause disruption of the proceedings; and f) the documents filed in the proceeding are confidential and the Claimants expressly refuse their consent to disclosing them to the Petitioners.

10. In its observations of December 18, 2006, the Respondent stated that it had no objection to the Petition.

11. This order rules on the Petition.

II. Suitability of the Petitioners to Make Amicus Submissions

12. In its Order of May 19, 2005, the Tribunal stated that the exercise of its power under Article 44 of the ICSID Convention to accept *amicus* submissions should depend on three criteria: 1) the appropriateness of the subject matter of the case; b) the suitability of a given nonparty to act as *amicus curiae* in that case; and c) the procedure by which the *amicus* submission is to be made and considered.

13. With respect to judging the suitability of the Petitioners, the Tribunal in its Order of May 19, 2005, indicated three factors of importance: expertise, experience, and independence. To be in a position to assess these factors, the Tribunal required that the petition for leave to submit an *amicus curiae* brief include information on the petitioner itself, its interest in the case, any support received from the Parties or other persons associated with the case, and the reasons why the Tribunal should accept the petition.

14. After the Tribunal's Order of May 19, 2005, ICSID revised its Arbitration Rules and adopted a new Rule 37 (2) which became effective on April 10, 2006 and reads as follows:

“(2) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the “non-disputing party”) to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

- (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
- (b) the non-disputing party submission would address a matter within the scope of the dispute;
- (c) the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.”

15. While this new Rule does not apply to this case and while its formulation may be partly different from the wording used in the Tribunal's decision of May 19, 2005, this amendment of the ICSID Arbitration Rules is in accord with the three criteria

previously identified by the Tribunal as well as with the three factors which the Tribunal decided to use to rule on the suitability of the Petitioners.

16. In this context, the Petition meets the requirements for information set out in the Order of May 19, 2005 and referred to above. Indeed, it provides sufficient information to show that the five Petitioners are respected nongovernmental organizations and that they have as a group developed an expertise in and are experienced with matters of human rights, the environment, and the provision of public services. Moreover, the Petition alleges that they are independent of either Party in this arbitration. The Claimants do not challenge any of the Petitioners' assertions in this regard nor do they challenge in any way the Petitioners suitability to serve as *amici* with respect to their expertise, experience or independence. The Tribunal concludes that the Petitioners have demonstrated their suitability to make *amicus* submissions in this case.

III. The Appropriateness of the Subject Matter of the Case

17. Effect of the Withdrawal of AASA. In paragraph 19 of its Order of May 19, 2005, which is quoted above, the Tribunal determined that this case presented an appropriate subject matter for an *amicus* submission because it involved matters of public interest, namely the international legal responsibility of the Argentine state, and more particularly the water and sewage system affecting millions of people, possibly raising complex issues in international law, including human rights considerations. The Claimants now argue that the termination of AASA's concession and the discontinuance of the proceedings with respect to AASA, the former operator of that water and sewage system, changes the nature of this case since any decision in

this arbitration can no longer have an impact on the operations of AASA or the water and sewage system it formerly operated. The Claimants contend that the only effect of any decision in this case is to determine the monetary liability, if any, in respect of alleged treaty breaches.

18. The Tribunal does not believe that the withdrawal of AASA and the end of the concession changes the nature of the subject matter of this case. Nor do they render such subject matter inappropriate for an *amicus* submission. Even if its decision is limited to ruling on a monetary claim, to make such a ruling the Tribunal will have to assess the international responsibility of Argentina. In this respect, it will have to consider matters involving the provision of “basic public services to millions of people”. To do so, it may have to resolve “complex public and international law questions, including human rights considerations” (Order of May 19, 2005, para. 19). It is true that the forthcoming decision will not be binding on the current operator of the water and sewage system of Buenos Aires. It may nonetheless have an impact on how that system should and will be operated. More generally, because of the high stakes in this arbitration and the wide publicity of ICSID awards, one cannot rule out that the forthcoming decision may have some influence on how governments and foreign investor operators of the water industry approach concessions and interact when faced with difficulties. As a result, the Tribunal concludes that this case continues to present sufficient aspects of public interest to justify an *amicus* submission even after the discontinuance of the proceeding with respect to AASA.

19. The Proper Forum for the Petitioners. The Claimants argue that the proper forum for the Petitioners to raise their concerns is the domestic courts of Argentina and that

in fact some of the Petitioners are engaged in such domestic litigation. The Tribunal does not believe that the availability of another forum is relevant to the question of whether the Petitioners may act as *amicus curiae* in the present arbitration. The present ICSID case and the litigation in the domestic courts of Argentina are distinctly different matters involving the application of distinctly different legal frameworks. Furthermore, the role of the Petitioners in this arbitration is not to serve as a litigant, as would be the case in a domestic case, but to assist the Tribunal, the traditional role of an *amicus curiae*.

20. New Factual Elements and Legal Arguments. The Claimants further argue that the Tribunal should reject the Petition because the Petitioners do not seek to offer any new factual elements but rather to make legal arguments inappropriate for a non-party. In its Order of May 19, 2005, the Tribunal did not limit the contribution of an *amicus curiae* to “new factual elements.” Rather, the Tribunal stated in paragraph 13 that the traditional role of an *amicus curiae* 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” (emphasis added). Such “arguments, perspectives and expertise” may relate to law, facts, or the application of law to the facts. This conclusion is further supported by the language of the new Rule 37(2) of the ICSID Arbitration Rules which refers to the *amicus* assisting the Tribunal “in the determination of a factual or legal issue”. Consequently, the Tribunal does not accept the Claimants’ argument on this point.

21. Timeliness of Petition. Noting that the Tribunal's Order allowing leave to file a Petition as *amicus curiae* was issued on May 19, 2005 and that the Petitioners did not submit their Petition until December 1, 2006, the Claimants argue that the Petition arrived too late in the proceeding to be considered. Since the Tribunal's Order of May 19, 2005 expressly stated that an *amicus curiae* submission would not be considered during the jurisdictional phase of this case, the time when the Petitioners might first have filed their petition was shortly after August 3, 2006, the date of the Tribunal's decision on jurisdiction in this case. While a delay of four months from that date in filing the Petition is somewhat long, the Tribunal does not believe that considering the Petition at this point will impede the progress of the case, particularly in light of the fact that the submission of memorials by the Parties will end on August 9, 2007 and that hearings are not scheduled to begin until October 29, 2007. The Tribunal believes that there is sufficient time to allow an *amicus* submission by the Petitioners and receive the Parties' observations thereon well before the beginning of the hearings, thus integrating the *amicus* process into the general course of the arbitration. In setting the relevant time limits, the Tribunal will obviously avoid conflicts with other deadlines in order not to unduly burden the parties. For the same purpose, it will limit the *amicus* submission to a reasonable length, allowing the *amicus* to provide substantive input without burdening the file with yet another substantial brief. Similarly, it will direct that the submission be filed without annexes, being understood that it will itself ask the *amicus* for any documents possibly referenced by the latter which it may wish to review.

22. Finding that the reasons advanced by the Claimants do not support the rejection of the Petition, the Tribunal concludes that the Petitioners are suitable nonparties to make an *amicus curiae* submission and that this case is an appropriate one to receive such an *amicus* submission in accordance with the limits and conditions stated hereinafter.

IV. Access to Arbitration Documents

23. The Petitioners have also requested “timely, sufficient, and unrestricted access to all the documents produced in the arbitration”. On the basis of extensive and detailed arguments, the Claimants object that the documents filed in this case are confidential and state that they do not consent to their disclosure to the Petitioners.

24. The revision of the ICSID Arbitration Rules which introduced Rule 37(2) did not deal with the *amicus curiae*’s access to the record and thus provides no guidance. As a general proposition, an *amicus curiae* must have sufficient information on the subject matter of the dispute to provide “perspectives, expertise and arguments” which are pertinent and thus likely to be of assistance to the Tribunal. Otherwise the entire exercise serves no purpose. In the present case, the Petitioners have sufficient information even without being granted access to the arbitration record. Hence, because of the specifics of these proceedings, the Tribunal can dispense with resolving the general question of a non-party’s access to the record.

25. As is apparent from their Petition, the Petitioners have already gained much information from other sources about this case. Moreover, the Tribunal’s Decision on Jurisdiction of August 3, 2006, publicly available on the ICSID website, contains information about the nature of the claims being advanced by the Claimants. In

addition, the Petitioners propose to offer their views to the Tribunal on general issues which per se do not require comprehensive information of the factual basis of this case. Furthermore, it must be emphasized that the role of an *amicus curiae* is not to challenge arguments or evidence put forward by the Parties. This is the Parties' role. The role of the Petitioners in their capacity as *amicus curiae* is to provide their perspective, expertise, and arguments to help the court. The Tribunal believes that, under the circumstances of the present case, the Petitioners can fully carry out that function without access to the record.

V. Procedure for Submitting and Considering Amicus Curiae Submissions

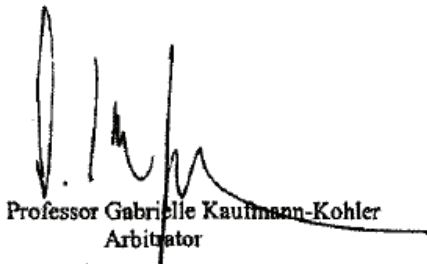
26. To determine the appropriate procedure, the Tribunal bears in mind the goal stated in its Order of May 19, 2005: which is to “enable an approved *amicus curiae* to present its views and at the same time to protect the substantive and procedural rights of the parties”. It is also mindful of the statement made in the same Order pursuant to which it would “endeavor to establish a procedure which will safeguard due process and equal treatment as well as the efficiency of the proceedings.” It further notes that the new Rule 37(2) of the ICSID Arbitration Rules requires tribunals to “ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission”.

27. On such basis and having considered the Petition and the Parties' observations, the Tribunal has determined that the Petitioners may file an *amicus curiae* submission in accordance with the following procedure:

- a. The Petitioners may file electronically a single joint *amicus curiae* submission with the Secretary of the Tribunal no later than April 4, 2007;
- b. Such submission shall be no longer than 30 double-spaced pages in 12 point font and shall be in both the English and Spanish languages;
- c. If the Tribunal wishes to consult any document which may be referred to in the submission, it will request a copy from the Petitioners who shall then provide it to the Secretary of the Tribunal;
- d. Upon receipt of the *amicus curiae* submission, the Secretary of the Tribunal shall forward the submission (in English and Spanish versions) to the Parties;
- e. The Parties may file observations on the submission no later than June 4, 2007.



Professor Jeswald W. Salacuse
President of the Tribunal



Professor Gabrielle Kaufmann-Kohler
Arbitrator



Professor Pedro Nikken
Arbitrator

AMICUS CURIAE SUBMISSION

In ICSID case No. ARB/03/19

Between
Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.
And
The Republic of Argentina

Amici

Centro de Estudios Legales y Sociales (CELS)
Asociación Civil por la Igualdad y la Justicia (ACIJ)
Consumidores Libres Cooperativa Ltda. de Provisión de Servicios de Acción Comunitaria
Unión de Usuarios y Consumidores
Center for International Environmental Law (CIEL)

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SUMMARY OF ARGUMENT & ROADMAP

During 2001 Argentina adopted emergency measures to address the most severe economic and social crisis of its history. *Inter alia*, Argentina devalued its currency and froze the tariff levels of certain essential services, including water and sanitation. *Amici* argue that human rights law provides a rationale for these measures, and that this rationale is relevant to the interpretation and application of Bilateral Investment Treaties (BITs).

More particularly, human rights law recognizes the right to water and its close linkages with several other human rights, including the right to life, health, housing, and an adequate standard of living. Human rights law also requires that Argentina adopt measures to ensure access to water to the population, including physical and economic access. Under this light, the measures adopted by Argentina, and particularly the freezing of the tariff levels amidst an economic crisis, ensured access to water to the population, and thus fully conformed to human rights law.

The *amicus curiae* brief is structured in four parts. *First*, the brief offers a basic account of the key facts of the dispute that implicate human rights issues. *Second*, *amici* analyze the content of the human right to water and its linkages with the enjoyment of other human rights, as well as the corresponding obligations of Argentina. *Third*, *amici* analyze how human rights law is relevant for the proper adjudication of the dispute. This analysis covers issues such as applicable law, interpretation, and the application of BIT standards. Specifically, *amici* argue that the rationale of the measures is relevant to determining whether Argentina's treatment was fair and equitable under the circumstances. Likewise, *amici* argue that the question whether governmental conduct is equivalent to an expropriation, or alternatively the legitimate exercise of regulatory powers, can also benefit from a human rights analysis. *Fourth* and finally, the *amicus curiae* brief suggests ways in which any conflict

of norms can be resolved, and explores the linkages between human rights law, essential services, and the state of necessity as a circumstance precluding wrongfulness.

I. FACTUAL BACKGROUND OF THE DISPUTE RAISES HUMAN RIGHTS ISSUES

1. Argentina's Economic Crisis

In 2001, a severe economic and social crisis hit Argentina. The crisis had been looming for several years, as the economy contracted by 25 percent between 1999 and 2002. Economic experts characterized the severity of the crisis as staggering, with social consequences comparable to that experienced by the United States during the Great Depression of the 1930s.¹ The Economist noted that, over the period of the collapse, “income per person in dollar terms . . . shrunk from around \$7000 to just \$3,500” and “[u]nemployment [rose] to more than 25%”².

Before the end of 2001, Argentina was already experiencing massive social upheaval³. The overall situation at the end of 2001 was described as “potentially explosive,” marked by

¹ See, e.g. Cybils, Weisbrat, and Kar, *Argentina Since Default: the IMF and the Depression*, working paper of the Center for Economic Policy Research (Sep. 3, 2002). See also Anthony Faola, *Despair in Once Proud Argentina*, Deep Poverty Makes Dignity a Casualty, Washington Post Foreign Service, Aug. 6, 2002 (“The economy is projected to shrink by 15 percent this year [2002], putting the decline at 21 percent since 1999. In the Great Depression years of 1930-33, the Argentine economy shrank by 14 percent.”).

² *A decline without parallel – Argentina's collapse – Explaining Argentina's economic collapse*, THE ECONOMIST, Special Report, 2 March 2002 (“income per person in dollar terms . . . shrunk from around \$7000 to just 3,500”).

³ Citizens had begun protesting in the streets in late 2000. On November 23, 2000, “millions of workers stayed off their jobs ... in the largest national strike in years as a union-led protest against government belt-tightening measures [designed to stave off the coming meltdown] paralyzed Argentina.” (Laurence Norman, *Argentina paralyzed by national strike, one striker killed*, THE ASSOCIATED PRESS, (Buenos Aires), Nov. 24, 2000). On May 22, 2001, demonstrators barricaded highways in protests across the country. The protestors set up a wave of roadblocks, and thousands marched on the capital. (Laurence Norman, *Demonstrators Protest in Argentina*, THE ASSOCIATED PRESS, May 22, 2001). On July 20, 2001, protestors blocked roads with flaming tires, and the national airline suspended all flights in “one of the biggest labour protests in years.” (See Foreign Staff, *Strike over cutbacks brings Argentina to a standstill*, THE SCOTSMAN, July 20, 2001). On August 8, 2001, approximately 100,000 people marched through Buenos Aires to protest further government austerity measures (see *Argentines protest against pay cuts*, BBC NEWS, Aug. 8, 2001, available at: <http://news.bbc.co.uk/2/hi/americas/1481313.stm>). In December 2001, one day of riots left more than 20

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“domestic political weakness and a lack of external support with depression, deflation, hyper-unemployment (20 percent of the active population), extreme poverty (14 million people) [and] high external debt (142,000 million dollars)”⁴.

This crisis had devastating effects on the population. The poverty rate in Argentina increased by more than 50 percent from 1998 to 2002. Between April 2001 and April 2002 alone, the number of people living below the poverty line in the greater Buenos Aires region increased by 26 percent.⁵ According to the World Bank, “[f]ew countries in the world have seen such a rapid rise in poverty.”⁶

2. Tariff Stabilization & Access to Water

In the context of these poverty figures, a sudden three-fold spike in the price of water to 7.740.000 inhabitants and of sewage services to 5.890.000 inhabitants could have had devastating consequences.⁷ It would have transformed an economic and social crisis into a full-fledged humanitarian disaster by abruptly depriving millions of citizens of their access to life-giving water. Such increase in tariffs would have triggered further social unrest and riots, thereby aggravating the already severe public order crisis.

In 2002 the National Congress initiated a process to renegotiate all the concession contracts with privatized companies in the essential services sectors, including water distribution and sanitation. There was a clear rationale in this decision. Two critical

civilians dead. (see *The events that triggered Argentina's crisis*, BBC NEWS, Dec. 21, 2001, available at: <http://news.bbc.co.uk/1/hi/business/1721103.stm>).

⁴ Deborah L. Norden & Roberto Russell, *The United States And Argentina*, 127 (Routledge 2002).

⁵ World Bank, *Poverty Reduction and Economic Management Unit, Report No. 26127-AR, Argentina—Crisis and Poverty 2003: A Poverty Assessment*, July 24, 2003, p. 5, available at: [http://wbln0018.worldbank.org/lac/lacinfoclient.nsf/d29684951174975c85256735007fef12/3d29a0ed02294a8b85256db10058dbdd/\\$FILE/ArgentinaPAMainReport.pdf](http://wbln0018.worldbank.org/lac/lacinfoclient.nsf/d29684951174975c85256735007fef12/3d29a0ed02294a8b85256db10058dbdd/$FILE/ArgentinaPAMainReport.pdf).

⁶ World Bank, *Report No. 26127-AR*, *supra* note 5, at p. 4.

⁷ See www.etoss.org.ar. (containing the figures cited)

dimensions of the contracts had changed: the value of the currency had been completely modified, and fundamental human rights were seriously affected by the crisis.

II. HUMAN RIGHTS LAW IMPLICATED IN THIS DISPUTE

1. The right to water & the right to life

The right to water is essential for sustaining human life and is protected under Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁸ According to the Committee on Economic, Social and Cultural Rights (ESCR Committee or Committee), the treaty body charged with monitoring State compliance with the ICESCR,⁹ “[t]he right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.”¹⁰ In reviewing country compliance with the ICESCR, the Committee has repeatedly expressed concern about States’ failures to provide adequate access to potable water.¹¹

Other international human rights treaties also protect the right to water. Article 14(2)(h) of the Convention on the Elimination of All Forms of Discrimination against Women (Women’s Convention) requires States to take appropriate measures to ensure women’s right “[t]o enjoy adequate living conditions, particularly in relation to housing,

⁸ International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16 at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

⁹ See Office of the High Commission for Human Rights, *Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, Economic and Social Council Resolution 1985/17 (May 28, 1985).

¹⁰ See U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 15, The right to water, U.N. Doc. E/C.12/2002/11, ¶ 3, 29th Sess. (Jan. 20, 2003) [hereinafter CESCR General Comment No. 15].

¹¹ See generally CENTRE ON HOUSING RIGHTS AND EVICTIONS, LEGAL RESOURCES FOR THE RIGHT TO WATER: INTERNATIONAL AND NATIONAL STANDARDS 98-108 (2003), [hereinafter LEGAL RESOURCES FOR THE RIGHT TO WATER] (summarizing Concluding Observations by the Committee on Economic, Social and Cultural Rights expressing concern about lack of access to adequate and potable water).

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sanitation, electricity and water supply.”¹² Article 24 of the Convention on the Rights of the Child (CRC) requires States to protect “the right of the child to the enjoyment of the highest attainable standard of health” through appropriate measures “[t]o combat disease [...] through [...] the provision of adequate nutritious foods and clean drinking water.”¹³

Although the adequacy of water that is necessary to ensure the right to water may be different in different conditions, water must in any event be available, of acceptable quality, and accessible. In defining accessible, the ESCR Committee has explained that water must be accessible without discrimination and both *physically* and *economically* accessible.¹⁴

The prohibition against discrimination requires that “[w]ater and water facilities and services must be accessible to all, including the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited

¹² Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, U.N. GAOR 34th Sess., Supp. No. 46 at 193, U.N. Doc. A/34/46, *entered into force* Sept. 3, at art. 14(2)(h). Sanitation and washing facilities are not only critical components of the right to housing, but are closely tied to the right to water. As the U.N. Special Rapporteur on the Right to Water notes, “the right to water and to sanitation are interdependent. The right to water, particularly the aspect of water quality, depends on adequate sanitation for all. Conversely, to ensure hygiene and adequate sanitation, each person should have access to at least a small amount of water on a regular basis.” Final Report of the Special Rapporteur, Mr. El Hadji Guissé, Relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation, U.N. Doc. E/CN.4/Sub.2/2004/20, 56th Sess., ¶ 50 (July 14, 2004) [hereinafter Report of Special Rapporteur Guissé, 2004].

¹³ Convention on the Rights of the Child, G.A. Res. 44/25, annex, 44 U.N. GAOR, 44th Sess., Supp. No. 49 at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2, 1990, at art. 24(1), (2)(e).

¹⁴ CESCR General Comment No. 15, *supra* note 10, at ¶ 12. In interpreting the right to health, the Committee adopted a similar definition of accessibility, explaining that health determinants, such as potable water, “must be accessible to all, especially the most vulnerable or marginalized sections of the population ... within safe physical reach for all sections of the population ... [and] affordable for all.” Committee on Economic, Social, and Cultural Rights, General Comment No. 14, The right to the highest attainable standard of health, U.N. Doc. E/C.12/2000/4, ¶ 43(c), 22nd Sess. (Aug. 11, 2000), [hereinafter CESCR General Comment No. 14, at ¶ 12(b)]; *see also* Interim report of the Special Rapporteur of the Commission on Human Rights on the right of everyone to enjoy the highest attainable standard of physical and mental health, Mr. Paul Hunt, U.N. Doc. A/58/427, 58th Sess. (Oct. 10, 2003), at ¶¶ 51, 53(c)-(d), (explaining that “health facilities, goods and services, including the underlying determinants of health, shall be available, accessible, acceptable and of good quality”). [hereinafter Interim Report of Special Rapporteur Hunt, 2003].

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grounds.”¹⁵ States “have a special obligation [...] to prevent any discrimination on internationally prohibited grounds in the provision of water and water services.”¹⁶

Physical accessibility requires that “water, and adequate water facilities and services, must be within safe physical reach for all sections of the population. Sufficient, safe and acceptable water must be accessible within, or in the immediate vicinity, of each household, educational institution and workplace.”¹⁷

Economic accessibility requires that “[w]ater, and water facilities and services, must be affordable for all.”¹⁸ The ESCR Committee has explained: “[A]ny payment for water services has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups.”¹⁹ Further, the Committee stated that “[t]he direct and indirect costs and charges associated with securing water must be affordable, and must not compromise or threaten the realization of other Covenant rights.”²⁰

2. The right to water as a component of other human rights

The right to water is also “a prerequisite for the realization of other human rights”²¹. The Special Rapporteur on the enjoyment of economic, social and cultural rights and the

¹⁵ CESCR General Comment No. 15, *supra* note 10, at ¶ 12(c)(iii). Prohibited grounds include race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status. *Id.* at ¶ 13.

¹⁶ *Id.* at ¶ 15.

¹⁷ *Id.* at ¶ 12(c)(i).

¹⁸ *Id.* at ¶ 12(c)(ii).

¹⁹ *Id.* at ¶ 27.

²⁰ *Id.* at ¶ 12(c)(ii).

²¹ CESCR General Comment No. 15, *supra* note 10, at ¶¶ 1, 3; *see also* Report of Special Rapporteur Guissé, 2004, *supra* note 12, at ¶ 23 (“The right to drinking water and sanitation is a part of internationally recognized human rights and may be considered as a basic requirement for the implementation of several other human

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promotion of the right to drinking water supply and sanitation (Special Rapporteur on Water)²² has emphasized that the right to drinking water is “an essential component of the right to life” and that “the lack of access to drinking water and sanitation jeopardizes the lives of millions of individuals.”²³

The International Covenant on Civil and Political Rights (ICCPR)²⁴ and the American Convention on Human Rights (American HRs Convention)²⁵ also protect the right to water in order to ensure the right to life. The ICCPR provides that every individual has an inherent right to life and explicitly prohibits the deprivation of means of subsistence.²⁶ Article 4 of the American HRs Convention also provides that “[e]very person has the right to have his life respected” and that “[n]o one shall be arbitrarily deprived of his life.”²⁷ The Inter-American Court of Human Rights has interpreted the right to life as including the right

rights.”); *see generally* Joint Statement by the Special Rapporteur on adequate housing, Special Rapporteur on the right to food and Special Rapporteur on the right to the highest attainable standard of physical and mental health at the Third World Water Forum, ¶¶ 6-9 (Mar. 17, 2003) [hereinafter Joint Statement by the Special Rapporteurs], [http://www.unhcr.ch/hurricane/hurricane.nsf/\(Symbol\)/HR.03.22.En?OpenDocument](http://www.unhcr.ch/hurricane/hurricane.nsf/(Symbol)/HR.03.22.En?OpenDocument) (discussing the importance of water for the rights to housing, food and health and calling “for a clear recognition of water as a human right in the Ministerial Declaration and other outcomes of the World Water Forum, in accordance with international human rights instruments including General Comments”).

²² In 2001, the U.N. Commission on Human Rights approved a decision of the Sub-Commission on the Promotion and Protection of Human Rights (Resolution 2001/2, U.N. Doc. E/CN.4/Sub.2/2001/40, ¶¶ 3-4 (Aug. 10, 2001)) to appoint Mr. El Hadji Guissé as Special Rapporteur. In approving the Sub-Commission’s resolution, the Commission instructed the Special Rapporteur “to conduct a detailed study on the relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation, at the national and international levels, taking also into account questions related to the realization of the right to development, in order to determine the most effective means of reinforcing activities in this field and defining as accurately and fully as possible the content of the right to drinking water in relation to other human rights.” Report of the Sub-Commission on the Promotion and Protection of Human Rights on its 53rd Session, U.N. Doc. E/CN.4/2002/2, at 9 (Nov. 22, 2001).

²³ Final Report of the Special Rapporteur, Mr. El Hadji Guissé 2004, ¶ 29, *supra* note 12. *See also* Preliminary report submitted by Mr. El Hadji Guissé, Relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation, U.N. Doc. E/CN.4/Sub.2/2002/10, 54th Sess., ¶ 42 (June 25, 2002) [hereinafter Preliminary Report of Special Rapporteur Guissé, 2002].

²⁴ International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16 at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

²⁵ American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

²⁶ ICCPR, *supra* note 24, at arts. 1(2), 6(1).

²⁷ ACHR, *supra* note 25, at art. 4(1).

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to access to conditions that guarantee a dignified life.²⁸ The right to water stands out as enabling life itself, as well as the conditions for a dignified life.

In interpreting the right to housing²⁹ enshrined in the ICESCR, the ESCR Committee has emphasized that “[a]ll beneficiaries of the right to adequate housing should have sustainable access to ... safe drinking water.”³⁰ The UN Special Rapporteur on the right to adequate housing has stated that “[A]ccess to safe and sufficient water – including drinking water – is an essential element of adequate housing. . . . Water is not only an essential human need, but its place in human rights lies at the confluence of human rights and housing, health and food.”³¹

The right to water is also a component of the right to the highest attainable standard of health. Article 12(1) of the ICESCR provides: “The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”³² Article 10(1) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) provides: “Everyone shall have the right to health, understood to

²⁸ Corte Interamericana de Derechos Humanos, *Caso Villagrán Morales y Otros (Caso de los “Niños de la Calle”)*, Sentencia del 19 de noviembre de 1999 (Ser. C) No. 63, párr. 144.

²⁹ ICESCR, *supra* note 8, at art. 11(1), (guaranteeing “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”); CRC, *supra* note 13, at art. 27(3) (“States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.”).

³⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 4, The right to adequate housing under Art. 11(1) of the Covenant, U.N. Doc. E/1992/23, annex III at 114 (1991), ¶ 8(b) 6th Sess. (Dec. 13, 1991) [hereinafter CESCR General Comment No. 4]. *See also* Working paper of the Special Rapporteur, Mr. El Hadji Guissé, The right of access of everyone to drinking water supply and sanitation services, U.N. Doc. E/CN.4/Sub.2/1998/7, 50th Sess., ¶ 22 (June 10, 1998) [hereinafter Working Paper of Special Rapporteur Guissé, 1998] (discussing the link between water and the right to housing).

³¹ Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Mr. Miloon Kothari, Addendum: Visit to the occupied Palestinian territories, U.N. Doc. E/CN.4/2003/5/Add.1, 59th Sess., ¶ 65 (June 12, 2002) [hereinafter Report of Special Rapporteur Kothari, Palestine Addendum, 2002].

³² ICESCR, *supra* note 8, at art. 12(1).

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mean the enjoyment of the highest level of physical, mental and social well-being.”³³ Article 24 of the CRC requires States to protect “the right of the child to the enjoyment of the highest attainable standard of health.”³⁴

In interpreting the right to health in the ICESCR, the ESCR Committee explained that it extends “also to the underlying determinants of health, such as access to safe and potable water.”³⁵ The Committee on the Rights of the Child, the treaty body charged with monitoring State compliance with the CRC, has stated that the obligation in Article 24 of the CRC to ensure that children have access to the highest attainable standard of health means that States “have a responsibility to ensure access to clean drinking water” and that such access is “essential for young children’s health.”³⁶

Finally, Article 26 of the American Convention provides that States “undertake to adopt measures . . . with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires”.³⁷

³³ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, O.A.S.T.S. No. 69 (1988), *entered into force* Nov. 16, 1999, at art. 10(1).

³⁴ CRC, *supra* note 13, at arts. 24(1), (2)(e).

³⁵ CESCR General Comment No. 14, *supra* note 14; *see also* Working Paper of Special Rapporteur Guissé, 1998, *supra* note 30, at ¶ 21 (discussing the link between water and the right to health).

³⁶ Committee on the Rights of the Child, General Comment No. 7, Implementing child rights in early childhood, U.N. Doc. CRC/C/GC/7, ¶ 27(a), 41st Sess. (Nov. 1, 2005).

³⁷ American Convention, *supra* note 25, at art. 26.

3. *Obligations of the Host State under human rights treaties*

Among other treaties, Argentina is a party to the International Covenant on Economic, Social and Cultural Rights³⁸, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights,³⁹ the Convention on the Rights of the Child,⁴⁰ the International Convention on the Elimination of All Forms of Discrimination against Women,⁴¹ the International Covenant on Civil and Political Rights,⁴² and the American Convention on Human Rights.⁴³ All these treaties are fully incorporated in Argentine law and require Argentina to protect the right to water.

Further, the Argentine Constitution lists and gives full constitutional status to the major international and regional human rights instruments: the American Declaration on the Rights and Duties of Man, the Universal Declaration of Human Rights, the American Convention on Human Rights, the ICESCR, the ICCPR, the CRC, the Women's Convention, and several others.⁴⁴ Section 75(22) of the Constitution confers upon these human rights conventions “constitutional hierarchy” and provides that they “are to be understood as complementing the rights and guarantees recognized herein.”

Under the ICESCR Argentina is obligated to ensure a minimum essential level of the right to water which includes:

- (a) To ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease;

³⁸ ICESCR, *supra* note 8, (ratified by Argentina on August 8, 1986).

³⁹ Protocol of San Salvador, *supra* note 33, (ratified by Argentina on October 23, 2003).

⁴⁰ CRC, *supra* note 13, (ratified by Argentina on December 4, 1990).

⁴¹ Women's Convention, *supra* note 12, (ratified by Argentina on July 15, 1985).

⁴² ICCPR, *supra* note 24, (ratified by Argentina on August 8, 1986).

⁴³ American Convention on Human Rights, *supra* note 25, (ratified by Argentina September 5, 1984).

⁴⁴ CONST. ARG. (Constitution of the Argentine Nation, adopted 1852, as amended 22 Aug 1994), at § 75(22).

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- (b) To ensure the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups; . . . [and]
- (c) To ensure physical access to water facilities or services that provide sufficient, safe and regular water.⁴⁵

As the ESCR Committee has explained, each State party to the ICESCR, notwithstanding its level of economic development, has an obligation to ensure a minimum essential level of each of the rights in the ICESCR, including the right to water.⁴⁶ Although Argentina is obligated to take affirmative measures to progressively realize the right to water, it also has obligations that “are of immediate effect”,⁴⁷ including to ensure that the right to water can be exercised without discrimination⁴⁸ and to refrain from taking any retrogressive measures.⁴⁹

The ESCR Committee explained that affirmative measures may include “appropriate pricing policies such as free or low-cost water” to ensure that water is affordable.⁵⁰ The U.N. Special Rapporteur on the Right to Water also explained that States must ensure that prices for water are reasonable and should “play an active role in designing and regulating pricing structures in order to ensure access to affordable water and sanitation, based on the principle of non-discrimination.”⁵¹

⁴⁵ CESCR General Comment No. 15, *supra* note 10, at ¶ 37. The ESCR Committee has explained that “access to . . . an adequate supply of safe and potable water” is also a core obligation of the right to health. CESCR General Comment No. 14, *supra* note 14, at ¶ 43(c).

⁴⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 3, The nature of States parties obligations under art. 2, para. 1 of the ICESCR, U.N. Doc. E/1991/23, annex III at 86 (1991), ¶ 10, 5th Sess. (Dec. 14, 1990) (emphasis in original).

⁴⁷ CESCR General Comment No. 15, *supra* note 10, at ¶ 17.

⁴⁸ *Id.* at ¶ 17.

⁴⁹ *Id.* at ¶ 19.

⁵⁰ *Id.* at ¶ 27(b).

⁵¹ Report of Special Rapporteur Guissé, 2004, *supra* note 12, at ¶¶ 51-52; *see also* Commission on Sustainable Development, Annex: Major groups’ Priorities for Action in water, sanitation and human settlements, U.N.

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Argentina's treaty obligations include not only the duty to respect the right to water, e.g., to refrain from measures that violate this right, but also the duty to protect the right to water, e.g., "to prevent third parties from interfering in any way with the enjoyment of the right to water."⁵² The responsibility to protect entails the obligation to adopt "the necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to adequate water."⁵³

According to the ESCR Committee, when water services "are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water."⁵⁴

The U.N. Special Rapporteur on Housing stated: "While human rights law does not prevent the provision of services – including water, education, electricity and sanitation – through private companies, States have the responsibility to ensure that such privatization does not infringe on the human rights of the population."⁵⁵ Also the Special Rapporteur on Water has identified as "[a] particular concern . . . the phenomenon of companies' raising prices when the local currency is devalued. Any concession contracts should specify that the risk of devaluation shall not be borne by the poorest consumers."⁵⁶

Doc. E/CN.17/2005/5, 13th Sess., ¶ 8 (Dec. 15, 2004) (calling on governments to "ensure safe, accessible and affordable drinking water supply (inter alia, through price regulation)").

⁵² CESCR General Comment No. 15, *supra* note 10, at ¶ 23.

⁵³ *Id.* at ¶ 23; *see also* CESCR General Comment No. 14, *supra* note 14, at ¶ 51 ("Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties.").

⁵⁴ CESCR General Comment No. 15, *supra* note 10, at ¶ 24.

⁵⁵ Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, Addendum: Mission to Brazil, U.N. Doc. E/CN.4/2005/48/Add.3, 61st Sess., ¶ 32 (Feb. 18, 2004); *see also* Adequate housing as a component of the right to an adequate standard of living, Report by the Special Rapporteur, Miloon Kothari, Addendum: Mission to Kenya, U.N. Doc. E/CN.4/2005/48/Add.2, 61st Sess., ¶ 19 (Dec. 17, 2004) (making same point with respect to Kenyan privatization program).

⁵⁶ Report of Special Rapporteur Guissé, 2004, *supra* note 12, at ¶ 60.

In this sense, if Argentina had not frozen the tariffs, water would have become unaffordable for millions of people in the province of Buenos Aires. In light of the human rights treaties in force in Argentina, this three-fold increase in the price of water would have constituted a breach of Argentina’s international human rights obligations.

III. HUMAN RIGHTS LAW IS RELEVANT FOR THE ADJUDICATION OF THE DISPUTE

1. Human rights law plays a role as applicable law to the dispute

The applicable law to the dispute is defined both in the ICSID Convention and the relevant BITs. The ICSID Convention provides in its Article 42(1) that, “[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed upon by the parties.” It also states that “[i]n the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws), and such rules of international law as may be applicable”.⁵⁷

The present dispute arises under three separate bilateral investment treaties (BITs): the U.K.-Argentina BIT,⁵⁸ the Spain-Argentina BIT,⁵⁹ and the France-Argentina BIT.⁶⁰ Each of these BITs embodies the agreement of the parties, and in the context of the instant dispute makes clear that the Tribunal should consider at least three sources of law in its deliberations, namely: 1) the BITs themselves, 2) the laws of Argentina (as the Contracting

⁵⁷ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, ICSID (W. Bank), opened for signature Mar. 18, 1965, 575 U.N.T.S. 159, art. 42(1) [hereinafter ICSID Convention].

⁵⁸ Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, Dec. 11, 1990, U.K.-Arg., 1765 U.N.T.S. 33, art. 8(4) [hereinafter U.K.-Argentina BIT].

⁵⁹ Acuerdo para la Promoción y la Protección Recíproca de Inversiones entre El Reino de España y la Republica Argentina, Oct. 3, 1991, Sp-Arg., 1699 U.N.T.S. 202, art. X.5 [hereinafter Spain-Argentina BIT].

⁶⁰ Treaty Concerning the Treatment and Protection of Investments, 3 July 1991, FR.-AR., 1728 U.N.T.S. 298, art. 8(4) [hereinafter France-Argentina BIT], *as translated in* FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 716 (R. Doak Bishop, James Crawford, and W. Michael Reisman eds., 2005) [hereinafter Bishop, Crawford & Reisman].

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Party in this dispute), and 3) the rules of international law that are applicable to this dispute. Consequently, and given that the factual circumstances underlying this dispute implicate Argentina's human rights obligations, the Tribunal should apply both international and domestic Argentine human rights law to the dispute at hand.

This dispute involves measures taken by the government of Argentina, during a period of severe economic and social crisis, to protect human rights. *Inter alia*, Argentina's measures have been adopted in furtherance of its obligation to progressively realize its citizens' right to water, as well as to protect and promote its citizens' right to health. Those rights are protected by several human rights treaties that were in force in Argentina before the investment was established.⁶¹

These human rights treaties, examined earlier, make clear that Argentina had a positive duty to act to prevent the disruption of water services to its citizens during and after the economic crisis of 2001.⁶² As long as the lingering effects of the crisis compromise Argentine consumers' ability to pay for water at the rates demanded by the Claimants, Argentina's human rights obligations remain relevant to the dispute. In particular, Argentina's measures in this case must be seen in light of its positive duty to ensure access to safe drinking water.

⁶¹ Argentina is a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador or San Salvador Protocol), the Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention), the Convention on the Rights of the Child (CRC), the International Covenant on Civil and Political Rights (ICCPR), and the American Convention on Human Rights (American Convention). These treaties require Argentina to protect the right to water.

⁶² ESCR General Comment No. 15, *supra* note 10, ("The obligation to *protect* requires State parties to prevent third parties from interfering in any way with the enjoyment of the right to water.") (emphasis in original). *See also id.* at ¶ 24 ("Where water services . . . are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water.").

2. Human rights law can aid the interpretation of BIT standards

Article 31.3.c of the Vienna Convention on the Law of Treaties⁶³ (VCLT) expresses the principle of systemic integration of the international legal system.⁶⁴ The International Court of Justice in the *Case Concerning Oil Platforms* confirmed the relevance of this principle of interpretation, as the Court utilized the rules of international law on the use of force in its interpretation of the bilateral Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran.⁶⁵ In application of this principle of systemic interpretation, human rights law can add color and texture to the standards of treatment included in a BIT. In addition, systemic interpretation is particularly apt when the terms of a treaty are by their nature open-textured,⁶⁶ such as the fair and equitable treatment standard.

A contextual interpretation of language in a BIT is also necessary because investment and human rights law seem to encounter frictions at the level of regimes, particularly in regards to quantitative policy space available for social development. Indeed, the “regulatory chill” that may result from certain interpretations of investment disciplines could reduce the capabilities of States to fulfill their human rights obligations, including their duty to regulate.⁶⁷ In that sense, a contextual interpretation leads to normative dialogue, accommodation, and mutual supportiveness among human rights and investment law.

⁶³ Vienna Convention on the Law of Treaties, art. 31.3.c, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969), available at <http://www.un.org/law/ilc/texts/treaties.htm> (last visited Aug. 11, 2005).

⁶⁴ Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT'L & COMP. L.Q. 279, 280 (2005).

⁶⁵ *Case Concerning Oil Platforms*, (Iran v. U.S.), Judgment ¶ 41, I.C.J. 2003.

⁶⁶ McLachlan, *supra* note 64 at 312.

⁶⁷ UNCTAD, *Investor-State Disputes Arising from Investment Treaties: A Review*, pgs. 43 & 48 (2005).

3. Human rights law can contribute to the application of BIT standards

The Tribunal’s Decision on Jurisdiction notes that Claimants allege “that, by failing to make tariff adjustments and to respect the equilibrium principle”, the Respondent has breached its duties with respect to the expropriation and fair and equitable treatment standards.⁶⁸ In that regard, the question whether an investor has been treated fairly and equitably can be illuminated by reference to the conduct owed by the State to the general population under human rights law. Likewise, the question whether governmental conduct is expropriatory, or otherwise the legitimate exercise of regulatory powers, can also benefit from a human rights analysis. This section addresses these issues.

A) Fair & Equitable Treatment Amidst a Severe Economic and Social Crisis

Despite the vagueness of the terms “fair and equitable” (F&ET) in the definition of the standard of treatment under BITs, and despite the varying formulations of the F&ET standard in BITs, international investment case law suggests several discrete components of this standard. Three emerging components are particularly relevant to this dispute, namely:

- (1) whether the government’s regulatory processes were administered in a diligent and transparent fashion;⁶⁹
- (2) whether the government’s conduct frustrated the legitimate basic expectations of foreign investors in making their investment;⁷⁰
- (3) whether any changes introduced to the regulatory framework after the investment’s establishment were arbitrary or discriminatory.⁷¹

⁶⁸ *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A., v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction (August 3, 2006), at ¶ 34. See also ¶ 1 and ¶ 28.

⁶⁹ *PSEG Global Inc. v. Republic of Turkey*, Award, ICSID Case No. ARB/02/5, (January 17, 2007).

⁷⁰ *Técnicas Medicoambientales TECMED S.A v. the United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003) [hereinafter *TecMed*], ¶ 154. *Eureko B.V. v. Republic of Poland*, Partial Award (Aug. 19, 2005), at ¶ 232.

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In addition, all these components involve the fundamental premise that governments are under the obligation to act in good faith toward foreign investors

None of the components of the F&ET standard would appear *a priori* to conflict with a host State's duty to protect its citizens' human rights. In this sense, human rights law and investment law would not be in conflict, but rather capable of concurrent application. This is all the more relevant in this case because Argentina's motivation for the privatization of the public water utilities was to upgrade service, expand investment, and increase access to water and sanitation services to promote the health of Argentine citizens. Still, a question that arises under the particular factual circumstances of the case is whether strict compliance with every term of the concession contract was at all compatible with the human rights obligations of the State. This question may involve a conflict of norms situation, addressed further below.

This conflict of norms issue need not arise, however, if the F&ET standard is interpreted under a human rights lens. In this regard, as the tribunal in *Waste Management II* concluded with reference to the FE&T, "the standard is to some extent a flexible one which must be adapted to the circumstances of each case."⁷² In that vein, it is wholly appropriate for the Tribunal to consider the human rights purposes and impacts of Argentina's measures in this case. On the one hand, the Tribunal would benefit from taking into consideration the purpose of the privatization program: to improve Argentine citizens' access to water and sanitation services, thereby furthering their basic economic and social rights. And at the same time, the Tribunal would also benefit from considering that the tariff levels were frozen by the government to protect the most vulnerable sectors of its population, who

⁷¹ CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/08, (May 12, 2005).

⁷² *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/03 (NAFTA), Award (Apr. 30, 2004) [hereinafter *Waste Management II*], ¶ 99.

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wouldn't be able to afford a sudden three-fold increase in water and sanitation tariffs amidst a deep economic and social crisis.

In this line of analysis, and for reasons of space, *amici* wish to examine only: (1) the frustration of legitimate expectations and (2) arbitrary changes to the legal framework, as components of the F&ET.

Firstly, in regards to legitimate expectations, the investor's expectations cannot be frustrated if the existing legal framework is put into operation. This principle applies equally to a State's pre-existing domestic laws and its pre-existing international treaty obligations.

In the case of *Maffezini v. Spain*,⁷³ for example, an ICSID tribunal constituted under the Spain-Argentina BIT reasoned that it could not hold the government of Spain responsible for Maffezini's unrealized profit expectations on account of the government's application of its environmental law. That is, notwithstanding the existence of the BIT, the fact that legal requirements concerning an environmental impact assessment were established in European Union law and Spanish law prior to Maffezini's investment meant that the investor could not legitimately expect to be compensated for any costs associated with compliance with the legal framework.

