International Centre for Settlement of Investment Disputes

ICSID Case No. ARB/05/22

BIWATER GAUFF (TANZANIA) LTD.,
CLAIMANT

V.

UNITED REPUBLIC OF TANZANIA,
RESPONDENT

PROCEDURAL ORDER N° 5

Rendered by an Arbitral Tribunal composed of

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

I. INTRODUCTION

1. On 27 November 2006, the following five Petitioners filed with the Secretariat of ICSID a petition for *amicus curiae* status:

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

   (collectively referred to as the "Petitioners").

2. The Petition and its appendices were forwarded to the Arbitral Tribunal by the ICSID Secretariat on 27 November 2006.

3. On 1 December 2006, the ICSID Secretariat informed the parties that the President of the Arbitral Tribunal invited them to submit by Monday 18 December 2006:

   (i) in accordance with ICSID Arbitration Rule 37(2), any observations they might have regarding the Petitioners' participation in the written phase of the proceedings; and

   (ii) in accordance with ICSID Arbitration Rule 32(2), any observations they might have on the Petitioners' attending or observing all or part of any forthcoming hearing in the case.

4. On 13 December 2006, Counsel for Claimant, being in the process of preparing its Reply, invited the Arbitral Tribunal to consider extending the deadline for submissions on the *amicus* petition until 12 January 2007. They further informed the Arbitral Tribunal that they had discussed the matter with the Respondent's Counsel, who had indicated that they were neutral as regards the requested extension.

5. On 15 December 2006, the ICSID Secretariat informed the parties that the Arbitral Tribunal had decided to grant the extension requested by Claimant.

6. On the same date, Counsel for Respondent communicated to the Arbitral Tribunal their observations on the Petition pursuant to ICSID Arbitration Rules 32(2) and 37(2).

7. On 12 January 2007, Counsel for Claimant communicated their observations on the Petition to the ICSID Secretariat.

8. On the same date, Counsel for Respondent reiterated in a letter to the Arbitral Tribunal that they considered it appropriate to have the parties' observations communicated to the Petitioners (subject to verification that the letters do not disclose the content of any confidential material), considering that absent unusual circumstances, an applicant to an arbitral or judicial tribunal should see material submitted to the tribunal advocating the modification or rejection of its application before a ruling is made.

9. The same day, Counsel for Claimant informed the Arbitral Tribunal that they considered it neither appropriate nor necessary to submit the parties' observations to the Petitioners, alleging furthermore that ICSID Arbitration Rule 37, neither requires nor envisages that the Arbitral Tribunal do so.

10. On 22 January 2007, the Arbitral Tribunal informed the parties, through the ICSID Secretariat, that it was sufficiently informed about the Petition and that it would render its decision soon.

II. THE PETITIONERS' REQUEST

A. The identity of the Petitioners

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

(a) The Lawyers' Environmental Action Team (LEAT), which describes itself as the first and the premier public interest environmental law organisation in Tanzania. It was established in 1994 as a company limited by guarantee. Its mission is to *"ensure sound natural resource management and environmental protection in Tanzania, thereby ensuring that the constitutional and environmental rights of the Tanzanian people are secured and realized by all"*. LEAT is further described as an independent organisation which is not subject to direction or control by any other organisation, but is open to partner with any public interest organisation in and outside the country in furtherance of its own mission and objective.

(b) The Legal and Human Rights Centre (LHRC) is registered in Tanzania as a private, non-governmental, non-partisan and non-profit making organisation. It is described as having been established to contribute to the process of democratisation in Tanzania due to the realisation that the majority of the people are unaware of their rights, and most importantly for the indigent who has no means to pursue his or her rights in court for want of legal representation. It is not a membership based organisation, but an independent non-governmental organisation.

