

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 Environmental 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 provide 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).

33. 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

34. 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

35. 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

36. 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.

37. 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

38. 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.

39. 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

40. 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.

41. 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

42. 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

43. 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

44. 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.

45. 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.

46. 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.

47. 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

48. 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.

49. 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

50. 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.

51. 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

52. 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

53. 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.

54. 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

55. 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*

56. 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

57. 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

58. 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

59. 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.

60. 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.

61. 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

62. 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.

63. 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

64. 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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