In the instant case, by analogy, Argentina's treaty-based human rights commitments pre-date its BITs. As in *Maffezini*, any investor was required to take into account and comply with the pre-existing legal framework in Argentina, which includes human rights norms. Since Argentina's human rights treaties govern its obligations with respect to water, public health, and other critical areas of public policy, an investor entering these sectors cannot legitimately expect the host State to disregard its human rights obligations. More

⁷³ *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7 (Nov. 13, 2000) [hereinafter *Maffezini*].

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particularly, an investor in a water concession must be aware that the government is under a duty to ensure access to water to the population, and that this duty does not disappear during an economic and social crisis. Consequently, an investor cannot legitimately expect tariffs to increase in such a way as to become an insurmountable obstacle to effective access to water and sanitation to millions of people.

Secondly, in regards to arbitrary changes to the legal framework, the question highlights the tensions between stability and regulatory change in society. On the one hand, BITs aim at establishing a secure and stable legal framework conducive to economic activity, which in turn may enable the efficient allocation of economic resources --a key element in the ability of governments to progressively realize economic, social, and cultural rights. On the other hand, human rights law and international environmental law establish positive duties upon States to regulate to prevent deleterious consequences to, *inter alia*, human health and the environment. These fields are by nature dynamic; they evolve as science identifies links between substances/activities and risks, and as circumstances require State intervention to secure access to essential services, for example. Under this light, the notion that an investor can expect the legal framework to remain frozen in time is by nature incompatible with the foreseeable and foreseen reality of expected regulatory change, especially in the public health and environmental context.

The tension described above has been addressed by the *Saluka* Tribunal, which noted that, “No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged.”⁷⁴ This conclusion would appear to dispose the question.

⁷⁴ *Saluka Investments BV v. The Czech Republic*, Arbitration under the UNCITRAL Rules, Partial Award, March 17, 2006, ¶ 305.

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Still, the related issue of reliance on specific commitments is also relevant in the operation of the F&ET standard in this case, in relation to any legitimate expectations. As the *CMS Gas* Tribunal reasoned, “It is not a question whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the framework can be dispensed with altogether when specific commitments to the contrary have been made.”⁷⁵ Similarly, the *Methanex* Tribunal also reasoned that specific commitments given to an investor would be relevant in the determination of an expropriation.⁷⁶

The question of the investor’s reliance on specific commitments entered into by the government, as a dimension of the F&ET standard, also can be addressed from a human rights perspective. In so doing, the Tribunal needs to evaluate whether the government of Argentina made any specific commitments guaranteeing that it would refrain from taking certain human rights-protecting measures in the event of an economic crisis.

In this regard, the Tribunal should take into account that no government may validly contract away its treaty-based obligations, including its human rights obligations. For example, any commitment that purported to freeze regulation on health, safety, and environmental matters may be incompatible with the government’s positive duty to provide protection to the population, including from interference by third-parties. Thus, any BIT interpretation turning Argentina’s specific commitments under the concession contract into a commitment to violate its human rights obligations would be contrary to the public order of the State. Consequently, the Tribunal may want to avoid any interpretation of the

⁷⁵ *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/08, ¶ 277 (May 12, 2005).

⁷⁶ *Methanex Corporation v. United States of America*, Final Award, Part IV, Chapter D, ¶ 7, (August 3, 2005).

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concession agreement that would lead to a direct conflict between Argentina's human rights obligations and its specific commitments to the claimants.

In light of the tensions addressed above, the better approach to the F&ET standard is its construct as a guarantee against *arbitrary* changes. In that vein, an emphasis on the rationale of the measure, as well as weight on procedural due process and available opportunities for judicial review, would enable BITs to avoid becoming obstacles to the realization of human rights. In the application of such construct, any *capricious* measure devoid of rationale would breach the F&ET standard. That does not seem to be the case here, given the government's need to ensure access to water to the population amidst a severe economic and social crisis.

B) Indirect Expropriation

The question whether governmental conduct is equivalent to an expropriation, or alternatively the legitimate exercise of regulatory powers can also benefit from a human rights analysis. Several issues fall in this basket, and due to space limitations *amici* offer analysis only on the following:

1. whether the measure is covered by the police powers of the State;
2. in the alternative, whether the measure is proportional to its objective, in light of the circumstances.

Firstly, regarding the police powers, the interpretation of the law on expropriation with human rights law could aid the Tribunal in the adjudication of the dispute. The application of the police powers doctrine to include important public health regulations could, in this vein, secure the policy space necessary for States to discharge their human rights obligations.

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In that context, several arbitral decisions confirm the relevance of the police powers. The *Feldman* award, for example, recognized a line separating a valid regulation from a compensable taking.⁷⁷ The *Feldman* Tribunal also observed that, “Governments, in their exercise of regulatory power, frequently change their laws and regulations in response to changing economic circumstances or changing political, economic or social considerations. Those changes may well make certain activities less profitable or even uneconomic to continue.”,⁷⁸ and concluded the following:

The Tribunal notes that the ways in which governmental authorities may force a company out of business, or significantly reduce the economic benefits of its business, are many. In the past, confiscatory taxation, denial of access to infrastructure or necessary raw materials, imposition of unreasonable regulatory regimes, among others, have been considered to be expropriatory actions. At the same time, governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this [...].⁷⁹

Other investment tribunals have echoed these considerations. The *Methanex* Award concluded that, “as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable [...]”⁸⁰ In this same direction, the *Saluka* Tribunal interpreted the BIT taking into account relevant rules of general customary law,⁸¹ and under its light concluded:

In the opinion of the Tribunal, the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are “commonly accepted as within the police power of States” forms part of customary international law today.⁸²

⁷⁷ Marvin Feldman v. Mexico, CASE No. ARB(AF)/99/1, Award ¶ 100 (Dec. 16, 2002).

⁷⁸ *Id.* at ¶ 112.

⁷⁹ *Id.* at ¶ 103.

⁸⁰ Methanex Corporation v. United States of America, Final Award, Part IV, Chapter D, ¶ 7, (August 3, 2005).

⁸¹ Saluka Investments BV v. The Czech Republic, Partial Award, ¶ 254 (Mar. 17, 2006).

⁸² *Id.* at ¶ 262.

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The recent arbitral decisions cited above demonstrate that, as a matter of customary law, measures covered by the police powers do not require compensation. In this regard, it is generally accepted that measures adopted for public health reasons fall within the police powers doctrine.⁸³ In the instant case, the measures adopted by Argentina sought to, *inter alia*, ensure access to water and sanitation to the population amidst a severe economic and social crisis. This measure thus averted the public health emergency that would have resulted from the lack of access to clean water and sanitation to millions of people in Buenos Aires. Under the light of human rights law, the police power doctrine operates to distinguish these measures from an otherwise compensable expropriation.

Secondly, in the alternative, and in case the Tribunal finds that the legitimate exercise of the police powers is subject to a proportionality test, the Tribunal would also benefit from applying human rights law methodologies.

This line of reasoning has been applied by the *Tecmed* Tribunal, which followed a two-pronged approach. The *Tecmed* Tribunal first determined the *effects* of the measure, and second it evaluated whether such impact was *proportional* to the public interest protected by the government's regulatory measures and police powers. The *Tecmed* Tribunal, following precedents from the European Court of Human Rights, queried whether Mexico's "measures [were] reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation."⁸⁴

⁸³ See e.g., G.C. Christie, *What Constitutes a Taking of Property Under International Law?*, 38 Brit. Y.B. Int'l L. 307, 331 (1962), *reprinted in* Bishop, Crawford & Reisman, pg. 888. ("The conclusion that a particular interference is an expropriation might also be avoided if the State whose actions are the subject of complaint had a purpose in mind which is recognized in international law as justifying even severe, although by no means complete, restrictions on the use of property. Thus, the operation of a State's tax laws, changes in the value of a State's currency, actions in the interest of the public health and morality, will all serve to justify actions which because of their severity would not otherwise be justifiable...").

⁸⁴ *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2. (Spain/Mexico BIT), Award, 29 May 2003, at ¶ 122.

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With respect to the effects of the measure, it may suffice to observe that while the investor received less income than it expected from water tariffs, it remained in control over the investment, managing the day-to-day operations of the company. That is, in contrast to the *Tecmed* case, where the investment was destroyed, in the instant case the investor still received income from the concession.

Further, with respect to the public interest protected by the government's measure, it appears that addressing a national emergency and preventing a public health crisis stand in the tallest order. More particularly, the measures of general application adopted by Argentina to address the economic crisis that limited tariff adjustments were adopted with a view to fulfilling a clear public purpose, namely the safeguard of the population's basic rights to water and sanitation.

In *Tecmed*, the tribunal found that Mexico's measures could not be justified under the police powers because the socio-political difficulties associated to the location and operation of the hazardous waste confinement did "not give rise [...] to a serious urgent situation, crisis, need or social emergency",⁸⁵ or have "serious emergency or public hardship connotations, or wide-ranging and serious consequences".⁸⁶ By stark contrast, the instant case implicates an urgent financial and social crisis involving the potential breakdown of essential services and a resulting public health emergency.

Still, while the public interest involved in a social crisis or public health emergency is self-evident, this should not lead to confine the proportionality of State action under the police powers to such grave and exceptional situations. Because human rights law requires that governments take action to prevent infringements on rights, whether during a national

⁸⁵ *Id.* at ¶ 139.

⁸⁶ *Id.* at ¶ 147.

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emergency or during normal times, any threshold determination of proportionality that hinges on a finding of an emergency situation would be incompatible with human rights law.

While resort to proportionality as a means of controlling the exercise of the police powers appears to introduce a bridge between investment law and human rights law, this avenue is not devoid of conceptual difficulties. The use of a proportionality test in investment disputes is problematic because it invites tribunals to evaluate the legitimacy of the public interest involved and to balance it against investor's rights. Such scrutiny and balancing role requires that competing rights be in the same axiological plane. In this regard, the UN High Commissioner for Human Rights has underscored the legal distinction between human rights and investor's rights, which is thus of consequence to any evaluation of proportionality.⁸⁷ This distinction rests on the fact that investor's rights are economic policy tools, and human rights reflect the recognition of the inalienable, inherent dignity of the human person. In addition, the Inter-American Commission on Human Rights has followed the UN Human Rights Committee approach in holding that corporations lack *locus standi*.⁸⁸ Thus, the difference in juridical nature between human rights and investor/investment protections means that they operate on different planes and are thus not amenable to balancing.

In light of this analysis, the better approach is to recognize and apply the police powers doctrine as a means of safeguarding the necessary policy space for the State to discharge its human rights obligations. Considerations of proportionality are unnecessary when the application of the police powers is limited to genuine situations involving the

⁸⁷ *Human Rights, Trade, and Investment, Report of the High Commissioner for Human Rights*, ¶ 24, U.N. Doc. E/CN.4/Sub.2/2003/9 (2003).

⁸⁸ Bernard Merens and Family v. Argentina, Inter-Am. Comm'n on Hum. Rts., Report No. 103/99, ¶ 16 (September 27, 1999) (*citing* A Newspaper Publishing Co. v. Trinidad & Tobago, Communication No. 360/1989, Report of the Human Rights Committee, U.N. GAOR, 44th Sess., Supp. No. 40, Annex XII.L, at 307, U.N. Doc. A/44/40 (1989)).

public interest, such as public health regulations. In this regard, the inescapable linkages between public health and access to water and sanitation in the instant case would lead to conclude that Argentina's measures are justified on the basis of the police powers doctrine.

IV. HUMAN RIGHTS LAW COULD DISPLACE INVESTMENT LAW

Human rights law could displace investment law in two situations examined in this section, namely a situation of conflict of norms and a situation of necessity.

1. Conflict of norms

Human rights law could displace investment law in a conflict of norms situation, *i.e.*, where the host State is unable to comply simultaneously with its obligations under human rights law and investment law. A conflict of norms situation could arise if the Tribunal were to find, for example, that against the backdrop of a severe economic crisis, the guarantees offered to foreign investors with respect to the concession's economic equilibrium were incompatible with the government's duty to ensure access to water to the population. This finding is not necessary for the adjudication of the case, however, as the contextual interpretation of investment law provides avenues for accommodation and normative dialogue. Still, in such situation of normative conflict, the primacy of human rights may need to be recognized and given effect.⁸⁹

The primacy of human rights law has been recognized by the international community in the Vienna Conference on Human Rights, which concluded that "Human

⁸⁹ Certain techniques for resolving conflict of norms are also relevant to this analysis, but for lack of space we cannot elaborate them.

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rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of government.”⁹⁰ The primacy of human rights law also flows from the imperative character (*Ius Cogens*) of certain rights recognized in human rights law, including the right to life, equality and non-discrimination. Further, the primacy of human rights law can also be established on the basis of the jurisprudence of the Inter-American Human Rights Court, which held in the *Case of Velásquez-Rodríguez vs. Honduras* that States are under a duty “to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights.”⁹¹ In light of the primacy of human rights law, a conflict of norms would be resolved in this case by justifying the treatment given to the water concessionaire on the basis of the human rights obligations of the host State.

2. Necessity as a Circumstance Precluding Wrongfulness

A second situation where investment law could be displaced concerns necessity as a circumstance precluding wrongfulness. In this context, human rights considerations involved in the risk of collapse of essential services, particularly amidst a severe economic crisis, are relevant in any analysis of necessity as a circumstance precluding wrongfulness. In this vein, the *LG&E* Tribunal recognized that “a state of necessity is identified by those conditions in which a State is threatened by a serious danger [...] to the possibility of

⁹⁰ World Conference on Human Rights, Vienna Declaration and Programme of Action, Article 1, A/CONF.157/23, (12 July 1993).

⁹¹ Case of Velásquez-Rodríguez v. Honduras, Inter-Am. C.H.R. 35, OAS/Ser. L/V/III. 19, doc. 13, app. VI, ¶ 166 (1988).

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maintaining its essential services in operation”, and cited Roberto Ago and Julio Barboza as authorities for its reasoning.⁹²

In this regard, *amici* want to stress that the state of necessity does not apply to human rights treaties that provide guarantees to human rights in times of national emergency. As the UN International Law Commission clarifies in its commentary to the Articles on Responsibility of States for Internationally Wrongful Acts, the state of necessity is excluded as a circumstance precluding wrongfulness in situations where the primary norm excludes such possibility, either explicitly or implicitly.⁹³ This is indeed the situation with respect to the American Convention on Human Rights, for example, which specifically incorporates human rights guarantees during times of national emergency.⁹⁴

CONCLUSION

It is the sincere expectation of *amici* that this brief will contribute to the Tribunal’s task of adjudicating this controversy. As the Tribunal itself noted, this decision will carry profound implications for the progressive development of international law and for the effective realization of the right to water.

⁹² LG&E Energy Corp v. Argentine Republic, ICSID Case N° ARB/02/1, Decision on Liability, October 3, 2006, ¶¶ 246, 251 & 257.

⁹³ UN International Law Commission, Commentary on Article 25 (2) ¶ 19; Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10). Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001.

⁹⁴ See e.g., Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87, October 6, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 9 (1987).

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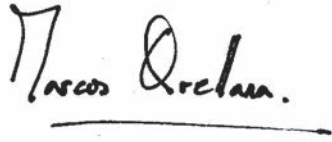
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FOR CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW (CIEL)

A handwritten signature in black ink that reads "Marcos Orellana." The signature is written in a cursive style and is underlined with a single horizontal line.

Marcos Orellana, Lawyer

Date: April 4, 2007

PETITION FOR AMICUS CURIAE STATUS

IN CASE NO. ARB/05/22 BEFORE THE
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES

BETWEEN
BIWATER GAUFF (TANZANIA) LIMITED
AND
UNITED REPUBLIC OF TANZANIA

Petitioners:

The Lawyers' Environmental Action Team (LEAT)
The Legal and Human Rights Centre (LHRC)
The Tanzania Gender Networking Programme (TGNP)
The Center for International Environmental Law (CIEL)
The International Institute for Sustainable Development (IISD)

November 27, 2006

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PETITION FOR AMICUS CURIAE STATUS
IN CASE NO. ARB/05/22 BEFORE THE
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
BETWEEN
BIWATER GAUFF (TANZANIA) LIMITED
AND
UNITED REPUBLIC OF TANZANIA

CONTENTS OF PETITION

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-

1. ORDERS BEING SOUGHT

[1.1]

The Petitioners are three Tanzanian-based legal non-governmental organizations (NGOs) and two international NGOs. Acting collectively, they are seeking the following orders of the Tribunal in the present arbitration between *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, Case No. ARB/05/22 before the International Centre for Settlement of Investment Disputes:

- Status as amicus curiae in the present arbitration;
- Access to the key arbitration documents; and
- Permission to attend the oral hearings when they take place, and to reply to any specific questions of the Tribunal on the written submissions.

2. PROCEDURE FOLLOWED IN THIS PETITION

[2.1]

As will be discussed in more detail below, this petition is made pursuant to Rule 37(2) of the recently amended Rules of Procedure for Arbitration Proceedings (Arbitration Rules) of the International Centre for the Settlement of Investment Disputes. It is common ground that these Rules apply to the present arbitration. As will be addressed below, Rule 37(2) provides the authority for this Tribunal to accept *amicus curiae* submissions. It sets out some tests for this purpose that potential *amici* should address. However, no specific procedure for applying for *amicus curiae* status is set out, and no preset forms are provided for this purpose. Moreover, as this is the first instance Petitioners are aware of where Rule 37(2) is being invoked, there are no previous decisions applying its terms to guide the Petitioners.

[2.2] Consequently, the Petitioners have considered the scope and content of Rule 37(2), as well as the two decisions under the previous ICSID Arbitration Rules relating to acceptance of *amicus curiae* submissions.¹ These two decisions are by tribunals with identical membership and set out identical procedures for this purpose. They seek from Petitioners for *amicus* status the following:

- [2.2.a]** a. The identity and background of the petitioner, the nature of its membership if it is an organization, and the nature of its relationships, if any, to the parties in the dispute.
- [2.2.b]** b. The nature of the petitioners' interest in the case.
- [2.2.c]** c. Whether the petitioner has received financial or other material support from any of the parties or from any person connected with the parties in this case.
- [2.2.d]** d. The reasons why the tribunal should accept the petitioner's *amicus curiae* brief.²

[2.3] Using this as a guideline, this Petition sets out in Section 3 the elements referred to in paragraphs (a) and (c) above. Section 4 then addresses the issues raised in paragraph (b). The remaining sections address the legal and procedural reasons that answer the question: Why should the tribunal accept the present Petition?

3. DESCRIPTION OF THE PETITIONERS

[3.1] **The Lawyers' Environmental Action Team (LEAT)** is the first and the premier public interest environmental law organization in Tanzania. It was established in 1994 in Dar es Salaam, Tanzania, and is incorporated under the Companies Ordinance Cap 212 as a company limited by guarantee. Its mission is to ensure sound natural resource management and environmental protection in Tanzania, thereby ensuring that the constitutional and environmental rights of the Tanzanian people are secured and realized by all. LEAT carries out policy research, advocacy, and selected public interest litigation. Its membership is widely open to people who aim to further environmental protection in Tanzania, to advance the culture of sound natural resources management and democratic governance. Its membership is mainly composed of lawyers from the private and not-for-profit sectors.

[3.2] LEAT is an independent organization which is not subject to direction or control by any other organization, but is open to partner with any public interest organization in and outside the country in furtherance of its own mission and objectives. While LEAT seeks to work with the government of Tanzania or other governmental units within Tanzania on environmental and natural resource management issues, it is not under or subject to control by any government agency.

[3.3] LEAT'S Public Interest Litigation Program seeks, on the one hand, to provide legal services to members of the public in Tanzania facing environmental degradation and human rights violations, and, on the other hand, to challenge infringement of people's rights, and the country's laws and constitution. For example, in the case of *LHRC, National Organizations for Legal Aid (NOLA) and LEAT v. Attorney General*³ LEAT and LHRC successfully argued before the High Court of Tanzania that the law allowing political candidates to offer gifts and other incentives to the electorate while canvassing votes was unconstitutional. LEAT has also been in the forefront

¹ *Aguas Argentinas et al. v. Argentina*, Order in response to a Petition for Transparency and Participation as Amicus Curiae, ICSID Case No. ARB/03/19 (19 May 2005); *Aguas Provinciales de Santa Fe et al. v. Argentina*, Order in Response to a Petition for Participation as Amicus Curiae, ICSID Case No. ARB/03/17 (17 March 2006).

² *Aguas Argentinas*, *ibid.*, para. 25; *Aguas Provinciales de Santa Fe*, *ibid.*, para. 24.

³ High Court of Tanzania at Dar es Salaam Misc. Civil Cause No 77 of 2005 (unreported).

of fundamental reforms of various laws in the country, including the enactment of major new environmental legislation in 2004.

- [3.4] LEAT is financed by The Ford Foundation, Oxfam Novib (NL) and Blacksmith Institute (USA).
- [3.5] Tundu Lissu is LEAT's Acting Executive Director and an Attorney at LEAT's headquarters in Dar es Salaam Tanzania. Rugemeleza Nshala, acting as co-counsel for the Petitioners in the present case, is the Senior Advocate at LEAT, currently based in New Haven, Connecticut. They both have detailed knowledge of, and experience with, Tanzanian environmental laws and natural resources management laws. In addition, both have in-depth knowledge on trade and investment laws and have closely followed international trade and investment cases.
- [3.6] Further information on LEAT's activities and structure can be found at www.lead.or.tz.
- [3.7] **The Legal and Human Rights Centre (LHRC)** is registered in Tanzania as a private, non-governmental, non-partisan and non-profit making organization. It has been an autonomous and independent entity since its registration in September 1995. The Legal and Human Rights Centre was established due to the realization that the majority of the people are unaware of their rights, and most importantly for the indigent who has no means to pursue his or her rights in court for want of legal representation.
- [3.8] The Centre was created to contribute to the process of democratization in Tanzania and strives to promote, reinforce and safeguard human rights and democracy; promote respect for and observance of the rule of law and due process; promote consumer protection; and create networks with public interest and human rights organization, non governmental organizations, universities, relevant research institutions, religious association and legal associations. It provides consultancy services to Government and Non-Governmental Organizations within the spirit of its objectives, and acts as a media resource on the issues within its mandate. LHRC also provides legal aid and legal and civic education to the members of the public, and plays a watchdog role in the arena of human rights and issues of national concern.
- [3.9] It runs radio and television programs on human rights, environmental protection, sound economic management, and social welfare. It also collaborates with other public interest organizations to litigate on behalf of the public on matters of national importance and the protection of rule of law, legality and the country's constitution. As mentioned above, in 2004, LHRC in collaboration with LEAT and NOLA successfully filed a constitutional petition against the government of the United Republic of Tanzania against the law that allowed political candidates to give gifts and other incentives while canvassing for votes. LHRC has also successfully represented Serengeti District residents that were forcefully evicted by the government of Tanzania from their lands without compensation before the Tanzania Human Rights Commission.
- [3.10] LHRC is not a membership based organization, but an independent non-governmental organization and is financed by the Ford Foundation, the governments of Sweden, Finland and Norway, as well as governmental and non-governmental organizations, such as Oxfam Novib (NL) and Equality Now (USA).
- [3.11] Helen Kijo-Bisimba is LHRC's Executive Director at its main office in Dar es Salaam Tanzania and a lawyer with vast experience on human rights issues. She will act as co-counsel for the Petitioners in the present instance.
- [3.12] More information on LHRC can be found at www.humanrights.or.tz.

- [3.13] The **Tanzania Gender Networking Programme (TGNP)**, established in 1993, is a Tanzanian non-governmental organization (NGO) working in the civil society sector, focusing on the practical promotion and application of gender equality and equity objectives through policy advocacy and mainstreaming of gender and pro-poor perspectives at all levels in Tanzanian society, including the public and governmental sectors. In particular, TGNP works on issues relating to access to water, especially for the poor and women. The organization strives to enhance the mainstreaming of gender at all levels of society from grassroots communities to the highest levels of national policy making and legislation.
- [3.14] TGNP's overall vision is a final responsibility of its members who have an Annual General Meeting (AGM) every year. Day to day running of the organization is directed by a Board whose secretary is the Executive Director of TGNP, as Chief Executive of the organization responsible for the entire staff of TGNP. TGNP houses the Secretariat of *FemAct*, a strong Feminist Activist advocacy coalition of more than 50 Tanzanian NGOs.
- [3.15] TGNP is financed greatly by its member contributions in terms of annual membership fees, volunteerism and backstopping. Recent external donations have come from charities, foundations and donors, including HIVOS/EU, CORDAID, SIDA, AIDOS, UNIFEM and Misereor, the Universalist Unitarian Service Committee (UUSC), Women for Water (USA) and the Women for Water Secretariat in the Netherlands.
- [3.16] More information on TGNP can be found at www.tgnp.org.
- [3.17] The **Center for International Environmental Law (CIEL)** is a nonprofit 501(c)3 organization under the laws of the United States of America and the regulations of the US Internal Revenue Service and incorporated as such in Washington, District of Columbia, United States of America. CIEL has offices in Washington, DC and Geneva working to provide legal support to persons and civil society organizations around the world.
- [3.18] CIEL is not a membership based organization, but an independent non-governmental organization. CIEL's mission is to use international law, institutions, and processes to protect the environment, human health and human rights, seeking to create a just and sustainable world. Founded in 1989, CIEL plays a key leadership role in establishing a firm foundation of legal analysis to strengthen progressive efforts by civil society. CIEL provides a wide range of services to clients and partners, including legal counsel, analysis, policy research, advocacy, education, training, and capacity building. The primary focus of this work is with developing country governments and civil society groups. CIEL staff are well-trained in international, common and civil law systems, come from five continents, are of different cultural and religious backgrounds, and have broad legal perspectives due, inter alia, to their diverse backgrounds and training. Most have international law experience working with their home governments as well.
- [3.19] CIEL's Trade and Sustainable Development Program seeks to reform the global framework of economic law, in order to promote human development and a healthy environment. CIEL has been engaged in international trade and investment law issues since the early 1990s, including for instance, participating in the first investor-state arbitration to allow amicus submissions, *Methanex Corp. v. United States* as well as in the *Agua Argentinas v. Argentina* case. CIEL also prompted the WTO Appellate Body to recognize its authority to consider *amicus curiae* briefs from civil society in the landmark *Shrimp/Turtle* case.

- [3.20] CIEL and its staff have published a number of papers and books on international trade law and international investment law, including most recently, *Fresh Water and International Economic Law* (Oxford University Press, 2005), and *Trade and Environment: A Guide to WTO Jurisprudence* (Earthscan, 2005).
- [3.21] Funding for CIEL’s Trade & Sustainable Program is provided by foundations, including the John D. and Catherine T. MacArthur Foundation, the Charles Stewart Mott Foundation, the Rockefeller Foundation, and the Ford Foundation, as well as governments and intergovernmental and non-governmental organizations. CIEL retains full control over the content of its work and projects, regardless of funding source.
- [3.22] Nathalie Bernasconi-Osterwalder is the Managing Attorney of CIEL’s Geneva office. She will act as co-counsel for the Petitioners. She is an experienced international lawyer and has previously been involved in *amicus* submissions in investment and trade law cases.
- [3.23] More information on CIEL can be found at www.ciel.org.
- [3.24] The **International Institute for Sustainable Development (IISD)** is a Canadian-based international non-governmental organization originally established by an Act of the Parliament of Canada. The mandate of the IISD is to foster local, regional and international policies and practices in support of the achievement of sustainable development. IISD receives some core funding from the governments of Canada and Manitoba, as well as core and project funding from a wide range of governmental and non-governmental funding sources. IISD retains full control over the content of its work and projects, regardless of funding source.
- [3.25] Trade and investment agreements are one of several areas of work relating to sustainable development that IISD undertakes. IISD has been actively engaged in international trade law issues since 1991, and international investment law issues since 1998. IISD’s primary concerns with the latter have been with regard to the relationship of international investment agreements to sustainable development. This includes the functioning and role of the dispute settlement systems, and the systemic legal implications of the individual and cumulative decisions of tribunals from a sustainable development perspective.
- [3.26] IISD initiated the first *amicus curiae* petition in the *Methanex Corp. v. United States* investor-state arbitration under NAFTA, and its *amicus* submissions in that case were expressly cited with approval by the tribunal.⁴ IISD is currently engaged in advising developing countries on international investment law negotiations, a multi-partner process for training on international investment law, as well as working on a next generation of international investment agreements. IISD staff have several dozen publications in this field, all of which are available at http://www.iisd.org/publications/publication_list.aspx?themeid=7. IISD is also the publisher of the Investment Treaty News bulletin.⁵

⁴ *Methanex Corporation v. United States of America, Final Award of the Tribunal on Jurisdiction and Merits*, 3 August 2005, (hereinafter, Final Award) Part IV, Chapter B, page 13, para. 27.

http://naftaclaims.com/Disputes/USA/Methanex/Methanex_Final_Award.pdf

⁵ Investment Treaty News is a publication of IISD. Its editorial functions are kept separate from the other work of IISD in order to ensure neutral and objective reporting. It has previously published reports on the present arbitration. This was noted in Procedural Order No. 3 as part of the evidence produced by Biwater showing the risk of publication of information on the case. Investment Treaty News has, indeed, published such stories and will undoubtedly continue to, as will other journals and news bulletins in the field, as new developments occur. Indeed, it would be rather unusual if there were no such reporting on a major infrastructure investment in the water sector that has gone awry and is now subject to an international

- [3.27] IISD's funding for this work is derived from a project on capacity provision and capacity building for developing countries in relation to international investment law. The project is funded by the Rockefeller Brothers Foundation, and the development agencies of the governments of Sweden and Denmark, in particular.
- [3.28] Howard Mann is the Senior International Law Advisor to IISD. A practicing international lawyer for nearly twenty years, Dr. Mann was counsel to IISD in the *Methanex* arbitration, has acted as counsel in NAFTA-based litigation before Canada's Federal Court of Appeal, and will also act as co-counsel for the Petitioners in the present instance.
- [3.29] More information on IISD can be found at www.iisd.org.
- [3.30] **Individually and collectively, the Petitioners hereby attest and affirm that they have no relationship, direct or indirect, with any party or any third party to this dispute.** The Petitioners have not received any assistance, financial or otherwise, from a party or a third party to this dispute in the preparation of this Petition for *Amicus* Status. They will not receive any such assistance in the preparation of their *amicus* submissions if this petition is accepted by the Tribunal.

4. REASONS FOR THE PETITION

- [4.1] This arbitration raises a number of issues of vital concern to the local community in Tanzania, and a wide range of potential issues of concern to developing countries (and indeed all countries) that have privatized, or are contemplating a possible privatization of, water or other infrastructure services. The arbitration also raises issues from a broader sustainable development perspective and is potentially of relevance for the entire international community.
- [4.2] In the UN Millennium Declaration, the international community committed itself to halve, by the year 2015, the proportion of people who are unable to reach or to afford safe drinking water. The privatization at issue in the present arbitration was conceived to work towards this goal. It has been described as "one of the most ambitious in Africa and was intended to be a model for how the world's poorest communities could be lifted out of poverty and countries could meet their millennium development goal targets."⁶
- [4.3] This was a critical project, watched by a wide range of observers. In few sectors is the relationship of service delivery to basic human rights and needs more salient than in the water sector. In addition, the management of water services relates closely to environmental management of water resources. Indeed, this Tribunal seems to implicitly recognize the multifaceted importance of this arbitration by explicitly noting "the public nature of this dispute and the range of interests that are potentially affected."⁷

arbitration. We note the Tribunal has ensured that general discussion of the case be permitted under its Order as well. At no time has any allegation of impropriety, disruption or distortion been made towards the reporting in ITN on the Biwater case.

⁶ *Flagship water privatisation fails in Tanzania, UK firm's contract cancelled amid row over supply*, by John Vidal in Dar es Salaam, Wednesday May 25, 2005, [The Guardian](http://politics.guardian.co.uk/development/story/0,15709,1491602,00.html) at <http://politics.guardian.co.uk/development/story/0,15709,1491602,00.html>.

⁷ Procedural Order No. 3, paragraph 147.

[4.4] This approach and understanding of the issues has jurisprudential support. In *Aguas Argentinas v. Argentina*, a dispute also involving water distribution and sewage services, the tribunal stated in response to a petition for amicus status:

[4.4.1] “ ... The factor that gives this case particular public interest is that the investment dispute centers around 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”.⁸

[4.5] Like the *Aguas Argentinas* case, the present dispute involves a water services agreement. The above statement of the *Aguas Argentinas* tribunal stresses what is also true for the present dispute, namely that the arbitration process goes far beyond merely resolving commercial or private conflicts, but rather has a substantial influence on the population’s ability to enjoy basic human rights. This aspect of the case means that the process should be transparent and permit citizens’ participation.

[4.6] Given the real and legitimate public concerns present in this case,⁹ it is entirely appropriate that the Tribunal hear from the leading civil society groups in Tanzania on these issues. The combination of natural resource and human rights issues is precisely what the Tanzanian Petitioners focus on in their day-to-day work. As locally based NGOs, they have the leading expertise to identify and discuss the various interests involved in this dispute from a civil society perspective. Indeed, this is what the Tanzanian NGOs have been doing since they were established. These Petitioners bring knowledge of local laws and circumstances, as well as the local context in which decisions on water services have been made.

[4.7] It is also appropriate that the Tribunal hear from Petitioners concerned with the implications of this dispute beyond the borders of Tanzania. This case potentially addresses Tanzania’s capacity to regulate and guarantee its citizens the supply of essential public services when they seek to enter partnerships with investors. But it is also potentially relevant for other developing countries that are currently facing massive infrastructure deficits. How international investment agreements, which by and large share similar structures and substantive content, can be applied to govern foreign investments in major infrastructure projects is of critical concern for the sustainable development of these countries.

[4.8] In addition, the legal responsibilities of foreign investors in such projects are becoming an increasingly important issue in the context of arbitrations concerning such projects. What is the nature of the due diligence to be exercised by such investors before an investment is made, what are the consequences for failing to meet the appropriate standards of conduct, and how could

⁸ Paragraph 19 of *Aguas Argentinas et al. v. Argentina*, Order in response to a Petition for Transparency and Participation as Amicus Curiae, ICSID Case No. ARB/03/19 (19 May 2005).

⁹ See, for instance: *Backlash over water Private Deals*, by John Vidal, May 25, 2005, The [Guardian](http://www.commondreams.org/headlines05/0525-07.html), <http://www.commondreams.org/headlines05/0525-07.html>; *Govt Dumps City Water*, by Bilal Abdul-Aziz of the Guardian, 14 May 2005, available at <http://216.69.164.44/ipp/guardian/2005/05/14/39435.html>; or Action Aid International, *Turning Off the Taps Donor Conditionality and water privatisation in Dar es Salaam, Tanzania*, available at http://www.actionaid.org.uk/_content/documents/TurningofftheTaps.pdf.

investor-state arbitrations take cognizance of these questions? The issue of investor responsibility is emerging as equally important to investor rights, and has already been a factor in at least three significant final awards.¹⁰

[4.9] The Center for International Environmental Law (CIEL) and the International Institute for Sustainable Development (IISD) have both developed an expertise in the broader international law issues that arise from arbitrations such as the one at issue here. This includes the relationship between international investment agreements and national development policy, the linkages between private agreements and international investment agreements, and the broader implications for environmental and human rights law and practice of the interpretation of host state obligations under treaties such as the United Kingdom-Tanzania bilateral investment treaty. Both organizations have important NGO perspectives on the legal issues that arise in such contexts, and the implications for developing countries to pursue development options, in particular in infrastructure development. While each individual case is fact-dependent, the legal reasoning employed in one decision has clear relevance to the interpretation of the law in other instances. Moreover, the cumulative body of decisions has significant importance for, most notably, developing countries, as well as private sector investors. This makes the linkages between investment agreements and the disputes under them central to the mandate of CIEL and IISD.

[4.10] In short, this arbitration involves issues of obvious public importance, and it has direct and indirect relevance to the Petitioners' mandates and activities at the local, national and international levels. The interest of the Petitioners in all of these public concerns is, without question, longstanding, genuine, and supported by their well recognized expertise on these issues.

[4.11] By acting collectively, the Petitioners bring the necessary experience and perspectives to weave the concerns that surround this case in a manner that will be integrated, grounded in the relevant legal principles and sources of law, directly connected to the issues before the Tribunal, and fully professional. In addition, by acting together, they will reduce the potential burden of two or three *amicus* petitions and submissions, and minimize any additional burden on the parties and the Tribunal.

5. JURISDICTION TO ACCEPT AMICUS BRIEFS

[5.1] At the first session of the Tribunal in March, 2006 in Paris, the question of *amicus* submissions was apparently raised by the Respondent government of Tanzania. The minutes of the First Session, at para. 20, indicate that the President of the Tribunal stated the matter would have to be considered under the new ICSID Rules upon their entry into force, and hence their application to the Tribunal, if the parties agreed to their application to these proceedings.

[5.2] It is now common ground that the amended ICSID Rules of Arbitration apply to these proceedings.¹¹ Hence, as indicated by the President in the minutes of the First Session, "the

¹⁰ World Duty Free Company Ltd. V. Republic of Kenya, ICSID ARB 00/7, Award 4 October 2006, available at http://www.investmentclaims.com/decisions/WDF-Kenya_Award.pdf; Inceysa Vallisoletana S.L. v. republic of El Salvador, ICSID Arb. 03/26, August 2, 2006, English translation of Spanish original found at <http://www.investmentclaims.com/decisions/InceysaVallisoletana-ElSalvador-Award.pdf>; MDT v. Republic of Chile, ICSID ARB 01/07, Award May 25, 2004, available at <http://www.investmentclaims.com/decisions/MTD-Chile-Award-25May2004.pdf>.

¹¹ Minutes of the First Session held March 23, 2006, page 4, para. 5. This is confirmed in several instances in Procedural Orders of the Tribunal.

procedure set out in such amended rules will apply to the question of *amicus curiae*.” (Minutes of the First Session, Para. 20.)

[5.3] Petitioners note that this is the first time, to their knowledge, that the new Rule 37(2) on *amicus* submissions, which lays out the groundwork for an orderly process for considering the participation of *amici*, is being considered by a Tribunal. For this reason, we believe it is useful to make some remarks on the new rule’s role, interpretation and application.

[5.4] Firstly, we note that the jurisdiction of the Tribunal to accept *amicus* submissions is now beyond doubt in these proceedings. Since 10 April 2006, the amended ICSID Arbitration Rules explicitly give tribunals the power to allow for submissions of non-disputing parties to the tribunal. Rule 37(2) of the new ICSID Arbitration Rules provides, *inter alia*:

[5.4.1] *Submissions of Non-disputing parties to the Tribunal*

[5.4.2] *After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the “nondisputing party”) to file a written submission with the Tribunal regarding a matter within the scope of the dispute.*

[5.5] This Rule is now expressly consistent with the practice that had emerged in previous arbitrations. This is so because the rule makes explicit not only that the Tribunal has the jurisdiction to accept *amicus curiae* submissions, but also that it may do so without the approval of one or both of the arbitrating parties.¹² Rule 37(2) requires a tribunal to consult with the parties, but does not ascribe to either or both parties together a veto over a decision by a tribunal to exercise its discretion as it sees fit for the best result in the matter before it. This is consistent with the very notion of an *amicus curiae*, that it be a friend of the court, and serve the court’s purpose of a fully informed decision.

[5.6] The inclusion of Rule 37(2) in the amended ICSID Rules must also, it is submitted, be understood in another light. By clarifying the jurisdiction of ICSID Tribunals to accept such submissions, the Rules also establish, by sound logic and necessary implication, the right of third parties to apply for such status. This third party right does not extend to the right to have such submissions accepted by the tribunal, or for them to form a basis for the final award if they are accepted. But it does establish a right to make a full presentation to a tribunal to be able to meet the tests for acceptance as an *amicus curiae* that are set out in the balance of Rule 37(2). It is to this issue that we now turn.

6. THE TEST TO APPLY IN THIS INSTANCE

[6.1] Rule 37(2) of the new ICSID Rules sets out the test for the Tribunal to apply in exercising its discretion to accept or not accept any particular Petition for *amicus curiae* status. The full text of Rule 37(2) reads:

[6.1.1] *After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the “nondisputing party”) to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In*

¹² The first decision to allow *amicus* participation in the *Methanex Corp. v. United States* arbitration was taken, for example, against the express wishes of the complainant corporation. *Methanex Corporation v. United States of America, Decision of the Tribunal on Petitions From Third Persons to Intervene as Amici Curiae*, January 15, 2001.

<http://naftaclaims.com/Disputes/USA/Methanex/MethanexDecisionReAuthorityAmicus.pdf> The same applies to the first two decisions on *amicus curiae* under the previous ICSID Rules, See *Aguas Argentinas* and *Aguas Provinciales de Santa Fe*, op.cit, note 1.

determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

- [6.1.1.a]** *(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;*
- [6.1.1.b]** *(b) the non-disputing party submission would address a matter within the scope of the dispute;*
- [6.1.1.c]** *(c) the non-disputing party has a significant interest in the proceeding.*
- [6.1.2]** *The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.*

[6.2] The tests set out here are generally consistent with how national courts and other tribunals have approached this issue of the test to be applied. They are also broadly similar to the tests enunciated by the NAFTA Free Trade Commission in their statement authorizing amicus interventions in NAFTA cases.¹³

[6.3] It is important to note that the Rule states, in the chapeau, that the tribunal “shall consider, among other things” the factors listed in the subsequent paragraphs. In other words, a Tribunal may not summarily reject a request such as the present Petition for *amicus curiae* standing. Rather, it must at a minimum, consider the factors set out in Rule 37(2) (We believe, for example, that the public credibility of the process, noted by the Tribunal in the *Methanex* case, is also a legitimate factor the Tribunal may consider, as discussed below.) Petitioners for *amicus curiae* status must therefore be afforded an opportunity to demonstrate that they meet these tests for the process to unfold in a manner that is consistent with due process and basic principles of fairness. To deprive, intentionally or unintentionally, a prospective Petitioner the opportunity to meet these tests and then deny standing on that basis, would, it is submitted, be to turn the intentions of the Rule on their head.

[6.4] However, in the present instance, it is not possible for the Petitioners to fulfill all the conditions necessary to allow the Tribunal to fully apply this test. The reason for this impossibility is the impact of the confidentiality order contained in Procedural Order No. 3 of the Tribunal. By precluding the release to the public of the documents that detail the facts and legal issues in dispute, the Petitioners cannot now describe the scope of their intended legal submissions, and hence the extent to which the tests set out in Rule 37(2) are fully met. The Rules should not, it is submitted, be interpreted in such a way as to compel Petitioners to meet the tests, or fail to do so, based on pure speculation as to what might be argued.

[6.5] This situation could not normally arise in the NAFTA context, where transparency of the arbitral documents is now the general rule. Nor could it arise in most national judicial proceedings where *amicus* briefs are permitted, as the legal documents there, too, are generally publicly available.

[6.6] The Petitioners accept that this legal conundrum is an unintended consequence of Procedural Order No. 3. Further, as this appears to be the first recorded instance of the application of this

¹³ The NAFTA Free Trade Commission Statement On Non-Disputing Party Participation (<http://www.naftaclaims.com/Papers/Nondisputing-en.pdf>).

new ICSID Rule, it falls to this Tribunal to sort out, as necessary, the kinds of difficulties or lacunae that the initial uses of the new Rules might highlight in practice. In this case, the question arises of how to square the issuance of a broad confidentiality order with the exercise of the right of non-parties to apply for status as an *amicus curiae* in a manner that complies with the letter and spirit of the new Rules that apply to this arbitration.

[6.7] It will not surprise the Tribunal that the Petitioners do not believe the confidentiality order is appropriate in a case of such broad public importance, or, indeed, in investor-state cases generally. At the same time, the Petitioners come to this process as it is and have no status to appeal the Order already made. Rather, the Petitioners herein suggest an appropriate way forward to allow their rights to make a fulsome Petition for *amicus* status to be realized, in respect of the Arbitral Rules controlling this arbitration. Each element of the test noted above may be considered separately in this regard.

[6.7.a] *(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties*

[6.7.a.1] The Petitioners fully appreciate the need to ensure that their submissions must assist the Tribunal in determining matters properly before it. The Petitioners thus undertake herewith to ensure that the matters they shall address will fall fully within the legal issues the tribunal must address for a proper legal determination in this case.

[6.7.a.2] However, at this time, it is impossible to demonstrate conclusively that the perspective of the Petitioners on any specific issue will differ from one of the parties. What has already been demonstrated, it is submitted, is that the starting perspective of the Petitioners, as NGOs with specialized interests and expertise in human rights, environmental and good governance issues locally in Tanzania, and in the multiple critical inter-relationships between international investment law and sustainable development at the international level, will be different than the initial interests, expertise and perspectives of the two contending parties. One can and should anticipate that this will lead to different legal arguments being made. Where the differences in argument are insignificant, the Petitioners undertake to exercise their discretion and refrain from making submissions on such issues.

[6.7.b] *(b) the non-disputing party submission would address a matter within the scope of the dispute*

[6.7.b.1] Petitioners understand this to mean matters in the more limited sense of a factual or legal issue that is within the scope of the dispute, not a political or broadly-stated policy issue. All the Petitioners can do at this time is again undertake to ensure that this will be so. Petitioners and their counsel are all seasoned legal practitioners with considerable experience inside legal processes at the national and international levels. They respect this as a forum for legal issues within the scope of the dispute.