(c) The Tanzania Gender Networking Programme (TGNP), which presents itself as a Tanzanian non-governmental organisation established in 1993, working in the civil society sector, focusing on the practical promotion and application of gender equality and equity objectives. In particular, TGNP works on issues relating to access to water, especially for the poor and women. It is run by an Executive Director appointed by the board, which is itself appointed by the General Assembly of its members.

(d) The Center for International Environmental Law (CIEL) is a nonprofit organisation under the laws of the United States of America and the regulations of the US Internal Revenue Service and incorporated as such in Washington DC. It is an independent non-governmental organisation whose mission is to use international law, institutions and processes to protect the environment, human health and human rights, seeking to create a just and sustainable world. It was founded in 1989 and has been engaged since the early 1990s in international trade and investment law issues. It was granted *amicus curiae* status in the ***Methanex Corp. v. United States***

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

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

B. The reasons for the Petitions

12. The Petitioners contend that this arbitration raises a number of issues of vital concern to the local community in Tanzania, and a wide range of potential issues of concern to developing countries (and indeed all countries) that have privatised, or are contemplating a possible privatisation of, water or other infrastructure services. The dispute is also said to raise issues from a broader sustainable development perspective, and is potentially of relevance for the entire international community.

13. The Petitioners further state that in the UN Millennium Declaration, the international community committed itself to halve, by the year 2015, the proportion of people who are unable to reach or to afford safe drinking water. According to the Petitioners, the privatization at issue in the present arbitration was conceived to work towards this goal. It has been described as "*one of the most ambitious in Africa and was intended to be a model for how the world's poorest communities could be lifted out of poverty and countries could meet their millennium development goal targets.*"

14. It is therefore the Petitioners' position that this arbitration process goes far beyond merely resolving commercial or private conflicts, but rather has a substantial influence on the population's ability to enjoy basic human rights. Therefore, the process should be

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

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

C. Jurisdiction to accept *amicus* briefs

16. The Petitioners point out that, as recorded in the minutes of the First Session, the President of the Arbitral Tribunal had noted that the question of *amicus* submissions would have to be considered under the new ICSID Arbitration Rules, upon their entry into force (on the assumption that the parties agreed to the application of the new Rules to these proceedings – which subsequently they did). Paragraph 20 of the minutes states that "*the procedure set out in such amended rules will apply to the question of amicus curiae.*"

17. Since 10 April 2006, the amended ICSID Arbitration Rules have explicitly given tribunals the power to allow for submissions of non-disputing parties. Rule 37(2) establishes the

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

D. The test to apply

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

> "After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider among other things, the extent to which:
>
> (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
>
> (b) the non-disputing party submission would address a matter within the scope of the dispute;
>
> (c) the non-disputing party has a significant interest in the proceeding.
>
> The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission."

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

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

20. As to condition (a) of Rule 37(2), and under the reservation noted in paragraph 19 above, the Petitioners submit that their starting perspective, as NGOs with specialized interests and expertise in human rights, environmental and good governance issues locally in Tanzania, and in the multiple critical inter-relationships between international investment law and sustainable development at the international level, will be different than the initial interests, expertise and perspectives of the two contending parties.

21. With respect to condition (b) of Rule 37(2), the Petitioners emphasise that they will comply with this condition and respect this Arbitral Tribunal as a forum for legal issues within the scope of the dispute.

22. In relation to condition (c) of Rule 37(2), the Petitioners, relying upon their general knowledge of the case and the legal issues it is likely to raise, consider that their introductory presentation (see A above) has clearly demonstrated that the public interest involved in the case is directly related to the sphere of expertise and mandate of the Petitioners.

23. Finally, given that Rule 37(2) does not exhaustively list the factors to be considered by the Arbitral Tribunal in deciding upon *amicus* status, the Petitioners also note two other factors that might be relevant to the Arbitral Tribunal's decision on their Petition. The first arises directly from the focus of the Arbitral Tribunal in *Procedural Order No. 3* on the proper functioning of the arbitral process. They underline in this regard that there is a history of practice by *amici* that is growing in investor-state arbitrations. They further note that there is no recorded instance of an abuse of the process by any petitioner or accepted *amicus curiae*. There is therefore no basis to assume that the application of Rule 37(2) will lead to a disruption of the arbitral process.

