

# 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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**1. ORDERS BEING SOUGHT**

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**

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.

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.<sup>1</sup> 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:

- 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.
- b. The nature of the petitioners' interest in the case.
- 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.
- d. The reasons why the tribunal should accept the petitioner's *amicus curiae* brief.<sup>2</sup>

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

**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.

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.

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*<sup>3</sup> 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

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<sup>1</sup> *Agua Argentina 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); *Agua 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).

<sup>2</sup> *Agua Argentina*, *ibid*, para. 25; *Agua Provinciales de Santa Fe*, *ibid*, para. 24.

<sup>3</sup> 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.

LEAT is financed by The Ford Foundation, Oxfam Novib (NL) and Blacksmith Institute (USA).

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.

Further information on LEAT's activities and structure can be found at [www.lead.or.tz](http://www.lead.or.tz).

**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.

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.

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.

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).

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.

More information on LHRC can be found at [www.humanrights.or.tz](http://www.humanrights.or.tz).

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.

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.

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.

More information on TGNP can be found at [www.tgnp.org](http://www.tgnp.org).

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.

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.

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.

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).

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.

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.

More information on CIEL can be found at [www.ciel.org](http://www.ciel.org).

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.

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.

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.<sup>4</sup> 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](http://www.iisd.org/publications/publication_list.aspx?themeid=7). IISD is also the publisher of the Investment Treaty News bulletin.<sup>5</sup>

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<sup>4</sup> *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](http://naftaclaims.com/Disputes/USA/Methanex/Methanex_Final_Award.pdf)

<sup>5</sup> 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

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.

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.

More information on IISD can be found at [www.iisd.org](http://www.iisd.org).

**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

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.

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."<sup>6</sup>

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."<sup>7</sup>

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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.

<sup>6</sup> *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>.

<sup>7</sup> Procedural Order No. 3, paragraph 147.

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:

“ ... 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”.<sup>8</sup>

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.

Given the real and legitimate public concerns present in this case,<sup>9</sup> 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.

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.

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

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<sup>8</sup> 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).

<sup>9</sup> 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](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.<sup>10</sup>

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.

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.

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

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.

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

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<sup>10</sup> 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](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>.

<sup>11</sup> 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.)

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.

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*:

*Submissions of Non-disputing parties to the Tribunal*

*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.*

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.<sup>12</sup> 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.

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

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:

*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*

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<sup>12</sup> 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:*

*(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.*

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.<sup>13</sup>

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.

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.

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.

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

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<sup>13</sup> 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.

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.

*(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*

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.

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.

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

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.

*(c) the non-disputing party has a significant interest in the proceeding*

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.

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:

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
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.

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.

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.<sup>14</sup> 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...”<sup>15</sup>, 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.<sup>16</sup>

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

<sup>14</sup> 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.”

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

<sup>16</sup> 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.

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).

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,

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.*<sup>17</sup>

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

*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.*<sup>18</sup>

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.

<sup>17</sup> *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>

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

## 7. ACCESS TO THE KEY ARBITRAL DOCUMENTS

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.

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.

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.*

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.

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.

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.

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**

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.

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

*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.*

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

*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.*

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.

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.

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.

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

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.

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.

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  
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Geneva, 27 November, 2006

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