[6.7.c] *(c) the non-disputing party has a significant interest in the proceeding*

[6.7.c.1] Petitioners have relied upon their general knowledge of the case and the legal issues it is likely to raise, to demonstrate why the proceeding has a significant interest to them. In

this regard, the public interest involved in the case is directly related to the sphere of expertise and mandate of the Petitioners. Based on what has been described above, we submit this test has been met.

[6.8] If the Tribunal is not satisfied that Petitioners have a significant interest in the proceeding or meet the other tests, the Tribunal is requested to bear in mind that the Petitioners cannot at this time be more explicit due to no fault or lack of diligence on their own part. In this event, the Petitioners respectfully suggest that the Tribunal consider one of two options:

[6.8.1] 1. Accepting the Petition now on the basis of the undertakings of the Petitioners set out above and providing the Petitioners with the key legal documents in order to ensure those undertakings can be met and a useful submission can be made; or

[6.8.2] 2. Providing Petitioners with the key legal documents in order that they may be able to demonstrate to the Tribunal that the tests are fully met before the Tribunal rules on the petition.

[6.9] To ensure that either option will be effective, the Tribunal could issue a new procedural order modifying the current restrictions on access to the arbitral documents under Procedural Order No. 3; or the Tribunal could simply order the release of certain documents, with or without specified conditions, as envisaged in Procedural Order No. 3.

[6.10] Given that Rule 37(2) does not exhaustively list the factors to be considered by the Tribunal in deciding *amicus* status, the Petitioners wish to note two other factors that might be relevant to its decision on this Petition.¹⁴ The first arises directly from the focus of the Tribunal in Procedural Order No. 3 on the proper functioning of the arbitral process. Petitioners wish to note in this regard that there is a history of practice by *amici* that is growing in investor-state arbitrations. In the first such case, *Methanex Corp v. United States*, the final award of the Tribunal recorded their “appreciation of the scholarship and industry which counsel for the Disputing Parties, Mexico and Canada as NAFTA Parties and the amici have deployed...”¹⁵, and also noted the attendance of the amici at the oral hearing on the merits in that arbitration. As noted above, both CIEL and IISD appeared as *amici* before the *Methanex* Tribunal.¹⁶

[6.11] It is this record of positive contribution, through what became simply a routine participation in the *Methanex* proceedings that the Petitioners wish to note. As well, with the number of *amicus* petitions now increasing, and with a growing experience, there is no recorded instance of the abuse of this process by any petitioner or accepted *amicus curiae*. There is no basis to assume the application of Rule 37(2) will lead to a disruption of the tribunal’s process. Indeed, to make such an assumption and use it as a basis to deny *amicus* standing or access to the requisite documents to participate in an informed manner would render the amendment to the Rules allowing *amicus* participation inutile. Such a result would fit neither the letter nor spirit of the amendment. We note again in this respect the repeated assertions of this Tribunal in Procedural Order No. 3 that

¹⁴ We note that Rule 37(2) states the Tribunal shall consider, “among other things”, the factors set out expressly in that Rule. Other factors may thus also be relevant. It may be noted that the tribunal in the *Agua Argentinas* and *Agua Provinciales de Santa Fe* decisions, supra, n.1, para. 27 and 26 respectively (which predate the current Rules), listed several factors to consider: “...all the information in the petition, the views of the Claimants and Respondent; the extra burden which the acceptance of *amicus curiae* briefs may place on the parties, the Tribunal and the proceedings; and the degree to which the proposed *amicus curiae* brief is likely to assist the tribunal in arriving at its decision.”

¹⁵ *Methanex* Final Award, note 2 above, at p. Part I-preface-page 5.

¹⁶ The Tribunal also, later on, expressly cited with approval the written submissions of IISD, see Footnote 4, above, and accompanying text.

one of the overall purposes of the amendment to the Rules of Arbitration was to promote more transparency in the investor-state process, not less than existed under the general mandate of the tribunal to manage its own process, the basis upon which Tribunals have previously allowed *amicus* participation.

[6.12] In addition, Rule 37(2) ascribes to the Tribunal the responsibility to manage the process so as to ensure no disruption or procedural unfairness arises. In the absence of clear evidence of a high likelihood of disruption, it is submitted that this factor, which motivated the Tribunal in Procedural Order No. 3, at least in large part, can only play a minimal role in setting the modalities for such participation in any appraisal under Rule 37(2).

[6.13] Finally, the Petitioners also note the importance of public access to such arbitrations from a different perspective; the credibility of the arbitration process in the eyes of the public. As noted in the *Methanex Corp v. United States* decision on jurisdiction to accept *amicus* submissions,

[6.13.1] 49. *There is undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial 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 Respondent 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.*¹⁷

[6.14] The exact same argument is found in the only two decisions on *amicus* participation under the previous ICSID Rules:

[6.14.1] *The acceptance of amicus submissions would have the additional desirable consequence of increasing the transparency of investor-state arbitration. Public acceptance of the legitimacy of international arbitral processes, particularly when they involve states and matters of public interest, is strengthened by increased openness and increased knowledge as to how the process functions.... Through the participation of appropriate representatives of civil society in appropriate cases, the public will gain increased understanding of ICSID processes.*¹⁸

[6.15] This perspective from an investor-state tribunal is particularly important in light of the potential impacts of the confidentiality order on public access to documents in the case as it evolves. While tribunals and the international arbitration bar often consider such issues from the perspective of the professional functioning of the individual case, as appears in the decision in Procedural Order No. 3 of this Tribunal, the public perception can be one of a system unfolding in a secret environment that is anathema in a democratic context. Allowing leading local and international NGOs *amicus curiae* status would help reduce the anxiety that accompanies such concerns and improve the public credibility of the process.

¹⁷ *Methanex Corporation v. United States of America, Decision of the Tribunal on Petitions From Third Persons to Intervene as Amici Curiae*, January 15, 2001.

<http://naftaclaims.com/Disputes/USA/Methanex/MethanexDecisionReAuthorityAmicus.pdf>

¹⁸ *Aguas Argentinas*, n. 1, para 22; *Aguas Provinciales de Santa Fe*, no. 1, para 21.

7. ACCESS TO THE KEY ARBITRAL DOCUMENTS

[7.1]

Pursuant to Procedural Order No. 3 on confidentiality, Petitioners submit that the Tribunal in the present case has retained the full authority and discretion to allow for access to documents to non-disputing parties. In order to make an informed decision on whether to apply for participation as *amici*, we ask that the Tribunal exercise its discretion and provide access to:

- the initial notice of arbitration and statement of defense, if any was prepared;
- the decisions, orders and directions of the Tribunal not already in the public domain, if any;
- the pleadings and written memorials of the arbitrating parties, and
- relevant witness statements and transcripts of any witness examinations.

[7.2]

In Procedural Order No. 3, the Tribunal explicitly allowed for “general discussion about the case” (para. 149-150). A “general discussion”, however, is insufficient to provide a clear understanding about the specific legal issues this dispute raises, or the facts to which they must be applied so as to enable an informed and useful *amicus* brief to be prepared.

[7.3]

Thus, the Petitioners turn to the Tribunal’s expressly retained power to decide in favor of disclosure of the above types of arbitral documents. This is found in at least two relevant places in Procedural Order No. 3:

- At para. 158, the Tribunal states that “this category of documents should be restricted, pending conclusion of the proceedings (or agreement between the parties, or *further order by the Tribunal*)”. [emphasis added.]
- At para. 162, the Tribunal expressly maintains for itself the continued review of the application of its Order.

In order to ensure that the balance between competing interests is maintained, the tribunal considers it appropriate to keep each category [of documents described in the Order] under continued review. To this end, pending conclusion of these proceedings, the tribunal will act as “gate-keeper” on disclosures. Thus, if new circumstances arise, and the parties are unable to reach agreement, the parties remain at liberty to apply to vary these directions on a case-by-case basis. In the interests of efficiency, the Tribunal expects that such applications would be made only in well-justified circumstances, supported by concrete explanations.

[7.4]

While the above paragraph refers to applications for variances from the Order by the parties, in the present circumstances the Petitioners submit that this should not be read so as to limit the broader notion of the Tribunal acting as the gate-keeper on disclosures in the context of a Petition for *amicus* standing. This would leave the ability of potential *amici* to engage in the process in an effective manner in the hands of the parties rather than in the hands of the tribunal, where the discretion has been fully vested by Rule 37(2) of the amended Rules.

[7.5]

In addition, nothing on the face of the Order suggests that the context of the second part of para. 162 was drafted in anticipation of a Petition of the present type. Thus, in addition to reading it within its intended scope, it is submitted that the Tribunal may rely upon its general powers under Rule 19 of the new Rules, to review its own orders in managing its proceedings, as well as the

implied power in Rule 37(2) to ensure that *amicus curiae* have the opportunity to properly present their petitions for said status and to make an effective contribution to the deliberations of the Tribunal.

[7.6] Petitioners wish to note two additional factors relating to this issue. First, it has become common practice where arbitral documents are released to the public for confidential business information to be redacted. A similar process can be undertaken here. Experience suggests that in most cases, this is generally easily accomplished, and in reality few redactions are necessary.

[7.7] Second, Petitioners submit that “the balance between competing interests”, as that phrase is used in para. 162 of Procedural Order No. 3, must also be understood to include the interests of potential *amici*, acting properly and fully within their rights and interests pursuant to Rule 37(2) of the Rules. That this adds an unanticipated twist to what the tribunal was addressing in its Order is clear. That does not, however, diminish the compelling need to address the impact Rule 37(2) should have on the scope or application of such an Order.

8. ACCESS TO THE ORAL HEARINGS

[8.1] Lastly, the Petitioners seek an Order from the Tribunal that the hearings be open to the public and that *amici*, once accepted, be allowed to reply directly to any questions directed to them by the Tribunal concerning their submissions.

[8.2] Rule 32(2) of the amended Arbitration Rules provides:

[8.2.1] *Unless either Party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.*

[8.3] This provision is notably different from the previous Rule 32(2), which stated:

[8.3.1] *The Tribunal shall decide, with the consent of the parties, which other persons besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal may attend the hearings.*

[8.4] Principally, the revised Rule enables the Tribunal to make a decision on its own initiative to allow third parties to attend the hearing. Such a decision is then subject to an objection, or veto, by a party. This difference, it is submitted, is emblematic of the overall shift to promoting transparency in investor-state arbitrations that this Tribunal has already noted in some detail in its Procedural Order No. 3.

[8.5] The Petitioners, relying on the widely recognized public interest in this arbitration, thus seek an Order of the Tribunal for open proceedings, and for the enabling of the Petitioners and Counsel to attend the hearing.

[8.6] In addition, Petitioners seek an Order to be allowed to respond to any questions on its submissions, should they be accepted by the Tribunal, at the oral hearings. Petitioners are aware

that such a response can theoretically add some time. However, the Tribunal is master of its own time, and can ensure that the proceedings are conducted in an orderly and timely fashion.

- [8.7]** Petitioners note that several investor-state cases have now been made open to the public, and there has been no incident or conduct that has disrupted the proceedings in any such case. Speculation that this case might lead to such disruptive conduct would be just that, baseless speculation. In fact, in a growing and consistent practice in similarly emotional cases, no disruption has occurred. Petitioners undertake to present their arguments in the time and manner directed by the Tribunal.

9. SUMMARY OF PETITION AND ORDERS SOUGHT

- [9.1]** The Petitioners seek the following orders of the Tribunal in the present arbitration between *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, Case No. ARB/05/22 at the International Centre for Settlement of Investment Disputes:

- Status as *amicus curiae* in the present arbitration;
- Access to the key arbitration documents; and
- Permission to attend the oral hearings when they take place, and to reply to any specific questions of the Tribunal on the written submissions.

- [9.2]** In order to avoid disturbing the orderly pace of this arbitration, and thus consistent with Rule 37(2) of the new Arbitration Rules, Petitioners request access to the above-mentioned documents as soon as possible.

- [9.3]** Respectfully submitted on behalf of:

The Lawyers' Environmental Action Team (LEAT)
The Legal and Human Rights Centre (LHRC)
The Tanzania Gender Networking Programme (TGNP)
The Center for International Environmental Law (CIEL)
The International Institute for Sustainable Development (IISD)

Original signed by Nathalie Bernasconi-Osterwalder
Center for International Environmental Law (CIEL)

Geneva, 27 November, 2006

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**International Centre for Settlement
of Investment Disputes**

ICSID Case No. ARB/05/22

**BIWATER GAUFF (TANZANIA) LTD.,
CLAIMANT**

v.

**UNITED REPUBLIC OF TANZANIA,
RESPONDENT**

PROCEDURAL ORDER N° 5

Rendered by an Arbitral Tribunal composed of

**Gary BORN, Arbitrator
Toby LANDAU, Arbitrator,
Bernard HANOTIAU, President**

I. INTRODUCTION

1. On 27 November 2006, the following five Petitioners filed with the Secretariat of ICSID a petition for *amicus curiae* status:
 - The Lawyers' Environmental Action Team (LEAT);
 - The Legal and Human Rights Centre (LHRC);
 - The Tanzania Gender Networking Programme (TGNP);
 - The Center for International Environmental Law (CIEL); and
 - The International Institute for Sustainable Development (IISD);(collectively referred to as the "Petitioners").
2. The Petition and its appendices were forwarded to the Arbitral Tribunal by the ICSID Secretariat on 27 November 2006.
3. On 1 December 2006, the ICSID Secretariat informed the parties that the President of the Arbitral Tribunal invited them to submit by Monday 18 December 2006:
 - (i) in accordance with ICSID Arbitration Rule 37(2), any observations they might have regarding the Petitioners' participation in the written phase of the proceedings; and
 - (ii) in accordance with ICSID Arbitration Rule 32(2), any observations they might have on the Petitioners' attending or observing all or part of any forthcoming hearing in the case.
4. On 13 December 2006, Counsel for Claimant, being in the process of preparing its Reply, invited the Arbitral Tribunal to consider extending the deadline for submissions on the *amicus* petition until 12 January 2007. They further informed the Arbitral Tribunal that they had discussed the matter with the Respondent's Counsel, who had indicated that they were neutral as regards the requested extension.

5. On 15 December 2006, the ICSID Secretariat informed the parties that the Arbitral Tribunal had decided to grant the extension requested by Claimant.
6. On the same date, Counsel for Respondent communicated to the Arbitral Tribunal their observations on the Petition pursuant to ICSID Arbitration Rules 32(2) and 37(2).
7. On 12 January 2007, Counsel for Claimant communicated their observations on the Petition to the ICSID Secretariat.
8. On the same date, Counsel for Respondent reiterated in a letter to the Arbitral Tribunal that they considered it appropriate to have the parties' observations communicated to the Petitioners (subject to verification that the letters do not disclose the content of any confidential material), considering that absent unusual circumstances, an applicant to an arbitral or judicial tribunal should see material submitted to the tribunal advocating the modification or rejection of its application before a ruling is made.
9. The same day, Counsel for Claimant informed the Arbitral Tribunal that they considered it neither appropriate nor necessary to submit the parties' observations to the Petitioners, alleging furthermore that ICSID Arbitration Rule 37, neither requires nor envisages that the Arbitral Tribunal do so.
10. On 22 January 2007, the Arbitral Tribunal informed the parties, through the ICSID Secretariat, that it was sufficiently informed about the Petition and that it would render its decision soon.

II. THE PETITIONERS' REQUEST

A. The identity of the Petitioners

11. The five Petitioners are as follows (the following descriptions being based entirely upon the statements contained in the Petition):

- (a) The Lawyers' Environmental Action Team (LEAT), which describes itself as the first and the premier public interest environmental law organisation in Tanzania. It was established in 1994 as a company limited by guarantee. Its mission is to “*ensure sound natural resource management and environmental protection in Tanzania, thereby ensuring that the constitutional and environmental rights of the Tanzanian people are secured and realized by all*”. LEAT is further described as an independent organisation which is not subject to direction or control by any other organisation, but is open to partner with any public interest organisation in and outside the country in furtherance of its own mission and objective.
- (b) The Legal and Human Rights Centre (LHRC) is registered in Tanzania as a private, non-governmental, non-partisan and non-profit making organisation. It is described as having been established to contribute to the process of democratisation in Tanzania due to the realisation that the majority of the people are unaware of their rights, and most importantly for the indigent who has no means to pursue his or her rights in court for want of legal representation. It is not a membership based organisation, but an independent non-governmental organisation.
- (c) The Tanzania Gender Networking Programme (TGNP), which presents itself as a Tanzanian non-governmental organisation established in 1993, working in the civil society sector, focusing on the practical promotion and application of gender equality and equity objectives. In particular, TGNP works on issues relating to access to water, especially for the poor and women. It is run by an Executive Director appointed by the board, which is itself appointed by the General Assembly of its members.
- (d) The Center for International Environmental Law (CIEL) is a nonprofit organisation under the laws of the United States of America and the regulations of the US Internal Revenue Service and incorporated as such in Washington DC. It is an independent non-governmental organisation whose mission is to use international law, institutions and processes to protect the environment, human health and human rights, seeking to create a just and sustainable world. It was founded in 1989 and has been engaged since the early 1990s in international trade and investment law issues. It was granted *amicus curiae* status in the *Methanex Corp. v. United States*

arbitration as well as in the *Agua Argentinas v. Argentina* case, which will be referred to in the course of this Order.

- (e) Finally, the International Institute for Sustainable Development (IISD) is a Canadian-based international non-governmental organisation originally established by an Act of the Parliament of Canada. Its mandate is to foster local, regional and international policies and practices in support of the achievement of sustainable development. IISD has been actively engaged in international trade law issues since 1991 and international investment law issues since 1998. Its primary concerns have been with regard to the relationship between international investment agreements and sustainable development, it was also granted *amicus curiae* status in the *Methanex* case.

B. The reasons for the Petitions

- 12. The Petitioners contend that this arbitration raises a number of issues of vital concern to the local community in Tanzania, and a wide range of potential issues of concern to developing countries (and indeed all countries) that have privatised, or are contemplating a possible privatisation of, water or other infrastructure services. The dispute is also said to raise issues from a broader sustainable development perspective, and is potentially of relevance for the entire international community.
- 13. The Petitioners further state that in the UN Millennium Declaration, the international community committed itself to halve, by the year 2015, the proportion of people who are unable to reach or to afford safe drinking water. According to the Petitioners, the privatization at issue in the present arbitration was conceived to work towards this goal. It has been described as “*one of the most ambitious in Africa and was intended to be a model for how the world’s poorest communities could be lifted out of poverty and countries could meet their millennium development goal targets.*”
- 14. It is therefore the Petitioners’ position that this arbitration process goes far beyond merely resolving commercial or private conflicts, but rather has a substantial influence on the population’s ability to enjoy basic human rights. Therefore, the process should be

transparent and permit citizens' participation. In particular, the Arbitral Tribunal should hear from the leading civil society groups in Tanzania on these issues. The combination of natural resource and human rights issues is precisely that which the Tanzanian Petitioners focus on in their day-to-day work. They have the leading expertise to identify and discuss the various interests involved in this dispute from a civil society perspective and will be able to inform the Arbitral Tribunal about the implications of this dispute beyond the borders of Tanzania. How international investment agreements, which by and large share similar structures and substantive content, can be applied to govern foreign investments in major infrastructure projects is asserted to be of critical concern for the sustainable development of these countries.

15. Finally, the Petitioners contend that the legal responsibilities of foreign investors are an increasingly important issue in the context of arbitrations concerning such projects. What is the nature of the due diligence to be exercised by such investors before an investment is made; what are the consequences for failing to meet the appropriate standards of conduct; and how could investor-state arbitrations take cognizance of these questions? In short, the Petitioners conclude that this arbitration involves issues of obvious public importance, and it has direct and indirect relevance to the Petitioners' mandates and activities at the local, national and international levels. The interest of the Petitioners in all of these public concerns is, without question, longstanding, genuine, and supported by their well-recognized expertise on these issues.

C. Jurisdiction to accept *amicus* briefs

16. The Petitioners point out that, as recorded in the minutes of the First Session, the President of the Arbitral Tribunal had noted that the question of *amicus* submissions would have to be considered under the new ICSID Arbitration Rules, upon their entry into force (on the assumption that the parties agreed to the application of the new Rules to these proceedings – which subsequently they did). Paragraph 20 of the minutes states that “*the procedure set out in such amended rules will apply to the question of amicus curiae.*”
17. Since 10 April 2006, the amended ICSID Arbitration Rules have explicitly given tribunals the power to allow for submissions of non-disputing parties. Rule 37(2) establishes the

right of third parties to apply for *amicus curiae* status. This right does not extend to a right to have such submissions accepted by the tribunal, or for them to form a basis for the final award if they are so accepted. On the other hand, it does establish a right to make a full presentation to the tribunal in order to be able to meet the test for acceptance as an *amicus curiae*. The Petitioners emphasise that it is now explicit not only that the tribunal has the jurisdiction to accept *amicus curiae* submissions, but also that it may do so without the approval of one or both of the arbitrating parties.

D. The test to apply

18. The full text of ICSID Arbitration Rule 37(2) reads as follows:

“After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the “non-disputing party”) to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider among other things, the extent to which:

- (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
- (b) the non-disputing party submission would address a matter within the scope of the dispute;
- (c) the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.”

19. The Petitioners consider that the above conditions are met in this case. They contend, however, that the impact of the confidentiality order contained in *Procedural Order No. 3*

of the Arbitral Tribunal, limiting the release to the public of certain categories of documents that detail the facts and legal issues in dispute, prevent them from describing the precise scope of their intended legal submissions and hence the extent to which the tests set out in Rule 37(2) are fully met.

20. As to condition (a) of Rule 37(2), and under the reservation noted in paragraph 19 above, the Petitioners submit that their starting perspective, as NGOs with specialized interests and expertise in human rights, environmental and good governance issues locally in Tanzania, and in the multiple critical inter-relationships between international investment law and sustainable development at the international level, will be different than the initial interests, expertise and perspectives of the two contending parties.
21. With respect to condition (b) of Rule 37(2), the Petitioners emphasise that they will comply with this condition and respect this Arbitral Tribunal as a forum for legal issues within the scope of the dispute.
22. In relation to condition (c) of Rule 37(2), the Petitioners, relying upon their general knowledge of the case and the legal issues it is likely to raise, consider that their introductory presentation (see A above) has clearly demonstrated that the public interest involved in the case is directly related to the sphere of expertise and mandate of the Petitioners.
23. Finally, given that Rule 37(2) does not exhaustively list the factors to be considered by the Arbitral Tribunal in deciding upon *amicus* status, the Petitioners also note two other factors that might be relevant to the Arbitral Tribunal's decision on their Petition. The first arises directly from the focus of the Arbitral Tribunal in *Procedural Order No. 3* on the proper functioning of the arbitral process. They underline in this regard that there is a history of practice by *amici* that is growing in investor-state arbitrations. They further note that there is no recorded instance of an abuse of the process by any petitioner or accepted *amicus curiae*. There is therefore no basis to assume that the application of Rule 37(2) will lead to a disruption of the arbitral process.
24. Finally, the Petitioners emphasise the importance of public access to the arbitration from the perspective of the credibility of the arbitration process itself in the eyes of the public,

which often considers investor-state arbitration as a system unfolding in a secret environment that is anathema in a democratic context.

E. Access to the key arbitral documents

25. The Petitioners observe that pursuant to *Procedural Order No. 3* (on confidentiality / procedural integrity), the Arbitral Tribunal has retained the full authority and discretion to allow for access to documents by non-disputing parties. They therefore ask that the Arbitral Tribunal exercise its discretion and provide access to:
- the initial notice of arbitration and statement of defence, if any was prepared;
 - the decisions, orders and directions of the Arbitral Tribunal not already in the public domain, if any;
 - the pleadings and written memorials of the arbitrating parties, and
 - relevant witness statements and transcripts of any witness examinations.
26. The Petitioners rely in particular on paragraph 162 of *Procedural Order No. 3* in which the Arbitral Tribunal expressly reserved to itself the continued review of the application of its Order. They also submit that it has become common practice in international arbitration that where arbitral documents are released to the public, confidential business information be redacted, and suggest that a similar process can be undertaken here.
27. Finally, the Petitioners submit that “*the balance between competing interests*” as that phrase is used in paragraph 162 of *Procedural Order No. 3*, must also be understood to include the interests of potential *amici*, acting properly and fully within their rights and interests pursuant to Rule 37(2).

F. Access to the oral hearings

28. Lastly, the Petitioners seek an Order from the Arbitral Tribunal that the hearings be open to the public and that *amici*, once accepted, be allowed to reply directly to any questions directed to them by the Arbitral Tribunal concerning their submissions.

29. Rule 32(2) of the amended ICSID Arbitration Rules provides that:

“Unless either Party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information”.

30. Relying on the “*widely recognized public interest in this arbitration*”, the Petitioners seek an Order from the Arbitral Tribunal for open proceedings, and for the enabling of the Petitioners and their Counsel to attend the hearing. They further seek an Order to be allowed to respond to any questions on their submissions, should they be allowed by the Arbitral Tribunal to attend at the oral hearings.

III. THE PARTIES’ OBSERVATIONS

A. Claimant’s position

1. Amicus curiae status

31. Claimant objects to the Petition to grant *amicus* status to the Petitioners. According to Claimant, the Petitioners should only be accorded *amicus* status if the issues they raise and the interests they represent will contribute information and insight in relation to the determinations that are necessary for the Arbitral Tribunal to make in order to resolve this dispute. The Petitioners’ concerns are, according to Claimant, factually and legally irrelevant to the issues to be decided by the Arbitral Tribunal in this arbitration. Moreover, they have not demonstrated any sufficient connection or interest in these proceedings to justify attributing to them *amicus* status.

32. According to Claimant, the fundamental flaw in the Petition is that the Petitioners assume that the issues that concern them must of necessity arise in the arbitration simply because

the background to the arbitration relates to water, and further that such issues will be of concern to the Arbitral Tribunal. This is not the case in the Claimant's submission.

33. The dispute between the parties that the Arbitral Tribunal is mandated to resolve arises out of the privatisation and investment that in fact took place. Claimant submits that, in relation to the privatisation, no issues arise in this arbitration as to whether the Republic ought to have involved the private sector in the water supply process in the first instance; what form of private sector participation should have been employed (if any); or whether the purported termination of the lease contract was a failure of the concept of private sector participation in general.
34. Claimant also submits that no environmental issues arise for determination in this case and that the arbitration raises no issues of sustainable development.
35. Finally, the fact that CIEL and IISD have an asserted expertise in broad international law issues such as the linkage between international investment agreements and national development policy, is irrelevant. Policy and political issues of this nature do not bear on the factual and legal issues in this dispute. The *Agua Argentinas* case in which CIEL was granted *amicus* status was totally different from this arbitration. In that case, the Tribunal found that the outcome of the decision had the potential to affect the operation of the water distribution and sewerage system in Buenos Aires. That position does not obtain in this case. Claimant has exited Tanzania, City Water is defunct and Claimant seeks compensation from the Republic's wrongdoing. The prayer for relief does not include any requests that would result in City Water's right to operate the water supply system being reinstated or otherwise bear on the provision of water services in Dar es Salaam.
36. Lastly, Claimant notes that the Petition was filed very late while the existence of these proceedings has been in the public domain since about August 2005; the issue of *amici* was already raised at the First Session; and co-counsel for the Petitioners were aware of the arbitration and its subject matter at least by May 2006, as it was referred to in a paper dated May 2006 written by Counsel for one of the Petitioners (Dr. H. Mann). The result of this late filing is that adding the Petitioners to the proceedings now would place intolerable strain on an already tight timetable, since a substantive hearing is scheduled in April 2007.

37. By way of conclusion, Claimant notes that there is nothing the Petitioners can add to the hearing in respect of the issues to be determined which cannot be said by either party and, since this is a clear requirement of Rule 37(2), this factor alone should be enough to cause the Arbitral Tribunal to reject the Petition.

2. Access to key arbitration documents

38. Claimant objects to the Petitioners' request to have access to key arbitration documents.
39. It notes that the scope of documents sought by the Petitioners is potentially extremely wide and covers almost the entire arbitration record. According to Claimant, this would be suggestive of a broader wish on the part of the Petitioners to engage in, and monitor, the proceedings as a matter of general interest, rather than a desire to provide assistance to the Arbitral Tribunal in relation to a particular subject matter.
40. Claimant also draws the Arbitral Tribunal's attention to the sensitive nature of the documents it has disclosed, and the difficulty of their redaction to protect Claimant's interests.

3. Attendance at the hearings

41. Claimant notes that Rule 37(2) does not contemplate that *amici* will be granted access to the oral hearing. Further, Rule 32(2) unequivocally provides that the Arbitral Tribunal may grant permission to attend subject to the objection of the parties. Therefore, despite the Petitioners' attempts to distort Rule 37, Claimant has the right to object to their attendance and for the reasons set out above indeed objects.

B. Respondent's position

1. The *amicus curiae* status

42. Respondent submits that the Petitioners appear to be potentially appropriate *amici* in light of their organisational interests, their experience as *amici* and the experience and reputation of their counsel.

43. Respondent admits on the other hand that it is difficult to come to a firm conclusion as to whether a submission from the Petitioners would be useful to the Arbitral Tribunal in deciding the matters before it. Respondent views the question as rather being whether the Petitioners should be given access to the additional information they claim in order to file an informed petition on the basis of the conditions set out in Rule 37(2). In this regard, Respondent states that it would not object in principle to the Petitioners having access to the four categories of documents identified in the Petition.
44. Finally, with respect to the last paragraph of Rule 37(2), Respondent submits that considering the Petitioners' track record, there does not seem to be any reason to expect the Petitioners' submission or conduct to be in some substantive sense "disruptive". The more practical question is the timing of any submission the Petitioners might make and in particular whether both parties will have an adequate and not unduly burdensome opportunity to present their observations on such a submission within the framework of the existing procedural schedule.

2. The amici's attendance at the hearings

45. Respondent notes that, by the clear terms of Rule 32(2), each party does retain a veto right in relation to the *amici's* attendance at the hearing and that since the First Session on 23 March 2006, Claimant has made clear that it objects to such attendance. The Republic submits that it would be willing to admit the Petitioners to the hearing. It is however up to Claimant to decide whether to make an exception to its own general position.

IV. DECISION OF THE ARBITRAL TRIBUNAL

A. The Petitioners' status as *Amicus Curiae* in the present arbitration

46. *Nature of the Petition:* The application before the Arbitral Tribunal is headed: "*Petition for Amicus Curiae Status*". It might be noted at the outset that the ICSID Rules do not, in terms, provide for an *amicus curiae* "*status*", in so far as this might be taken to denote a standing in the overall arbitration akin to that of a party, with the full range of

procedural privileges that that might entail. Rather, the ICSID Arbitration Rules expressly regulate two specific – and carefully delimited – types of participation by non-parties, namely: (a) the filing of a written submission (Rule 37(2)) and (b) the attendance at hearings (Rule 32(2)). Each of these types of participation is to be addressed by a tribunal on an *ad hoc* basis, rather than by the granting of an overall “*amicus curiae status*” for all purposes. Indeed, Rule 37(2) is specifically drafted in terms of the discretion of a tribunal to accept “a” written submission, rather than all submissions from a particular entity. It follows that there may be some written submissions from any given non-disputing party that are accepted as qualifying under the terms of Rule 37(2), and some that are not. It also follows that a “non-disputing party” does not become a party to the arbitration by virtue of a tribunal’s decision under Rule 37, but is instead afforded a specific and defined opportunity to make a particular submission.

47. The Arbitral Tribunal considers this an important starting point in terms of safeguarding the expectations of all concerned, as well as the integrity of the arbitral process, lest it be misunderstood that once any type of permission to participate is given to a non-disputing party, the latter may then be entitled as of right to all other procedural rights and privileges.
48. Having said this, the Arbitral Tribunal also recognises that to allow effective access to an *amicus curiae*, there may be certain other procedural mechanisms that need to be put in place.
49. *Rule 37(2)*: The test which the Arbitral Tribunal must apply in deciding whether or not to allow any particular Petitioner to file a written submission in these proceedings is set out in Rule 37(2) (which has already been quoted earlier in this Order – see paragraph 18 above).
50. The Arbitral Tribunal has carefully considered each of the conditions in Rule 37(2)(a), (b) and (c). On the basis of the information provided in the Petition, the nature and expertise of each Petitioner, and the submissions summarised above, the Arbitral Tribunal is of the view that it may benefit from a written submission by the Petitioners, and that allowing for the making of such submission by these entities in these proceedings is an important element in the overall discharge of the Arbitral Tribunal’s mandate, and in securing wider confidence in the arbitral process itself. In particular, the Arbitral Tribunal:

- (a) considers that a written submission by the Petitioners appears to have the reasonable potential to assist the Arbitral Tribunal by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties (Rule 37(2)(a));
- (b) accepts the Petitioners indication that their submissions would address matters within the scope of the dispute, and obviously reserves the right to disregard any submission that does not do so (Rule 37(2)(b));
- (c) accepts that each of the Petitioners has a sufficient interest in this proceeding (Rule 37(2)(c)).

51. In this regard, the Arbitral Tribunal respectfully adopts the words of the Arbitral Tribunal in *Methanex Corporation v. United States of America*, (Decision of the Tribunal on Petitions from Third Persons to Intervene as *Amici Curiae*, January 15, 2001) at para. 49:

“there is an undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties. This is not merely because one of the Disputing Parties is a State: there are of course disputes involving States which are of no greater general public interest than a dispute between private persons. 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 Respondents and Canada: the ... 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”.

52. In another recent ICSID case, *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentina* (ARB/03/19), relating to a water concession covering the city of Buenos Aires and the metropolitan area of greater

Buenos Aires, the Tribunal also emphasised the public interest dimension of the dispute, in terms which apply equally to this arbitration:

“In examining the issues at stake in the present case, the tribunal finds that the present case potentially involves matters of public interest. This case will consider the legality under international law, not domestic private law, of various actions and measures taken by Governments. The international responsibility of a State, the Argentine Republic, is also at stake, as opposed to the liability of a corporation arising out of private law. While these factors are certainly matters of public interest, they are present in virtually all cases of investment treaty arbitration under ICSID jurisdiction. The factor that gives this case particular public interest is that the investment dispute centres around the water distribution and sewage systems of a larger 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 favour 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 non parties. ... Given the public interest in the subject matter of this case, it is possible that appropriate non parties may be able to afford the tribunal perspectives, arguments and expertise that will help it arrive at a correct decision”.

(Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, May 19, 2005, paras. 19, 20 and 21)

53. The Arbitral Tribunal notes Claimant’s submission that this case is different, in that Claimant is no longer seeking *to* operate in Tanzania. In the Arbitral Tribunal’s view, however, this is not determinative of the issue, since any decision by the Arbitral Tribunal still has the potential to impact upon the same wider interests.
54. Further, even if Claimant ultimately proves that such wider interests, as a matter of fact, are untouched by its claims, the observation of the tribunal in the *Methanex* case still applies with force, namely that:

“the acceptance of amicus submissions would have the additional desirable consequence of increasing the transparency of investor state arbitration” (para. 22).

55. For the above reasons, and subject to the further directions below, the Arbitral Tribunal grants the Petitioners the opportunity to file a written submission in these arbitral proceedings, pursuant to Rule 37(2).

56. *Procedural Safeguards:* Rule 37(2) of the new ICSID Rules also provides that:

“the Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission”.

57. As was pointed out by the Tribunal in *Methanex*:

“the acceptance of amicus submissions might add to the overall costs of the arbitration and, as considered above, there is a possible risk of imposing an extra burden on one or both the Disputing Parties. In this regard, as appears from the Petition, any amicus submissions from these Petitioners are more likely to counter the Claimant’s position and eventually to support the Respondent’s case. This factor has weighed heavily with the tribunal; and it is concerned that the Claimant should receive whatever procedural protection might be necessary”.

58. The same concern was also taken into consideration in the *Aguas Argentinas* case, in which the Tribunal decided that it had to exercise its powers:

“in such a way as to minimize the additional burden on both the parties and the Tribunal, while giving the Tribunal the benefit of the views of suitable amici curiae in appropriate circumstances” (para. 15).

59. Very serious concerns have been expressed by the parties here, and in particular Claimant, as to the timing of the Petition (i.e. the delay in its filing); the proximity of the substantive

hearing (April 2007); and the tight procedural timetable that exists in the meantime. The Arbitral Tribunal has great sympathy with these concerns, and is adamant that no procedural direction be given which might unduly burden any party in their preparation for the forthcoming hearing, or indeed jeopardise the hearing itself.

60. Having said this, the Arbitral Tribunal considers these factors insufficient in themselves to deny the Petition for all purposes. Rather, they militate in favour of a two-stage process, as follows:

- (a) *First Stage:* In the first instance, and no later than 26 March 2007, the Petitioners, jointly, should file a single, initial written submission, articulating whatever arguments, and providing whatever information, they consider appropriate, but limited to a maximum of 50 pages (double-spaced). This submission should not attach any evidence or documentation, but may identify any such material that the Petitioners may wish to introduce at a later stage. If the Arbitral Tribunal considers that it needs to be provided with such documentation, it will request it from the Petitioners on its own initiative.
- (b) This will allow each party a three week period prior to the hearing in order to consider the written submission, and decide how best to address it (if at all). There will be no requirement on the part of either party to respond to the written submission at the April hearing itself, although either side will obviously be free to do so. In this regard, in order to ensure that no disputing party is taken by surprise at the April hearing, the Arbitral Tribunal directs that:
 - i. On or before 2 April 2007, each disputing party shall consult with the other as to whether each intends to address or respond to the Petitioners' written submission at the April hearing;
 - ii. On the basis of the exchange of views, on or before 9 April 2007, each party shall state finally to the Arbitral Tribunal whether or not it intends to address or respond to the Petitioners' written submission at the April hearing.

- (c) *Second Stage:* Following the conclusion of the April hearing, and having consulted with the disputing parties on this matter, the Arbitral Tribunal will issue procedural directions for responses from both parties to the written submission (in so far as any party wishes to respond further or at all), as well as for any further written submissions, documents or evidence from the Petitioners, in so far as the Arbitral Tribunal deems this appropriate. Indeed, the Arbitral Tribunal considers that it will be better placed after the April hearing to make further determinations on this issue, since it will then have a clearer view as to any areas on which it might need further assistance.

61. This two-stage approach also allows for flexibility on the issue of access to documents, as explained below.

B. The Petitioners' request to have access to the key arbitration documents

62. The Petitioners seek an Order to have access to the key arbitration documents notwithstanding the provisions of *Procedural Order No. 3*, by which the Arbitral Tribunal imposed certain limitations on disclosure of documents in order to preserve the integrity of the process for the time being.
63. In order to address this application, it is important to be clear as to the proper role of a “non disputing party”, or *amicus curiae* in any given case.
64. In this case, given the particular qualifications of the Petitioners, and the basis for their intervention as articulated in the Petition, it is envisaged that the Petitioners will address broad policy issues concerning sustainable development, environment, human rights and governmental policy. These, indeed, are the areas that fall within the ambit of Rule 37(2)(a) of the ICSID Rules. What is not expected, however, is that the Petitioners (a) will consider themselves as simply in the same position as either party’s lawyers, or (b) that they will see their role as suggesting to the Arbitral Tribunal how issues of fact or law as

presented by the parties ought to be determined (which is the sole mandate of the Arbitral Tribunal itself).

65. This has been a very public and widely reported dispute. The broad policy issues on which the Petitioners are especially qualified are ones which are in the public domain, and about which each Petitioner is already very well acquainted. These, after all, are the very issues that have led to their application to intervene in these proceedings. None of these types of issue ought to require – at least for the time being – disclosure of documents from the arbitration.
66. However, this is an issue that may be revisited after the conclusion of the April hearing. As set out in *Procedural Order No 3*, there were specific reasons of procedural integrity (not necessarily confidentiality) that led the Arbitral Tribunal to impose certain limitations on disclosure. These reasons remain for the time being, and the safeguards now in place would be effectively swept away if access was now given to all categories of documents. 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. At the same time, the Arbitral Tribunal would also need to address the question of how to ensure compliance by the Petitioners with any restrictions which it was necessary or appropriate to maintain or to impose.
67. This, therefore, is an issue that the Arbitral Tribunal intends to consider in the second stage of this procedure, as outlined in paragraph 60 above.
68. It follows that, for the time being only, and pending a further ruling after the April hearing, the Arbitral Tribunal denies the Petitioners' application for access to the documents filed by the parties in this arbitration.

C. The Petitioners' request to attend the oral hearings and to reply to any specific questions of the Tribunal on the written submissions


69. Lastly, the Petitioners seek an order from the Arbitral Tribunal that the hearings be open to the public and that non-disputing parties or *amici* be allowed to reply directly to any questions directed to them by the Arbitral Tribunal concerning their submissions.
70. Rule 32(2) of the amended Arbitration Rules governs this issue. It has been set out earlier in this Order, but its opening words are clear, and condition the Arbitral Tribunal's powers in this regard: "[u]nless either party objects, ..."
71. In this case, 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.
72. On the other hand, 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, which might assist in better understanding the Petitioners' position, whether before or after the hearing.

D. Publication of this Order


73. Finally, given the public interest in the subject matter of this Procedural Order, and pursuant to its directions in *Procedural Order No 3*, the Arbitral Tribunal hereby directs that this Procedural Order No 5 shall be subject to no confidentiality restrictions, and may be freely disclosed to third parties.

2 February 2007

The Arbitral Tribunal


Gary BORN


Toby LANDAU


Bernard HANOTIAU

IN Case No. ARB/05/22 before the
International Centre for Settlement of Investment Disputes

BETWEEN
Biwater Gauff (Tanzania) Limited
and
United Republic of Tanzania

AMICUS CURIAE SUBMISSION OF:

The Lawyers' Environmental Action Team (LEAT)
The Legal and Human Rights Centre (LHRC)
The Tanzania Gender Networking Programme (TGNP)
The Center for International Environmental Law (CIEL)
The International Institute for Sustainable Development (IISD)

26 March, 2007

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AMICUS CURIAE SUBMISSION OF

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The Center for International Environmental Law (CIEL)
The International Institute for Sustainable Development (IISD)**

**IN CASE NO. ARB/05/22 BEFORE THE
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES**

**BETWEEN
BIWATER GAUFF (TANZANIA) LIMITED
AND
UNITED REPUBLIC OF TANZANIA**

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1. INTRODUCTION

1. The present submission by *Amici* is being made pursuant to Procedural Order No. 5 of this Tribunal, issued on 2 February, 2007. This submission has been prepared under the terms and conditions specified by the Tribunal in that order. A brief note on the practical impact of these terms and conditions on the preparation of this submission follows in the introduction.

2. *Amici* wish to note with appreciation the effort made to accommodate this submission by the Tribunal and the parties. We note that this is the first of what may be two submissions to the Tribunal, should the Tribunal determine that the issues raised and process followed to date make a second round of submissions appropriate, and look forward to the decision of the Tribunal on this.

1.1 The broad background to the privatization contract

3. The background to the current dispute goes back long before the negotiation of the contract that underpins the current arbitration. Until 1991, water was a free service in Dar es Salaam. From 1991, the Government of Tanzania began the process of removing subsidies to move the water service sector to a self-financing footing. Managerial problems, financing problems and other circumstances, including droughts and floods, prevented significant progress in the early efforts. In 1997, the government created the Dar es Salaam Water and Sewerage Authority (DAWASA) as a quasi-commercial parastatal agency. In 1999, it passed a Water Law allowing for the privatization of DAWASA's operational activities. In 2001, legislation was passed to establish an

independent Energy and Water Utilities Regulatory Authority to govern the provision of water services in Dar es Salaam. Despite these changes, service levels and coverage failed to improve in a significant way and to keep up with growing demand. The social and health impacts of the water system became increasingly serious.

4. In 1997, the Government began to look for a private operator to take over major responsibility for water production, transmission, distribution, billing and collection. This approach was not only supported but in fact mandated by the World Bank and other donors. In March 2000, the World Bank and the International Monetary Fund made the signing of a concession agreement assigning the assets of DAWASA to private management companies one of the conditions for Tanzania to qualify for debt relief under the Heavily Indebted Poor Countries Initiative. Similarly, the World Bank's 2000 Country Assistance Strategy required Tanzania to meet the same conditions in order to qualify for greater annual loans.

5. Tanzania's search for a private partner began in mid-1997 and took a full 6 years to conclude, going through two phases, with two rounds of bidding in the second phase. In the second round of the second phase, the Claimant was the only bidder, and was ultimately awarded a 10-year lease contract in February 2003. Since that time, however, there appears to have been no improvement in some areas of the operation, deterioration in others, and significant lack of required progress in yet others. A succinct summary is provided in a report on the Dar es Salaam privatization by a former World Bank expert on privatization processes:

The primary assumption on the part of almost all involved, certainly from the donor side, was that it would be very hard if not impossible for the

*private operator to perform worse than DAWASA. But that is what happened.*¹

6. On 13 May 2005, after months of negotiations, mediations, renegotiations and other efforts, and faced with continued deterioration in the water service, the Government announced that the lease contract was terminated effective from that day. The termination of the contract presumptively created the necessary legal pre-condition for the initiation of this arbitration.