24. Finally, the Petitioners emphasise the importance of public access to the arbitration from the perspective of the credibility of the arbitration process itself in the eyes of the public,

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

E. Access to the key arbitral documents

25. The Petitioners observe that pursuant to *Procedural Order No. 3* (on confidentiality / procedural integrity), the Arbitral Tribunal has retained the full authority and discretion to allow for access to documents by non-disputing parties. They therefore ask that the Arbitral Tribunal exercise its discretion and provide access to:

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

26. The Petitioners rely in particular on paragraph 162 of *Procedural Order No. 3* in which the Arbitral Tribunal expressly reserved to itself the continued review of the application of its Order. They also submit that it has become common practice in international arbitration that where arbitral documents are released to the public, confidential business information be redacted, and suggest that a similar process can be undertaken here.

27. Finally, the Petitioners submit that "*the balance between competing interests*" as that phrase is used in paragraph 162 of *Procedural Order No. 3*, must also be understood to include the interests of potential *amici*, acting properly and fully within their rights and interests pursuant to Rule 37(2).

F. Access to the oral hearings

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

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

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

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

III. THE PARTIES' OBSERVATIONS

A. Claimant's position

1. *Amicus curiae* status

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

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

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

33. The dispute between the parties that the Arbitral Tribunal is mandated to resolve arises out of the privatisation and investment that in fact took place. Claimant submits that, in relation to the privatisation, no issues arise in this arbitration as to whether the Republic ought to have involved the private sector in the water supply process in the first instance; what form of private sector participation should have been employed (if any); or whether the purported termination of the lease contract was a failure of the concept of private sector participation in general.

34. Claimant also submits that no environmental issues arise for determination in this case and that the arbitration raises no issues of sustainable development.

35. Finally, the fact that CIEL and IISD have an asserted expertise in broad international law issues such as the linkage between international investment agreements and national development policy, is irrelevant. Policy and political issues of this nature do not bear on the factual and legal issues in this dispute. The ***Aguas Argentinas*** case in which CIEL was granted *amicus* status was totally different from this arbitration. In that case, the Tribunal found that the outcome of the decision had the potential to affect the operation of the water distribution and sewerage system in Buenos Aires. That position does not obtain in this case. Claimant has exited Tanzania, City Water is defunct and Claimant seeks compensation from the Republic's wrongdoing. The prayer for relief does not include any requests that would result in City Water's right to operate the water supply system being reinstated or otherwise bear on the provision of water services in Dar es Salaam.

36. Lastly, Claimant notes that the Petition was filed very late while the existence of these proceedings has been in the public domain since about August 2005; the issue of *amici* was already raised at the First Session; and co-counsel for the Petitioners were aware of the arbitration and its subject matter at least by May 2006, as it was referred to in a paper dated May 2006 written by Counsel for one of the Petitioners (Dr. H. Mann). The result of this late filing is that adding the Petitioners to the proceedings now would place intolerable strain on an already tight timetable, since a substantive hearing is scheduled in April 2007.

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

2. Access to key arbitration documents

38. Claimant objects to the Petitioners' request to have access to key arbitration documents.

39. It notes that the scope of documents sought by the Petitioners is potentially extremely wide and covers almost the entire arbitration record. According to Claimant, this would be suggestive of a broader wish on the part of the Petitioners to engage in, and monitor, the proceedings as a matter of general interest, rather than a desire to provide assistance to the Arbitral Tribunal in relation to a particular subject matter.

40. Claimant also draws the Arbitral Tribunal's attention to the sensitive nature of the documents it has disclosed, and the difficulty of their redaction to protect Claimant's interests.