1.2 Overview of the legal arguments of *Amici*

7. This arbitration raises a number of issues of vital concern to the local community in Tanzania, as well as for other developing countries that have privatized, or are contemplating a possible privatization of, water or other infrastructure services. The arguments presented below reflect the primary concerns of *Amici*: human rights and sustainable development. The legal starting point for the present submission is not, however, general principles of human rights law or sustainable development. Rather, it is the basic premise set out in numerous investment arbitrations to date:

*... that Bilateral Investment Treaties are not insurance policies against bad business judgments.*²

8. From the facts *Amici* have been able to gather, it appears that in the present case the failure of the Claimant's investment was closely related either to a lack of business

¹ Rühl, Christen, Gökgür, Nellis, *United Republic of Tanzania: Privatization Impact Assessment – Infrastructure*, 21 July 2005, p. 27. The report was the output of a technical assistance and dialogue mission financed by the Private Participation in Infrastructure Advisory Facility (PPIAF) of the World Bank at the request of the Government of Tanzania. The primary objective of the mission and the report was to support the review of infrastructure privatization in Tanzania commissioned by the President of Tanzania.

² *Maffezini v. Spain*, Case No. ARB/97/7, Award of 13 November 2000, 16 ICSID Rev-FILJ 248 (2001) at para. 64.

competence and acumen, or to a business strategy to force a renegotiation of the contract shortly after it entered into force. Both of these possibilities have significant legal consequences under international investment law. *Amici* will argue that these consequences are amplified in the face of a major water privatization project that directly affects the human right to clean and safe water, and the capacity of a society to pursue its sustainable development objectives.

9. The arbiters of international investment law, when considering whether an investor's rights have been infringed, must have regard to the investor's execution of its own responsibilities and duties. This argument is not novel. Existing investor-state case law and emerging doctrine support at least three specific investor responsibilities:

- the duty to apply proper business standards to the investment process, including proper due diligence procedures;
- the duty to observe the principle of *pacta sunt servanda*; and
- the duty to act in good faith both prior to and during the investment period.

10. *Amici* will examine each of these legal responsibilities under international investment law in light of what we surmise to be the facts involved in the present dispute. *Amici* will suggest that the investor may not have fulfilled these responsibilities, thereby endangering both its own investment and the people of Dar es Salaam's access to water. *Amici* will demonstrate that if the Tribunal determines that in fact these responsibilities have not been met, then legal consequences must flow from such a finding. *Amici* will then show that the responsibility of the investor, based on good faith as an underlying principle, requires that there be no hidden business strategy of seeking to renegotiate the contract shortly after it is completed and other potential bidders are "out of the way".

Drawing on literature from senior World Bank economists and others, *Amici* will note several indicators that point to such a strategy having been at play in the present instance. It will then show that, if this is in fact the case, it must have significant legal consequences in the present arbitration. Both of these levels of argument link directly to the human rights and sustainable development concerns that motivate this submission. *Amici* will demonstrate that these links were well known to the Claimant, the water sector in general, and to the Government of Tanzania.

11. *Amici* will show that the right to water and to pursue sustainable development goals, so fundamental to developing countries, should be understood to increase the standards of responsibilities of investors in the water sector. The provision of water services in developing countries is not, and cannot be understood as, just another business venture. When investors choose to enter into this sector, they encumber themselves with responsibilities that are linked to the achievement of essential human rights. This Tribunal has both the authority and the responsibility to enquire into whether these responsibilities have been fulfilled, and to consider the legal consequences if they have not been fulfilled.

1.3 Impacts of the limitations in Procedural Order No. 5

12. Procedural Order No. 5 imposed specific conditions pertaining to this *amicus curiae* brief. For present purposes, the most important of these was that the request in the original petition for *amicus curiae* status to have access to the arbitral record was denied. The Tribunal indicated, instead, that the *Amici* were to rely on documents in the public domain, press reports, etc. We have done so. In order to balance this limitation, the

Tribunal indicated that a second round of submissions may be invited following the oral hearings in April 2007, should the Tribunal determine this is warranted.

13. *Amici* wish to note that the inability to access the proper factual record has necessarily meant that the present submission is based on an incomplete set of factual information. *Amici* have made a significant effort to obtain documents from public sources. Considerable industry has been used to create a platform that is as informed as possible in the circumstances. Despite these efforts, however, the factual basis will still be incomplete. The arguments made below, therefore, are based on what we have been able to obtain, and certain assumptions we have made from that information. But we have made every effort to stop short of asserting facts where we are not able to verify them. Undoubtedly, there will, as a result, be flaws in the facts discussed below, and other instances where *Amici* are able only to suggest possible factual situations to the Tribunal, and the legal implications that may flow from them if the facts suggested are borne out. We trust that the parties and Tribunal will approach the arguments with an understanding of these limitations.

14. Similarly, *Amici* remain unaware of the legal arguments being made by either party or the facts they allege to support them. We therefore make no comment herein on either party's arguments. Finally, *Amici* wish to note that this submission is without prejudice to any views they might wish to express on jurisdictional issues that might be raised in this case, if any. *Amici* have not seen any arguments in this regard, and this submission should not be read as accepting or agreeing with any positions on such arguments as may have been made by the parties.

2. THE LEGAL ARGUMENT FOR INVESTOR RESPONSIBILITIES IN THE SUSTAINABLE DEVELOPMENT AND HUMAN RIGHTS CONTEXT

15. This section sets out the arguments on investor responsibilities. Section 2.1 reviews the general argument from the emerging case law. Sections 2.2-2.4 develop specific applications of the general principles relevant to the present arbitration: the duty to apply proper business standards to the investment process, including proper due diligence procedures; the principle of *pacta sunt servanda*; and the duty to act in good faith both prior to and during the investment period. Section 2.5 then elaborates on the need to understand the impacts of sustainable development and human rights when assessing claims brought under investment treaties.

2.1 The general principle of investor responsibilities

16. The first element in the principle of investor responsibilities lies in the dictum already noted: investment agreements are not an insurance policy for bad business decisions and practices, nor for all the negative impacts of governmental actions or activities. For example, in *Maffezini v. Spain*, the Tribunal stated rather starkly that:

*... Bilateral Investment Treaties are not insurance policies against bad business judgments.*³

And in *MTD v. Chile*:

*The BITs are not an insurance against business risk....*⁴

³ See, e.g., *Maffezini v. Spain*, *op. cit.*, at para. 64; cited expressly with approval in *Eudoro Armando Olguin v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Award, July 26, 2001, at para. 73.

⁴ *MTD Equity v Chile*, ICSID Case No. ARB 01/7, Award, May 25, 2004, at para. 178.

Taking this a little further, the very first decision under NAFTA’s Chapter 11 on Investment noted that:

*It is a fact of life everywhere that individuals may be disappointed in their dealings with national authorities, and disappointed yet again when national courts reject their complaints.... NAFTA was not intended to provide foreign investors with blanket protection from this kind of disappointment, and nothing in its terms so provides.*⁵

17. This limitation of not using investor-state arbitrations as an “insurance policy” is complemented by a second limitation: investors are expected to be intelligent and aware of the environment into which they are investing. This includes the general legal, political and administrative culture. In *Olguin v. Paraguay*, the tribunal observed that it was not reasonable for the investor, an accomplished businessman who was well aware of the political environment of Paraguay where he was investing, to seek compensation for his losses in a “speculative, or at best not very prudent” investment through the investor-state process.⁶ Similarly, in *Genin v. Estonia*, the tribunal makes the following introductory statement to its analysis of the fair and equitable treatment claim in that case:

*348. We turn now to the crux of the case to be determined...: the revocation of EIB’s license. In doing so, the Tribunal considers it imperative to recall the particular context in which the dispute arose, namely, that of a renascent independent state, coming rapidly to grips with the reality of modern financial, commercial and banking practices and the emergence of state institutions responsible for overseeing and regulating areas of activity perhaps previously unknown. This is the context in which Claimants knowingly chose to invest in an Estonian financial institution, EIB.*⁷

⁵ *Robert Azinian et al v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Final Award, November 1, 1999, at para. 83.

⁶ *Eudoro Armando Olguin v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Award, July 26, 2001, at para. 65b.

⁷ *Alex Genin, Eastern Credit Limited, Inc v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, June 25, 2001, at para. 348.

18. This view has not been expressed solely with respect to developing countries or states with economies in transition. It appears equally in the decision on the merits in

Methanex v. United States:

9. Methanex entered a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level, operating under the vigilant eyes of the media, interested corporations, non-governmental organizations and a politically active electorate, continuously monitored the use and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons. Indeed, the very market for MTBE in the United States was the result of precisely this regulatory process

10. Methanex entered the United States market aware of and actively participating in this process.⁸

19. These decisions make it clear that investment agreements cannot be relied upon as a bulwark against factors that investors should know about through good business practices, including the general political economy surrounding the investment. These decisions also make it clear that investors remain responsible for their own actions and omissions during the investment-making and investment implementing processes. This was succinctly stated by the tribunal in *MTD v. Chile*:

...the Tribunal considers that the Claimants should bear the consequences of their own actions as experienced businessmen.⁹

Similarly, in the *Genin v. Estonia* decision, the tribunal stated that:

... , the officers of EIB [the investor] who conducted the negotiations regarding the purchase of the branch clearly acted unprofessionally and,

⁸ *Methanex v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, at Part IV Chapter D, p. 5, paras 9-10.

⁹ *MTD v. Chile, op cit.*, para. 178.

*indeed, carelessly... The responsibility for the result of EIB's conduct, including its omissions, is EIB's alone.*¹⁰

20. It is worth noting that the general principle of investor responsibility is also found in one of the few decisions of the International Court of Justice relating to investor protection. In the 1989 *Case Concerning Elettronica Sicula S.P.A.* between the United States and Italy, popularly known as the ELSI case, the ICJ Chambers, with a spirited dissent by the Judge Schwebel, clearly held that the primary cause of the Claimant's difficulties in that case lay in its own years of mismanagement, and not the act of requisition imposed by the governmental authorities:

100. It is important in the consideration of so much detail, not to get the matter out of perspective: given an under-capitalized, consistently loss-making company, crippled by the need to service large loans, which company its stockholders had themselves decided not to finance further but to close and sell off because, as they were anxious to make clear to everybody concerned, the money was running out fast, it cannot be a matter of surprise if, several days after the date at which the management itself had predicted that the money would run out, the company should be considered to have been actually or virtually in a state of insolvency for the purpose of Italian bankruptcy law.

*101. ... There were several causes acting together that led to the disaster to ELSI. No doubt the effects of the requisition [the governmental act] might have been one of the factors involved. But the underlying cause was ELSI's headlong course towards insolvency; which state of affairs it seems to have attained even prior to the requisition.*¹¹

21. An investor's failure to conduct an adequate risk assessment or unconscionable behavior in order to win a bid will affect its rights under the investment contract and an applicable investment agreement. Two recent arbitral decisions provide ample testimony to this proposition. The tribunals in the *Inceysa*

¹⁰ *Genin v. Estonia*, *op cit.*, para. 345.

¹¹ *Case Concerning Elettronica Sicula S.P.A (United States of America v. Italy)* {1989} ICJ Reports 15, 20 July 1989, paras 100-101.

v. El Salvador and in *World Duty Free v. Kenya* dismissed the investors' claims on the basis of corruption involved in the pre-investment phase. *Inceysa v. El Salvador* noted expressly that the conduct of the investor in the pre-investment phase breached its duty of good faith.¹² (These cases are discussed in Section 2.4.)

22. *Amici* do not make any arguments with respect to corruption in this case. These cases, however, show unequivocally that the conduct of an investor before an investment is made can be directly relevant to the issues a tribunal must consider.

23. The emerging doctrine in international investment law is also recognizing the role of investor obligations, based in part on the decisions noted above. In a recent article, Prof. Peter Muchlinski extensively considers the role of investor conduct in the context of the evolution of the fair and equitable treatment standard.¹³ He concludes that:

*Indeed, just as the various claims made by an investor can and do overlap, given their origin in one set of facts, so too will the investor's conduct be of relevance to an assessment of all claims they make.*¹⁴

24. The above decisions establish beyond a doubt that a tribunal sitting under the authority of a bilateral investment treaty may consider the conduct of the investor at any and all stages of the investment process. They establish clearly the principle that investors are responsible for their own acts and omissions, and cannot seek the protections of international investment agreements in order to avoid the commercial, contractual or regulatory consequences of their acts.

¹² *Inceysa v. El Salvador*, ICSID Case No ARB/03/26, Award, August 2, 2006; *World Duty Free v. Kenya*, ICSID Case No. ARB/00/7, Award, 4 October, 2006.

¹³ Peter Muchlinski, "Caveat Investor? The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard", 55 ICLQ 527 (2006).

¹⁴ *Id.* at p. 529.

2.2 The duty to apply proper business standards, including proper due diligence procedures

25. A number of arbitral decisions indicate that an investor investing abroad has the responsibility of making a proper assessment of risks involved before entering an investment. This is in line with commercial contract law and practice on due diligence, whereby the investor is expected to assess and carry the responsibility for regular commercial risks.

26. The tribunal in *Waste Management v. Mexico* rejected the claim for expropriation, in large part due to the role the investor's bad business planning played in the failure of the investment:

*In the Tribunal's view, it is not the function of the international law of expropriation as reflected in Article 1110 to eliminate the normal commercial risks of a foreign investor, or to place on Mexico the burden of compensating for the failure of a business plan which was, in the circumstances, founded on too narrow a client base and dependent for its success on unsustainable assumptions about customer uptake and contractual performance.*¹⁵

27. In *MTD Equity v. Chile* the tribunal accepted Chile's argument that the investor did not exercise the due diligence that could be expected from a normal investor, stating:

*Chile has argued that each organ of the Government has certain responsibilities, that it is not its function to carry out due diligence regarding the legal and technical feasibility of a project for investors, and that this is the investors' responsibility. The Tribunal agrees that it is the responsibility of the investor to assure itself that it is properly advised, particularly when investing abroad in an unfamiliar environment...,*¹⁶

and:

[The Claimants'] choice of partner, the acceptance of a land valuation based on future assumptions without protecting themselves contractually in case the assumptions would not materialize, including the issuance of the required

¹⁵ *Waste Management, Mexico*, ICSID Case No. ARB/AF/98/02, June 2, 2000, para. 177.

¹⁶ *MTD v. Chile*, *op cit.*, para. 164.

*development permits, are risks that the Claimants took irrespective of Chile's actions.*¹⁷

28. Tribunals have also held that an investor has the responsibility to do thorough background checks before deciding to invest. In *Genin v. Estonia*, the tribunal rejected a claim for breach of fair and equitable conduct on the grounds that the investor, who purchased a bank branch in Estonia, had not applied sufficient care, in a case with close parallels to the present one:

*... , the officers of EIB [the investor] who conducted the negotiations regarding the purchase of the branch clearly acted unprofessionally and, indeed, carelessly. A credit portfolio cannot be checked on the spot in a few hours; the buyers should have known that Social Bank was on the verge of bankruptcy and should thus have taken extra precautions, such as insisting on warranties relating to the quality of the assets. The responsibility for the result of EIB's conduct, including its omissions, is EIB's alone.*¹⁸

These decisions make it clear that risk-appropriate investigations on the part of the investor are a required element to underpin a claim relating to the risk assumed.

29. Case law also indicates that investors cannot expect the “easiest” investment climate when investing in developing countries or countries in transition, and that therefore the business risks that an investor has to accept are greater than they would be in another investment climate. In the *Olguin* case, for instance, the tribunal noted:

*What is evident is that Mr Olguin, an accomplished businessman, with a track record as an entrepreneur going back many years and experience acquired in the business world in various countries, was not unaware of the situation in Paraguay. He had his reasons (which this Tribunal makes no attempt to judge) for investing in this country, but it is not reasonable for him to seek compensation for the losses he suffered on making a speculative, or at best, not very prudent, investment.*¹⁹

¹⁷ *MTD v. Chile, op cit.*, para. 178.

¹⁸ *Genin v. Estonia, op cit.*, para. 345.

¹⁹ *Olguin v. Paraguay, op cit.*, para.65(b).

30. Prof. Muchlinski subsumes these responsibilities under the investor's "duty to engage in the investment in the light of an adequate knowledge of its risks."²⁰ He argues:

The recent case-law on the scope of protection offered by IIAs appears to be developing a principle that the investor is bound to assess the extent of the investment risk before entering the investment, to have realistic expectations as to its profitability and to be on notice of both the prospects and pitfalls of an investment undertaken in a high risk-high return location. Any losses that subsequently arise out of an inaccurate risk assessment will be borne by the investor. They will not be recoverable under the terms of the investment treaty... The development of such a principle is justified by the view that IIAs, 'are not insurance policies against bad business judgments'.

31. It should go without saying that if investment agreements are not an insurance policy for inaccurate risk assessments, they must be even less so for investments undertaken without a proper risk assessment at all.

2.3 The principle of *pacta sunt servanda*

32. An investor's failure to meet obligations undertaken in a contract with a host state, especially in an infrastructure project, can uproot the entire foundation of the contract, jeopardize its basic goals for the community involved, and create significant risks to human health, the operation of businesses, and the achievement of development and other societal objectives. The principle of *pacta sunt servanda* lies at the core of any contract, and its application to this dispute cannot be doubted:

The implicit confidence that should exist in any legal relation is based on the good faith with which the parties must act when entering into the legal relation, and which is imposed as a generally accepted rule or standard. Asserting the contrary would imply supposing that the commitment was assumed to be breached, which is an assertion obviously contrary to the maxim pacta sunt servanda, unanimously accepted in legal systems.²¹

²⁰ Muchlinski, *op cit.*, p. 530.

²¹ *Inceysa v. El Salvador*, *op cit.*, para. 233.

33. The sanctity of the contract is critical in the privatization process, where monopoly services are moved, usually as ongoing monopolies, from the public to private sector. When private sector investors fail to meet their obligations, it is not simply the commercial bargain that is put at risk, but the very welfare of the citizens that the privatization was mandated to enhance. The principle of *pacta sunt servanda* remains the most critical bulwark against such a result.

2.4 The duty of good faith

34. The duty of good faith is a foundation for the entire investor-state process. For host governments, it is reflected in the obligation for fair and equitable treatment. *Amici* submit that it is equally applicable to investors coming to the investor-state dispute settlement process under an international investment treaty. This is as basic as the fundamental doctrine requiring a Claimant to come to court with clean hands, a principle that *Amici* submit is equally and fully applicable to this Tribunal.

35. The *Inceysa v. El Salvador* tribunal offers an extensive discussion of the principle of good faith on the investor in international investment law, including:²²

230. *Good faith is a supreme principle, which governs legal relations in all of their aspects and content...*

231. *In the contractual field, good faith means absence of deceit and artifice during the negotiation and execution of instruments that gave rise to the investment, as well as loyalty, truth and intent to maintain the equilibrium between the reciprocal performance of the parties...*

232. *Any legal relation starts from an indispensable basic premise, namely the confidence each party has in the other. If this confidence did not exist,*

²² *Inceysa v. El Salvador*, *op cit.*, paras 230-239.

the parties would have never entered into the legal relation in question, because the breach of the commitments assumed would become a certainty, whose only undetermined aspect would be the question of time.

36. While the *Inceysa* tribunal later also ties the finding of bad faith to the provision in the Spanish – El Salvador bilateral investment treaty requiring the investment to be made in accordance with law, it is clear that its ambit is not restricted to this type of treaty provision. The duty of an investor to act in good faith exists as a general principle of law. It is not contingent on the presence of such a provision in a bilateral investment treaty or contract. In *World Duty Free v. Kenya*, the issue of bribery, a quintessential example of bad faith, is placed within the broader concept of “ordre public international”, with an equally emphatic denial of jurisdiction as found in *Inceysa*. No treaty provision was necessary for this purpose.

37. The decision in *Azinian v. Mexico* provides another illustration of the application of this principle in the absence of a treaty provision requiring the investment to be made in accordance with law. That tribunal considered the impact of several misrepresentations by the investor prior to the signing of a contract for a waste disposal concession. The tribunal found that the investor’s misrepresentation and unconscionable conduct went to support the original findings of the Mexican Courts that the cancellation of the concession contract for waste services was a valid act by the government authority.²³

38. In *Genin v. Estonia*, the failure of the investor to fully disclose its operating partners and the full beneficial ownership of the bank (the purchase of which was the investment in the case) created one of the principal grounds for the finding that the removal by government authorities of the bank permit was justifiable.²⁴

²³ *Azinian v. Mexico*, *op. cit.*, paras 104-110, 117-118, 124.

²⁴ *Genin v. Estonia*, *op. cit.*, paras 362, 363.

39. The scope for bad faith is, on the one hand, as limitless as the mind is able to dream up schemes, frauds, and misrepresentations. But it is still possible to apply the principle of good faith with some precision. In section 4, below, a content-specific application is submitted for the consideration of the Tribunal. For his part, Prof. Muchlinski places the concept of bad faith into a larger tent of “the duty of the investor to refrain from unconscionable conduct.”²⁵ He identifies several specific aspects of unconscionable conduct: fraud, misrepresentation, undue influence or abuse of power, corruption, behaviour without candour and transparency, and abuse of a superior bargaining position to extract unduly beneficial promises and other advantages.²⁶

40. Because bad faith or unconscionability may go to questions of jurisdiction and justiciability, as is seen in the *Inceysa* and *World Duty Free* cases, the issue arises whether a tribunal can, or must, address such issues even if not raised by the arbitrating parties. *Amici* are not aware of any investor-state arbitration where this issue has arisen specifically. (Indeed, we are not even aware if the Respondent has raised the issue of bad faith or unconscionability in the present proceedings.) Analysis of this issue appears to be limited to date to the issue of corruption, where a number of recent articles conclude that there is indeed a duty on a tribunal to address the issue when credible evidence is before it, even if not by the parties to the arbitration.

41. Dr. Richard Kreindler, in a paper presented at the Geneva Global Arbitration Forum in December 2006, argues the following, while noting relevant recent cases:

5. Should or must the arbitrator determine the issue of illegality in all cases when alleged?

²⁵ Muchlinski, *op. cit.*, pp. 536-542.

²⁶ Muchlinski, *op. cit.*, pp. 536-541.

5.1 The answer should be yes, as long as the otherwise applicable prerequisites of arbitrability, jurisdiction, and relatedness to the proceedings are fulfilled.

6. Should or must the arbitrator, sua sponte, determine the issue of illegality even when not alleged?

6.2 ...Where a suspected or manifest illegality is at least arguably relevant to the *petita*, then it is also relevant to the duty to render an award which is to the greatest extent enforceable, particularly under the law of the seat.

6.4 As the agreed or deemed primary trier of fact, the arbitrator is in a unique position, normally not shared or aspired to by the subsequent reviewing or enforcing court, to ascertain the facts. To the extent determining the facts surrounding an alleged illegality may be tied to enforceability, the arbitrator should err on the side of initiating investigation, and thereby preempt any need or temptation of a reviewing court to reopen the case: e.g., *Westacre*.²⁷

42. This view is supported by other recent writing as well, often flowing from the notion of the need of the tribunal to uphold the “ordre public international” concept in international arbitrations, as seen in the *World Duty Free* case.²⁸ *Amici* submit that the present case may indeed rise to the level of “ordre public international” for reasons more fully developed in section 4, below. If bad faith is evidenced such that it goes to undermine the very foundation of the contract, in particular in a sector as sensitive as water services where the highest standards of business conduct must, of necessity, be applied, then *Amici* submit that “ordre public international” is engaged and with it matters relating to the jurisdiction and justiciability of the arbitration.

²⁷ Richard H. Kreindler, *Is the Arbitrator Obligated to Denounce Money Laundering, Corruption of Officials, etc.? The Arbitrator as Accomplice - Sham Proceedings and the Trap of the Consent Award*, 12th Geneva Global Arbitration Forum “Settling Disputes on a Shrinking Planet, Geneva, 7 December 2006.

²⁸ See, eg, Karen Mills, “Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto”, in *International Commercial Arbitration : Important Contemporary Questions (ICCCA Congress Series, No. 11)*, Kluwer International, 2003.

2.5 Putting investor responsibility in the sustainable development and human rights context

43. At least three investor-state tribunals have noted that human rights law *can* be relevant to the issues raised before them, including this tribunal in paragraph 52 of Procedural Order 5.²⁹ The question for consideration here, therefore, is not whether this is theoretically possible, but how might it be specifically relevant in the present case. This is not an instance of, for example, rampant environmental destruction or the poisoning of water resources. Such issues would raise fairly obvious and direct questions of culpability by any investor, foreign or domestic. Rather, the primary legal issues raised by the sustainable development and human rights contexts in the present case are how they condition the responsibilities of the investor in the present case.

44. The Millennium Development Goals (MDGs), adopted by the United Nations in 2000, include the target of reducing by half the number of people not having proper access to potable water by 2015. The implementation of this target has since been the subject of many conferences, statements, and declarations, and the international community has recognized that “water is a key to sustainable development.”³⁰

45. The World Summit on Sustainable Development (WSSD), held in Johannesburg in 2002, prominently addressed water-related issues, and the heads of State reiterated the need for the water service goals of the MDG’s to be met. The private sector was also present at the WSSD and stressed the urgency of water access needs, especially in the

²⁹ The other two known cases are *Aguas Argentinas et al. v. Argentina*, Order in response to a Petition for Transparency and Participation as Amicus Curiae, ICSID Case No. ARB/03/19, 19 May 2005, para. 19, and *Aguas Provinciales de Santa Fe et al. v. Argentina*, Order in Response to a Petition for Participation as Amicus Curiae, ICSID Case No. ARB/03/17, 17 March 2006, para. 18.

³⁰ Eg Bonn Recommendations for Action, International Conference on Fresh Water, Bonn , 3-7 December 2001, http://www.water-2001.de/outcome/reports/Brief_report_en.pdf.

developing world. The World Business Council for Sustainable Development (WBCSD), for instance, in a foundational paper entitled “Water for the Poor”, opens with the simple statement that:

*Water supply and sanitation are essential for poverty alleviation, health improvement and for sustainable development. The time for talking is long past. Action is needed now if solutions are to be found.*³¹

46. Private sector involvement at the WSSD was further solidified with the creation of “Partnerships for Sustainable Development” in key areas, including water. These partnerships are voluntary, multi-stakeholder initiatives aimed at implementing sustainable development. The partnerships recognize the need for business to be part of the solution and the private sector is recognized as a key player in these partnerships. The Claimant has affiliated itself with this goal: Biwater International is a member of “Partners for Water and Sanitation (PAWS)”³², one of the “Partnerships for Sustainable Development”.

47. The Claimant in the present case has also acknowledged the importance of the Millennium Development Goals to its business ethos, as far back as March 2003:

“There is no doubt that the discussions and debates will continue, just as Biwater will continue to demonstrate its willingness to work with all stakeholders to contribute to the achievement of the MDGs. With projects such as the Laguna Alta water supply plant in Panama, the Beetham Wastewater Treatment plant in Trinidad, the Adi Nefas Water Treatment Plant in Eritrea and the Greater Makurdi Water Supply Project in Nigeria, not to mention Cascal’s concessions worldwide, Biwater is already working to increase provision of safe and

³¹ World Business Council for Sustainable Development, *Water for the Poor*, August 2002, p. 3, available at http://www.wbcd.org/DocRoot/rb0fIAtrUPY7fCmLkPEB/20020821_water.pdf

³² <http://webapps01.un.org/dsd/partnerships/public/partnerships/92.html>

affordable access to clean water and sanitation, which is not only a Millennium Development Goal – it's our core business."³³

48. Not only is access to clean water essential for sustainable development, it is also a basic human right. In 2002, the United Nations Committee on Economic, Social and Cultural Rights, the body monitoring implementation of the corresponding Covenant, declared in a General Comment that a right to water exists as an independent right.³⁴ In its comment the Committee described water as a limited natural resource and a public good fundamental for life and health, and it stated that the human right to water was indispensable for leading a life in human dignity. While there is no doubt that the fulfillment of this right is replete with challenges, the simple fact that life is not possible without water, and that health is not possible without clean water, attest to this basic human right.

49. The Claimant, as well as other major water companies, has also acknowledged the existence and importance of this basic human right, stating:

*"Every man, woman and child has **the right** to a reliable system of clean water and good sanitation".*³⁵

50. *Amici* submit that the stated commitments of water companies and the recognition by the international community of the private sector role for achieving sustainable development goals and human rights have important legal significance. Thus the Claimant in the present case must be asked to live up to the standards and goals it has

³³ Biwater, "World Water Forum" in *Biwater Focus*, 16 March 2003, at 15, available at http://www.biwater.com/media_room/library.html#FocusMagazine

³⁴ General Comment No. 15, The Right to Water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/2002/11, 26 November 2002.

³⁵ Biwater, *Water for Life*, 2003, p. 54. http://www.biwater.com/pdf/en/library/Biwater_Corp_bro.pdf. [Emphasis added] See also, e.g. See Suez Environment web site at <http://www.suez-environnement.com/info/en/service-1242067.htm>, *Access for all to drinking water and sanitation is necessary for life, and is an essential element for human dignity. Every human being is entitled to have access to drinking water..*

enunciated, lest they be made into a dead letter by the investor-state process. *Amici* submit that the Claimant's decision to enter into this sector encumbers it with the highest level of responsibility to meet its duties and obligations as a foreign investor, precisely because the risks associated with failure in this sector are so great for those who need it most: the poor, the sick, the struggling and women and girls (who bear the brunt of getting water when proper services fail). As noted earlier, this is not a run-of-the-mill business. Indeed, there is no other like it. In assessing the investor's conduct and responsibility, this context cannot be ignored.

51. *Amici* do not argue that the fact that this investment, and hence this dispute, concerns the human right to water creates a completely open-ended liability for the Claimant. Nor do we suggest that this alleviates a host state of liability for its possible breaches of international obligations when they are properly established. Rather, *Amici* submit that human rights and sustainable development issues must be factors that condition the nature and extent of the investor's responsibilities, and the balance of rights and obligations between the investor and host state.

52. Prof. Muchlinski picks up this theme as well:

*.... standards have emerged in international codes of conduct, notable among which are the OECD Guidelines for Multinational Enterprises and the UN Global Compact, and in corporate and industry codes, as well as binding conventions. These standards can serve to inform the content of what may be regarded as ethical business practice. They include, in particular, a general duty to obey the law, to pay taxes, to act in accordance with fundamental labour standards and to observe human rights principles. ... These standards could be used to assess the conduct of a foreign investor in a given case.*³⁶

³⁶ Muchlinski, *op. cit.*, p 531.

53. Prof. Muchlinski suggests that these principles reflect “ethical standards” that “represent a benchmark by which the conduct of multinational enterprises will increasingly be judged in the future.” *Amici* submit that this future is now. Foreign corporations engaged in projects intimately related to human rights and the capacity to achieve sustainable development, have the highest level of responsibility to meet their duties and obligations as foreign investors before seeking the protection of international law. This future is present today before this Tribunal.

3. CLAIMANT’S FAILURE TO MEET THE DIFFERENT RESPONSIBILITIES IN THIS ARBITRATION

3.1 Relevant facts

54. Based on the information available to them, *Amici* submit that the investor’s own acts and omissions, rather than those of the Respondent, caused the failed investment.

55. First, the Claimant did not apply proper business standards and necessary care either in the pre-investment or the investment phases. The Claimant submitted a bid that was too low for it to be able to meet the costs of providing the water services it promised to provide. Moreover, the Claimant did not carry out proper due diligence to determine the feasibility and viability of the investment in the pre-establishment phase. Finally, the Claimant failed to minimize unnecessary costs during its period of operation.

56. Each of these failures is attested to in various independent reports on the City Water privatization, including by former World Bank privatization experts and Price Waterhouse Coopers:

1. In its bid, the Claimant had proposed the minimum operator tariff allowed by the Respondent in the bid documents.³⁷
2. The Claimant committed in the bid to retain all DAWASA operational employees, notwithstanding that it was under no obligation to do so.³⁸
3. Price Waterhouse Coopers found that the unit cost of water was incorrectly understated in the Bid Form submitted by the Claimant,³⁹ as the unit cost set out therein was less than that in the financial and technical projections also submitted with the bid. For example, the Claimant's Bid Form forecast a unit cost of electricity in Year 1 of 26 Tshs m³. However, its own technical projections submitted with the bid, when broken down into a per unit basis, provided for a unit cost of electricity of 71 Tshs m³.⁴⁰
4. The lack of a due diligence investigation prior to undertaking the bid led to significantly higher employee costs than anticipated:⁴¹
 - Due diligence would have identified the anomaly between the DAWASA staff handbook, which indicated that the compulsory retirement age for staff was 55 years, and the Public Service Retirement and Benefits Act, which provides for a retirement age of 60 years.⁴²
 - Legal due diligence would have uncovered the existence of the court case, commenced in 2000, which resulted in a June 2003 court ruling that City

³⁷ Rühl, Christen, Gökgür, Nellis, *op. cit.*, p. 27.

³⁸ *Ibid.*

³⁹ Price Waterhouse Coopers (PWC), Review of the City Water Services Limited (the Operator) Submission on the grounds for an interim review of tariff under the Lease Contract and equity contribution, November 2004, page 20, referring to Bid Form 13/4 (Volume 2 of 4, Financial Submission).

⁴⁰ Price Waterhouse Coopers, *op. cit.*, p. 20.

⁴¹ Price Waterhouse Coopers, *op. cit.*, p. 35.

⁴² Price Waterhouse Coopers, *op. cit.*, p. 37.

Water claimed had financial implications for its plan to offer early retirement or redundancies to reduce the number of staff.⁴³

- Tax due diligence should have shown the anomalies between the pension contributions in DAWASA's records and those required under law.⁴⁴
- The Claimant's failure to include meal and other allowances in the bid, which allowances were included in the staff handbook but not in DAWASA's 2000/2001 budget, indicated weaknesses in the bidder's due diligence.⁴⁵
- Tax due diligence should have identified the Skills and Development levy for which City Water was liable, notwithstanding that DAWASA had had an exemption.⁴⁶

5. Price Waterhouse Coopers also found that once the investment was established, City Water paid tax on employees' allowances although there was no legal obligation to pay it,⁴⁷ and that City Water had not adopted procedures to control and minimize overtime.⁴⁸

57. From the above, it appears that had Price Waterhouse Coopers or another similar firm been engaged by the Claimant before the privatization was consummated, this entire arbitration might have been avoided.

⁴³ Price Waterhouse Coopers, *op. cit.*, p. 37.

⁴⁴ Price Waterhouse Coopers, *op. cit.*, p. 39.

⁴⁵ Price Waterhouse Coopers, *op. cit.*, p. 40.

⁴⁶ Price Waterhouse Coopers, *op. cit.*, p. 43.

⁴⁷ Price Waterhouse Coopers, *op. cit.*, p. 42.

⁴⁸ Price Waterhouse Coopers, *op. cit.*, p. 39.

58. Other elements apparently also led to problems with the investment during its operation. According to information available to *Amici*, the Claimant's poor performance led to an income that was lower than projected.

1. In year one of the lease, City Water was supposed to install 16,500 new meters and add 1,000 new water connections. According to the Government of Tanzania, in year one City Water actually installed 8,751 new meters (47 percent shortfall) and added 400 new connections (60 percent shortfall).⁴⁹
2. According to City Water's reports, collections were consistently less than the targeted amount. From August 2003 through March 2005, City Water collected, on monthly average, Tshs 975 million, against a monthly target of 1.3 Tshs billion. This was a 25 percent shortfall, or about \$295,000 a month.⁵⁰
3. There was a decline in the availability of water in many parts of Dar es Salaam over the period the lease was in force. Despite a 15 percent increase in water production (mostly coming from the associated works repair and investment program funded by the donor loans that were the main source of capital inputs), parts of the city that previously had water services twice a week were reduced to getting water once a month.⁵¹

59. Each of the above was within City Water's control and could only negatively impact City Water's income.

3.2 Legal implications

⁴⁹ Rühl, Christen, Gökgür, Nellis, *op. cit.*, p. 29.

⁵⁰ Rühl, Christen, Gökgür, Nellis, *op. cit.*, p. 29.

⁵¹ Rühl, Christen, Gökgür, Nellis, *op. cit.*, p. 29.

60. First, the Claimant is responsible for failed business judgments - the UK-Tanzania Bilateral Investment Treaty cannot serve as an insurance against business risk.

61. The fact that the Claimant had proposed the minimum operator tariff allowed by the Respondent in the bid documents and that it committed to retain all DAWASA operational employees was a business decision that was entirely the Claimant's. Like in *Waste Management v. Mexico* it appears that the Claimant's business plan was based on "unsustainable assumptions" about contractual performance, in this case the feasibility of the targets committed to in light of the circumstances. The tribunal in that case had noted that it was "clear that the arrangement was not commercially viable, taking into account both the lower than expected proportion of customers serviced and the additional costs incurred"⁵². This seems to resemble closely the situation in the present arbitration where it also appears that the bid on which the Lease Contract was based was "not commercially viable" from the outset. In *Waste Management*, the tribunal concluded that international law did not have "the function ... to eliminate the normal commercial risks of a foreign investor, or to place on [the host State] the burden of compensating for the failure of a business plan". The conclusion of the present Tribunal, *Amici* submit, should be the same.

62. Second, like the investor in *MTD Equity v. Chile*, it seems that the present Claimant had not carried out proper "due diligence regarding the legal and technical feasibility". In *MTD Equity v. Chile*, the lack of due diligence led to the tribunal's conclusion that "the Claimants should bear the consequences of their own actions as experienced businessmen."⁵³ The *Genin v. Estonia* tribunal similarly criticized the investor's omission to check the credit portfolio of the bank it acquired in a thorough

⁵² *Waste Management v. Mexico*, *op. cit.*, para. 57.

⁵³ *MTD Equity v. Chile*, *op. cit.*, para. 178.

manner (which would have indicated that the bank was on the verge of bankruptcy). It concluded that the investor's unprofessional and careless actions and omissions were alone the responsibility of the investor.⁵⁴

63. *Amici* submit that the Claimant, like the investors in *MTD Equity v. Chile* or in *Genin v. Estonia*, should be held responsible for its own acts and omissions.

64. The cases also make it clear that the investors' business experience must be taken into account. As mentioned above, the *Genin v. Estonia* tribunal noted "that the Claimants should bear the consequences of their own actions as experienced businessmen". Similarly, in *Olguin v. Republic of Paraguay* the tribunal noted that the investor was "an accomplished businessman, with a track record as an entrepreneur going back many years and experience acquired in the business world in various countries". This, of course, is also true for the Claimant in the present arbitration. At the time of the bid submission, the Claimant's affiliated entities had already invested in a number of developing countries, including in Africa. The Claimant's group of companies had, for example, invested in water supply and treatment and sanitation operations in Guatemala, Indonesia, Mexico, Malaysia, Nigeria, Panama, Philippines and South Africa.⁵⁵

65. This experience ensures that the Claimant was very much in a position to be aware of the notorious state of financial and operational data on water systems in developing countries. The precarious nature of financial records in African parastatals and quasi-government agencies with a commercial operation was, and remains, widely known. Bernard de Haldevang, Chief Executive of the African Trade Insurance Agency, an intergovernmental trade and investment insurance organization of which Tanzania is a

⁵⁴ *Genin v. Estonia*, *op. cit.*, para. 345.

⁵⁵ Biwater, *Water for life*, December 2003, available at http://www.biwater.com/media_room/library.html

member, for example, has noted that investing in Africa often requires long and complicated due diligence.⁵⁶

66. Based on the Claimant's experience it is logical to conclude that it should have been aware of the particular challenges and difficulties inherent to investments in the water services sector in developing countries. Yet it appears from the reports seen by *Amici* that it still did not undertake a full due diligence review.

67. Privatization expert Nilgün Gökgür notes in relation to the partial privatization of the Tanzania Telecommunications Company Ltd., undertaken during the same time period:

*The bidders were constrained by unreliable financial and operational data while preparing their bid and conducting their due diligence. Without judging the actions of any one in the TTCL process, one can say that poor quality data provides an opportunity for unscrupulous bidders to offer inflated prices, knowing that it is likely that if they win, they will uncover information at a later date which, they can claim, negates the assumptions of their earlier offer.*⁵⁷

68. Finally, *Amici* recall the investor's responsibility to meet its contractual obligations: *pacta sunt servanda*. In the present arbitration the Claimant's performance during the investment phase was poor and ultimately led to an income that was lower than projected. However, the poor performance affected not only the Claimant's income but also the people of Dar es Salaam who were dependant on the Claimant for water delivery during the contract period and into the future. First, the number of new connections was less than promised in the contract. Second, the Claimant failed to deposit

⁵⁶ Eg. Bernard de Haldevang, Chief Executive of political risk insurers African Trade Insurance Agency, in an interview by Business Day in 2004, noted that investing in Africa often requires long and complicated due diligence investigations, http://www.southafrica.info/doing_business/investment/africainvest.htm

⁵⁷ Nilgün Gökgür, "The Partial Divestiture of the Tanzania Telecommunications Company Ltd." in Rühl, Christen, Gökgür, Nellis, *op. cit.*, p. 75.

the “social connection tariff” into the “First Time New Domestic Water Supply Connection Fund” which was to be used for the expansion of water services to unserved, low-income areas.⁵⁸ Third, there was a decline in the availability of water in many parts of Dar es Salaam over the period the lease was in force.

69. These last failures are particularly noteworthy, for they relate directly to the possible breach of the human rights of the citizens of Dar es Salaam by the Claimant. *Amici* do not argue that this was done as a specific effort motivated to deny basic human rights, and specifically note they have no reason to suggest or support such a motivation here. Rather, it is simply that the acts of the Claimant led to this result.

4. THE DUTY TO ACT IN GOOD FAITH: WAS THERE A STRATEGY TO RENEGOTIATE?

70. As already set out in section 2.4, the duty of an investor to act in good faith is a basic part of any investor relationship with a host state. What is important is to relate this duty to the case at hand. It is here that *Amici* are most at a disadvantage because of their limited access to the facts of the present case.

71. *Amici* submit that the pattern of behavior of the Claimant suggests a pre and post-investment renegotiation strategy – a strategy of bidding low to receive the contract in order to renegotiate it afterwards. *Amici*, given the conditions for these submissions, do not have the capacity to argue affirmatively that such a strategy *was* at play. However, we have noted several factors that appear to be consistent with such a strategy. These are set out below. Given the submissions made in section 2.5 on the possible legal impact of a strategy of renegotiation, i.e. a finding of bad faith, and the responsibility this would

⁵⁸ Rühl, Christen, Gökgür, Nellis, *op. cit.*, p. 29.

place on the Tribunal to consider its potential jurisdictional and justiciability implications, *Amici* approach this issue with the greatest of caution.

72. *Amici* are not aware of any existing investor-state case that has seriously considered this issue. It appears to be, therefore, a case of first instance before this Tribunal. The closest parallel that has been found, the *Azinian v. Mexico* case,⁵⁹ is, however, instructive. It involved a concession in the waste management business that was granted on the basis of a business plan that affirmed the extensive experience of the investors and promised large amounts of capital that would be invested and employment created.⁶⁰ In reality, however, the investors had very limited experience and had no resources to invest, relying almost entirely on third parties. The tribunal noted that the business plan as presented by the investors was “apparently devoid of any feasibility study worth the name” and “unrealistic”⁶¹:

... This was the grandiose plan presented to the Ayuntamiento, which was told at the same meeting that the city of Naucalpan would be given a carried interest of 10% in DESONA “without having to invest one single cent and that after 15 years it would be theirs.” One can well understand how members of the Ayuntamiento would be impressed by ostensibly experienced professionals explaining how a costly headache could be transformed into a brilliant and profitable operation.

The tribunal then concluded:

The Claimants obviously cannot legitimately defend themselves by saying that the Ayuntamiento should not have believed statements that were so unreasonably optimistic as to be fraudulent.

73. The *Azinian* tribunal also held that one of the testimonies supported “the conclusion that the Claimants’ main effort was focused on getting the Concession

⁵⁹ *Azinian v. Mexico*, *op. cit.*, Final Award, November 1, 1999.

⁶⁰ *Id.* at para.106.

⁶¹ *Id.* at, para.107.

Contract signed, after which they intended to offer bits and pieces of valuable contract rights to more capable partners.”⁶² Thereupon the tribunal stressed that the government partner was “entitled to expect much more”.⁶³ In other words, the representations and business plan put forward during the negotiations were misrepresentations of their true intentions.

4.1 The concept of the renegotiation strategy

74. “...perhaps the biggest problem with concessions has been the high incidence of contract renegotiation shortly after their award”⁶⁴

75. Jose Luis Guasch, the leading expert at the World Bank on this issue, summarizes the renegotiation strategy and how it is set-up:

The following equation offers a simplified representation of financial equilibrium, where revenues minus costs should provide the appropriate return on investment:

$$R = PQ - OC - T - D = rKi,$$

*where R is profits, P is prices or tariffs, Q is quantity or output, OC is operation and maintenance costs, T is taxes, D is depreciation, r is the opportunity cost of capital, and Ki is invested capital. If the award criterion is a transfer fee, it appears under Ki. If it is the lowest tariff, it appears under P. **In principle, any appropriate bid, whether based on K or P, has behind it an analysis that balances this equation.***

A strategic or opportunistic bid is, presumably, one in which the left hand side of the equation (profits) is less than the right-hand side (returns to capital).

Here strategic, opportunistic, or aggressive bidding refers to bids that do not provide firms with financial equilibrium—that is, the costs of submitted bids exceed revenues. That is, bidding a transfer fee or a tariff such that

$$R = PQ - OC - T - D < rKi.$$

***The objective of such a bid is to win the concession with the expectation of later renegotiation**—arguing that the equation does not balance, and higher tariffs or lower future investments are needed to restore financial equilibrium.*

⁶² *Id.* at para. 114.

⁶³ *Id.* at para. 115.

⁶⁴ Jose Luis Guasch, *Granting and Renegotiating Infrastructure Concessions: Doing it Right* (2004), p. 33. (Hereinafter, Guasch, *Doing it Right*)

*Ample anecdotal evidence indicates the existence of low-ball bidding on concessions, and that should raise a red flag.*⁶⁵

76. Guasch has elsewhere more specifically defined the concept of “opportunistic” bidding that he frequently uses:

*The broader picture shows that renegotiations may be of two types. First of all, there are renegotiations initiated by operators (Guasch et al. 2003). These might be shock related, when a devaluation or a recession make the operation of a given concession unsustainable. ... They might also be opportunistic, when a firm uses its bargaining power in bilateral negotiation with the government or the regulatory agency to strike a better deal than the initially agreed one. This affects one of the central benefits of the concession model, namely the competitive pressure introduced by the ex ante auction procedure. To the extent that firms are aware of the potential gains due to their bargaining power in a subsequent bilateral negotiation with sometimes inexperienced government officials, they may be tempted to strategically undercut rivals at the bidding stage.*⁶⁶

77. This is precisely what *Amici* refer to as the renegotiation strategy. This strategy is well known in the infrastructure investment business. In the main, analysts have focused on renegotiations initiated by host states in order to increase their share of royalties, taxes, ownership in a joint venture, etc. Such cases have made for large public headlines. While global figures do not appear to be available, recent analysis of renegotiations in Latin America across all major sectors shows that water privatizations are significantly more subject to renegotiation than any other sectors, with a 74% renegotiation rate, and 66% of those initiated by the investor.⁶⁷ The average time frame for such renegotiations in the water sector in Latin America has been 1.6 years.⁶⁸ These figures suggest that renegotiation is a well known business strategy. Its potential benefits for the private

⁶⁵*Id.* at p. 36, emphasis added.

⁶⁶ Jose Luis Guasch and Stéphane Straub, “Renegotiation of Infrastructure Concessions: an Overview”, *Annals of Public and Cooperative Economics* 77:4 2006, p. 484.

⁶⁷ Guasch, *Doing it Right*, pp. 12-13, 16.

⁶⁸ *Id.* at p. 13.

sector operator when initiated by them, and losses for the public and government interlocutor, are clear:

If concessions are renegotiated shortly after their award, as often happens, the initial bidding or auction turns into a bilateral negotiation between the winning operator and the government—undermining competitive discipline of the auction. At that stage the operator has significant leverage, because the government is often unable to reject renegotiation and is usually unwilling to claim failure—and let the operator abandon the concession—for fear of political backlash and additional transaction costs. In such cases the operator, through renegotiations, can undermine all the benefits of the bidding- or auction led competitive process.”⁶⁹

Costs not noted here, in particular in the water and sanitation sectors, may include significant losses in service to the public, increased costs for service, increased health risks during renegotiation and transition periods, and public security issues resulting from water problems, amongst others.

78. In fact, concerns that the Claimant may have a renegotiation strategy were voiced during the bidding process. This triggered an internal review at the World Bank, as the primary project funder. It determined the project should go ahead.⁷⁰ This Tribunal, however, has the benefit of hindsight where the World Bank did not. *Amici* submit that the Tribunal, for the reasons explained in section 2, has the right and the duty to draw its own conclusions on this issue.

4.2 Application to the present case: Was there a renegotiation strategy?

79. Determining whether there has been a renegotiation strategy at play can be difficult. Much like the problem of determining corruption, there is rarely going to be a smoking gun, i.e., a statement that says this was all about setting up a renegotiation.

⁶⁹ *Id.* at p. 33.

⁷⁰ Summarized in Rühl, Christen, Gökgür, Nellis, *op. cit.*, at p. 27.

Amici submit, however, that this neither precludes the investigation nor alters its potential impacts.

80. In *Methanex v. United States*, the tribunal was faced with a claim that the corruption of the then Governor of California led to the decision to ban MTBE as a gasoline additive, with the resulting adverse impacts on Methanex. There was no smoking gun, and in the end, a finding of no corruption. What is important for present purposes, however, is the methodology adopted by the tribunal in perhaps the most extensive recorded investigation of corruption in an investor-state arbitration decision.

81. The tribunal in *Methanex v. United States* adopted the methodology put forward by the Claimant company that, where clear evidence was not available, it was entitled to draw “appropriate inferences” from the facts before it.⁷¹ While it expressed the need to be cautious in doing so, and to ensure all the dots were being assessed and not just those favourable to one viewpoint, it went on to adopt what it labeled a “connect the dots” approach, even labeling its individual pieces of evidence as Dot 1, Dot 2, etc.. The *Methanex* tribunal also noted that, while corruption could be found in a party’s acts that were illegal under national or international law, acts not considered illegal under any laws could also, when considered together, lead to a finding of corruption in some circumstances.⁷²

82. *Amici* submit that this methodology is relevant to the present case. Like the alleged corruption reviewed by the *Methanex* tribunal, a renegotiation strategy will have multiple elements, most if not all being quite legal. It is thus essential to “connect the

⁷¹ *Methanex v. United States*, *op. cit.*, Part III, Chapter B, paras. 2-3.

⁷² *Ibid*, eg. Part III, Chapter B, paras. 19, 37-38.

dots” to determine if there is a more nefarious explanation than each would attract individually.

83. If one accepts this methodology, what is one to look for? J. Luis Guasch, in his seminal writings, gives some direction, expressly or by implication, of how to find “strategic, opportunistic or aggressive bidding”:

- Bids that do not provide firms with financial equilibrium—that is, the costs of submitted bids exceed revenues;⁷³
- The early initiation of a renegotiation, with the average time in the water sector being 1.6 years; and
- The financial equation does not balance, and higher tariffs or lower future investments are needed to restore financial equilibrium.⁷⁴

84. Using the above as a reference point, *Amici* turn to the facts available to them, drawn from various reviews of the bidding and investment processes:

- The Claimant submitted the lowest possible level of bid on tariffs, the basic source of income from the project.⁷⁵
- The Claimant bid below the level of its own cost projections,⁷⁶ meaning that it could not meet the financial equilibrium posited by Guasch.
- The Claimant failed to undertake a proper due diligence examination of the water services operation before submitting the bid, despite the notoriety of the poor operational and financial shape of the service.⁷⁷

⁷³ Guasch, *Doing it Right*, p. 36.

⁷⁴ *Ibid.*

⁷⁵ Rühl, Christen, Gökgür, Nellis, *op. cit.*, p. 27.

⁷⁶ Price Waterhouse Coopers, *op. cit.*, p. 20.

⁷⁷ Price Waterhouse Coopers, *op. cit.*, pp. 37, 39, 40 and 43, discussed in section 3.1 above.

- The Claimant agreed to keep all previous staff of the public water company and supervising authority, thereby keeping costs high.⁷⁸
- City Water failed to deposit the “social connection tariff” into the “First Time New Domestic Water Supply Connection Fund” to provide for new connections in poor neighborhoods (a key contract provision).⁷⁹ This meant that it could allocate revenues for other uses and minimize new sunk capital costs that otherwise would be lost if the investment failed.
- Claimant sought an interim tariff review in August 2004 under the terms of the contract. This was rejected by Tanzania on the basis of the report of independent auditors Price Waterhouse Coopers, which concluded there were no grounds for such a review and increase.⁸⁰
- Efforts to renegotiate the contract then began no later than 16 months after the contract entered into force, in keeping with the expected timeframe described by Guasch.⁸¹
- The scope of demands by the Claimant included many key elements going to revenues and costs, the financial equilibrium referred to by Guasch above: a five year extension to the contract (50% longer) “in order for the contract to be financially viable”; additional outside financing for modernization; reduced collection targets;⁸² reduced employee levels by almost 1/3⁸³; and an increased operator tariff.⁸⁴

⁷⁸ Rühl, Christen, Gökgür, Nellis, *op. cit.*, p. 27.

⁷⁹ Rühl, Christen, Gökgür, Nellis, *op. cit.*, p. 29.

⁸⁰ Price Waterhouse Coopers, *op. cit.*, p. 1 and Appendix 1.

⁸¹ Rühl, Christen, Gökgür, Nellis, *op. cit.*, p. 32, which states that in December 2004 and again in January 2005, City Water proposed a revision of the lease terms.

⁸² TRC Economic Solutions, Contract Renegotiations of Lease Contract between Dar es Salaam Water and Sewerage Authority and City Water Services Ltd: Phase II, Draft Final Report, 24 May 2005, p. 22.

- City Water held back from investing the full amount of equity required from it under the Lease Contract. The Lease Contract required City Water to invest \$5.5 million in equity by the end of year one. At the end of year one, it had put in \$3.9 million and by the date of termination, its total equity investment stood at \$4 million.⁸⁵
- City Water refused to inject further capital into the project until the renegotiation was done.⁸⁶
- City Water rejected the mediator's recommendations on a renegotiation.⁸⁷

85. *Amici* appreciate that taken alone, each of these factors would not make a case. Considered together (and subject to facts not knowable to *Amici*), however, *Amici* submit that they constitute a *prima facie* case that the Claimant was following a renegotiation strategy. The question for the Tribunal is whether this *prima facie* case makes it incumbent on it to investigate further. In the view of *Amici*, the significant consequences of the entire experience for the government and people of Tanzania require no less of this Tribunal than to ensure that all the facts are thoroughly investigated.

86. *Amici* submit that, if these elements are borne out by the full record in this arbitration, then the most obvious conclusion is that a renegotiation strategy was at play. Indeed, it is hard to conceive of another business rationale that would explain this combination of factors. This explanation is also consistent with the Claimant's parent company's previous history in the water sector. There are some indications from the

⁸³ *Id.* at p. 30.

⁸⁴ *Id.* at p. 31.

⁸⁵ Rühl, Christen, Gökgür, Nellis, *op. cit.*, pp. 28-29.

⁸⁶ TRC Economic Solutions, *op. cit.*, p. 51.

⁸⁷ *Id.* at p. 54.

limited information available to *Amici* that the Claimant's parent company and its affiliates have previous experience with renegotiating water contracts.

87. In November 1999, for instance, the Claimant's parent company, operating through one of its subsidiaries in a joint venture company, Greater Nelspruit Utility Company (GNUC)⁸⁸, was awarded a 30-year water concession in Nelspruit, South Africa. In early 2003, just 4 years into the 30-year concession, cost recovery was considerably lower than expected and GNUC threatened to pull out of the concession unless it received assistance from Nelspruit's municipality. In response, the municipality agreed to several relief measures, including a reduction in GNUC's electricity tariffs for the operation of infrastructure; an increase in the portion of the municipality's equitable share; a reduction in the municipality's monitoring fee; and a reduction in the rental fee for municipal property. Further, as part of the 5-year concession review, GNUC's tariffs were renegotiated, and the municipality approved another 15% increase as of January 2005.⁸⁹

88. Another example is the acquisition by the Claimant's affiliate, Cascal, of the Government of Belize's 82.7% shareholding in Belize Water Services Limited (BWS), assuming operation of water supply and sanitation in Belize in March 2001.⁹⁰ Within months of the purchase, BWS requested the Government to introduce an infrastructure charge for each new sewer connection plus increase water rates and announced that it would not spend the US\$140 million which it had promised on new capital investment.⁹¹

⁸⁸ GNUC is a joint venture between Biwater's subsidiary Cascal and a black empowerment group, Sivukile.

⁸⁹ Brown, J. (2005) Center on Regulation and Competition, Institute for Development Policy and Management, University of Manchester, Working Paper Series, Paper No. 112, *Water Service Subsidies and the Poor: a Case Study of Greater Nelspruit Utility Company. Mbombela Municipality, South Africa*, available at www.competition-regulation.org.uk.

⁹⁰ Press Office, Government of Belize, "WASA Privatised", Press Release, 23 March 2001, available at http://www.belize.gov.bz/press_release_details.php?pr_id=1445.

⁹¹ Cutlack, M., "When the dollars run out", *New Statesman*, 4 March 2002. available at <http://www.newstatesman.com/200203040023>; King, K., "Cascal says WASA was 'puss enna beg'",

BWS requested the regulatory authority to increase tariffs by 32% for the 2004-2009 period to meet existing debts and short falls.⁹² BWS' request was rejected by the Belize Public Utilities Commission (PUC), which approved only a 15% increase. An independent review later recommended a 17% rate increase in February 2004, a rise which was acceptable to the PUC.⁹³ The company, however, initiated arbitration against Belize. In a settlement agreement in October 2005, the Government re-purchased the majority shareholding in BWS from Cascal for the original price of US\$24.8million.⁹⁴

89. The Respondent in the present case did not choose to renegotiate or buy out the Claimant. Instead, the Respondent chose to enforce the Lease Contract by way of termination provided for in the Contract itself.

90. *Amici* submit that the response of the Respondent to terminate the contract in the face of this full set of factors was quite correct. This is turned to in more detail in section

5. For now, we just note the following from J. Luis Guasch:

*But what if a firm submits an unreasonable bid, one that has a very high transfer fee or very low tariff, and then, **as expected**, the financial equation does not hold? Should the firm be held accountable to its bid, or should the firm be bailed out?*

The right answer is that, barring major external factors, operators should be held accountable to their bids, and if petitions for renegotiation are turned down, operators ought to feel free to abandon the projects, if they choose to do so (with the corresponding penalties). The appropriate

Amandala, 19 October 2001, available at http://www.belizehall.com/amandala/archives/archives_2001/oct_21_2001.html#2.

⁹² Transcript of Public Hearing on a Full Tariff Review: Proceeding involving Belize Water Services Limited and the Public Utilities Commission, 10 November 2003, available at <http://www.puc.bz/publications/the%20fairweather%20report%20on%20public%20consultation%20meeting%20bws%20ftpr.pdf>.

⁹³ Dr Richard Hern, Nera Economic Consulting, Independent Export Report under the First Full Tariff Review Proceedings: Belize Water Services, 26 February 2004, available at <http://www.puc.bz/publications/bwsfinalsent260204.pdf>.

⁹⁴ See Press Office, Government of Belize, "Agreement reached for the purchase of BWS", Press Release, 12 August 2005, available at http://www.belize.gov.bz/press_release_details.php?pr_id=3377; Press Office, Government of Belize, "Government and Cascal finalise BWS re-purchasing agreement", Press Release, 3 October 2005, available at http://www.belize.gov.bz/press_release_details.php?pr_id=3235.

*behavior for government is to uphold the sanctity of the bid and not concede to opportunistic requests for renegotiation. Doing so may lead to the abandonment of a concession, but that is a price worth paying and, in fact, can help government establish a reputation of not being easy in terms of renegotiation demands and, in doing so, would discourage future aggressive bids.*⁹⁵

4.3 Legal implications

91. *Amici* are well aware that it is not generally unreasonable or bad faith for investors to have alternative business strategies and plans in place at any given time. One would in fact often expect this to be so. In the ELSI case, for example, it is clear that the American controlling company of ELSI had concurrent strategies for selling the company and for winding it down in accordance with law in order to maximize its asset values. While this was described in the ICJ decision as “Janus-like”, and the two strategies were certainly played against each other, the legitimacy of each track and their relationship to each other is understandable. Moreover, they were transparent and concurrent alternative strategies. This does not appear to have been a significant factor in the final decision of the ICJ in that case.

92. The issue here is whether the renegotiation approach pointed to in this case constitutes bad faith, as opposed to two legitimate strategies being pursued at the same time to maximize value. In the present case, we are not looking at two alternative strategies, but a single sequential strategy where phase one is to obtain the concession contract and phase two, hidden from view, is to renegotiate it when potential competitors are out of the way. As is typically the case in similar situations, the negotiating partner is a developing country and in this case, as was well known to all, subject to mandatory privatization requirements by the World Bank and hence under important pressures to

⁹⁵ Guasch, *Doing it Right*, pp. 37-38, emphasis added.

reach a deal, pressures that the investor is almost always well aware of. This, if found to be present, falls fully and squarely within the scope of the existing investor-state decisions on bad faith, as reviewed in section 2.4.

93. In addition to *Azinian v. Mexico*, discussed above, the decision in *Inceysa v. El Salvador* would also seem closely related to this situation. In that case, the tribunal found, *inter alia*, that the investor submitted false financial information in the tender and made false representations during the bidding process. The tribunal concluded:

237: The conduct mentioned above constitutes an obvious violation of the principle of good faith that must prevail in any legal relationship. This Tribunal considers that these transgressions of this principle committed by Incesya represent violations of the fundamental rules of the bid that made it possible for Inceysa to make the investment that generated the present dispute. It is clear to this Tribunal that, had it known the aforementioned violations of Inceysa, the host State, in this case El Salvador, would not have allowed it to make its investment.⁹⁶

94. *Amici* submit that, if the Tribunal determines that the acts and omissions of the Claimant do demonstrate a renegotiation strategy, then this must have serious consequences as a matter of law.

5. CONCLUSIONS: CONSEQUENCES FOR BREACHES OF INVESTOR RESPONSIBILITIES

5.1. Contract termination for valid reasons

95. The termination of the contract, as *Amici* understand it, was an action by the Respondent to prevent further deterioration of the water delivery services. Citizens were suffering as a direct consequence of the failed investment. The Claimant had failed to meet the agreed performance targets and had caused a decline in the availability of water

⁹⁶ *Inceysa v. El Salvador*, *op cit.*, paras. 234-237.

in many parts of Dar es Salaam. The Claimant had failed to meet the water service expansion targets, or set aside the funds required for the “First Time New Domestic Water Supply Connection Fund”. Both of these continued to increase human health risks and impose costs and water collection problems on citizens of Dar Es Salaam. These problems especially affected women and children.

96. The Claimant, by not fulfilling the promises contained in its bid, had created a situation of urgency requiring governmental action. In fact, the Government, carrying the duty to provide access to water to its citizens, had to take action under its obligations under human rights law to ensure access to water for its citizens, including under:

- The African Charter on the Rights and Welfare of the Child, Article 14.2 (c), committing States parties to take measures “to ensure the provision of adequate nutrition and safe drinking water” (ratified by Tanzania in 2003);
- The Convention on the Elimination of All Forms of Discrimination Against Women, Article 14.2(h), stipulating that States parties shall ensure to women the right to “enjoy adequate living conditions, particularly in relation to [...] water supply” (ratified by Tanzania in 1985); and
- The Convention on the Rights of the Child, Article 24.2(c), requiring States parties to combat disease and malnutrition “through the provision of adequate nutritious foods and clean drinking-water” (ratified by Tanzania in 1991).

97. In line with this, a recent Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises stated:

In sum, the state duty to protect against non-state abuses is part of the

*international human rights regime's very foundation. The duty requires states to play a key role in regulating and adjudicating abuse by business enterprises or risk breaching their international obligations.*⁹⁷

98. *Amici* respectfully submit that the Tribunal in the present arbitration must take into consideration the human rights and sustainable development aspects of this case when assessing the consequences for the claims at issue here. In this light, terminating the contract, if legitimately done in order to prevent the deterioration or abuse of human rights, cannot be found to be a breach of the contract whose very purpose was to promote and enhance the achievement of those rights.

5.2 Contract termination taking into account investor conduct

99. International investment case law now provides a sturdy basis for the concept that investor conduct has consequences for claims made against the host state under investment treaties. In various cases, tribunals have taken into account investor conduct and the specific investment context, including the developmental, political and social situation in the host state. At least three categories of consequences for the claims examined by various tribunals can be identified:

- The tribunal may find the underlying investment contract invalid and thus dismiss the claims on the basis of a lack of jurisdiction or justiciability;
- In examining the individual breaches, the tribunal may find that reproachable investor conduct affects the finding of a breach and ultimately deny the claim on the merits; or

⁹⁷ John Ruggie, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Business and human rights: mapping international standards of responsibility and accountability for corporate acts, 19 February 2007, para. 18.

- The tribunal may reduce the damages award in consideration of the investor’s conduct.

100. First, investor conduct can affect the validity of the claim altogether. This is the case where the investor is not in good faith or where its conduct is unconscionable. As seen earlier, examples include fraudulent behaviour, misrepresentation, or abuse of power. Addressing “unconscionable conduct” Prof. Muchlinski writes:

*Where unconscionable conduct is found, this may have serious consequences for any claim made by the investor. Evidence of such conduct may vitiate any right to a claim, especially if the regulatory response that is being challenged arises out of the application, by the host country, of its powers to punish the conduct through an interference with the investment.*⁹⁸

101. Several tribunals, as set out in detail above, have dismissed claims precisely for such unconscionable conduct, and in some instances have referred to reasons of “ordre public international”. These include the decisions *Azinian v. Mexico*, *Inceysa v. El Salvador*, and *World Duty Free v. Kenya*. In *Azinian v. Mexico* the tribunal found that the concession contract was invalid, primarily on the ground of misrepresentation on the part of the investor, and thus dismissed the claim. In *Inceysa v. El Salvador* the tribunal declined jurisdiction largely based on the fact that the investor had violated the principle of good faith and other principles of international law through its behaviour in order to prevail in the bidding process. While in *Inceysa*, the lack of jurisdiction was linked to the violation of Salvadoran law, which vitiated protection under the applicable BIT, this link was not found necessary in *World Duty Free v. Kenya*. In this latter case, the tribunal found the contract, procured by bribing a state officer, in violation of international public policy and thus legally unenforceable. As a consequence it dismissed the claim.

⁹⁸ Muchlinski, *op. cit.*, see footnote 13 above.

102. Thus, in all of these cases, claims were dismissed on the basis that the contract could not be valid because it was based on misrepresentation, bad faith or involved some kind of illegal behavior on the part of the claimant. *Amici* submit that the Tribunal should come to the same conclusion if it concludes that the Claimant's bid was submitted as part of a renegotiation strategy.

103. The second category of consequences in case law relates to the failure of duty of care by the investor in the pre- and post investment phases. In *Genin v. Estonia* and *Olguin v. Paraguay*, the tribunals did look at the individual claims, but ultimately denied all of them. In *Olguin v. Paraguay* the tribunal's conclusion to deny the claims was influenced largely by the fact that the investor had not sufficiently covered itself against risks and could ultimately not rely on the BIT as its insurance policy. In *Genin v. Estonia* the tribunal did not find a violation of any of the BIT provisions, among other things because the investor had failed to cooperate with the Estonian banking authorities, and had concealed ownership questions from the authorities. Moreover, the investor had not carried out its due diligence regarding the financial situation of the bank branch it was acquiring and had not taken precautions against the risks involved.

104. A third category of consequences for investor conduct is the reduction of damages. In *MTD Equity v. Chile* the failure of the investors to protect themselves against business risks did not lead to the denial of the claim but led to a reduction in the damages.

105. *Amici* submit that, should the Tribunal not find the presence of a renegotiation strategy, the Claimant's lack of due diligence in the bidding phase and poor business practices during the investment should be taken into account when considering any alleged bilateral investment treaty violation.

106. Finally, *Amici* submit that, if the Tribunal finds in accordance with this submission, an award of costs against the Claimant is appropriate. In the present case, the government and people of Tanzania and Dar Es Salaam have already suffered the direct and most serious impacts of the failed water privatization. They must face the costs of completing what was not done under the contract and carrying the water services project forward. The Government of Tanzania is also carrying the costs of the World Bank loan used to finance the project, recalling here that the Claimant was the smallest capital provider in the project.

107. In addition, the Tribunal should consider the need to sanction this type of conduct if it finds it to have existed. Serious breaches of a contract for such basic water services cannot be accepted. Moreover, if there is a finding of a secondary hidden strategy, such deceit and bad faith creates, as Guasch noted, serious consequences for the entire sector, where this strategy is widely known to be employed. If investors are not held to the highest standards, it also creates significant consequences for the infrastructure development strategies, and hence for sustainable development strategies more broadly, of developing and least developed countries.

*What should be done more often is for governments to reject opportunistic requests for renegotiation and, in such cases, allow concessions to fail. Such outcomes would reduce the incidence of renegotiation. That is a key issue in private concessions of infrastructure services—yet one that is often resolved in favor of operators. Thus aggressive bidding and the high incidence of renegotiation should not be surprising*⁹⁹

108. Using the investor-state process to seek compensation for the failure of such a strategy when a state stands up and says “no, we will not be a party to this”, as Prof.

⁹⁹ Guasch, *Doing it Right*, p. 38.

Guasch argues they must, should be rejected as a clear signal for future cases. An award of costs is the most appropriate means for sending this clear signal.

Respectfully submitted on behalf of:

The Lawyers' Environmental Action Team (LEAT)
The Legal and Human Rights Centre (LHRC)
The Tanzania Gender Networking Programme (TGNP)
The Center for International Environmental Law (CIEL)
The International Institute for Sustainable Development (IISD)

Nathalie Bernasconi-Osterwalder
Center for International Environmental Law (CIEL)

Geneva, 26 March, 2007

**IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG HIGH COURT (PRETORIA)**

Case No: 55896/2007

Case No: 10235/2008

In the application for admission as an amicus curiae of

CENTRE FOR APPLIED LEGAL STUDIES

Applicant

In the matter between
AGRI SOUTH AFRICA

Plaintiff

and

MINISTER OF MINERALS AND ENERGY

Defendant

And

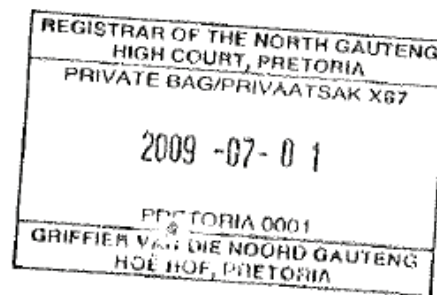
In the matter between
ANNIS MOHR VAN ROOYEN

Plaintiff

and

MINISTER OF MINERALS AND ENERGY

Defendant



NOTICE OF MOTION:

APPLICATION TO BE ADMITTED AS *AMICUS CURIAE*

PLEASE TAKE NOTICE that the Centre for Applied Legal Studies hereby makes application to the above Honourable Court for an order in the following terms:

1. To the extent necessary, the late filing of the applicant's application for admission as *amicus curiae* is condoned;
2. The applicant is admitted as *amicus curiae* in the above proceedings in terms of Rule 16A of the Uniform Rules of Court;
3. The applicant is granted:
 - 3.1.the opportunity to submit written argument in the above matter;
 - 3.2.the opportunity to submit oral argument at the hearing of the above matter;
 - 3.3.the opportunity to adduce the evidence described in the founding affidavit attached hereto.
4. Further or alternative relief.

[5] TAKE NOTICE FURTHER that the affidavit of **JACQUELINE CLAIRE ANNETTE DUGARD** and the annexures thereto will be used in support of this application.

[6] TAKE NOTICE FURTHER that the applicant has appointed the offices of its attorneys set out below as the address at which it will accept notice and service of all documents in these proceedings.

[7] **TAKE NOTICE FURTHER** that should you intend to oppose this application, you are required to file an answering affidavit within five days of the date of service of this application setting out clearly and succinctly the grounds of such opposition.

DATED AT JOHANNESBURG THIS 30th DAY OF JUNE 2009.


LEGAL RESOURCES CENTRE

Applicant's attorneys

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c/o LOUISE DU PLESSIS ATTORNEYS

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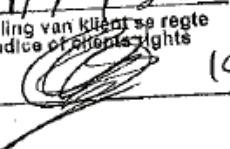
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**TO: THE REGISTRAR
PRETORIA**

AND TO: MACROBERT INC
Plaintiff's Attorneys (Agri South Africa matter)
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MacRobert Inc
Date/Datum 1/7/2009
Sonder benadeling van klient se regte
Without prejudice of clients rights
Get./Sign  10/45

AND TO: GEO KILLIAN ATTORNEYS
Plaintiff's Attorneys (Van Rooyen matter)
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Ref: Mr Geo Killian

Hack, Stupel and Ross
Standard Bank Chambers
Church Square
Tel: (012) 325 4185
Ref: Foxcroft 1ck / RF 1817

1/7/2009 12:56
ACCEPTED WITHOUT PREJUDICE
HACK STUPEL & ROSS
2ND FLOOR
STANDARD BANK CHAMBERS
CHURCH SQUARE PRETORIA

AND TO: STATE ATTORNEY
Defendant's Attorneys
Bothongo Heights
8th Floor
167 Andries Street
PRETORIA
Ref: Mr SP Mathebula/6658/2007/ Z51 SMCG

STAATSPROKUREUR
PRIVAATSAK/PRIVATE BAG X91
2009 -07- 01
PRETORIA 0001
STATE ATTORNEY

MPA 11 12h10
GEMAKKELIJK VERMOEDEN VAN HET
AANGEGEEN ZONDER PREJUDICE

International Centre for Settlement of Investment Disputes

1818 H Street, N.W., Washington, D.C. 20433, U.S.A.
Telephone: (202) 458-1534 Faxes: (202) 522-2615/2027
Website: www.worldbank.org/icsid

By e-mail

October 5, 2009

Mr. Jason Brickhill
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Dr. Carlos Lopez
Senior Legal Officer
International Commission of Jurists
P.O. Box 91
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Re: Piero Foresti, Laura de Carli and others v. Republic of South Africa
(ICSID Case No. ARB(AF)/07/1)

Dear Sirs,

- [1] I refer to the Petition for Limited Participation as Non-Disputing Parties filed on July 17, 2009, by the Centre for Applied Legal Studies, the Center for International Environment Law, the International Centre for the Legal Protection of Human Rights and the Legal Resources Centre, as well as the Petition filed on August 19, 2009, by the International Commission of Jurists.
- [2] Please be informed that the Tribunal has decided to allow the above mentioned Non Disputing Parties (NDPs) to participate in this proceeding in accordance with Arbitration (Additional Facility) Rule 41(3). The Tribunal has accordingly fixed the schedule for the involvement of the above mentioned NDPs in the next stages of the case and has given directions for the disclosure of documents to them, having in mind two basic principles:
- [2.1] (1) NDP participation is intended to enable NDPs to give useful information and accompanying submissions to the Tribunal, but is not intended to be a mechanism for enabling NDPs to obtain information from the Parties.
- [2.2] (2) Where there is NDP participation, the Tribunal must ensure that it is both effective and compatible with the rights of the Parties and the fairness and efficiency of the arbitral process.
- [3] Accordingly, the Tribunal has taken the view that the NDPs must be allowed access to those papers submitted to the Tribunal by the Parties that are necessary to enable the NDPs to focus their submissions upon the issues arising in the case and to see what positions the Parties have taken on those issues. The NDPs must also be given adequate opportunity to prepare and deliver their submissions in sufficient time before the hearing for the Parties to be able to respond to those submissions.

[4] The Tribunal does not at this stage envisage that the NDPs will be permitted to attend or to make oral submissions at the hearing. A final decision on those questions will be taken after March 12, 2010, by which date the Parties will have responded to the NDP submissions.

[5] For the time being, the schedule is as follows:

November 2, 2009	Claimants' Reply
November 6, 2009	Exchange between the Parties of the redacted versions of the documents to be sent to the NDPs
November 16, 2009	Filing by the Parties of the redacted documents for the NDPs – Transmission to the NDPs by the Centre
December 21, 2009	NDP's Submissions to be filed with the Centre
March 12, 2010	- Respondent's Rejoinder; - Parties' response to the NDPs' submissions; and - Claimants' additional submission on compensation mechanism
March 26, 2010	Respondent's reply to Claimants' additional submission
April 12-23, 2010	Hearing

[6] In view of the novelty of the NDP procedure, after all submissions, written and oral, have been made the Tribunal will invite the Parties and the NDPs to offer brief comments on the fairness and effectiveness of the procedures adopted for NDP participation in this case. The Tribunal will then include a section in the award, recording views (both concordant and divergent) on the fairness and efficacy of NDP participation in this case and on any lessons learned from it.

Sincerely yours,



Eloïse M. Obadia
Secretary of the Tribunal

cc:
Tribunal Members and Parties

IN THE ARBITRATION UNDER THE
AGREEMENT ON ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS
BETWEEN THE KINGDOM OF THE NETHERLANDS AND THE REPUBLIC OF BOLIVIA
AND THE ICSID ARBITRATION RULES
BETWEEN

AGUAS DEL TUNARI, S.A.,

Claimant/Investor,

-and-

REPUBLIC OF BOLIVIA,

Respondent/Party.

CASE No. ARB/02/3

**PETITION OF
LA COORDINADORA PARA LA DEFENSA DEL AGUA Y VIDA,
LA FEDERACIÓN DEPARTAMENTAL COCHABAMBINA DE
ORGANIZACIONES REGANTES,
SEMAPA SUR, FRIENDS OF THE EARTH-NETHERLANDS,
OSCAR OLIVERA, OMAR FERNANDEZ,
FATHER LUIS SÁNCHEZ, AND CONGRESSMAN JORGE ALVARADO
TO THE ARBITRAL TRIBUNAL**

August 29, 2002

INTRODUCTION

1. This dispute arises out of Bolivia's attempt to privatize the water services of its third largest city, Cochabamba. In 1999, Bolivia removed operation of the city's sewage and water system from SEMAPA, the Cochabamba water and sewage agency, and granted a 40-year concession to operate the system to Aguas del Tunari, S.A. Within weeks of taking control of the water system, the company raised water rates by an average of over 50% and in some cases far higher. Unable to pay their water bills, the people of Cochabamba participated in widespread public protests that caused the Government of Bolivia to declare a state of emergency, suspend constitutional rights, and ultimately to use violence to repress the protests, injuring more than 100 people and killing a 17 year-old boy. When these measures failed to halt the protests, Aguas del Tunari abandoned its management of the water system and left the country. Aguas del Tunari has now brought a claim to this Tribunal demanding compensation for anticipated profits lost as a result of its departure.

2. This Tribunal's resolution of this claim will directly affect both the specific interests of Petitioners. In addition, the Tribunal's award is likely to affect issues of broad public concern. For the following reasons, fundamental fairness and the legitimacy of the Tribunal's award requires that the Tribunal allow Petitioners to intervene in these proceedings:

- (i) Each Petitioner has a direct interest in the subject matter of this claim and may be adversely affected by the award of this Tribunal. Accordingly it would be unfair and inconsistent with the principles of fundamental justice to deny them the opportunity to defend their interests in these proceedings;
- (ii) Each Petitioner also has an interest in addressing the lack of transparency that traditionally attends international arbitral processes and in ensuring that issues with broad public impacts are resolved through democratic processes that provide for meaningful public participation. Because this dispute is not essentially private in character, but rather may have far-reaching impacts on a broad diversity of non-party interests – such as governmental authority to guarantee public order and the provisions of essential services – it would be unfair and inconsistent with the principles of natural justice to exclude those who wish to address these issues, and are uniquely qualified to do so. Moreover, by their concern for these issues, Petitioners represent the concerns of a broad sector of the public in Bolivia and throughout the world. Allowing Petitioners to be parties in this arbitration will provide this Tribunal with a fuller appreciation of the consequences of the questions before it, and give it the opportunity to address public doubt about the legitimacy of this arbitration.
- (iii) Petitioners have unique expertise and knowledge that would contribute to the Tribunal's resolution of the claim.

3. For the reasons set forth in this petition, Petitioners request permission to intervene as parties in this arbitration or, in the alternative, to participate as *amici curiae*, as well as measures

to guarantee public scrutiny of and participation in this arbitration. Specifically, Petitioners request:

- (i) standing to participate as parties in any proceedings that may be convened to determine the claim made by Aguas del Tunari, S.A., in this matter, and all rights of participation accorded to other parties to the claim;
- (ii) in the alternative, should the status as party be denied to one or more Petitioners, the right to participate in such proceedings as *amici curiae*, in accordance with the principles of fundamental justice, at all stages of the arbitration, including but not limited to permission
 - to make submissions concerning the procedures by which this arbitration will be conducted;
 - to make submissions concerning the jurisdiction of this Tribunal and, once they are fully known, the arbitrability of the matters the disputing investor has raised;
 - to make submissions concerning the merits of Aguas del Tunari's claims;
 - to attend all hearings of the Tribunal;
 - to make oral presentations during hearings of the Tribunal;
 - to have immediate access to all submissions made to the Tribunal.
- (iii) public disclosure of the statements of claim and defense; memorials and counter-memorials; pre-hearing memoranda; supplemental submissions; witness statements and expert reports; transcripts of hearings; appendices and exhibits to any submissions made to the Tribunal; and any other submissions made to the Tribunal;
- (iv) that the Tribunal open all hearings in this arbitration to the public;
- (v) that the Tribunal visit Cochabamba, Bolivia, and hold public hearings concerning the facts underlying this claim;
- (vi) that the Tribunal permit Petitioners to respond to any arguments by either party to this arbitration concerning this petition, including through attendance at and participation in any hearings in which this petition is discussed; and
- (vii) an opportunity to amend this petition as further details of this claim become known to the Petitioners.

4. Support for this Petition is widespread. Over 300 representatives of civil society in Bolivia (the locus of the dispute), the Netherlands (whose investment agreement with Bolivia Aguas del Tunari cites as a basis for bringing its claim before this Tribunal), the United States (where Bechtel Corporation, Aguas del Tunari's parent company is based) and 38 other countries have written to the Tribunal to express their concerns and urge the Tribunal to allow Petitioners to intervene, as well as to indicate that Petitioners' participation will help ensure that their

concerns are represented to the Tribunal.¹ Should further expressions of public concern regarding these proceedings come to our attention, we will make them available to the Tribunal.

THE PETITIONERS

5. *La Coordinadora para la Defensa del Agua y Vida* (Coalition for the Defense of Water and Life; hereinafter “Coordinadora”) is a coalition of community organizations, labor groups, human rights organizations, farmers associations, students and other broad-based networks of civil society in the region of Cochabamba, Bolivia. The Coordinadora was formed in late 1999 to facilitate public participation in the proposed privatization of the local water service. During the months that followed, the Coordinadora demonstrated its concerns through public protests, during which members of the Coordinadora were injured. The Coordinadora also carried out a public *consulta*, or participatory survey process, that allowed more than 60,000 people – nearly 10% of the city of Cochabamba – to make their concerns about the water concession contract known to the government. During negotiations, the Government of Bolivia asked the Coordinadora to represent the tens of thousands of opponents of Aguas del Tunari’s activities in Cochabamba. The Coordinadora continues to take primary responsibility for educating the public and the media about developments in the dispute and in conveying public concerns to Bolivian officials and representatives of international institutions and organizations.

6. As a representative of tens of thousands of citizens of Cochabamba, the Coordinadora has a direct stake in the outcome of this arbitration. Under the terms of the current concession contract with Bolivian regulators, pursuant to which SEMAPA operates the local water system, SEMAPA will assume any costs associated with the termination of Aguas del Tunari’s concession contract. Thus, if Aguas del Tunari is successful in its demand for compensation, SEMAPA is likely to be responsible for paying Aguas del Tunari. The only way SEMAPA would be able to pay such an award would be to substantially raise the price Cochabamba residents pay for water, significantly limit those residents’ access to water, or both. In any case, the members of the Coordinadora would clearly be directly and significantly impacted by an award to Aguas del Tunari.

7. Oscar Olivera is a spokesperson for the Coordinadora. Since November 1999, Mr. Olivera has been the Coordinadora’s most visible representative during its efforts to reverse the privatization of Cochabamba’s water system and reform the law that required privatization.

8. *La Federación Departamental Cochabambina de Organizaciones Regantes* (the Cochabamba Federation of Irrigators’ Organizations; hereinafter “Irrigators’ Federation”) represents thousands of small-scale producer families, whose livelihoods are based on the irrigation of food crops such as corn and other vegetables in the Cochabamba valleys and who produce much of the food consumed in Cochabamba. The Federation arose in the mid 1990s, at the initiative of the small farmers, to protect customary water usage rights and practices in the Cochabamba Valley.

9. For generations, members of the Irrigators’ Federation have had the right, pursuant to legally recognized customary usage rules (*usos y costumbres*), to access and manage local

¹ See Letter to James Wolfensohn, *et al.*, Aug. 29, 2002, attached at Tab 1.

irrigation water resources. When the Government of Bolivia privatized the Cochabamba water system and granted Aguas del Tunari the water concession that is the subject of this arbitration, these rights were taken from Federation members. Suddenly deprived of rights to water they had held and depended on for generations, Federation members found their access to water limited by discriminatory regulatory practices and the imposition of usage fees that were often a financial burden and sometimes beyond their means. When the concession contract was terminated, rights to these essential resources reverted to members of the Federation, who resumed managing and using them as they had for generations. The Federation has introduced changes in Bolivia's water laws to protect the rights of all communities of small-scale irrigators to access to and control over water resources in the future. Changes to the legislation were approved in April 2000, though regulatory definitions have been held up in the Bolivian Congress.

10. If this Tribunal were to issue an award in favor of Aguas del Tunari in this arbitration, the impact on the Irrigators' Federation would be very damaging. Implementation of the Federation's legislative victories in 2000, which guaranteed their traditional water rights, would be effectively impossible because legislators would fear potential further challenges from transnational corporations. In addition, such an award would establish the precedent that rights to use and manage water could be undermined at any time by transnational corporations using secretive international processes. Moreover, if SEMAPA becomes responsible for paying a multi-million dollar award to Aguas del Tunari, as many authorities believe would happen, there would be a serious likelihood that SEMAPA would be forced to place new fees and restrictions on Foundation members' water rights to obtain the necessary resources to make the payment. Any of these outcomes would effectively negate the democratically established legal framework for water use and management.

11. Omar Fernandez is the President of the Cochabamba Federation of Irrigators' Organizations, which he created in the mid-1990s. Mr. Fernandez was also the original organizer of the Coordinadora.

12. SEMAPA Sur is a grassroots organization dedicated to bringing water to the neighborhoods in the southern part of Cochabamba. The Aguas del Tunari water concession removed control of local water systems from communities in these neighborhoods and, without providing secure or accessible alternatives. Since the concession contract was terminated, security over local systems has been reestablished, and SEMAPA Sur has been participating in the implementation of plans to extend SEMAPA coverage in ways that complement, not threaten, local systems. If Aguas del Tunari is successful in arbitration, these plans and relationships may well be destroyed.

13. Father Luis Sánchez is the founder of SEMAPA Sur. He is also a member of the Board of Directors of SEMAPA, the Cochabamba public water company that managed and controlled access to water resources in Cochabamba prior to the water concession contract that is the subject of this arbitration. The concession contract removed control of the local water system from SEMAPA – reducing SEMAPA to a small holding company – and gave it to Aguas del Tunari. When the concession contract was terminated in April 2000, SEMAPA was called upon to retake control of the water system, and formally given responsibility in agreements signed by

the Coordinadora and local and national governments.

14. Because SEMAPA will assume any costs associated with the termination of Aguas del Tunari's concession contract, if Aguas del Tunari is successful in this arbitration, Father Sánchez and the rest of the Board of SEMAPA will be without resources to implement SEMAPA's plans to ensure access to water to those in Cochabamba who presently do not have it.

15. Congressman Jorge Alvarado has been the President of the Cochabamba delegation to the Bolivian Congress since he was elected to Congress in July 2002. In April 2000, after the Aguas del Tunari concession contract was terminated, Mr. Alvarado was chosen by the Coordinadora to direct SEMAPA. For nearly two years, until he began his candidacy for Congress, Mr. Alvarado worked to find an equitable and feasible way to provide water to all people in Cochabamba. Mr. Alvarado has continued to make this issue a central task of his term as Congressman. If Aguas del Tunari succeeds in this arbitration, however, Mr. Alvarado will be forced to approve Bolivia's payment of any award to the company and to approve reallocations to Bolivia's budget to make such payment possible. Any reallocation of such a major portion of Bolivia's annual budget is certain to decrease resources available for the programs that are of primary importance to Mr. Alvarado.

16. Friends of the Earth-Netherlands (hereinafter "FOE-Netherlands") is a Dutch environmental association with 30,000 members, working at the local, national and international level for ecologically sustainable development. The organization has worked to support sustainable development and to prevent the use of Dutch corporate structures in ways that are unsustainable. FOE-Netherlands has campaigned against Aguas del Tunari's use of the Bolivia-Netherlands investment agreement to gain leverage over the Government of Bolivia. An award by this Tribunal in favor of Aguas del Tunari would undermine the organization's work on these issues.