3. Attendance at the hearings

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

B. Respondent's position

1. The *amicus curiae* status

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

43. Respondent admits on the other hand that it is difficult to come to a firm conclusion as to whether a submission from the Petitioners would be useful to the Arbitral Tribunal in deciding the matters before it. Respondent views the question as rather being whether the Petitioners should be given access to the additional information they claim in order to file an informed petition on the basis of the conditions set out in Rule 37(2). In this regard, Respondent states that it would not object in principle to the Petitioners having access to the four categories of documents identified in the Petition.

44. Finally, with respect to the last paragraph of Rule 37(2), Respondent submits that considering the Petitioners' track record, there does not seem to be any reason to expect the Petitioners' submission or conduct to be in some substantive sense "disruptive". The more practical question is the timing of any submission the Petitioners might make and in particular whether both parties will have an adequate and not unduly burdensome opportunity to present their observations on such a submission within the framework of the existing procedural schedule.

2. The *amici's* attendance at the hearings

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

IV. DECISION OF THE ARBITRAL TRIBUNAL

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

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

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

47. The Arbitral Tribunal considers this an important starting point in terms of safeguarding the expectations of all concerned, as well as the integrity of the arbitral process, lest it be misunderstood that once any type of permission to participate is given to a non-disputing party, the latter may then be entitled as of right to all other procedural rights and privileges.

48. Having said this, the Arbitral Tribunal also recognises that to allow effective access to an *amicus curiae*, there may be certain other procedural mechanisms that need to be put in place.

49. *Rule 37(2):* The test which the Arbitral Tribunal must apply in deciding whether or not to allow any particular Petitioner to file a written submission in these proceedings is set out in Rule 37(2) (which has already been quoted earlier in this Order – see paragraph 18 above).

50. The Arbitral Tribunal has carefully considered each of the conditions in Rule 37(2)(a), (b) and (c). On the basis of the information provided in the Petition, the nature and expertise of each Petitioner, and the submissions summarised above, the Arbitral Tribunal is of the view that it may benefit from a written submission by the Petitioners, and that allowing for the making of such submission by these entities in these proceedings is an important element in the overall discharge of the Arbitral Tribunal's mandate, and in securing wider confidence in the arbitral process itself. In particular, the Arbitral Tribunal:

(a) considers that a written submission by the Petitioners appears to have the reasonable potential to assist the Arbitral Tribunal by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties (Rule 37(2)(a));

(b) accepts the Petitioners indication that their submissions would address matters within the scope of the dispute, and obviously reserves the right to disregard any submission that does not do so (Rule 37(2)(b));

(c) accepts that each of the Petitioners has a sufficient interest in this proceeding (Rule 37(2)(c)).

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

> "there is an undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties. This is not merely because one of the Disputing Parties is a State: there are of course disputes involving States which are of no greater general public interest than a dispute between private persons. The public interest in this arbitration arises from its subject-matter, as powerfully suggested in the Petitions. There is also a broader argument, as suggested by the Respondents and Canada: the ... arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's willingness to receive amicus submissions might support the process in general and this arbitration in particular, whereas a blanket refusal could do positive harm".

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

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

> "In examining the issues at stake in the present case, the tribunal finds that the present case potentially involves matters of public interest. This case will consider the legality under international law, not domestic private law, of various actions and measures taken by Governments. The international responsibility of a State, the Argentine Republic, is also at stake, as opposed to the liability of a corporation arising out of private law. While these factors are certainly matters of public interest, they are present in virtually all cases of investment treaty arbitration under ICSID jurisdiction. The factor that gives this case particular public interest is that the investment dispute centres around the water distribution and sewage systems of a larger metropolitan area, the City of Buenos Aires and surrounding municipalities. Those systems provide basic public services to millions of people and as a result may raise a variety of complex public and international law questions, including human rights considerations. Any decision rendered in this case, whether in favour of the Claimants or the Respondent, has the potential to affect the operation of those systems and thereby the public they serve. These factors lead the tribunal to conclude that this case does involve matters of public interest of such a nature that have traditionally led courts and other tribunals to receive amicus submissions from suitable non parties. ... Given the public interest in the subject matter of this case, it is possible that appropriate non parties may be able to afford the tribunal perspectives, arguments and expertise that will help it arrive at a correct decision".
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> (Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, May 19, 2005, paras. 19, 20 and 21)