17. In addition to Petitioners' interest in this arbitration, Petitioners' counsel – Earthjustice, the Center for International Law (CIEL), José Gutierrez and Rogelio Mayta – have substantial litigation expertise in international trade law and its nexus with sustainable development and protection of the environment, human health and human rights. Earthjustice lawyers have litigated, taught, written and spoken extensively on these matters, as well as on the relationship between international investment protections and legitimate governmental measures.² Earthjustice and CIEL lawyers represented petitioners seeking *amicus curiae* status in the proceedings between Methanex Corporation and the United States under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL rules. Earthjustice lawyers also wrote and submitted the first, and several subsequent, amicus submissions to the World Trade Organization. Likewise, CIEL lawyers have been active in amicus submissions to NAFTA and WTO tribunals. In addition, Earthjustice and CIEL lawyers have been involved in international policy debates surrounding the appropriate scope of investment agreements.

² See, e.g., J. Martin Wagner, *International Investment, Expropriation and Environmental Protection*, 29 GOLDEN GATE U.L. REV. 465 (1999).

PETITIONERS' INTEREST IN THIS CLAIM SUPPORTS THEIR PARTICIPATION

Petitioners Have a Direct Interest in the Outcome of this Arbitration

18. As described above, this Tribunal's award in this case will directly impact each of the Petitioners in numerous ways. Because any monetary award against Bolivia will be paid by SEMAPA, such an award will directly affect water rights and related interests of the Coalition and Oscar Olivera; the Irrigators' Federation and Omar Fernandez; and SEMAPA Sur and Father Luis Sánchez.³ Each of these organizations and individuals has worked hard to ensure affordable and equitable access to water in the Cochabamba region. Moreover, the members of each organization depend on such access for their lives, health and livelihoods. A large financial obligation imposed on SEMAPA would require that the agency raise revenues by raising water rates or limiting access to water. This would undermine the changes these Petitioners have achieved to guarantee the right to affordable and equitable access to water, and would jeopardize their members' right to access to water.

19. An award against Bolivia in this case would also undermine the efforts of the Irrigators' Federation and Omar Fernandez to regain for small-scale irrigating communities their traditional water rights. SEMAPA's need to increase its revenues would require replacing government limitations on access to water, which is inconsistent with these rights. An award in favor of Aguas del Tunari is also likely to undermine, and perhaps even reverse, the Federation's legislative victories that have provided legal protection for the rights of these communities. If such protection is perceived to be inconsistent with the rights of foreign investors – a message that an award in favor of Aguas del Tunari will send – Bolivian legislators will be unwilling to provide for the implementation of these laws and will be pressured to rescind the protections.

20. SEMAPA's obligation to pay an award in favor of Aguas del Tunari would also leave SEMAPA without resources to implement plans to expand or improve water service to those whose access is presently inadequate. This would interfere with the rights and interests of all the Bolivian Petitioners, including Father Sánchez who, as a member of the SEMAPA Board of Directors, has been working to implement such an expansion. Likewise, the burden that the Tribunal's award could place on Bolivian financial resources available for expanding water services would interfere with the efforts of Congressman Alvarado to find an equitable and feasible way to provide water to all people in Cochabamba.

21. An award against Bolivia will also harm the direct interest of all the Bolivian petitioners in ensuring that the Government of Bolivia can implement legitimate measures to maintain public order and guarantee access to services and resources essential to the lives of all Bolivians without fear of major financial penalties for doing so.

22. An award against Bolivia would also interfere with the interests of Friends of the Earth-Netherlands. Such an award would validate the use of Dutch international agreements to challenge legitimate government actions in the public interest, and would undermine FOE-

³ Even if the Government of Bolivia were to pay an award directly, a large award would directly affect all citizens of a country like Bolivia with such a relatively small economy.

Netherlands’ work to ensure that Dutch corporate structures not be used to undermine sustainable development.

Petitioners’ Interest in Guaranteeing Transparency and Promoting Democratic Processes Support Granting Petitioners’ Requests

23. Since the initiation of this arbitration, there have been widespread expressions of public concern regarding the legitimacy of ICSID’s resolution of Aguas del Tunari’s claim.⁴ These concerns arise out of three fundamental issues: First, that Aguas del Tunari’s claim has essentially to do with matters of general public concern, and the resolution of the claim could have broad impacts on the public and on the Government of Bolivia’s ability to promote and protect the public welfare. Second, that the active role of the International Bank for Reconstruction and Development (hereinafter “World Bank”) in the dispute makes it particularly problematic for ICSID, a Bank-controlled institution, to resolve this claim. Finally, in light of the preceding, this Tribunal’s resolution of Aguas del Tunari’s claim cannot be legitimate unless it can guarantee meaningful public scrutiny of and participation in the arbitration. Each of the Petitioners has a specific interest in addressing these concerns, and granting Petitioners’ requests is an essential step in addressing them.

This Arbitration Is Likely to Have Broad Public Impacts

24. The significance of the legal questions at issue in this dispute reinforces the need for intervention by Petitioners. In addition to this claim’s direct impacts on them, Petitioners have a vital interest in its broader public policy implications. While it is impossible to know the full nature of those implications without particular knowledge of Aguas del Tunari’s claims, available information makes clear that the claim is likely to have broad impacts on the interests of all citizens of Bolivia, and potentially on the citizens of any country.

25. This case is unlike most commercial arbitration proceedings involving a public entity, in which the matters at issue generally are of primary, if not exclusive, concern to the immediate parties to the proceeding. Because the arbitration arises out of actions by the Government of Bolivia to guarantee public order and access to water, the Tribunal’s decision in this case could implicate core government functions. The decision could also alter the legal obligations that apply to the Government of Bolivia when it regulates to protect public order and human health, as well as the economic and other factors it takes into account when deciding whether to do so.

26. In Bolivia, as in other countries, the careful balance between governmental authority to regulate for the public interest and private property rights is an issue of constitutional importance.⁵ Aguas del Tunari’s claim in this case requires this Tribunal to decide whether an international investment agreement requires Bolivia to upset the balance, established by Bolivia’s democratic political processes, between property rights and governmental authority to implement public health and sanitation regulations.

⁴ See Letter to James Wolfensohn, *supra*, attached at Tab 1.

⁵ See, e.g., Political Constitution of Bolivia, Arts. 22, 25, 138, 139, 165, 166, 167, 169, .

27. Aguas del Tunari's claim also could create a disincentive for Bolivia to protect important public interests in the future. If, as a result of its efforts to guarantee public order and access to water, this Tribunal forces Bolivia to divert public resources from achieving those very goals, the Government of Bolivia will have a strong disincentive to try to protect the public interest in future cases in which doing so might affect foreign investments. Because investment agreements like the one between Bolivia and the Netherlands severely limit the ability of governments to restrict foreign investment, the Government of Bolivia does not have the option of limiting foreign investment so as to avoid this obstacle to fulfilling its democratic responsibility to protect the interests of Bolivian citizens.

28. These broad impacts of this Tribunal's award in this case are not limited to Bolivia. Because the Tribunal's award is likely to carry persuasive weight with other arbitral tribunals resolving similar claims,⁶ the Tribunal's award could have the same effects on other governments that are party to investment agreements similar to Bolivia's agreement with the Netherlands. Because there are thousands of such agreements worldwide, this award could have global implications.

The World Bank's Role in this Dispute Raises Questions Concerning the Legitimacy of this Arbitration

29. A number of factors related to the World Bank's role in the water dispute underlying this case throws into serious doubt the ability of ICSID – whose governing body is chaired by Bank President James Wolfensohn and made up of World Bank Governors – to render an impartial decision in this case. First, the Bank itself directly forced the government of Bolivia to privatize the water system of Cochabamba, making that privatization a condition for both debt relief and funds for water system expansion and thereby setting the events of this case in motion. In its 1999 *Bolivia Public Expenditure Review*, the Bank opined that “no subsidies should be given to ameliorate the increase in water tariffs in Cochabamba.” Additionally, during the water revolt in Bolivia in April 2000, the World Bank took a position on the dispute when Bank President Wolfensohn publicly supported water price increases. The Bank's role in this dispute and its obvious bias in favor of privatization and increased water tariffs creates, at the very least, an extremely reasonable concern that a Bank-controlled institution cannot be an objective arbiter of this dispute. Adding to this concern is our understanding that a high-level Bank official approved the appointment of the President of this Tribunal following the recommendation of the ICSID staff. World Bank approval of the President of the Tribunal creates the appearance of a

⁶ Although the Tribunal's interpretation of the agreements at issue in this case will not be binding on panels considering other government regulations, many arbitral tribunals have recognized decisions of other arbitral tribunals as “persuasive.” See, e.g., *In the Arbitration under Chapter 11 of NAFTA and the ICSID Arbitration Rules between Metalclad Corporation and the United Mexican States*, States, Case No. ARB(AF)/97/1, para. 108 (Aug. 30, 2000) (available at <http://www.state.gov/s/l/c3439.htm>); *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petition from Third Persons to Intervene as “Amici Curiae,” paras. 32-33 (Jan. 15, 2001) (available at <http://www.state.gov/s/l/c3439.htm>) (citing decisions of the Iran-US Claims Tribunal and the World Trade Organization's Appellate Body; *United Parcel Service of America v. Government of Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, para. 61,64 (Oct. 17, 2001) (available at <http://www.state.gov/s/l/c3439.htm>) (citing same and *Methanex* decision). Any award issued in an ICSID dispute – although not binding beyond the particular private investor and State respondent – has the potential to become part of a body of arbitral decisions under international law that is informative, and perhaps even persuasive, in other contexts.

conflict of interest that could call into question the integrity of the process.

30. Even before this dispute arose, the ICSID system had developed a public reputation as being a “secret trade court” in which urgent public matters are decided behind a shroud of secrecy, without any of the opportunities for public vigilance and participation.⁷ The facts described in the preceding paragraph have only added to the already strong public doubt that an ICSID Tribunal can resolve this dispute justly. Giving Petitioners the opportunity formally to represent the public’s concerns during the arbitration process may help assuage public apprehension that the arbitration process is a secretive one in which private interests are given priority over public concerns.

Without Petitioners’ Participation, this Arbitration Cannot Be a Legitimate Process for Resolving Aguas del Tunari’s Claim

31. Because of the broad significance of Aguas del Tunari’s claim, and the international media attention it has received, the proceedings in this case and the Tribunal’s award will be the subject of great public scrutiny. Public acceptance of the legitimacy of any decision rendered by this Tribunal is important. Bolivia has already had to suffer massive public protest that led to numerous injuries and at least one death as the result of a public sense of injustice arising out of Aguas del Tunari’s actions in Cochabamba. Aguas del Tunari’s claim has already given rise to protests in other parts of the world as well. For example, the city of San Francisco, USA, issued a resolution calling on Aguas del Tunari’s parent company, Bechtel Corporation, to pull the company out of this arbitration.⁸ A resolution of Aguas del Tunari’s claim by a tribunal that the public does not consider to be a legitimate arbiter of the dispute is likely to give rise to further public discontent. Moreover, on a broader scale, a perception that this Tribunal is not a legitimate forum for resolving this claim will fuel already growing public suspicion of international investment agreements and arbitration as a resolution to international investment disputes. Such suspicion could affect other arbitrations and the efforts of many governments to expand foreign investment worldwide. For these reasons, it is important that this Tribunal apply procedures that are broadly considered to be fundamentally fair and democratic. Allowing the participation of affected individuals and organizations is one of the most important such procedures.

32. Tribunals have recognized that arbitration claims with broad public impacts require processes that afford opportunities for public awareness and participation. In *Esso Australia Resources Ltd. v. Plowman*,⁹ the High Court of Australia noted that an arbitration concerning efforts to raise the price of natural gas sold to public utilities had a clear public impact that

⁷ See, e.g., Editorial, “A Fairer Trade Bill,” NY Times, July 25, 2002, p. A16; Anthony DePalma, “NAFTA’s Powerful Little Secret: Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say,” NY Times, March 11, 2001, Section 3, p. 13.

⁸ See Resolution Urging Bechtel Corporation and Its Bolivian Subsidiary, Aguas del Tunari, to Immediately Withdraw Their Punitive Legal Claims in International Courts Against Bolivia and Its People and to Abstain from Engaging in any Further Litigation or Mediation Claims – Either Within or Without U.S. Borders – with the South American Country, City of San Francisco Board of Supervisors, July 1, 2002, attached at Tab 2.

⁹ 183 CLR 10 (1995), 128 ALR 391 (1995).

mandated public access to the arbitration processes. In the Court's words, there should be a presumption of public disclosure of information submitted to an arbitral tribunal

when the information relates to statutory authorities or public utilities because . . . in the public sector the need is for compelled openness, not for burgeoning secrecy. The present case is a striking illustration of this principle. Why should the consumers and the public of Victoria be denied knowledge of what happens in these arbitrations, the outcome of which will affect, in all probability, the prices chargeable to consumers by the public utilities?"¹⁰

The Court also commented that a rule that made proceedings and documents confidential simply by virtue of being part of an arbitration proceeding would be "unduly narrow." Such a rule would "not recognise that there may be circumstances, in which third parties and the public have a legitimate interest in knowing what has transpired in an arbitration, which would give rise to a 'public interest' exception."¹¹

33. Similarly, the tribunal in the arbitration between the *Methanex Corporation and the United States of America* recognized the implications for arbitration processes when resolution of the claim will have broad public impacts. In an arbitration arising out of government regulations to protect the quality of drinking water, the tribunal determined that it had the authority to permit participation by *amici curiae* because

[t]here is undoubtedly a public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties. . . . There is also a broader argument. . . : the [North American Free Trade Agreement] 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."¹²

34. For the reasons noted above, the Tribunal's award in this claim will have broad implications for the general public and for the authority and capacity of governments to regulate in the future. Because of these implications, the legitimacy of the Tribunal's role in this arbitration depends in part on ensuring full public access to the Tribunal's proceedings, obtaining a complete understanding of public concerns arising out of the claim and giving those concerns real consideration. For these reasons, the Tribunal should grant Petitioners' requests for standing to intervene in this arbitration, require public disclosure of all documents and transcripts related to the arbitration, open all hearings in the arbitration to the public, and hold a public hearing on the facts of the claim in Cochabamba.

¹⁰ *Id.*, text following footnote 35.

¹¹ *Id.*, text preceding footnote 31.

¹² *Methanex*, *supra*, para. 49.

Petitioners Have Unique Expertise and Knowledge that Would Contribute to the Tribunal's Resolution of the Claim

35. Petitioners would also bring to this arbitration an important perspective not represented by either Aguas del Tunari or the Government of Bolivia. As representatives of those directly affected by the actions of Aguas del Tunari and the Bolivian government that underlie this claim, Petitioners have access to important factual information that the other parties may not have. For example, Aguas del Tunari's parent company, Bechtel Corporation, has asserted that, "[f]or the poorest people in Cochabamba [water] rates went up little, barely 10 percent," as a result of Aguas del Tunari's tariff increases. Petitioners could provide this Tribunal documents demonstrating that the average rate increase in Cochabamba was 50%, with many poor residents' rates increasing by significantly more. Because the Tribunal's award could affect non-parties so directly and have such far-reaching public impacts, the Tribunal should act in a manner that best ensures it is fully and thoroughly informed of all perspectives on the legal issues before it. Allowing Petitioners to intervene would serve that purpose.

36. In addition, Petitioners would ensure a full and vigorous defense of Aguas del Tunari's claims. Although Petitioners do not doubt that the Government of Bolivia intends to counter Aguas del Tunari's arguments, Petitioners are not encumbered by the conflicting objectives that might undermine a full defense of the claim. For example, the Government of Bolivia, like most all heavily indebted developing country governments, faces strong pressure to attract foreign investment, a situation that could create incentives that run contrary to mounting the most vigorous defense of Aguas del Tunari's claims. Furthermore, the possibility that the Government of Bolivia would argue that any award to Aguas del Tunari should be paid by SEMAPA, thereby affecting water services throughout the Cochabamba region, demonstrates the difference in the interests of the people of Cochabamba, as represented by Petitioners, and the Government in this case. For the same reasons, it is clear that the Government of Bolivia does not fully represent Petitioners' interests in this arbitration.

THE TRIBUNAL HAS THE AUTHORITY TO GRANT PETITIONERS' REQUESTS

The Tribunal Generally Has the Authority to Allow Petitioners to Participate

37. This arbitration is to be conducted according to the rules of ICSID. Nothing in the ICSID Convention or the ICSID Arbitration Rules precludes Petitioners' participation. Rather, Article 44 of the ICSID rules explicitly allows the Tribunal to decide any question of procedure not covered by those instruments or by a rule agreed by the parties. As explained below, Petitioners' request to intervene is a procedural issue, not a substantive one.

38. Although the Convention gives some weight to procedural rules agreed by the parties, there are limitations on the rules parties may adopt. As one authoritative text states:

The parties may not confer powers upon an arbitral tribunal which would cause the arbitration to be conducted in a manner contrary to public policy of the state where the arbitration is held. One important mandatory rule is that which requires that each party

should be given a fair hearing, or as the Model Law puts it, “a full opportunity to present his case.”¹³

39. The principle of providing a fair hearing carries with it certain broader implications that are relevant to the new era of investor-state arbitration. In light of the public character of disputes such as the present one, the diverse interests that may be adversely affected by such claims, and the impacts of these claims on public policy, this principle must now be given broader reading than would be necessary if this dispute was essentially private in character and implication. The principle supports the authority of this Tribunal to permit any affected party to intervene in this arbitration, and the flexibility that Article 44 gives the Tribunal to establish fair and appropriate rules allows the Tribunal to exercise that authority.

40. The unique character of claims such as this one further supports the Tribunal’s authority to permit third party participation. As set forth above, this case raises broad issues of public concern, including the capacity of the Bolivian government to act in the public interest and the access of people at all economic levels to the fundamental elements of life such as water. The *Methanex* tribunal recognized the significance of these issues when, in which, as in the present claim, a foreign investor challenged government actions taken in the public interest, it determined that it had the authority to permit *amicus* participation: “There is undoubtedly a public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties.”¹⁴ These factors make this claim significantly different from most commercial arbitrations, and weigh strongly in favor of participation by Petitioners.

Bolivian Law Supports this Tribunal’s Authority to Permit Petitioners to Intervene

41. As noted above, it is accepted that arbitral tribunals may not be given powers that “would cause the arbitration to be conducted in a manner contrary to public policy of the state where the arbitration is held.” Bolivian public policy gives third parties affected by a dispute the right to intervene in the resolution of that dispute. For example, Articles 355-369 of the Bolivian Code of Civil Procedure provide a variety of means for ensuring that interested and affected third parties have the opportunity to participate in disputes. These provisions for public participation contribute to the context in which this Tribunal must interpret the power these two countries intended it to have when they ratified the ICSID Convention and entered into the Bolivia-Netherlands investment agreement. Moreover, these provisions for domestic public participation also mean that participation by Petitioners should neither come as a surprise, nor be an unacceptable burden, to either party to this dispute.

¹³ Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (2d edition), Sweet and Maxwell, at pp. 292 – 293.

¹⁴ *Methanex*, para. 49.

The Tribunal Has the Authority to Grant Each of Petitioners' Specific Requests

Petitioners' Request for Standing

42. A request for standing to participate in an arbitration is a procedural matter to be resolved by procedural rules. Permitting a third party to intervene in arbitration does not change the parties' rights and duties, as would a substantive matter; the present parties' substantive rights continue to be defined by the same rules after a third party is added as they were before. For these reasons, the rules concerning the participation of third parties are nearly always included in *procedural* codes. For example, in Bolivia the rights of affected third parties and the rules for deciding requests to participate are set forth in Articles 355-369 of the Code of Civil Procedure.¹⁵ Because the question of direct participation of third parties in arbitration is a procedural one, the power that Article 44 of the ICSID rules gives to the Tribunal to decide procedural questions supports the Tribunal's authority to grant a request for such participation.¹⁶

43. A few arbitral tribunals have considered petitions to participate to be substantive requests, and on that basis have decided that they lack the authority to permit third party participation.¹⁷ These decisions are incorrect, as the preceding paragraph explains; the question whether to add a third party to an arbitration is a procedural one. Adding a party does not change the nature of the matter subject to arbitration, as the *Methanex* and *United Parcel Service* tribunals appeared to fear.¹⁸ The matter subject to arbitration will be the same "substantive dispute between the Claimant and the Respondent"¹⁹ – the one defined by the Bolivia-Netherlands Investment Treaty and the statement of claim – and the addition of a third party cannot change that fact. Similarly groundless is the concern that adding a party requires a tribunal to make new substantive rules. The rights of that party will be determined by the same rules that apply to any other party to the arbitration.

44. The *Methanex* tribunal also stated that it had "no mandate to decide . . . any dispute determining the legal rights of third persons." As noted above, however, because of the direct

¹⁵ Similarly, in the courts of the United States, participation by third parties whose interests will be affected by the outcome of a case is a procedural issue. See U.S. Federal Rule of Civil Procedure 24.

¹⁶ Even if the question of third party participation were substantive, the Tribunal would have the authority to permit such participation. Under Article 42(1) of the ICSID Convention, when there are no clear rules to guide the Tribunal's substantive decision in a dispute, the Tribunal is to "apply the law of the Contracting State party to the dispute . . . and such rules of international law as may be applicable." As noted above, Bolivian law gives tribunals the power to permit third party participation. And as noted below, international law, while not providing much guidance, generally supports the same conclusion. As described below, the tribunals in the *Methanex* and *United Parcel Service* arbitrations determined that they could not grant third parties standing because of their (incorrect) conclusions that the question of standing was substantive and because, under the applicable UNCITRAL arbitration rules, they did not have the authority to apply any substantive rules other than those established by the parties. Unlike UNCITRAL, Article 42 of the ICSID Convention gives this Tribunal the responsibility to fill substantive *lacunae* with domestic and international law.

¹⁷ See, e.g., *Methanex*, *supra*, para. 27.

¹⁸ See, e.g., *United Parcel Service*, *supra*, paras. 61 (receiving *amicus* submissions from a third person "is not equivalent to making that person a party to the arbitration. . . . The rights of the disputing Parties are not altered (although in exercise of their procedural rights they will have the rights to respond to any submission) and the legal nature of the arbitration remains unchanged"), 65 (in permitting participation as *amici curiae* "the particular matter which is subject to arbitration remains unchanged").

¹⁹ *Methanex*, *supra*.

impact of Aguas del Tunari's claim on Petitioners, this Tribunal cannot avoid deciding a dispute affecting Petitioners' rights. It is for precisely that reason that the Tribunal should permit Petitioners to intervene.

45. It is also true that World Trade Organization dispute panels have permitted *amicus curiae* submissions (as described below), but have never authorized (or been asked to authorize) the addition of a non-governmental third party. However, a clear distinction can and should be drawn between the state-to-state dispute settlement regime of the DSU, and the investor-state dispute apparatus established under the Netherlands-Bolivia Investment Treaty. While the former is justifiably limited to the Parties to the DSU and other agreements of the WTO, the latter explicitly invites non-Party participation by allowing foreign investors to invoke the dispute resolution machinery created by this treaty. Accordingly, in the case of investor-state claims, for reasons of equality and fairness, the intervention by affected and interested third parties is warranted.

46. Intervention by third parties in international arbitrations is not without precedent. Indeed, as early as 1959, one tribunal applied what it called the "generally recognized principle" of according standing to anyone who could show a legitimate interest that might be affected by the decision in the case.²⁰

47. Finally, the Tribunal's authority to permit Petitioners to participate in this arbitration is supported by International Human Rights Principles. For example, Article 14 of the International Covenant of Civil and Political Rights stipulates:

All persons shall be equal before the courts and tribunals. In the determination of ... his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

48. As previously noted, this Tribunal's award will determine Petitioners' rights. As such, it is essential that Petitioners have an opportunity to be heard by the Tribunal.

Petitioners' Alternative Request for Status as Amici Curiae

49. Should this Tribunal refuse any Petitioner's request to intervene as parties to the arbitration, Petitioners request that the Tribunal permit that Petitioner to participate in the role of *amicus curiae*. The authority of the Tribunal to grant such a request is well established under international law.

50. As with the question of third party participation, there are no ICSID rules addressing *amicus* participation. And like that issue, the source of the Tribunal's authority to grant Petitioners' request is Article 44 of the ICSID Convention, which gives the Tribunal authority to decide any question of procedure not explicitly covered by ICSID's rules or by a rule agreed to by the parties. The absence of explicit authorization and the power of the tribunal to regulate the arbitration process have been recognized by other tribunals to support their authority to permit

²⁰ *Levis & Levis & Veerman v. Federal Republic of Germany* – Decision of the Arbitral Commission on Property Rights and Interests in Germany, 28 ILR 587 (Decision of 27 Jan. 1959).

amicus participation.²¹

51. In the arbitration between the Methanex Corporation and the United States of America under international investment provisions nearly identical to those at issue in this case (those included in NAFTA's Chapter 11), the tribunal decided that the absence of explicit rules concerning the participation of third parties, coupled with the broad authority provided by Article 15 of UNCITRAL's arbitration rules to conduct the arbitration as the tribunal considered appropriate, established the power of the tribunal to permit third parties to participate in the arbitration.²² The *Methanex* tribunal found this practice to be supported by the practice of the Iran-U.S. Claims Tribunal and the World Trade Organization.²³

52. The *Methanex* tribunal recognized several relevant factors supporting its authority to permit third parties to participate:

There is undoubtedly a public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties. . . . There is also a broader argument. . . : the [NAFTA] 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.²⁴

As described in other parts of this petition, these factors all apply in the present arbitration as well.

53. As in *Methanex*, the tribunal in *United Parcel Service of America v. Government of Canada*, determined that UNCITRAL's Article 15 provided authority to permit third party participation.²⁵

54. The practice of the WTO Appellate Body supports this Tribunal's authority to allow Petitioners to participate. The Appellate Body has affirmed that it and WTO dispute settlement panels have the authority to accept and consider submissions from third parties, despite the absence of any explicit provision for such submissions in the WTO Dispute Settlement Understanding (DSU).²⁶

²¹ For example, without any formal authorization from the Rules, the [Iran-U.S. Claims] Tribunal . . . permitted briefs from non-parties as *amici curiae*," among other things. Stewart Abercrombie Baker & Mark David Davis, UNCITRAL Arbitration Rules in Practice 76 (1992). The Iran-U.S. tribunal modified the UNCITRAL Rules to permit oral or written *amicus* participation "when the Tribunal determined that the statement is likely to assist the tribunal in carrying out its task. Although the UNCITRAL Rules contain no similar provision, *they do not prohibit a tribunal from accepting or considering amicus curiae briefs from non-parties.*" *Id.* at 98 (quotation omitted; emphasis added).

²² See *Methanex*, *supra*, paras. 29-31, 47.

²³ See *id.* paras. 32-33.

²⁴ *Id.* para. 49.

²⁵ See *United Parcel Service*, *supra*, para. 61-63.

²⁶ See *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998), paras. 83, 110, App. 10; *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and*

55. The reasoning underlying the Appellate Body’s acceptance of third party submissions in the *Hot-Rolled Lead* dispute applies equally to this arbitration. The Appellate Body noted that nothing in the applicable rules explicitly permitted it to or prohibited it from accepting or considering submissions from non-parties to the appeal.²⁷ Those rules did, however, give the Appellate Body “broad authority to adopt procedural rules which do not conflict with” any of the applicable rules.²⁸ On this basis, the Appellate Body concluded that it had legal authority to accept and consider third party briefs in an appeal in which the Appellate Body finds it “pertinent and useful to do so.”²⁹

56. The same analysis applies to Petitioners’ request to participate in the present arbitration. There are no provisions of ICSID or the Bolivia-Netherlands investment agreement that specifically address third party participation. Like the WTO’s DSU and the Appellate Body’s Working Procedures, ICSID Article 44 gives this Tribunal broad authority to conduct the arbitration in such a manner as it considers appropriate, as long as it does not conflict with any applicable rule. As the Appellate Body determined in the *Hot-Rolled Lead* case, the question of *amicus* participation is a procedural issue.³⁰ The Tribunal therefore has the authority to permit such third party participation as it considers pertinent and useful.³¹

57. The Appellate Body has also noted the importance of broad authority that allows a tribunal to consider third party submissions. In the *Shrimp* case, the Appellate Body noted that

ample and extensive authority to undertake and to control the process by which [a panel] informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts . . . is indispensably necessary to enable a panel to discharge its duty . . . to make an objective assessment of the matter before it, including an *objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements*.³²

58. None of the arbitral decisions cited here has allowed an *amicus curiae* to do anything other than make written submissions to the tribunal, whereas Petitioners are requesting that if the

Bismuth Carbon Steel Products Originating in the United Kingdom, WT/DS138/AB/R, paras. 38-42 (May 10, 2000), App. 11.

²⁷ *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R at para. 39.

²⁸ *Id.* The Appellate Body cited Article 17.9 of the WTO’s Dispute Settlement Understanding, which gives the Body authority to establish its working procedures. It also cited Article 16.1 of the Working Procedures, which gives the particular panel hearing an appeal authority “to develop an appropriate procedure in certain specified circumstances where a procedural question arises that is not covered by the *Working Procedures*.” *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R at para. 39, fn. 33.

²⁹ *Id.* para. 42.

³⁰ The Appellate Body determined that its authority to adopt procedural rules included authority to accept and consider *amicus* submissions. *See id.* paras. 39, 42.

³¹ The Tribunal’s authority to regulate the arbitration proceedings as it considers appropriate does not depend on the consent of the parties. *See, e.g., Dadras Int’l v. Iran*, Iran-U.S. Cl. Trib., 1995 Iran Award 567-213, 1995 WL 1132818, paras. 59-61, App. 12 (allowing the submission of an affidavit over Iran’s objection that it would not be able to cross-examine the affiant).

³² *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998), para. 106 (quotation omitted; emphasis added by the Appellate Body).

Tribunal refuses to allow them to participate as parties, their participation as *amici curiae* include permission to attend hearings and make oral presentations. Although the WTO dispute panels have not received requests to do other than make written submissions, both the *Methanex* and *United Parcel Service* tribunals explicitly denied requests to attend hearings and make oral presentations. The decisions of those tribunals on this point are irrelevant to Petitioners' request.

59. The *Methanex* and *United Parcel Service* cases were decided under the UNCITRAL rules. Pursuant to Article 25(4) of those rules, the tribunals hearings are to be held *in camera*. The tribunals in those cases decided that the requirement was meant to exclude non-parties, and therefore determined that *amici curiae* could not attend or make oral presentations at those hearings.³³ Neither the ICSID Convention or Rules, nor the Bolivia-Netherlands BIT imposes any similar restriction on this Tribunal's hearings.³⁴ The reasoning that supports *amicus* participation generally applies equally to attendance and participation at hearings.

60. Petitioners note that both the *Methanex* and *United Parcel Service* tribunals refused to permit *amici curiae* to make submissions during phases of the arbitration during which jurisdictional arguments were resolved. It is obvious that the resolution of jurisdictional arguments can have strong implications for Petitioners' interests, and can also have direct impacts on the broader public concerns described above. For those reasons, Petitioners explicitly request that, should they be permitted to participate only as *amici*, they be permitted to participate at every stage of the proceedings.

Petitioners' Request for Public Disclosure of Submissions to the Tribunal, Opening the Tribunal's Hearings to the Public, and that the Tribunal Visit Bolivia to Conduct Public Hearings Concerning the Facts of this Claim

61. As noted above, there is strong and wide-spread public skepticism concerning the legitimacy of this Tribunal's resolution of Aguas del Tunari's claim, based in large part on the secrecy of the Tribunal's proceedings and their potentially broad impacts. If not addressed, that skepticism could weaken public acceptance of this Tribunal's award, as well as the operations of other arbitral tribunals. As the tribunal stated in *Methanex*,

the [NAFTA] 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.³⁵

³³ *Methanex*, *supra*, para. 41; *United Parcel Service*, *supra*, paras. 67, 69.

³⁴ In *Metalclad*, the arbitral tribunal reprinted a determination it had previously made that dealt with the issue of confidentiality. In that determination, the tribunal recognized that there is no general principle of confidentiality in the investment provisions of the relevant international agreement (NAFTA) or in the ICSID (Additional Facility) Rules, nor in the UNCITRAL Rules or the draft Articles on Arbitration adopted by the International Law Commission. It also acknowledged that a public company has positive obligations to provide certain information and that both the Claimant and the respondent government may be under duties of public disclosure. *Metalclad*, *supra*, para. 13.

³⁵ *Methanex*, *supra*, para. 49.

62. While granting Petitioners' requests to intervene is one important step in preventing the kind of harm envisioned by the *Methanex* tribunal, the broad public impacts of this case and widespread public concern regarding it mandate that this Tribunal provide full transparency by publicly disclosing all submissions to the Tribunal, opening hearings to the public, and visiting Bolivia to provide affected communities a direct opportunity to present their concerns to the Tribunal.

PETITION

63. For the foregoing reasons, Petitioners respectfully request that this Tribunal:

- (i) grant them standing to participate as parties in any proceedings that may be convened to determine the claim made by Aguas del Tunari in this matter, and all rights of participation accorded to other parties to the claim;
- (ii) in the alternative, should the status as party be denied to one or more Petitioners, grant them the right to participate in such proceedings as *amici curiae*, in accordance with the principles of fundamental justice, at all stages of the arbitration, including but not limited to permission
 - a. to make submissions concerning the procedures by which this arbitration will be conducted;
 - b. to make submissions concerning the jurisdiction of this Tribunal and, once they are fully known, the arbitrability of the matters the disputing investor has raised;
 - c. to make submissions concerning the merits of Aguas del Tunari's claims;
 - d. to attend all hearings of the Tribunal;
 - e. to make oral presentations during hearings of the Tribunal;
 - f. to have immediate access to all submissions made to the Tribunal.
- (iii) require public disclosure of the statements of claim and defense; memorials and counter-memorials; pre-hearing memoranda; supplemental submissions; witness statements and expert reports; transcripts of hearings; appendices and exhibits to any submissions made to the Tribunal; and any other submissions made to the Tribunal;
- (iv) open all hearings in this arbitration to the public;
- (v) visit Cochabamba, Bolivia, and hold public hearings concerning the facts underlying this claim;
- (viii) that the Tribunal permit Petitioners to respond to any arguments by either party to this arbitration concerning this petition, including through attendance at and participation in any hearings in which this petition is discussed; and

- (vi) grant them an opportunity to amend this petition as further details of this claim become known to the Petitioners.

Respectfully submitted,

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August 29, 2002

Professor David D. Caron
C/o Ms. Margrete Stevens
Senior Counsel
International Centre for the Settlement of Investment Disputes, MC6-611
The World Bank Group
Washington, D.C. 20433 U.S.A.

January 29, 2003

J. Martin Wagner
Director, International Program, Earthjustice
426 17th Street, 6th Floor
Oakland, CA 94612

Dear Mr. Wagner:

- [1] I write in response to your letter of August 28th 2002 to the Secretary-General of the International Centre for Settlement of Investment Disputes (ICSID) requesting that he forward to the Tribunal a petition for intervention in ICSID Case No. Arb/02/03, *Aguas del Tunari v. The Republic of Bolivia*. The Secretary-General promptly forwarded your request to me and the other members of the Tribunal, José Alberro and Henri Alvarez. You were entirely correct in directing your request to the Tribunal, rather than ICSID itself, as ICSID plays only an administrative and support function in any tribunal's handling of cases.
- [2] The Tribunal has given extended consideration to your request. Moreover, the Tribunal requested, and subsequently received, the views of the parties to the dispute. As indicated on the ICSID public register for this case, the Tribunal was constituted under the Rules, without objection from the parties, on July 5, 2002, and held the First Session in this matter on December 9, 2002. Your letter and the request in it were discussed at that meeting and considered by the Tribunal. I write to you and your co-petitioners on behalf of the Tribunal with our response to the particular requests specified in your petition (copy attached hereto).
- [3] First, it is the Tribunal's unanimous opinion that your core requests are beyond the power or the authority of the Tribunal to grant. The interplay of the two treaties involved (the Convention on the Settlement of Investment Disputes and the 1992

Bilateral Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and Bolivia) and the consensual nature of arbitration places the control of the issues you raise with the parties, not the Tribunal. In particular, it is manifestly clear to the Tribunal that it does not, absent the agreement of the Parties, have the power to join a non-party to the proceedings; to provide access to hearings to non-parties and, *a fortiori*, to the public generally; or to make the documents of the proceedings public.

[4] Second, the consent required of the Parties to grant the requests is not present. Although the Tribunal did not receive any indication that such consent may be forthcoming, the Tribunal remains open to any initiative from the parties in this regard.

[5] Third, the Tribunal is of the view that there is not at present a need to call witnesses or seek supplementary non-party submissions at the jurisdictional phase of its work. We hold this view without in anyway prejudging the question of the extent of the Tribunal's authority to call witnesses or receive information from non-parties on its own initiative.

[6] The Tribunal wishes to emphasize that it has given serious consideration to your request. The brevity of our reply should not be taken as an indication that your request was viewed in other than a serious manner. Rather, the Tribunal has endeavored to answer the request in a manner that is both responsive and efficient. In addition, given your status as a non-party to this dispute, we necessarily have been careful in our response not to breach the undertakings in our declarations as arbitrators, signed under Arbitration Rule 6(2), to maintain the confidentiality of the proceedings.

[7] 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. It is no less our duty to follow the structure and requirements of the instruments that control this case.

[8] The Tribunal thanks you for your letter and the attached petition. Your letter and petition will remain on file with the Secretariat. The ICSID Secretariat and the Parties

have been informed of our views.

~~On behalf of myself and the other members of the Tribunal, I am~~

Respectfully yours,



David D. Caron

President of the Tribunal in the matter of

Aguas del Tunari vs. The Republic of Bolivia

**INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES**

BERNHARD VON PEZOLD AND OTHERS (CLAIMANTS)

v.

**REPUBLIC OF ZIMBABWE (RESPONDENT)
(ICSID CASE NO. ARB/10/15)**

- AND -

**BORDER TIMBERS LIMITED, BORDER TIMBERS INTERNATIONAL (PRIVATE)
LIMITED, AND HANGANI DEVELOPMENT CO. (PRIVATE) LIMITED
(CLAIMANTS)**

v.

**REPUBLIC OF ZIMBABWE (RESPONDENT)
(ICSID CASE NO. ARB/10/25)**

PROCEDURAL ORDER NO. 2

Members of the Arbitral Tribunals

Mr. L. Yves Fortier, C.C., Q.C., President
Professor David A.R. Williams, Q.C., Arbitrator
Professor An Chen, Arbitrator

Secretary of the Tribunals

Eloïse Obadia

Assistant to the Tribunals

Alison FitzGerald

Representing the Claimants

Mr. Matthew Coleman
Mr. Anthony Rapa
Mr. Kevin Williams
Ms. Helen Aldridge
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Mr. Charles O. Verril, Jr.
Wiley Rein LLP, Washington, D.C., U.S.A.

Representing the Respondent

The Honorable Johannes Tomana
Advocate Prince Machaya
Ms. Sophia Christina Tsvakwi
Ms. Fatima Chakupamambo Maxwell
Ms. Elizabeth Sumowah
Attorney General's Office

Harare, Republic of Zimbabwe

I. INTRODUCTION

1. On 23 May 2012, the European Center for Constitutional and Human Rights (“ECCHR”) and four indigenous communities of Zimbabwe (the “**indigenous communities**”) (together, the “**Petitioners**”) filed a Petition for leave to make submissions as *amicus curiae* in these conjoined arbitral proceedings (the “**Application**”) pursuant to Rule 37(2) of the Rules of Procedure for Arbitration Proceedings (the “**Rules**”). The Arbitral Tribunals have considered the Application and, having deliberated, have decided as follows.

II. PROCEDURAL HISTORY

2. On 14 March 2012, the ECCHR sought information from the Arbitral Tribunals on the provisional timetable applicable to these proceedings with a view to making a request for leave to make submissions as *amicus curiae*, asserting that “these cases ... raise critical questions of international human rights law, which engage both the duty of the Zimbabwean state and the responsibility of the investor company, with regard to the affected indigenous peoples.”
3. Further to the Arbitral Tribunals’ invitation, the Parties provided their comments on the ECCHR’s request for information.
4. The Claimants advised by letter dated 29 March 2012 that they objected to the ECCHR’s request, submitting that the Parties had agreed during the First Session that no non-disputing party (“**NDP**”) submissions would be made. The Claimants took the view that, in light of this agreement, the Arbitral Tribunals had no residual discretion under Article 44 of the ICSID Convention to allow such submissions to be made.
5. The Respondent advised by letter dated 29 March 2012 that while the Parties had agreed during the First Session that Rule 37(2) would not apply to these proceedings, it had not anticipated that there could be any person or organisation with an interest in the matter apart from the Parties. The Respondent stated that it had no objection to the ECCHR being allowed to make submissions provided they fall within the parameters of Rule

37(2) and they do not impinge on or amount to a challenge to the sovereignty and territorial integrity of the Republic of Zimbabwe.

6. On 4 April 2012, the Arbitral Tribunals wrote to the Parties advising that they interpreted the Parties' agreement on the non-application of Rule 37(2) as having been made in a general context. Given the Republic of Zimbabwe's clarification and the interest expressed by ECCHR, there were new circumstances that justified the application of Rule 37(2) and a proper consideration of a potential NDP's application. The Tribunals noted that they had the power to allow the filing of an NDP submission even if one or both of the Parties object so long as the requirements of Rule 37(2) are satisfied. The Arbitral Tribunals therefore stated that they intended to request a detailed application from the ECCHR, enclosing a draft letter to the ECCHR for this purpose, in order to make an informed decision as to whether the ECCHR should be allowed to file a submission.
7. By letter dated 5 April 2012, the Claimants requested that the Arbitral Tribunals elicit specific information from the ECCHR in regard to its connection, if any, with Mr. Rob Sacco and the Nyahode Union Learning Centre ("NULC") in Chimanimani, with whom the Claimants are engaged in an "on-going dispute".
8. On 9 April 2012, the Arbitral Tribunals informed the Claimants that there was no need to modify the draft letter to the ECCHR, noting that once the ECCHR had reverted with its detailed application and the Parties had filed their observations, it would be possible to revert to the ECCHR and seek additional information, if necessary. Accordingly, on 9 April 2012, the Secretary to the Tribunals wrote to the ECCHR inviting the ECCHR to file a detailed application by 23 April 2012.
9. On 11 April 2012, the ECCHR requested a one-month extension of time to file its detailed application, explaining that it intended to formulate a submission on legal and factual questions relevant to these arbitrations in collaboration with joint *amici*, including indigenous groups directly affected by the outcome of the arbitrations and experts in relevant fields. The ECCHR stated that, as a result, it required further time to coordinate with its partners.

10. On 12 April 2012, the Claimants wrote to the Arbitral Tribunals opposing the requested extension of time on the ground that the invitation to file a detailed application was extended to the ECCHR alone, and not an invitation for other potential *amici curiae* to file an application to acquire NDP status. The Claimants also stated that if the ECCHR “goes unchecked” it will cause the Claimants to incur unnecessary costs, identifying what constituted, in their view, a “mismatch” in the information requested by the Arbitral Tribunals of the ECCHR and what the ECCHR should provide if it is acting in concert with other potential *amici curiae*.
11. On 16 April 2012, the Arbitral Tribunals wrote to the Parties indicating that they considered the reasons invoked by the ECCHR in its request for an extension of time to be legitimate. The Arbitral Tribunals averred that there was no “mismatch” between what had been requested of the ECCHR and what the ECCHR should provide, but indicated that the Tribunals would confirm to the ECCHR that the information solicited to be included in their detailed application applied to all of those individuals and groups that may be involved in the preparation of the application.
12. Accordingly, the Secretary of the Tribunals wrote to the ECCHR on 16 April 2012, granting the requested extension and specifying that the information required of the ECCHR in its detailed application, extends to all of those individuals and groups involved in the preparation of the application.
13. As noted above, the Petitioners filed their Application on 23 May 2012. The Claimants filed their observations on the Application on 6 June 2012 (“**Cl. Obs.**”). The Respondent elected not to file any observations.

III. THE NDP APPLICATION

14. The Petitioners seek the following in their Application:
 - (a) Permission to make a written submission as joint *amici curiae* in the present arbitration;
 - (b) Access to the key arbitration documents; and

- (c) Permission to attend the oral hearings when they take place, and to reply to any specific questions of the Tribunals on the written submissions.
15. As regards the request for access to “key arbitration documents”, access is requested to the Claimants’ request for arbitration, the notice of arbitration and statement of defense; any decisions, orders and directions of the Tribunal; the pleadings and written memorials of the Parties; and relevant witness statements and transcripts of any witness examinations (see Application, p. 8).

Identity

16. The Application is submitted by two groups: the ECCHR and the indigenous communities.
17. The ECCHR is described as an independent, non-profit legal and educational organization dedicated to protecting human rights. The ECCHR “engages European, international and national law to enforce human rights and to hold state and non-state actors accountable for egregious abuses, with a strong focus on strategic litigation in the area of business and human rights”. The ECCHR’s Board of Directors and Advisory Board are composed of various independent human rights experts from civil society, academia and legal advocacy groups (see Application, p. 4).
18. The indigenous communities are described as follows (see Application, p. 3):

“Four indigenous communities – the Chikukwa, Ngorima, Chinyai and Nyaruwa peoples – are living in areas in the region of Chimanimani, in South-Eastern Zimbabwe, on which the Claimant’s properties are located. In the present Petition, and in accordance with their traditions and customs, Chief Chadworth Ringsai Chikukwa, Chief Phineas Zamani Ngorima, Chief Simon Masodzi Chinyai, and Chief Naison Ndarera Nyaruwa, act with authority as representatives of these four indigenous communities respectively. This authority is evidenced in affidavits available from the Petitioners on the request of the tribunal. The membership of these indigenous groups is determined in accordance with the traditions and customs specific to each.” (footnote omitted)

19. The Petitioners received support from NULC, which is described as an NGO based in the Chimanimani region of South-Eastern Zimbabwe. The NULC’s facilities “enabled the indigenous communities to communicate with the ECCHR, to produce affidavits and to hold meetings to discuss” the Application (see Application, p. 4).

Significant Interest

20. The Petitioners submit that they respectively and collectively have a significant interest in the outcome of the present arbitrations.
21. The indigenous communities explain that they each have a distinct cultural identity and social history which is inextricably linked to their ancestral lands. They submit that the outcome of the present arbitral proceedings will determine not only the future rights and obligations of the disputing parties with regard to these lands, but may also potentially impact on the indigenous communities’ collective and individual rights through the following (see Application, p. 5):

“the determination of rights and access to land inhabited by indigenous communities, which may impede their enjoyment of their internationally recognized rights to land and to consultation in relation to their ancestral lands; and

the prejudicing of the particular rights of indigenous peoples under international law to be able to access judicial remedies for human rights violations, because the indigenous communities affected in this arbitration, as non-disputing parties, are not able to participate in or contest the decisions of this Tribunal as of right.”

22. The ECCHR states that its significant interest in the arbitral proceedings is determined by its mission to develop the strategic use of legal actions for corporate human rights responsibilities. The ECCHR states that the question of access to land by the indigenous communities came to its attention through its participation in a workshop held in June 2011 in Cameroon, in which participants considered several issues, such as possible challenges to cases of corporate abuses, including land grabbing, the precarious existence of displaced people and agricultural contamination on the African continent (see Application, p. 5).

23. The ECCHR submits that “[t]hese issues are also of significant public interest beyond the present dispute, to other indigenous communities and individuals living in areas potentially affected by foreign investments, to investors and governments, in Zimbabwe and elsewhere” (see Application, p. 5). It notes that regional and international human rights institutions, including the United Nations and the Inter-American Court of Human Rights, have identified the relationship between investment treaties and indigenous peoples’ rights as critical to effect human rights protection, and the application of Bilateral Investment Treaties (“BITs”) should be in compliance with international human rights law. According to the ECCHR, the present arbitrations touch upon (see *ibid.*, p. 6):

“issues that have been identified as “the Top Ten Business and Human Rights issues of 2011 and again for 2012 by the Institute for Human Rights and Business: namely, to address the negative impacts of land use and acquisition on communities, to emphasize community consultations within human rights due diligence, and to strengthen legal accountability and redress for alleged human rights abuses by corporations.”

24. Finally, the ECCHR reasons that international dispute settlement mechanisms offer *amicus curiae* status as the sole possibility for affected communities to be heard (see *ibid.*, p. 6).

Legal Perspective

25. The Petitioners state that they will argue that both Parties to these arbitrations incur shared responsibility vis-à-vis the indigenous communities who, it is asserted, have rights under international law in relation to lands on which the Claimants’ properties are located. In this regard, the Petitioners submit that international human rights law on indigenous peoples applies to these arbitrations in parallel to the relevant BITs and the ICSID Convention (see Application, p. 7):

“Article 42(1) of the ICSID Convention provides that the ‘Tribunal shall decide a dispute in accordance with such rules of law as may be agreed upon by the parties’, and that ‘in the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws), and such rules of international law as may be applicable.’ Under the BITs entered into by the Republic of Zimbabwe with the Federal Republic of Germany and with the Swiss Federation respectively, the tribunal is mandated to reach its decisions on the basis of the BITs themselves, 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 of which the investment in question is situated.”

26. The Petitioners contend that, in light of the “interdependence of international investment law and international human rights law”, any decision in these conjoined arbitrations which neglects the content of the international human rights norms will be “legally incomplete” (see Application, p. 7). Accordingly, they urge the Arbitral Tribunals to give due consideration to the duties of States and the responsibilities of companies with respect to the rights of indigenous communities.
27. Specifically, vis-à-vis the Respondent, the Petitioners refer to Article 26 of the U.N. Declaration on the Rights of Indigenous Peoples, adopted in 2007, which provides for the indigenous right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership and other traditional occupation or use, and requires States to give legal recognition and protection to these lands, territories and resources (see Application, p. 7).
28. As regards the Claimants, the Petitioners submit that principles have been developed by several institutions, including the Organisation of Economic Cooperation and Development and the World Bank, which provide that companies should assess whether indigenous people may lay claim to territory in accordance with criteria set out in international rules, and should not assume that the absence of official recognition of indigenous communal ownership rights implies that such rights do not exist (see Application, pp. 7-8).

IV. THE PARTIES' OBSERVATIONS

A. The Claimants' Observations

29. The Claimants oppose the Application in its entirety, including the Petitioners' request for access to documents and to attend hearings, summarizing their position as follows (see Cl. Obs., para. 3):

“3.1 The Applicants are not independent of the Respondent because of their association with Mr Sacco and the Nyahode Union Learning Centre, and in regard to the Chiefs, because they are State organs appointed and dismissed at the State's will. Alternatively, they do not have the appearance of being independent.

3.2 The Applicants do not propose to make submissions on legal or factual issues that relate to the proceedings.

3.3 The Applicants' proposed legal submissions on the law of indigenous peoples does not concern the applicable law.

3.4 If the applicable law does include the law of indigenous peoples, the Applicants have not proven that the Tribes are 'indigenous' as that term is understood in public international law.

3.5 The Applicants will not bring a perspective, particular knowledge or insight that is different from that of the Respondent or relevant because they are not independent, and in regard to the ECCHR, it has no expertise in regard to Zimbabwe.

3.6 The Applicants have no significant interest in these proceedings because they lack independence, their proposed legal submissions are on matters that are outside of the applicable law and their 'mission' concerns corporate human right [sic] responsibilities that are not in issue in these proceedings.

3.7 Investment treaty tribunals should not adjudicate as to who are indigenous peoples, what are their rights, and what obligations they are owed (if any). States should be the first-line decision makers on these issues.” (paragraph references omitted)

30. As a preliminary matter, the Claimants deny that they have been involved in any human rights abuses, averring that the Petitioners' allegation that these arbitrations touch upon

redress for alleged human rights abuses by corporations is inappropriate (see Cl. Obs., paras. 6-9).

31. As regards the identity of the Petitioners, the Claimants observe that the ECCHR does not profess to have any experience or prior interest in Zimbabwe or investment treaty arbitration. The Claimants also observe that the rights of “indigenous peoples” under public international law are in their nascent stages of development and that, in any event, the indigenous communities have not established that they have “indigenous peoples” status under public international law. In the Claimants’ view, investment treaty tribunals, such as the present Arbitral Tribunals, are likely to be ill-equipped to deal with the issues surrounding the establishment of “indigenous peoples” status under public international law unless significant resources and time are devoted to the issue (see Cl. Obs., paras. 12 and 13).
32. As a historical matter, the Claimants note that their titles have never been subject to, or conditional on, the claims of the indigenous communities. However, the Claimants have “always acknowledged that some parts of the Border Estate are of particular cultural significance” to those communities, and the Claimants have therefore granted access to those parts of the Estate to the communities (see Cl. Obs., paras. 29-30).
33. Turning to the criteria for granting NDP status, the Claimants submit that the Petitioners must be independent and must meet the specific criteria set out in Rule 37(2). The Claimants contend that neither the ECCHR nor the indigenous communities are independent, and therefore the Application should be denied on this basis. Specifically, the Claimants note that the indigenous communities have expressed the desire to occupy parts of the Border Estate, to the detriment of the Claimants. The Claimants contend this represents a conflicting interest with their own interests in relation to the title and occupation of the Border Estate (see Cl. Obs., paras. 34-36).
34. The Claimants argue that the independence of the indigenous communities is further compromised by the fact that the chiefs of the communities are appointed and may be dismissed by the President of Zimbabwe pursuant to the Constitution of Zimbabwe and the *Traditional Leaders Act 1998*. As the *Traditional Leaders Act 1998* prescribes in

detail the functions of the chiefs, the Claimants submit that these functions are in fact functions of the government and the acts/omissions of the chiefs are attributable to the Respondent under Article 4 of the International Law Commission's Articles on State Responsibility. The effect, in the Claimants' view, is that the indigenous communities are either not independent of the Respondent or have the appearance of not being independent of the Respondent (see Cl. Obs., paras. 37-44).

35. The Claimants submit that a further basis for impugning the independence of the Petitioners is their connection with the NULC and Mr. Sacco, its founder and director or otherwise "its alter-ego" (see Cl. Obs., para. 47). The Claimants describe Mr. Sacco as "an activist of the ruling political party ZANU-PF, an organisation that is an organ of the Republic and has been involved, from the outset in the Invasions." (see ibid.). The "Invasions", the Claimants note, are one of the central events giving rise to the Respondent's alleged liability for breaches of the applicable BITs. Among other alleged involvement in the events forming part of the factual matrix of these disputes, the Claimants state that (see ibid., paras. 50-52):

"Mr Sacco and Nyahode Union Learning Centre have been vehemently opposed to the Claimants owning and operating the Border Estate. They have been frustrated by the Claimants' refusal to run the Border Estate as a 'Joint Forest Management' project. Mr Sacco and the Nyahode Union Learning Centre proposed that they and the Tribes participate in this project, a situation from which Mr Sacco would personally benefit through sourcing timber for his own sawmill.

'Joint Forest Management' is a byword for handing over the Border Estate without compensation. It is a crude attempt to retrospectively justify the Land Reform Programme as being a policy to advance the 'indigenous peoples'. Nothing could be further from the truth. If the LRP had been a policy to advance the 'indigenous peoples' it would not have received the condemnation that it has from the Respondent's own courts, human rights groups and international tribunals in Africa. From 2000 onward, the real purposes of the Land Reform and Resettlement Programme, and indeed the policy, became to expropriate all of the large scale commercial farms that were directly or indirectly owned by white people, and to enrich senior members of the government, ZANU-PF and military and civil servants. These matters have been documented extensively in the Claimants' Memorial.

Mr Sacco has stated that he intends to ‘internationalise’ his dispute with the Claimants. He is now attempting to do so in these proceedings through the ECCHR.” (citations omitted)

36. The Claimants contend that the ECCHR has “lost any claim to being independent from the Parties” in circumstances where it is working with the NULC and Mr. Sacco and/or, in circumstances where it is working with the chiefs of the indigenous communities, who themselves are not independent for the reasons stated above.
37. As regards the criteria identified in Rule 37(2), the Claimants submit that the Petitioners either do not satisfy the criteria or additional considerations, identified below, and these weigh against granting NDP status to the Petitioners. First, the Claimants submit that Rule 37(2)(a) is composed of three elements (see Cl. Obs., para. 60):

“will the non-disputing party’s submission be applicable to ‘factual or legal issues related to the proceeding’ (if not, they cannot possibly help the Tribunal in its determination);

will the non-disputing party’s submissions bring a ‘perspective, particular knowledge or insight that is different from that of the disputing parties’ (it must also be relevant, otherwise it will not be of assistance); and

if the first and second elements have been satisfied, will the submission assist the Tribunal in determining the factual or legal issue?”

38. As regards the first element of Rule 37(2)(a), the Claimants submit that the legal issues on which the Petitioners seek to make submissions are not “legal issues related to the proceeding”, because the Parties have not raised the issue of whether the indigenous communities have rights under international law or whether the Parties owe obligations to them under international law, nor have the Parties raised the issue of how such alleged rights and obligations affect the obligations of the Respondent to the Claimants under the applicable BITs. The Claimants also note that the applicable law in these arbitrations is comprised of the BITs, public international law, and the municipal laws of the Republic of Zimbabwe, to the extent that they are not inconsistent with the BITs and public international law, and not international human rights law on indigenous peoples (see Cl. Obs., paras. 61-64).

39. The Claimants aver that reference to “international law” in the applicable BITs does not mean that the whole body of substantive international law is applicable. Rather, the Claimants submit that the context, object and purpose of the BITs indicate that the body of law relating to the protection and promotion of foreign investments applies; by contrast, there is no indication that international human rights law on indigenous peoples applies (see Cl. Obs., paras. 65-75). Even if this latter body of law were to apply, the Claimants contend that it would not advance the position of the Petitioners because they have not established that the indigenous communities have “indigenous peoples” status under international law (see ibid., para. 76). The Claimants conclude that given the non-applicability of the Petitioners’ legal submissions, the factual submissions made in support of those legal issues must also be inapplicable.
40. As regards the second element of Rule 37(2)(a), the Claimants submit that the Petitioners will not bring a perspective, particular knowledge or insight that is different from that of the disputing parties because they are not independent. Moreover, the Claimants note that the ECCHR does not profess to have any particular experience in relation to Zimbabwe or investment treaty arbitration, therefore its perspective, knowledge and insight will not be relevant (see Cl. Obs., para. 86).
41. Turning to the third element of Rule 37(2)(a), the Claimants submit that the Petitioners will not assist the Arbitral Tribunals because their submissions will not be applicable to “factual or legal issues related to the proceeding” and because they will not bring “a perspective, particular knowledge or insight that is different from that of the disputing parties” (see Cl. Obs., para. 87).
42. As regards the second criterion set out in Rule 37(2)(b), the Claimants consider that this essentially repeats the first element of Rule 37(2)(a) in that, for a submission to “address a matter within the scope of the dispute”, the submission must be applicable to “factual and legal issues related to the proceeding”. For the reasons summarized above, the Claimants contend that the Petitioners’ proposed submissions fail to meet this criterion (see Cl. Obs., paras. 89-90).

43. With respect to the criterion set forth in Rule 37(2)(c), the Claimants submit that the Petitioners cannot have “significant interest in the proceeding” because they are not independent. Even if they were considered to be independent, the Claimants reason that as they only want to make submissions in regard to international human rights law on indigenous peoples, their submissions are irrelevant because this does not form part of the applicable law. The Claimants add that these arbitrations do not concern “corporate human rights responsibilities”, they concern the responsibility of the State for breaches of the BITs. As such, the ECCHR’s stated mission does not translate into a significant interest in the proceedings (see Cl. Obs., paras. 91-94).
44. Finally, the Claimants observe that the criteria set out in Rule 37(2) are non-exhaustive and that the Arbitral Tribunals have the discretion to consider other matters when determining whether or not to allow an NDP to make a submission. The Claimants therefore submit that, in addition to the foregoing, the Arbitral Tribunals should consider whether it is appropriate for an investment treaty tribunal to adjudicate on whether the indigenous communities are “indigenous peoples” under public international law and on the content of the Parties’ obligations to them, if any. In the Claimants’ view, it was never anticipated that investment treaty tribunals established pursuant to the ICSID Convention would opine on the rights of indigenous peoples to land or to classify peoples as being indigenous or not. The Claimants aver that a mechanism has been established under the U.N. Declaration on the Rights of Indigenous Peoples for such a purpose, and that States, not international investment treaty tribunals, should be the “first-line decision makers” in regard to indigenous peoples (see Cl. Obs., paras. 97-100).
45. The Claimants note that the Rules are silent on the issue of access to documents by NDPs, but they object to the disclosure of any of the requested documents on the grounds that they contain personal and commercial information that is confidential, none of which was filed in anticipation of it being viewed by third parties (see Cl. Obs., paras. 103-105).
46. Finally, the Claimants object to persons other than the Parties attending the hearings. They contend that pursuant to Rule 32(2), their objection in this regard constitutes a bar to the Petitioners attending any hearings (see Cl. Obs., para. 106).

B. The Respondent's Observations

47. On 8 June 2012, the Respondent confirmed that it has no observations on the Application, other than those observations set out in its letter of 29 March 2012 (see paragraph 5 above).

V. ANALYSIS

48. The Arbitral Tribunals have the discretion, upon consulting with the Parties, to allow an NDP to make a submission pursuant to Rule 37(2), provided that certain minimum criteria are met. Specifically, Rule 37(2) states as follows:

“(2) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the ‘non-disputing party’) to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;

(b) the non-disputing party submission would address a matter within the scope of the dispute;

(c) the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.”

49. The Arbitral Tribunals agree with the Claimants’ observation that an NDP should also be independent of the Parties. This is implicit in Rule 37(2)(a), which requires that the NDP bring a perspective, particular knowledge or insight that is different from that of the Parties. Other ICSID tribunals have also considered this to be a requirement of to admit *amicus* submissions (see eg. *Aguas Provinciales de Santa Fe S.A.*, *Suez, Sociedad*

General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as *Amicus Curiae*, 17 March 2006, Cl. Obs. Tab 11):

“The Suitability of Specific Nonparties to Act as Amici Curiae.
The purpose of *amicus* submissions is to help the Tribunal arrive at a correct decision by providing it with arguments, and expertise and perspectives that the parties may not have provided. The Tribunal will therefore only accept *amicus* submissions from persons who establish to the Tribunal’s satisfaction that they have the expertise, experience, and independence to be of assistance in this case. ...”. [At para. 23]

50. The Claimants have raised concerns about the independence of the Petitioners from several perspectives. First, the Claimants contend that the interests of the indigenous communities are adverse to their own and aligned with those of the Respondent. Second, they claim that the indigenous communities are effectively organs of the State and therefore cannot be independent of the Respondent. Third, they claim that the connection between the Petitioners and Mr. Sacco or the NULC undermines their independence. The Claimants also argue that whether or not the Petitioners are in fact independent, these circumstances give the appearance that they are not independent.
51. The Claimants’ first contention is based on the allegation that members of the indigenous communities invaded parts of the Border Estate in 2000 and following, as part of the Respondent’s Land Reform Programme (“LRP”). The Claimants allege that the indigenous communities “wish to permanently occupy parts of the Border Estate,” an intent that runs counter to the Claimants’ request for relief in these arbitrations, namely that full unencumbered legal title and exclusive control to the Border Properties be restored to them. In the Application, the Petitioners assert that both Parties have responsibilities towards the indigenous communities relating to their alleged rights over or in relation to their ancestral lands. The Arbitral Tribunals are not persuaded, on the basis of the indigenous communities’ desire to have their claimed rights recognized by the Parties or indeed by these Tribunals, that they are “aligned” with the Respondent; however, as the indigenous communities appear to lay claim over or in relation to some of the lands in respect of which the Claimants assert a right to full, unencumbered legal

title and exclusive control, they appear to be in conflict with the Claimants' primary position in these proceedings.

52. The Arbitral Tribunals are not persuaded on the basis of the materials before them that the functions of the chiefs of the indigenous communities are functions of the government. Indeed, a finding that the acts of the chiefs of the indigenous communities are attributable to the Republic of Zimbabwe as a matter of international law, with all of the consequences that may flow from such a finding, would be premature in light of the abbreviated nature of a Rule 37(2) inquiry.
53. In the Application, the chiefs attest and affirm that "they have no relationship, direct or indirect, with any party to this arbitration which might give rise to any conflict of interest" (see Application, p. 6). The Respondent's constitutional power to appoint and dismiss the chiefs of the indigenous communities arguably constitutes such a relationship. However, it does not follow that because the President of Zimbabwe has the power to appoint and dismiss the chiefs that the indigenous communities are not independent for the purposes of a Rule 37(2) application. The Arbitral Tribunals note in this regard that the power to appoint and dismiss the chiefs is not absolute, but constrained through detailed criteria set out in the *Traditional Leaders Act 1998*.
54. As regards the Claimants' third challenge to the Petitioners' independence, the Petitioners state that they have received support from the NULC in the nature of facilitating communications between the ECCHR and the indigenous communities, the production of affidavits and the holding of meetings to discuss the Application. It is unclear from the Application what, if any, involvement Mr. Sacco may have had. The details provided in respect of the NULC confirm that Mr. Sacco is Director of this organization, and that the focus of its activities is "Awareness Raising/Development Education and Development Cooperation Projects". The NULC also apparently serves as a "resettlement agency", providing "pre and post settlement training". Funding for the NULC is provided primarily through private donation (75%), with only 10% coming from the Government of Zimbabwe (see Cl. Obs., Tab 10). The NULC itself does not, therefore, appear to be closely linked with either Party.

55. The Claimants have, however, alleged that the NULC is the “alter-ego” of Mr. Sacco and that he has threatened to “internationalise” his dispute with them regarding the Border Estate’s refusal to enter into a Joint Forest Management Project (see Cl. Obs., Second Witness Statement of Heinrich Bernard Alexander Josef Von Pezold, Tab 34, para. 8-9). Mr. Sacco’s 2005 paper titled “Peasant Revolution in Zimbabwe” leaves little doubt as to his support for the resettlement of land in Zimbabwe and the Respondent’s land reform policies. This paper also confirms that the NULC is Mr. Sacco’s creation and that he is a central figure in its activities (see Cl. Obs., Tab 8).
56. Based on the foregoing, the Arbitral Tribunals consider that the circumstances of their Application give rise to legitimate doubts as to the independence or neutrality of the Petitioners. The apparent lack of independence or neutrality of the Petitioners is a sufficient ground to deny the NDP Application. In addition, having considered the Application in light of all of the criteria set out in Rule 37(2), the Arbitral Tribunals are not persuaded that the Petitioners should be permitted to make a submission in these proceedings because they have not satisfied any of the criteria in Rule 37(2).
57. The Petitioners do not propose to make submissions that would assist them “in the determination of a factual or legal issue related to the proceeding”, as is required by Rule 37(2)(a). The Petitioners, in effect, seek to make a submission on legal and factual issues that are unrelated to the matters before the Arbitral Tribunals. 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. Moreover, neither Party has put the identity and/or treatment of indigenous peoples, or the indigenous communities in particular, under international law, including international human rights law on indigenous peoples, in issue in these proceedings.
58. The Petitioners provided no evidence or support for their assertion that international investment law and international human rights law are interdependent such that any decision of these Arbitral Tribunals which did not consider the content of international human rights norms would be legally incomplete. The Petitioners contend that the

Arbitral Tribunals’ mandate derives from “powers delegated to it by Contracting Parties with concrete human rights obligations under international law” (see Application, p. 7). The Petitioners refer in particular to Article 26 of the UN Declaration on the Rights of Indigenous Peoples, which they say requires States to give legal recognition and protection to lands, territories and resources possessed by indigenous peoples by reason of traditional ownership or other traditional occupation or use, and other unspecified customary international law norms which they claim are binding.

59. The Arbitral Tribunals are not persuaded that consideration of the foregoing is in fact part of their mandate under either the ICSID Convention or the applicable BITs. The Respondent has not yet filed a substantive pleading in these proceedings. However, it was afforded the opportunity to make observations on the Application, including any observations as to the perspective the Petitioners propose to bring to the factual and legal issues in these proceedings. The Respondent affirmed its initial observations that any NDP submission must fall within the parameters of Rule 37(2) and must not impinge on its territorial integrity. Whether or not the proposed NDP submission would have the effect of impinging on the Respondent’s territorial sovereignty is unclear. However, the Respondent has neither raised as a defence in these proceedings that it has obligations towards the indigenous communities under international law nor has it indicated that a submission from the Petitioners based on their Application may be relevant to factual or legal issues in these proceedings.
60. The Arbitral Tribunals similarly do not consider that the proposed NDP submission would “address a matter within the scope of the dispute”. The disputes in these conjoined arbitrations arise out of the allegedly unlawful measures taken by the Respondent against the Claimants and their investments pursuant to the LRP. As noted above, the Petitioners propose to make a submission on the putative rights of the indigenous communities as “indigenous peoples” under international human rights law, a matter outside of the scope of the dispute, as it is presently constituted. Indeed, as the Claimants have noted, in order for the Arbitral Tribunals to consider such a submission, they would need to consider and decide whether the indigenous communities constitute “indigenous peoples” for the purposes of grounding any rights under international human rights law. Setting aside

whether or not the Arbitral Tribunals are the appropriate arbiters of this decision, the decision itself is clearly outside of the scope of the dispute before the Tribunals.

61. Finally, the Arbitral Tribunals find that the Petitioners do not have a “significant interest in the proceeding”. This requirement must be interpreted in light of the proceeding as constituted, not as the NDP would prefer the proceeding to be constituted. The Arbitral Tribunals note that the ECCHR’s expertise is focused on corporate responsibilities for human rights abuses. The Claimants have strenuously objected to the suggestion that they have committed or are responsible for any such abuses. The Arbitral Tribunals do not understand the Petitioners’ statement that the Application “touches upon ... redress for alleged human rights abuses by corporations” to be an allegation that the Claimants in these cases have committed or are responsible for human rights abuses. Indeed, the reference for this statement is to a general list of business and human rights issues compiled by the Institute for Human Rights and Business, and the statement itself, read in its entirety, identifies other concerns of this organization, including the negative impacts of land use and acquisition on communities and community consultation relating to land use and acquisition (see Application, p. 6). However, the ECCHR’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”.
62. As regards the indigenous communities, the Claimants themselves recognize that they 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 (see Cl. Obs., paras. 29-30). It may therefore well be that the determinations of the Arbitral Tribunals in these proceedings will have an impact on the interests of the indigenous communities. However, as noted above, the Arbitral Tribunals have reservations as to the independence and/or neutrality of the Petitioners, including the chiefs of the indigenous communities. There is a latent tension in the Rule 37(2) criteria which require that an NDP be independent yet also possess a significant interest in the proceedings. Regardless of whether one or both of these criteria are met, however, Rule 37(2) also provides that an NDP submission must not unfairly prejudice either party. In this case, the Arbitral Tribunals are of the view that the circumstances surrounding these Petitioners are such

that the Claimants may be unfairly prejudiced by their participation and the Application must therefore be denied.

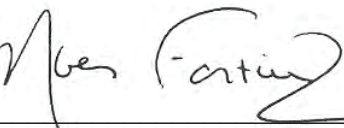
63. In light of the Arbitral Tribunals' conclusions above with respect to the Petitioners' request to make a written submission, it is unnecessary for the Arbitral Tribunals to consider their subsidiary requests for access to documents and to attend the hearings in these proceedings. For further certainty, however, the Arbitral Tribunals note that under Rule 32(2), where a Party objects to the request of an NDP to attend the hearings in a proceeding, a tribunal has no discretion to grant such a request over that party's objection. Accordingly, the Petitioners' request to attend the hearings in these proceedings must be denied in any event because the Claimants' objection constitutes an absolute bar to granting the request.

VI. THE ARBITRAL TRIBUNALS' DECISION

64. Based on the foregoing, the Arbitral Tribunals deny the Application.
65. There shall be no order as to costs.

Dated as of 26 June 2012

Signed on behalf of the Arbitral Tribunals

A handwritten signature in black ink, appearing to read "L. Yves Fortier", is written over a horizontal line.

L. Yves Fortier, C.C., Q.C.

President



CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW

March 2, 2011

The Honorable V.V. Veeder, Esq.
Essex Court Chambers
24 Lincoln's Inn Fields
London WC2A 3EG
United Kingdom

VIA EMAIL IcsidSecretariat@worldbank.org

Re: *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12
APPLICATION FOR PERMISSION TO PROCEED AS *AMICI CURIAE*

Dear President Veeder:

Prospective *amici* are member organizations of the *Mesa Nacional Frente a la Minería Metálica de El Salvador* (the El Salvador National Roundtable on Mining) (“La Mesa”), a coalition of community organizations, research institutes, and environmental, human rights, and faith-based nonprofit organizations who collectively aim to improve public policy dialogue concerning metals mining in El Salvador.ⁱ *Amici* respectfully apply for permission to proceed as *amicus curiae* in the above-captioned matter, pursuant to Article 37(2) of the ICSID Arbitration Rules, United-States Central American Free Trade Agreement (CAFTA) Article 10.20.3, and the Tribunal’s Procedural Order dated February 2, 2011. Specifically, prospective *amici* seek permission to file the written submission attached as Appendix and the opportunity to make an oral presentation at the upcoming jurisdictional hearing.

Claimant has put this matter before the Tribunal by asserting that it has a legal dispute with the Republic of El Salvador relating to an investment in El Salvador, namely the Claimant’s efforts made with respect to the proposed El Dorado mine and certain other mining projects that it wished to pursue in El Salvador. The facts underlying Claimant’s claim are deeply intertwined with the social and political change that has occurred since the advent of representative democracy in post-civil war El Salvador. In this respect, the Tribunal’s decision, including a decision to accept or reject jurisdiction over a claim of this nature, would impact the transition toward democracy in El Salvador.

An encouragingly democratic nationwide debate over metals mining and sustainability has arisen in El Salvador. Particular knowledge of this political debate is directly relevant to the subject-matter of this arbitration. As active participants in this social dialogue, prospective *amici* are uniquely placed to provide the Tribunal with a perspective different from that of the disputing Parties. The people of El Salvador are grappling with fundamental questions such as: whether metals mining is appropriate in a country with the highest population density in the Americas and a profound shortage of water; whether affected communities are sufficiently informed to understand the choices they face; whether they are sufficiently organized to defend their right to participate in the public policy dialogue affecting such choices; and whether they are sufficiently empowered that their informed choices will be respected.

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As civil society organizations who are constituted by, and work daily with, affected communities and individuals to help them understand and mobilize to face these challenges, prospective *amici* have a unique understanding of, and a significant interest in, these proceedings. As *amici* will argue if given the opportunity, Claimant's claim does not present any "legal dispute" or cognizable "measure" sufficient to confer jurisdiction under Article 25 of the ICSID Convention and Article 10.14 of CAFTA, but rather appears to reflect Claimant's dissatisfaction with the general direction that Salvadoran public policy has taken in recent years. Prospective *amici* are uniquely qualified to offer the Tribunal a broad contextual understanding—and defense—of the substance and historical significance of the government's response to the democratic debate over metals mining and sustainable development in El Salvador.

The interest of prospective *amici* in this proceeding is also unique because that interest is uniquely vulnerable. As *amici* will argue if given the opportunity, Claimant is using this proceeding to gain an advantage in what is fundamentally not a dispute between it and the Republic, but rather between it and the independently-organized communities who have risen up against Claimant's projects, *i.e.*, *amici*. The momentous gains that *amici* and their allies have achieved in the last decade are at stake in this arbitration. These gains concern not just the mining debate but also much broader areas of civic participation, respect for human and environmental rights, and representative democracy. If Claimant is allowed to leverage international investment law to essentially hang a price tag on its opponents' successes in domestic public policy debates (even if that price tag is just the not-insignificant cost of litigating a claim to the merits), the democratic gains *amici* and their constituent communities have earned, for literally the first time in El Salvador's history, could be drastically undermined.

Prospective *amici* are juridical citizens of El Salvador. No organization has received any financial or other support connected to this submission or any future involvement in these proceedings.

For these reasons, prospective *amici* request that the Tribunal: (1) grant this request for permission to file an *amicus curiae* brief in this case; (2) consider the submission included in the Appendix; and (3) allow the undersigned to make an oral presentation at the upcoming hearing on jurisdiction.

Very truly yours,

A handwritten signature in black ink, reading "Marcos Orellana", with a horizontal line underneath.

Marcos A. Orellana
Center for International Environmental Law (CIEL)

On behalf of prospective amici

ⁱ Prospective *amici* are as follows.

Comité Ambiental de Cabañas (The Cabañas Environmental Committee, “CAC”) is a community-based organization formed in 2005 to address environmental issues in Cabañas, El Salvador, including municipal waste and mining;

La Asociación Amigos de San Isidro Cabañas (The Association of Friends of San Isidro, Cabañas) (“ASIC”) is a community development organization founded in 1992 in San Isidro, the community closest to the proposed El Dorado gold mine, that promotes wider participation in public policy dialogue through education and community-building.

La Asociación de Comunidades para el Desarrollo de Chalatenango (The Association of Communities for the Development of Chalatenango) (“CCR”) is a nonprofit founded in 1988 that works in areas of community health, education, and human rights.

La Asociación de Desarrollo Económico y Social (The Association for Economic and Social Development) (“ADES”) is a nonprofit founded in 1993 in Sensuntepeque, the nearest substantial city to the proposed El Dorado mine, that works with affected communities in the Cantón of Santa Marta.

La Asociación para El Desarrollo de El Salvador (The Association for the Development of El Salvador) (“CRIPDES”) is a San Salvador-based development organization founded in 1984, at the height of the civil war, that now works more than 270 local women’s committees and 250 local youth committees in seven of the El Salvador’s 14 departments, including Cabañas.

La Fundación de Estudios para la Aplicación del Derecho (The Foundation for the Study of the Application of the Law, “FESPAD”) is a social, legal, and political action center dedicated to protecting human rights and using the law as an instrument to help the neediest in society.

Unidad Ecológica Salvadoreña (The Salvadoran Ecological Union, “UNES”) is an NGO whose mission includes the defense of nature, improvement in quality of life, strengthening of communities, and the equal participation of men and women in the policy dialogue at the regional, national, and international levels.

Movimiento Unificado Francisco Sánchez (The Unified Movement Francisco Sánchez, “MUFRAS”) is an organization founded in 2001 that focuses on increasing citizen participation to solve social, political, and environmental challenges.

APPENDIX:
SUBMISSION OF MEMBER ORGANIZATIONS OF LA MESA AS AMICUS CURIAE

Pac Rim Cayman LLC v. Republic of El Salvador
ICSID Case No. ARB/09/12

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I. INTRODUCTION

This dispute is not a “legal dispute” under Article 25 of the ICSID Convention but rather is an expression of Pac Rim Cayman’s (or Pacific Rim Mining Corp.; for simplicity, *amici* will refer to the Claimant as “Pac Rim”) disagreement with general (and universally applicable) shifts in Salvadoran public policy. In essence, this so-called “dispute” concerns Pac Rim’s dissatisfaction with the fact that El Salvador’s public policy has begun to recognize the destructive environmental and social effects that metals mining poses to local communities, as well as the emptiness of mining’s promise as a path to sustainable development in El Salvador. Furthermore, there are no “measures” in this case that relate to Pac Rim, but rather a general political debate concerning sustainability, metals mining and democracy in El Salvador.

CAFTA does not purport to allow foreign investors to dictate the environmental and social policy over natural resources of Central American States. Yet this is what lies at the heart of this arbitration: the attempt by Pac Rim to extract compensation as a result of its dissatisfaction with the government’s legitimate exercise in political democracy. Plainly, this is not a legal issue, but a political debate over the meaning of sustainable development at this point in time in El Salvador’s history.

II. FACTUAL BACKGROUND

In its 50-page retelling of the “facts” in its Counter Memorial, Pac Rim presents itself as the victim of two-faced politicians who alternate between scheming against Pac Rim and caving into feverish mobs of agitators who apparently are too ignorant or irrational to recognize all the alleged opportunities that Pac Rim’s promise of “green mining” has to offer.

Amici will endeavor to use this submission to make sure that the Tribunal understands that: (A) the grassroots, peaceful opposition to Pac Rim’s proposed mine—and the government’s response to it—were and are entirely legitimate and should be celebrated as a new dawn for representative democracy in El Salvador, not saddled with a hundred-million-dollar price tag; (B) the environmental concerns underlying that opposition were, and are, well-founded, but were not adequately addressed in Pac Rim’s Environmental Impact Assessment (the “El Dorado EIA”); and (C) Pac Rim’s involvement in Salvadoran and regional politics in support of its proposed mine has been deeply problematic, and the proposed mine itself has already generated disturbing levels of intra-community conflict and violence.

A. Opposition to the El Dorado Mine Grew Organically from the Direct Experiences of Local Communities, and its Success is a Success for Civic Participation and Representative Democracy in Post-Civil War El Salvador

Opposition to Pac Rim’s plans for El Salvador arose organically from the first-hand experiences of affected local communities and their commendable efforts to organize and protect themselves. Indeed, the first stirrings of opposition were engendered by Pac Rim itself when in 2003 and 2004, as it ramped up exploratory drilling work, its technicians and engineers trespassed on the private property of local residents, drilling exploratory wells without permission and in a manner that was both “suspicious and arrogant.”¹ Yet more critically, as reported by the International Union for the Conservation of Nature (IUCN) in a detailed examination of the context and consequences of the proposed El Dorado mine by Professor Richard Steiner, as early as 2004 “people living near mining exploration activities began to

¹ Nester Martinez, *A Compelling History of Mining in El Salvador*, U.S.-El Salvador Sister Cities Network (Jan. 2010), courtesy link at <http://bit.ly/eaNvyf> (<http://elsalvadorsolidarity.org>).

notice environmental impacts from the mining exploration--reduced access to water, polluted water, impacts to agriculture, and health issues.”²

Clearly, the negative effects felt by the people at the exploratory stage were only a preview of what they could expect if the El Dorado mine were to be developed. At the individual level, people who owned land in Pac Rim’s concession area simply refused to sell Pac Rim their land or allow it to operate there. As Oxfam America has noted, this refusal to sell is a tool of opposition that has emerged as one of the key building blocks by which local communities in Central America have been able to prevent the establishment of mines in their communities.³ At the local community level, in 2005 community members formed the Environmental Committee of Cabañas (*Comité Ambiental de Cabañas*), which in turn joined with other civil society organizations to form La Mesa as a national umbrella organization.

Comité Ambiental de Cabañas and La Mesa focused their energy on highlighting the problems with Pac Rim’s proposed mine and conveying their views to a national audience, including representatives in government who typically confined their presence and attention to San Salvador, the capital city. La Mesa engaged the broader question of whether metals mining offered an appropriate development path for El Salvador, in light of mining’s deleterious environmental and social impacts, as documented by scholars and discussed briefly below. Using a combination of locally-based organizing and small-scale protesting, *Comité Ambiental de Cabañas* and La Mesa were able to not just bring the issue of metals mining to the nation’s attention but make it a “central issue of Salvadoran politics.”⁴

Opposition to mining was by no means confined to community organizations or individual landowners. In 2007, the Catholic Bishops Conference of El Salvador issued a statement in opposition to metals mining in El Salvador, noting the danger of water pollution, particularly related to use of cyanide. The Catholic Church emphasized the inappropriateness of mining in El Salvador, given its small size and high population density.⁵ A year later, the Archbishop of San Salvador Fernando Sáenz Lacalle gave a series of statements in which he reiterated the church’s opposition to metals mining in El Salvador, emphasizing the “irreversible damage [mining] will cause to humans and the environment.”⁶ The church specifically “castigated Pacific Rim’s economic justification for gold mining operations. ‘No material advantage,’ the bishops warned, ‘can be compared with the value of human life.’”⁷

These swells of resistance—each peaceful, organic, and unrelated to government action—led to a situation where by late 2007, 62.5% of Salvadorans were against allowing metals mining in El Salvador, despite the lobbying campaign deployed by Pac Rim as discussed briefly below. The resistance was so broad, effective, and deeply-felt that in 2008, then-President Elías Antonio Saca of the right-wing ARENA party announced his own view that metals mining should not proceed in El Salvador without

² Richard G. Steiner, *Gold, Guns, and Choice: The El Dorado gold mine, violence in Cabañas, CAFTA claims, and the national effort to ban mining*, International Union for the Conservation of Nature (Feb. 2010), at 15, *courtesy link at* <http://bit.ly/f42Ken> (<http://www.miningwatch.ca/>) (“IUCN Report”).

³ See *Metals mining and sustainable development in Central America*, Oxfam America (2009), at 25, *courtesy link at* <http://bit.ly/hFCKH1> (www.oxfamamerica.org); *id.* at 13 (discussing the use by Guatemalan local communities of laws requiring the purchase of surface rights of land over a mineral deposit before the deposit can be mined to become “gatekeepers” of proposed mining developments in their regions).

⁴ Michael Busch, *El Salvador’s Gold Fight*, Foreign Policy in Focus, Institute for Policy Studies (2009), *courtesy link at* <http://bit.ly/9msWaY> (www.fpif.org).

⁵ See Michelle Petrotta, *Congressional Brief: Mineral Mining In El Salvador*, SHARE Foundation (2009) *courtesy link at* <http://bit.ly/eG0X3B> (elsalvadorsolidarity.org).

⁶ *Id.*

⁷ Busch, *supra* note 4.

significant further study of possible environmental impacts and codification of more robust mining laws.⁸ Then in January 2010, President Carlos Mauricio Funes of the left-wing FMLN party set up a "Strategic Environmental Evaluation of the Metallic Mining Sector of El Salvador."⁹ The Ministry of Economy's Department of Hydrocarbons and Mines reported to the Legislative Assembly that the Strategic Environmental Evaluation is to be finalized in May 2011. A Blue Ribbon Commission of prominent international scientists and experts was set up by the Ministry of Environment and Natural Resources (MARN) to assure that the Strategic Environmental Evaluation is carried out in an objective and scientific manner.

The fact that La Mesa could form and help achieve such results is a step to be celebrated in El Salvador's long climb out of war-torn chaos toward a representative democracy—a democracy where representatives not only are elected according to the will of the people, but also act during their terms according to the public interest as expressed in myriad forms, including popular expression and demonstrations and the work of civil society.

B. The Environmental Concerns Behind Pac Rim's Proposed Mine Are Real and Not Addressed By Pac Rim's EIA

1. Potentially Devastating Environmental Impact of the Proposed Mines

Pac Rim's proposed El Dorado mine alone would encompass 144 square kilometers, located just 3 km from the community of San Isidro, where over 10,000 people live, just 12 km from the town Sensuntepeque, where almost 50,000 people live, and just 65 km from the capital of San Salvador.¹⁰ The Department of Cabañas, in which the El Dorado mine and Pac Rim's other proposed mines would be located, has a high population density of approximately 194 persons per square km, roughly the same as Luxemburg. The majority of these persons are subsistence farmers who live in rural villages, work the land for less than \$2 a day, and rely on clean surface water and groundwater for drinking, bathing and sustaining their crops and animals.¹¹

One of the major socio-environmental issues facing El Salvador generally, and the area of the proposed mining project specifically, is access to clean water for human consumption and agriculture. According to the Joint Monitoring Programme for Water Supply and Sanitation of the World Health Organization ("WHO") and UNICEF, as of 2008 only 42% of El Salvador's rural population had access to on-premises piped drinking water, and 24% had no access to drinking water sources in any way monitored for quality and safety.¹² At the same time, the World Bank estimates that a staggering 90% of El Salvador's surface water bodies are contaminated, with 98% of municipal wastewater and 90% of industrial wastewater discharged into El Salvador's rivers and creeks without treatment.¹³ The World

⁸ Public Citizen, *CAFTA Investor Rights Undermining Democracy and the Environment: Pacific Rim Mining Case* (May 25, 2010), p. 3 available at www.citizen.org/documents/Pacific_Rim_Backgrounder1.pdf.

⁹ The Spanish Agency for International Cooperation and Development is funding this process, and the contract for the assessment has been awarded to Tau Consultora Ambiental of Spain. See *Update on El Salvador*, Press Release, Condor Resources, PLC, Sept. 16, 2010, at <http://www.infomine.com/index/pr/Pa928579.PDF>.

¹⁰ See <http://www.pacrim-mining.com/s/Eldorado.asp>.

¹¹ See IUCN Report at 5.

¹² See *A Snapshot of Drinking-water and Sanitation in the MDG region Latin-America & Caribbean – 2010 Update*, WHO / UNICEF Joint Monitoring Programme for Water Supply and Sanitation (2010), courtesy link at <http://bit.ly/et4slu>.

¹³ *El Salvador, Recent Economic Developments in Infrastructure - Strategy Report (REDI-SR)*, Report No. 37689-SV, ¶ 6.16, World Bank (Oct. 20, 2006).

Bank further reports that in the twenty years ending in 2006, yields from El Salvador's springs declined by 30% due to deforestation, causing water tables in some areas to decline by one meter per year.¹⁴

The areas in which Pac Rim proposes to mine are among those in which such dramatic annual declines in water tables have been observed.¹⁵ Moreover, the proposed mining areas are all within the basin of Rio Lempa, El Salvador's largest and most important river and the source of drinking water for approximately half of El Salvador's 6 million people, including the population of San Salvador.¹⁶ The area affected by the proposed El Dorado mine includes an aquifer that provides critical water supply for local communities and which is located between, and linked to, the Copinolapa and Tilahuapa rivers, which flow into the Rio Lempa.¹⁷

As noted above, residents of Cabañas have already reported negative environmental impacts from the approximately 660 exploratory wells that Pac Rim has drilled in the region, ranging from reduced access to fresh water, polluted water, impacts to livestock, and adverse health impacts.¹⁸ The potential adverse environmental consequences of full exploitation of El Dorado project would be far more dramatic. As affirmed by El Salvador's Ombudsman for the Defense of Human Rights, an independent monitoring body established as part of the Peace Accords that ended El Salvador's civil war,¹⁹ the environmental and social risks of the proposed mine include:

- the planned use of 2 tons of cyanide per day in the mine's operation which, combined with other factors including "higher levels of acidity and heavy metals from [released] hydrocarbons" could lead to contamination not only of surrounding surface waters but also local aquifers;
- unpredictable realignment of the flow of local aquifers caused by the excavation of the mine by explosives, which could open up existing fissures;
- contamination of local aquifers from released mine water, which contains nitrates and heavy metals, as well as cyanide and acid from contaminated materials used to refill mine galleries;
- air pollution which could cause respiratory problems for nearby local populations and lead to additional contamination of surface waters;
- contamination of groundwater caused by leaching from "tailings" (drilling wastes) ponds, including acid rock drainage;
- the danger of catastrophic failure of the dams of such ponds; and
- severe modifications of local landscape caused by necessary deposits of large quantities of overburden materials and related de-vegetation, and other impacts.²⁰

Given these severe threats to local communities in Cabañas, a heavy burden lay on Pac Rim to convince community members that their lives and livelihoods would not be wholly destroyed. Merely invoking the words "green mining" and describing sunny "best case" scenarios would not suffice. But as

¹⁴ *Id.* at ¶ 6.18.

¹⁵ IUCN Report at 5.

¹⁶ *Water Resource Assessment of El Salvador*, United States Southern Command (Oct. 2008), at 4, *courtesy link at* <http://bit.ly/hN0Qji> (noting that San Salvador withdraws about 1.5 cubic meters per second from the Rio Lempa); *Mining in El Salvador*, USESSC Fact Sheet (2010), *courtesy link at* <http://bit.ly/dGXiOk>.

¹⁷ *Statement concerning situation surrounding the "El Dorado" mining extraction project and assassinations in Cabañas*, El Salvador National Ombudsman for the Defense of Human Rights (Procuraduría para la Defensa de los Derechos Humanos or "PDDH Report") (2009), at 27, *attached as* Appendix I to the IUCN Report.

¹⁸ IUCN Report at 19.

¹⁹ See Michael Dodson & Donald Jackson, *Horizontal Accountability in Transitional Democracies: The Human Rights Ombudsman in El Salvador and Guatemala*, 46:4 *Latin Am. Pol. and Soc'y* 1, 1-27 (Winter, 2004).

²⁰ IUCN Report at 27-28 (PDDH Report).

shown below, the only concrete assurance Pac Rim was able to provide, its EIA, failed to address the communities' real concerns.

2. Pac Rim's EIA Utterly Failed to Adequately Assess the Mine's Environmental Impacts and Provide Assurance to Local Communities

Professor Robert E. Moran, Ph.D., a U.S.-based hydrogeologist conducted a technical review of Pac Rim's El Dorado EIA and concluded, in no uncertain terms, that "[t]his EIA would not be acceptable to regulatory agencies in most developed countries."²¹ Specifically, Dr. Moran highlighted:

- its "near complete lack" of baseline water quantity data, preventing any meaningful assessment of the effect of the mine's expected consumption of 327,970,000 liters of water per year;²²
- its "near complete lack" of baseline water quality data, preventing any meaningful assessment not only of changes in water quality in the future but also any impacts already suffered due to Pac Rim's intensive exploratory drilling;²³
- its "failure to consider the costs to the community of 'free water use' by the mining company" through the use of ground water sources;²⁴ and
- "the lack of transparency in the public consultation process" concerning the 1400-page EIA, which Moran reports was only available for public review in a single location in El Salvador for a period of 10 days and which could not be photographed or copied.²⁵

A review of Dr. Moran's report shows plentiful support not only for the conclusions highlighted above but also many additional and equally disturbing concerns ("half-truths," as Dr. Moran puts them) as well.²⁶ For example, the "detoxification" process Pac Rim intended to use is known to produce byproducts including cyanate, thiocyanate, sulfate, ammonia, nitrate, and "free cyanide," the toxicity of which is not well understood, especially in combination.²⁷ Another chilling aspect of the EIA is that while it acknowledges that the region has a history of seismic activity, it "fails to present a specific summary of past seismic events" such as would allow for serious risk analysis and mitigation, including

²¹ Ex. B, Robert E. Moran, *Technical Review of the El Dorado Mine Project Environmental Impact Assessment* (October 2005), at 15 *courtesy link at* <http://bit.ly/guZ0gC> ("EIA Review").

²² *Id.* at iii; *see also id.* at 7 ("the EIA fails to answer in any credible, quantitative manner, the basic question: **How much groundwater is available at the site and what will be the long-term impacts to ground water resources?**") (emphasis in original).

²³ *Id.* at iii; *see also id.* at 7-9.

²⁴ *Id.* at iii. As Moran explains:

Frequently, industries in Latin America will be required to pay a nominal and artificially-low price for the use of surface waters---prices much lower than are paid by agricultural users. However, often the mining companies will simply avoid even these modest water costs by constructing wells near rivers or lakes, which then extract the surface waters indirectly, because the nearby ground waters are usually interconnected with the surface waters.

Id. at 10. The EIA does not discuss what effect this would have water table levels that are already falling in the area. *Id.* at 10-11.

²⁵ *Id.* at iii, v. Although government regulations naturally bears a good part of the blame for these specific limitations, Pac Rim appears to have made no effort to further disseminate the EIA, despite its professed commitment to the "cardinal rule [] of Corporate Social Responsibility... to maintain an open dialogue with the local communities" Shrake Decl. ¶ 69.

²⁶ *Id.* at 12.

²⁷ *Id.* at 9.

with respect to the consequences of a seismic event leading to tailings pond dam failure.²⁸ Dr. Moran also noted that many environmental impacts “do not become visible until after a mine closes.”²⁹

All this is not to say that the affected communities simply *reacted* to Dr. Moran’s review of the EIA.³⁰ They reacted to their own perceptions and direct experiences, and to the experience of other Central American communities negatively impacted by mining projects. *Amici* believe it is critical that the Tribunal recognize that these perceptions and experiences, and the communities’ decision to stand up and oppose Pac Rim, are independently legitimate and entitled to much more weight than either disputing party to this case concedes. They are not “inconvenient” facts that the Republic must “explain away;” nor are they a basis for Pac Rim to pin liability on the Republic. The communities do not and need not apologize for standing up in defense of their own rights, lives and livelihoods.

C. Pac Rim’s Involvement in Salvadoran Politics and Its Strategy for Dealing with Local Opposition Are Deeply Problematic and Have Already Caused Violent Fissures in Local Communities

As described in detail in its own briefing, Pac Rim reacted to the growing tide of grassroots opposition described above by initiating a two-pronged, patronage-based “divide and conquer” strategy at the national and local levels.

At the national level, Pac Rim, purportedly on the basis of its CEO’s “experience” with “relatively new regulatory regimes,” engaged in an intense lobbying effort to sway national officials, especially those in the country’s right-wing ARENA party that was then in power.³¹ The intent of the lobbying was, in effect, to convince officials to ignore the popular will in opposition to the El Dorado project, as so vocally expressed in public demonstrations, described in the media, and documented in reputable opinion surveys. Pac Rim’s lobbying also sought to convince officials to ignore the serious shortcomings of the El Dorado EIA described above, and to put aside inconvenient “details,” like the fact that Pac Rim had long since let its right to appeal MARN’s denial of an environmental permit lapse. The decision of then-President Saca and others in the ARENA-dominated government to stand firm in the face of such pressure is, as discussed above, a hopeful sign in the development of El Salvador’s nascent democracy.

²⁸ *Id.* at 11-13.

²⁹ *Id.* at 3. In addition to all of the above, Dr. Moran found that the EIA failed to (a) adequately assess the potential for rocks and waste materials from the mine to generate “acid rock drainage” and other types of ground and surface water contamination, *id.* at 9-10; (b) account for cumulative risks caused by the development of the El Dorado mine in combination with other planned mines, *id.* at 13-14; (f) provide for financial assurance to address unexpected environmental impacts that occur after the mine’s closure, *id.* at 14; or (g) acknowledge that the World Bank standards utilized in the EIA were and are in many respects substantially weaker than those employed in the United States, Canada, and other countries, *id.* at 12-13.

³⁰ Indeed, the communities did not need Dr. Moran’s analysis to confirm their inherent mistrust of a document produced by paid consultants to serve Pac Rim’s purposes. Dr. Moran himself recognizes that the fact that “mining companies are allowed to choose, direct and pay the consultants who prepare the EIAs . . . [means that] most metal mining EIAs are notorious for presenting overly optimistic discussions of future impacts,” and thus that civil society has justifiably learned not to fully trust them. *Id.* at 4. Nor is this lesson confined to the developing world, as many Gulf of Mexico residents may have recognized in retrospect when they learned that BP had told the United States on its permit application that it had the capability to effectively mitigate the effects of a blowout of up to 162,000 barrels/day—three to ten times the maximum flow rate of the blowout that did occur, and that BP spent months failing to mitigate. *See, e.g.,* Alison Fitzgerald, “BP Ready for Spill 10 Times Gulf Disaster, Plan Says,” *Bloomberg BusinessWeek*, May 31, 2010, *courtesy link at* <http://buswk.co/aJF5cH>.

³¹ Declaration of Thomas Shrake ¶ 75.

At the local level, Pac Rim's tactics have become intertwined with an explosion of violence that has brought widespread international condemnation and is disturbingly reminiscent of El Salvador's violent past. In this regard, foreign investment that causes violence and denial of human rights is not conducive to sustainable development and should not receive the protection of international law.

While the local residents "feel strongly" that Pac Rim's actions have played a significant role "in politically destabilizing the region," Pac Rim continues to trumpet the benefits that it could bring to local people in the area of its proposed mine.³² A patronage-based divide-and-conquer strategy is evident. At public forums, people have spoken of what they see as Pac Rim representatives'

attempt to buy their "social license to operate," through which they have provided up to \$1 million/year to various local initiatives aimed at winning local consent for the project. These initiatives include community projects, parties, and ***substantial discretionary funding reportedly paid to several mayors of the region.***³³

These discretionary payments, not surprisingly, have created pockets of entrenched (and well-financed) support for the proposed mine, especially in the regional ARENA-dominated local governments.³⁴ Pac Rim officials reportedly sought to even widen the intra-community divide by "[telling] their employees that local environmental leaders, in particular members of the Environmental Committee of Cabañas, were to blame for their lack of work."³⁵

The result of Pac Rim's divide-and-conquer strategy has been the creation "of what social psychologists describe as 'corrosive communities,'" in which "an intense sociopolitical polarity [has] developed between proponents and opponents of mining [that has led] to social tensions, emotional stress, disintegration of civil society, political turmoil, and violence."³⁶ El Salvador's violent past and remaining political divisions, including the polarity between the right-wing ARENA and left-wing FMLN parties, has provided a flammable ground for violence.

The consequences for community members who have led the opposition to Pac Rim's plans have been particularly violent—and in some cases fatal. Beginning in March of 2006 and continuing through the present, several of the most vocal opponents of the proposed El Dorado mine have been the victims of murders, abductions, torture, assaults, and threats that El Salvador's Ombudsman for Human Rights has concluded "are very probably related to each other, thus enabling us to infer that they are also linked to the victims' work in defense of the environment."³⁷ In October 2010, La Mesa documented and denounced the violence against environmental defenders opposed to mining in El Salvador at a hearing at the Inter-American Commission of Human Rights of the Organization of American States.³⁸

This disturbing trend took a particularly vicious turn for the worse in 2009. The first victim was Marcelo Rivera, Director of the Association of Friends of San Isidro and a member of La Mesa. Marcelo was kidnapped from a bus in the area near the proposed El Dorado mine on June 18, 2009 and whose body, which "showed signs of torture that were consistent with former Death Squad tactics of the civil

³² IUCN Report at 21.

³³ *Id.* (emphasis added).

³⁴ *Id.*

³⁵ *Id.* at 17.

³⁶ *Id.* at 19.

³⁷ IUCN Report at 34 (PDDH Report).

³⁸ See Center for International Environmental Law, *Environmental Defenders in Danger: The Situation in Mexico and Central America in the Context of the Mining Industry*, (October 2010).

war,” was subsequently found at the bottom of 30 meter deep dry well. Marcelo was also an outspoken opponent of the El Dorado mine.³⁹ On September 22, 2010, three individuals were sentenced to 40 years each for their direct participation in Marcelo’s murder.⁴⁰ El Salvador’s Ombudsman has faulted the Attorney General’s office and the police for their handling of the investigation and specifically for their “refusal to view the crime in the context of the struggle against mining.”⁴¹

The next murder of a mine opponent occurred on December 20, 2009, when Ramiro Rivera, vice president of the *Comité Ambiental de Cabañas* and a leader of local opposition to Pac Rim, was gunned down by at least four gunman armed with M-16 military assault rifles as he drove a steep road near Pac Rim’s proposed Santa Rita mine site. With him in his truck at the time was José Santos Rodríguez, another outspoken Pac Rim opponent, Felicita Eschevarría, thirteen-year-old Eugenia Guavara, and two armed police guards that had been assigned to protect Ramiro. Felicita was also killed in the attack; Eugenia was severely injured. Ramiro had led actions by local people to evict exploration equipment used by Pac Rim at the Santa Rita site, and following those actions had received death threats.

Less than a week later, on December 26, 2009, another environmental defender was murdered, Dora Alicia Recinos Sorto. She was an active member of *Comité Ambiental de Cabañas*. She was shot with a rifle as she returned from a spring where she had been washing clothes. Alicia was 8 months pregnant at the time of her murder; her unborn child died with her in the attack. Her two-year-old son, who was with her when she was gunned down, was shot in the leg. A police station is located approximately 300 meters from the location of Alicia’s murder, but police stationed there were apparently unable to prevent the attack or apprehend its perpetrators.⁴²

In reaction to the murders, El Salvador’s Ombudsman issued “a public statement before the media on December 28, 2009, condemning the acts and urging for security measures to be adopted to protect the members of the Environmental Committee of Cabañas and their families. The Ombudsman stated:

Given the time elapsed between the homicide of Mr. Gustavo Marcelo Rivera Moreno and the constant complaints of death threats and attacks against members of the environmental defense organizations in the area, without conclusive and satisfactory results of investigations of the crimes, their motives and culprits, this could have been a principal factor that led to the subsequent acts of violence... On top of that, none of the criminal investigations in these cases has made any public mention of possible intellectual authors. ***This Ombudsman’s Office notes that there are sufficient elements in the homicides, in the way they have been carried out and the levels of planning involved, to lead one to believe that the homicides and other events may be related and have a common origin.***⁴³

Among the “other events” to which the Ombudsman refers in this statement are the attacks on Father Luis Quintanilla, a Catholic priest in Cabañas and a vocal opponent of Pac Rim’s plans in the area. Father Quintanilla hosts a show on Radio Victoria, a key local radio station, and has been the subject of death threats since 2006. In the summer of 2009, after being followed and photographed while driving in May of 2009 and evading masked gunman while driving on July 13, 2009, Father Quintanilla was

³⁹ IUCN Report at 13.

⁴⁰ *El Salvador: Tribunal Convicts Marcelo Rivera’s Killers*, La Mesa Communications Team, courtesy link at <http://bit.ly/hohjL8> (www.miningwatch.ca).

⁴¹ PDDH Report at 34.

⁴² *Id.* at 14.

⁴³ *Id.* at 37 (emphasis added).

stopped at roadblock on July 27, 2010 by masked gunman, who he overheard say to one another: “Should we kill him now? No, we are supposed to take him alive.” Father Quintanilla was only able to evade capture by leaping from his car and down a ravine.⁴⁴

Radio Victoria itself has also been the object of intimidation and vandalism aimed at disabling its broadcast capabilities.⁴⁵ Neftally Ruiz, a Radio Victoria reporter, was threatened in December 2007 and January 2008, after Radio Victoria refused an offer of financial assistance by Pac Rim. Neftally was told in these threats “that he should keep out of Pacific Rim’s way.”⁴⁶ The threats commonly referenced the earlier murders as examples of what would be done if the demands were not met, such as the following received by a Radio Victoria reporter on January 21, 2010: “get ready you damn Radio Victoria people because we already got the first three.”⁴⁷ The threatened violence against Radio Victoria has continued to this day. On January 11, 2011, a death threat was slipped under the door at Radio Victoria from a group identifying itself as the “extermination group.”⁴⁸

As El Salvador’s Ombudsman has concluded, there are many strong indications that these events are linked not only to one another but also to conflict in the local community engendered by Pac Rim’s planned mining and the strong democratic opposition to such plans by La Mesa.

III. ARGUMENT

A. The Dispute Pac Rim Would Place Before this Tribunal Is Not a “Legal Dispute” under Article 25 of the ICSID Convention Nor a “Measure” Under Article 10.1 of CAFTA

Under Article 25, an ICSID tribunal’s jurisdiction only extends to a “legal dispute arising directly out of an investment.” CAFTA 10.1 states that the chapter on investment disputes only “applies to measures adopted or maintained by a Party.” As set forth below, each of these limitations independently excludes Pac Rim’s claim from this Tribunal’s jurisdiction.

1. This dispute is not a “legal dispute” under Article 25 but rather Pac Rim’s disagreement with general (and universally applicable) shifts in Salvadoran public policy.

The Tribunal has the authority to appreciate the claim for what it is, no matter how the claimant has framed it. This so-called “dispute” is in truth merely an expression of Pac Rim’s dissatisfaction with the fact that El Salvador’s public policy has begun to recognize the deeply destructive environmental and social effects that metals mining poses to local communities, as well as the emptiness of mining’s promise as path to sustainable development in El Salvador.

This shift in public policy by the government of El Salvador responds to the advocacy and demands of the member organizations of La Mesa. La Mesa has actively engaged social movements, non-governmental organizations and local communities in a political dialogue regarding metals mining, sustainable development, and the protection of human rights and the environment in El Salvador. The government’s response to La Mesa’s demands constitute an encouraging exercise in political democracy, where authorities are accountable to the governed and must reflect the preferences of society expressed through democratic channels of social dialogue.

⁴⁴ IUCN Report at 15.

⁴⁵ See *id.* at 42-49; *Urgent Action: Denounce recent wave of death threats and crimes against El Salvadoran anti-mining movement*, SHARE et al., Jan. 31, 2011, courtesy link at <http://bit.ly/eZx6l6> (www.miningwatch.ca).

⁴⁶ IUCN Report at 43.

⁴⁷ *Id.* at 49.

⁴⁸ *Id.*

This “political” character of the public policy dialogue, particularly over issues of such importance as the use of natural resources, is neither wrong, dirty, nor in breach of international law, as the investor would like to present it. The investor in the recently-decided *AES Summit* case tried a similar tactic, seeking to characterize Hungary’s move to lower electricity prices for its citizens as an inherently illegitimate “political” response to the public’s outrage over the perception that power generators were enjoying “luxury profits.”⁴⁹ The *AES Summit* tribunal did not dispute the “political” nature of Hungary’s acts—in fact, it noted that the investor had become “something of a political lightning rod,” and that the politics of which the investor complained were driven in part by “upcoming elections”—but found the “political” label to be of little consequence.⁵⁰ Indeed, the tribunal noted that while the reality of democratic politics “may not be seen as desirable in certain quarters,”⁵¹ nonetheless “it is normal and common that a public policy matter becomes a political issue; that is the arena where such matters are discussed and made public.”⁵² This understanding is correct: the term “political” should be properly understood in the Aristotelian tradition as the high art of governance of the polis, underscoring democratic decision-making, in contrast with dictatorial, autocratic or corrupt regimes. When Pac Rim attacks the “political” nature of the policy shifts it dislikes, it reveals that its complaints are not a legal dispute over a particular measure, but rather about broader changes in political dynamics in El Salvador.

Public policy is “political;” it also carries consequences, and the reality is that commercial mining interests, Salvadoran and non-Salvadoran alike, may well feel some of those consequences. Broad historical shifts are part of the life and history of a nation and its people; they are also part of the fundamental underlying risk that any enterprise embraces when it decides to enter commerce. CAFTA was not designed as a strict liability insurance policy guaranteeing foreign investors 100% protection against all risk,⁵³ nor was it designed to stand in the way of history, or freeze public policy developments.⁵⁴ It is the attempt by foreign investors to transform investment treaties into such fantasies that has increasingly mired ICSID arbitration in controversy over the last decade.⁵⁵

⁴⁹ *AES Summit Generation Ltd. et al. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, Sept. 23, 2010, at ¶ 9.1.5.

⁵⁰ *Id.* at ¶ 10.3.22., ¶ 10.3.31-34 (“Having concluded that Hungary was principally motivated by the politics surrounding so-called luxury profits, the Tribunal nevertheless is of the view that [the government pursued] a perfectly valid and rational policy objective.”).

⁵¹ *Id.* at ¶ 10.3.34.

⁵² *Id.* at ¶ 10.3.24.

⁵³ See, e.g., *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID CASE NO. ARB/05/22, Award, Jul. 24, 2008, at ¶ 376 (“the investor is bound to assess the extent of the investment risk before entering the investment, to have realistic expectations as to its profitability and to be on notice of both the prospects and pitfalls of an investment undertaken in a high risk - high return location”) (quoting Peter Muchlinski, *Caveat Investor? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard*, 55 ICLQ 527, 530 (2006)).

⁵⁴ Reference can be made to “stabilization” or “freezing” clauses in investment contracts, which have increasingly come under fire in recent years. See, e.g., Andrea Shemberg, *Stabilization Clauses and Human Rights*, Joint Research Project for the International Finance Corporation and the United Nations Special Representative to the Secretary General on Business and Human Rights, at 10, ¶ 36, (March 2008), courtesy link at <http://bit.ly/gNIGIG> (www.ifc.org) (noting vocal concerns that stabilization clauses are “wrong in principle, because [they] deny the state its proper role as legislator . . . [and] create[] a financial disincentive for the host state, thus chilling or hindering the application of dynamic social and environmental standards”); *id.* (noting that such concerns are “exacerbated in developing countries, where rapid legislative development and implementation is needed, rather than obstacles to the application of new laws.”).

⁵⁵ See, e.g., Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 Vand. J. Trans’l L. 775, 779-82 (2008) (describing the

In an effort to avoid such results, an ICSID tribunal's jurisdiction under Article 25 only extends to "legal disputes," and under CAFTA 10.1 only applies to disputes over "measures."⁵⁶ These limitations play a critical jurisdictional role, recognizing that the whole area populated by disagreements over general public policy is outside the limits of the judicial function and not a source of "legal disputes."

It has been widely recognized that this limit is inherent in the very nature of the ICSID forum as a *judicial* remedy. As Professor Abi-Saab has recognized, the judicial function itself incorporates limits which "may be difficult to catalogue . . . [but] are nonetheless imperative as a conclusive bar to adjudication in a concrete case."⁵⁷ "[I]ncompatibility of the claim with its judicial function" must be recognized at the outset, as a "delimit[ation of] the borders of judicial function" and policed as a jurisdictional (or admissibility) matter by the Tribunal pursuant to its "residual discretionary power."⁵⁸

The same principle may also be described in terms of justiciability and non-justiciability. As Professors Collier and Lowe have written:

Justiciability is an aspect of the focusing of a disagreement or clash of interests into a concrete dispute, capable of resolution by a judicial process on the basis of law. Disputes that do not have those characteristics ought not to be submitted to judicial procedures; and if they are so submitted, a preliminary objection by one of the parties ought to result in the dismissal of the case by the tribunal.⁵⁹

As many tribunals have now agreed, the limits of Article 25 mean that an ICSID tribunal "does not have jurisdiction over measures of general economic policy . . . and cannot pass judgment on whether they are right or wrong."⁶⁰ Rather, tribunals must limit their review to "specific *measures* affecting the Claimant's investment or measures of general economic policy having a direct bearing on such investment that have been adopted in violation of legally binding commitments made to the investor in treaties, legislation or contracts."⁶¹

evolution of investment law from "shield" to "sword"); Gus van Harten, *Investment Treaty Arbitration and Public Law* (2007).

⁵⁶ Article 10.14 of CAFTA also limits the scope of a tribunal's jurisdiction to "investment disputes."

⁵⁷ Georges Abi-Saab, *Les Exceptions Préliminaires dans la Procédure de la Cour Internationale* 147 (1967).

⁵⁸ *Id.* at 97. *See also id.* at 146-147 ("In the same way as one distinguishes . . . between special jurisdiction and general jurisdiction, it is possible to distinguish, in the context of material admissibility, between the specific conditions of admissibility representing the conditions for the existence or exercise of the right of action and the conditions of general admissibility which delimit the borders of judicial function"); Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-54: Questions of Jurisdiction, Competence and Procedure*, 34 *British Y.B. Int'l L.* 1, 21-22 (1958) ("The fact that an international tribunal has jurisdiction in a given case, does not mean that it will necessarily be bound to, or will, exercise it. The question of propriety of its doing so in particular circumstances may enter in, and the tribunal may in certain cases feel that it ought to decline to exercise its jurisdiction.").

⁵⁹ John Collier & Vaughan Lowe, *The Settlement of Disputes in International Law* 16 (1999); *see also Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 220-36 (June 27) (Oda, J., dissenting); *id.* at 285 (Schwebel, J., dissenting).

⁶⁰ *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8 Decision on Objections to Jurisdiction, Jul. 17, 2003, at ¶ 33; *Pan American Energy LLC et al. v. The Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, Jul. 27, 2006, at ¶ 65 (quoting *CMS*).

⁶¹ *Id.* (emphasis added); *see also id.* ¶ 27 ("What is brought under the jurisdiction of the Centre [are] not the general measures in themselves but the extent to which they may violate [] specific commitments"); *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, Aug. 2, 2004, at

While this formulation could involve a difficult line-drawing process between “measures of general economic policy” and “specific measures affecting the Claimant’s investment,”⁶² in the instant arbitration its application is relatively straightforward. Pac Rim’s own description of its claim is exceptionally broad and is not linked to any discrete action or measure by El Salvador. The best Pac Rim can do is describe El Salvador’s so-called “de facto ban on mining operations” as a measure. But the description is unpersuasive; the so-called “de facto ban” is clearly a general (and legitimate) policy shift, perhaps one that “may not be seen as desirable in certain quarters,”⁶³ but that is nonetheless legitimate and rational and cannot serve as the sole basis for a “legal dispute” under ICSID Article 25.

2. The only “legal” dispute Pac Rim may have had against the government expired when it failed to appeal MARN’s denial of its EIA in 2004—the breakdown of subsequent negotiations does not amount to a “legal dispute.”

To the degree that Pac Rim might have had a legal dispute with El Salvador, it is only MARN’s denial of the requested environmental permit by not granting it within the statutorily prescribed sixty days (ending in December 2004).⁶⁴ Pac Rim, however, deliberately failed to properly appeal that denial per procedures “explicitly provided in the Environmental Law for the environmental permit,”⁶⁵ choosing, instead, to pursue an extralegal and unofficial solution to the issue through discussions with various “high-ranking” Salvadoran government officials.⁶⁶

Pac Rim’s Mr. Shrake clearly believed, based on his experience “work[ing] in countries with relatively new regulatory regimes,” that Pac Rim had a greater chance of success using high-level informal channels as opposed to the formal legal mechanisms of El Salvador’s regulatory framework (new or otherwise). Pac Rim describes how Mr. Shrake and other executives regularly engaged in backroom dealings with senior individuals in the Salvadoran government to gain the legal results the company desired. Its methods were not subtle: for example, Pac Rim describes how, instead of simply following the mining laws and purchasing ownership or authorization to use the surface land over the proposed mine, it vigorously lobbied the highest officials in the Salvadoran Ministry of Mines to convince MINEC to shift its interpretation of the law—and when this strategy failed, it sought to change Salvadoran law to meet its own needs.⁶⁷ It describes how government officials outwardly and publicly “ceased all official communication,” but nonetheless met privately with Pac Rim and allegedly gave it “personal” “assurances” and the like.⁶⁸

Pac Rim now complains based on the failure of these unofficial back-channel discussions to bear fruit. However, such informal, extralegal processes (and any informal extralegal promises purportedly

¶ 12.; *Camuzzi International S.A. v. Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Jurisdiction, May 11, 2005, ¶ 59.

⁶² It is worth noting that the Tribunal clearly has the power, at this stage, to conduct such inquiry and analysis as may be necessary to make this distinction. See, e.g., *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award of Aug. 2, 2006, at ¶ 155 (“When deciding on its own competence [a Tribunal]... has the power to analyze all of those issues that may have legal relevance to [the scope of its competence], regardless of whether these are issues that may be qualified as substantive or of ‘merits’ or procedural issues.”).

⁶³ *AES Summit* at ¶ 10.3.34.

⁶⁴ Mem. at ¶¶ 26-29.

⁶⁵ Mem. at ¶ 27.

⁶⁶ Countermem. at ¶¶ 120-21, 123; Shrake Decl. at ¶¶ 78, 85-96, 101-103, 118-121.

⁶⁷ Shrake Decl. at ¶¶ 84-86.

⁶⁸ Countermem. at ¶¶ 117-18.

made therein) do not give rise to a “legal dispute” as required under Article 25 of the ICSID Convention and do not amount to a Party “measure” under CAFTA 10.1.

The weakness of Pac Rim’s jurisdictional case is illustrated by its own description of how troubled it was upon hearing in July 2006 that a “high-ranking” official (the then-Minister of the Environment, Hugo Barrera) had expressed his general view that metals mining was “inconvenient” for El Salvador.⁶⁹ Pac Rim notes that it “immediately flew” to San Salvador to talk to Mr. Barrera, who “downplayed the remarks and said they did not represent official policy.”⁷⁰ Neither, of course, did the other un-official assurances Pac Rim allegedly received and which it would have the Tribunal invest the force of law.

There are also important public policy reasons that compel the Tribunal to disallow this sort of claim. Even if nothing more untoward occurred than what Pac Rim describes in its Countermemorial, what did occur set a stage ripe for corruption and the very opposite of transparent government. International investment law and its institutions should encourage the development of robust, transparent regulatory regimes, especially in developing countries. This is particularly important for El Salvador where the development of new regulatory regimes is part of a broader shift towards democratic and representative government. While the regulatory framework in El Salvador may be weaker than in other States, El Salvador is a sovereign country that has adopted a system of governance based on laws. Failure to abide by the law, or to use the recourses provided therein, carries direct consequences that cannot be circumvented or avoided by Pac Rim’s attempt to seize arbitral jurisdiction under CAFTA and ICSID.

Pac Rim’s attempt to paint itself as blind-sided by an invidious policy coming from the highest political rank is patently unconvincing. As described above, opposition to the proposed mine grew organically from the direct experiences of local communities and swelled, over a course of years, to a level of critical importance in national politics because it implicated fundamental debates about environmental protection, human rights and sustainable development in El Salvador. Pac Rim knowingly took the risk to continue its work because it thought that its political clout, largely exercised through backroom deals and arm-twisting, could circumvent the practice of good governance and the government’s accountability to the law and to the people.⁷¹ Though not illegal, this is certainly not the sort of investor conduct that the investor-State arbitration regime was meant to encourage.⁷²

La Mesa has been active in legislative debates in El Salvador, advocating for a general law that will ban metals mining in the country, and has rejected the intervention of foreign investors in the domestic environmental and social affairs of El Salvador. The fact that Pac Rim preferred to engage in a political debate (substantially conducted in the rear corridors of power) rather than pursue legal means to address its dispute with MARN also underscores that there is no legal dispute in this arbitration. It further underlines that the real political controversy is between the investor and La Mesa, and that it has been taken to a forum where La Mesa cannot participate in equal footing, as elaborated below.

⁶⁹ *Id.* at ¶ 122.

⁷⁰ *Id.*

⁷¹ Interestingly, all the alleged unofficial communications Pac Rim relies (except for the “troubling” communications with Minister Barrera) on are attributed to government officials *outside of MARN*. See Countermem at ¶¶ 117-130. Salvadoran administrative law, like any administrative law, understands that different government agencies not only have different competencies but might also have different perspectives, guiding principles, and the like, and allocates decision-making authority amongst agencies accordingly. The law explicitly requires MARN’s approval—for Pac Rim to try to construct a dispute over MARN’s (in)actions by referencing “assurances” from other agencies is simply disingenuous.

⁷² *Cf. Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/03/24, Award, Aug. 27, 2008, at ¶ 139 (“the fundamental aim [of investment law is] to strengthen the rule of law”).

B. *Pac Rim's Claim Amounts to an Abuse of Process*

Another arbitral tribunal recently noted in a major decision: “even a well-founded claim will be rejected by the tribunal if it is found to be abusive.”⁷³ This principle, as an expression of the larger principle of good faith, has long been recognized as a fundamental, stabilizing element of international law and the adjudication of international legal rights.⁷⁴

More specifically, as formulated by one leading publicist, the “abuse of right” or “abuse of process” doctrine is used to prevent parties from using conferred rights of available procedures of law: (1) “for purposes that are alien to those for which the procedural rights were established;” (2) “for fraudulent, procrastinatory or frivolous purpose;” (3) “for the purpose of causing harm or obtaining an illegitimate advantage;” (4) for the purpose of reducing or removing the effectiveness of some other available process;” or (5) “for purposes of pure agenda.”⁷⁵ As discussed below, *Pac Rim's* claim is abusive in multiple respects, implicating most of the foregoing factors.

1. *Pac Rim's* last minute re-organization to take advantage of CAFTA benefits after setting itself up to enjoy the benefits of Cayman Islands’ zero taxation is abusive in nature.

Amici agrees with the Republic’s analysis concerning *Pac Rim's* ill-concealed attempt to transform itself into a CAFTA-covered investor at the last minute before filing its claim and how that amounts to an abuse of process under applicable general principles of international law.

Amici would only add a few points. *Pac Rim* admits at several places that it was incorporated in the Cayman Islands to obtain unspecified “tax savings” and “tax benefits.”⁷⁶ *Amici* would simply like make sure that in its overall appreciation of the jurisdictional faults in *Pac Rim's* claim, the Tribunal’s view is not overly clouded by such euphemisms: *Pac Rim* incorporated in the Cayman Islands in order to avoid paying U.S. and/or Salvadoran taxes. The Cayman Islands, of course, has a corporate tax rate of **zero** and a capital gains tax rate of zero,⁷⁷ and has been denounced by President Obama as housing “the biggest tax scam in the world.”⁷⁸ Although the *Pac Rim* companies did not end up taking in any revenue in El Salvador, it was neatly set up to escape taxation in the event that it did.

⁷³ *Chevron Corp. and Texaco Petroleum Corp. v. The Republic of Ecuador*, Interim Award, Dec. 1, 2008, at ¶ 139. See also *Phoenix v. Czech Republic*, ICSID Case No. ARB/06/5, Award, April 15, 2009, at ¶ 106 (“The protection of international investment arbitration cannot be granted if such protection would run contrary to the general principles of international law”).

⁷⁴ See *Phoenix*, Award at ¶ 107 (“Nobody shall abuse the rights granted by treaties, and more generally, every rule of law includes an implied clause that it should not be abused”); Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 131-34 (1958) (“The principle of good faith thus requires every right to be exercised honestly and loyally.”); H.C. Gutteridge, *Abuse of Rights*, 5 *Camb. L.J.* 22, 24 (1935) (“an act ceases to be the exercise of a right as soon as it acquires an abusive character”).

⁷⁵ Robert Kolb, *General Principles of Procedural Law*, in *The Statute of the International Court of Justice: A Commentary* 831 ¶ 65 (Andreas Zimmermann et al. eds., 2006).

⁷⁶ Counterterm at ¶ 51, 84.

⁷⁷ See Cayman Islands Tax Guide 2010, PKF Worldwide Tax Guides 2010, *courtesy link at* <http://bit.ly/e2Xxcb> (www.pkf.com).

⁷⁸ See Landon Thomas, “Offshore Haven Considers a Heresy: Taxation,” *NY Times*, Oct. 3, 2009, *courtesy link at* <http://nyti.ms/dGTuUJ> (www.nytimes.com). By contrast to the Caymans’ zero rate of corporate and capital gains taxation, El Salvador applies a corporate tax rate of 25% and the United States applies a corporate rate up to 39.3%; El Salvador applies a capital gains tax rates of 10%, the United States applies a rate up to 15%. See *El Salvador Tax Guide 2010*, *supra* at 1; *Topic 409—Capital Gains and Losses*, U.S. Internal Revenue Service, *at* <http://www.irs.gov/taxtopics/tc409.html>.

Pac Rim cites another arbitral award noting such arrangements are “not uncommon in practice,”⁷⁹ but that does not mean that this Tribunal cannot consider the tax-avoidance character of Pac Rim’s initial arrangement in assessing the overall abusive character of its sudden move to the United States in December of 2007, long after MARN had rejected its EIA.⁸⁰ Interestingly, Pac Rim defends its 2007 move to Nevada having been motivated by “the desire to take into account changing regulations and regulatory regimes in the places where our Companies were located.”⁸¹ This may refer to the fact that the Cayman Islands was at that time coming under extreme pressure by OECD countries as a tax haven and was promising to implement tax and regulatory reforms.⁸²

Pac Rim established its business arrangements to enjoy the benefits of light taxation (and more regulatory freedom), at the expense of *not* enjoying the treaty protections accorded to CAFTA Party investors—and effectively paid for by CAFTA Party citizens through the taxes that Pac Rim sought to avoid by incorporating in the Cayman Islands. Pac Rim’s attempt to “free ride” on CAFTA’s benefits through this proceeding represents a clear attempt to obtain an illegitimate advantage, and thus contributes to the abusive character of Pac Rim’s claim.

2. Pac Rim’s attempt to take a dispute centered between it and the affected communities to a forum where the communities have only limited discretionary rights is abusive in nature.

This Tribunal must appreciate Pac Rim’s claim for what it really is. Although Pac Rim names the Republic as the Respondent, as it must in order to invoke this proceeding under CAFTA and the ICSID Convention, Pac Rim’s own pleadings show that the real locus of the dispute is not between Pac Rim and the Republic, but rather between Pac Rim and the independently organized communities that would be affected by its proposed mine, including *amici*.

Throughout its Counter Memorial, Pac Rim emphasizes how Salvadoran government officials were supportive of its proposed mine. Moreover, it does not base its claim on any specific regulatory action or “measure” (not even on MARN’s administrative denial of its EIA in December 2004), but rather grounds it in *comments to the media* made by President Saca in 2008, which it claims evidence of a so-called “de facto mining ban.”⁸³ The government of El Salvador was not the source of Pac Rim’s problem; the media comments Pac Rim bases its claim on were mere attempts by then-President Saca to mirror popular opposition genuinely rooted elsewhere, namely in the grassroots opposition revealed by the organizing and public expression of the communities that would be affected by Pac Rim’s proposed mine.

The important fact is that the genuine “political” opposition of which Pac Rim complains is centered between Pac Rim and the communities. Pac Rim is now trying to have this dispute resolved in this forum, a notable feature of which is that the communities, Pac Rim’s genuine opponent on the issue, have no right to appear to defend their position, but rather appear pursuant to this *amicus curiae* brief.

Amici submit that the purpose of the dispute resolution provisions in CAFTA and of the ICSID Convention more broadly is to provide a forum for disputes genuinely arising out of actions by governments abusing their unique sovereign powers. Instances of expropriation, denial of justice, or targeted animus define the core nature of disputes the investment arbitration regime was designed to

⁷⁹ Counter Mem at ¶ 302.

⁸⁰ NOA at ¶ 64; Counter Mem at ¶ 117.

⁸¹ Shrake Decl. at ¶ 10.

⁸² See, e.g., Natasha Lance Rogoff, “Haven or Havoc?,” PBS Frontline, *courtesy link at* <http://to.pbs.org/982JUQ> (www.pbs.org).

⁸³ See Counter Mem at ¶ 23 (“It was only in 2008, after then-President Saca appeared to announce a de facto ban on metallic mining that a dispute began to crystallize”).

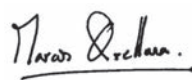
address. What has occurred here is different by an order of magnitude: in a sense this dispute is unquestionably between Pac Rim and the communities, so much so that Pac Rim cannot point to any concrete government action or measure but must instead rely on an isolated comment to the media made by a former President in the heat of a campaign in reaction to popular pressure. It is a bedrock principle of international law that where the rights of a third party “would not only be affected by a decision, but would form the very subject-matter of the decision,” exercise of jurisdiction otherwise granted is inappropriate.⁸⁴ What Pac Rim’s own facts reveal is a government that is pointedly *not* abusing its sovereign powers as would implicate the concerns and purpose of investor-State arbitration, but rather a government doing its best to remain neutral and mediate the underlying dispute between Pac Rim and the affected communities.⁸⁵ Pac Rim’s strategic decision to take this dispute to a forum where its principal opponent-in-interest cannot appear is improper and abusive.

IV. CONCLUSION

The general political debate concerning sustainability, metals mining and democracy in El Salvador is ongoing. Pac Rim has attempted to influence the political debate, but has been disappointed in its lobbying efforts. Dissatisfied with the direction of the democratic dialogue, Pac Rim has abused the arbitral process by changing its nationality to attract jurisdiction. More importantly, the Tribunal has no jurisdiction to hear a complaint against the course of a political debate.

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⁸⁴ *Monetary Gold Removed from Rome in 1943* (Italy v. Fr., U.K., U.S.), 1954 I.C.J. 19 (Judgment of June 15, 1943) (emphasis added).

⁸⁵ It is additionally worth considering that accepting jurisdiction over Pac Rim’s claim would essentially punish the Republic for fulfilling its own international law obligations to be responsive to its citizens and to secure their rights, including their economic, social, and cultural rights. *Cf.* Commission on Human Rights, Report of the United Nations High Commissioner for Human Rights, “Human rights and the extractive industry” at 4, U.N. Doc. E/CN.4/2006/92 (Dec. 19, 2005) (noting that power and resource imbalances between extractive industries companies and affected communities in developing countries have already had a deleterious effect on a wide range of those communities’ rights); The Reports of Special Representative to the Secretary-General on Business and Human Rights, Prof. John Ruggie. UN Docs E/CN.4/2006/97 (2006), A/HRC/4/035 (Feb. 9, 2007), and A/HRC/8/5 (2008); *see also* John G. Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 Am. J. of Int’l L. 819, 821 (2007); OECD Guidelines for Multinational Enterprises, at <http://bit.ly/eZmyim>; ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, at <http://bit.ly/t9Fb5E>; the UN Global Compact, at <http://bit.ly/Ko1kf>.

APPENDIX B

Relevant Provisions of the *International Convention on the Settlement of Investment Disputes between States and Nationals of Other States* and the ICSID Arbitration Rules

The Convention—Powers and Functions of the Arbitral Tribunal

Article 41

- (1) The Tribunal shall be the judge of its own competence.
- (2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

Article 42

- (1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.
- (2) The Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law.
- (3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute *ex aequo et bono* if the parties so agree.

The Arbitration Rules

Rule 22 — Procedural Languages

- (1) The parties may agree on the use of one or two languages to be used in the proceeding, provided that, if they agree on any language that is not an official language of the Centre, the Tribunal, after consultation with the Secretary-General, gives its approval. If the parties do not agree on any such procedural language, each of them may select one of the official languages (i.e., English, French and Spanish) for this purpose.
- (2) If two procedural languages are selected by the parties, any instrument may be filed in either language. Either language may be used at the hearings, subject, if the Tribunal so requires, to translation and interpretation. The orders and the award of the Tribunal shall be rendered and the record kept in both procedural languages, both versions being equally authentic.

Rule 32(2)—The Oral Procedure [Potential Access to Proceedings for Non Parties]

(2) Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.

Rule 37(2)—Submissions of Non-disputing Parties

(2) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the “nondisputing party”) to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

- (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
- (b) the non-disputing party submission would address a matter within the scope of the dispute;
- (c) the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

APPENDIX C

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APPENDIX D

Organizations with Experience Acting as *Amicus Curiae* in ICSID Disputes

Organization	Experience
Asociación Civil por la Igualdad y la Justicia (ACIJ) Av. de Mayo 1161, 5° office 9. (C1085ABB) Bs As, Argentina Telephone: +54 11 4381-2371 http://acij.org.ar/	<i>Argentina - Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v Argentine Republic</i> (ICSID Case No. ARB/03/19)
Center for International Environmental Law (CIEL) United States 1350 Connecticut Avenue NW Suite #1100 Washington, DC 20036 Telephone: +1 202 785-8700 Fax: +1 202 785-8701 Email info@ciel.org Switzerland 15 rue des Savoises, 1205 Geneva, Switzerland Telephone: +41 22 789-0500 Fax: +41 22 789-0739 geneva@ciel.org	<i>Argentina - Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v Argentine Republic</i> (ICSID Case No. ARB/03/19) <i>Biwater Gauff (Tanzania) Limited v United Republic of Tanzania</i> (ICSID Case No. ARB/05/22) <i>Piero Foresti et al v The Republic of South Africa</i> (ICSID Case No ARB(AF)/07/1)
Centre for Applied Legal Studies (CALS) Location: DJ du Plessis Building West Campus University of the Witwatersrand Braamfontein Duduzile.Mlambo@wits.ac.za Telephone: +27 11 717 8600 Fax: +27 11 717 1702 http://www.wits.ac.za/academic/clm/law/cals/16858/home.html Mailing: Private Bag 3 Wits University 2050 South Africa	<i>Piero Foresti et al v The Republic of South Africa</i> (ICSID Case No ARB(AF)/07/1)
Centro de Estudios Legales y Sociales (CELS) Piedras 547. 1 piso. C1070AAK Buenos Aires Argentina consultas@cels.org.ar Telephone: + 54 11 4334 4200	<i>Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v Argentine Republic</i> (ICSID Case No. ARB/03/19)
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