53. The Arbitral Tribunal notes Claimant's submission that this case is different, in that Claimant is no longer seeking to operate in Tanzania. In the Arbitral Tribunal's view, however, this is not determinative of the issue, since any decision by the Arbitral Tribunal still has the potential to impact upon the same wider interests.

54. Further, even if Claimant ultimately proves that such wider interests, as a matter of fact, are untouched by its claims, the observation of the tribunal in the ***Methanex*** case still applies with force, namely that:

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

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

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

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

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

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

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

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

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

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

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

(a) *First Stage:* In the first instance, and no later than 26 March 2007, the Petitioners, jointly, should file a single, initial written submission, articulating whatever arguments, and providing whatever information, they consider appropriate, but limited to a maximum of 50 pages (double-spaced). This submission should not attach any evidence or documentation, but may identify any such material that the Petitioners may wish to introduce at a later stage. If the Arbitral Tribunal considers that it needs to be provided with such documentation, it will request it from the Petitioners on its own initiative.

(b) This will allow each party a three week period prior to the hearing in order to consider the written submission, and decide how best to address it (if at all). There will be no requirement on the part of either party to respond to the written submission at the April hearing itself, although either side will obviously be free to do so. In this regard, in order to ensure that no disputing party is taken by surprise at the April hearing, the Arbitral Tribunal directs that:

i. On or before 2 April 2007, each disputing party shall consult with the other as to whether each intends to address or respond to the Petitioners' written submission at the April hearing;

ii. On the basis of the exchange of views, on or before 9 April 2007, each party shall state finally to the Arbitral Tribunal whether or not it intends to address or respond to the Petitioners' written submission at the April hearing.

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

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

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

62. The Petitioners seek an Order to have access to the key arbitration documents notwithstanding the provisions of *Procedural Order No. 3*, by which the Arbitral Tribunal imposed certain limitations on disclosure of documents in order to preserve the integrity of the process for the time being.

63. In order to address this application, it is important to be clear as to the proper role of a "non disputing party", or *amicus curiae* in any given case.

64. In this case, given the particular qualifications of the Petitioners, and the basis for their intervention as articulated in the Petition, it is envisaged that the Petitioners will address broad policy issues concerning sustainable development, environment, human rights and governmental policy. These, indeed, are the areas that fall within the ambit of Rule 37(2)(a) of the ICSID Rules. What is not expected, however, is that the Petitioners (a) will consider themselves as simply in the same position as either party's lawyers, or (b) that they will see their role as suggesting to the Arbitral Tribunal how issues of fact or law as

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

65. This has been a very public and widely reported dispute. The broad policy issues on which the Petitioners are especially qualified are ones which are in the public domain, and about which each Petitioner is already very well acquainted. These, after all, are the very issues that have led to their application to intervene in these proceedings. None of these types of issue ought to require – at least for the time being – disclosure of documents from the arbitration.

66. However, this is an issue that may be revisited after the conclusion of the April hearing. As set out in *Procedural Order No 3*, there were specific reasons of procedural integrity (not necessarily confidentiality) that led the Arbitral Tribunal to impose certain limitations on disclosure. These reasons remain for the time being, and the safeguards now in place would be effectively swept away if access was now given to all categories of documents. Once the April hearing has been concluded, however, the concerns with respect to procedural integrity may be altered, and if so, there may then be less impediment to the disclosure of documents to non-disputing parties. At the same time, the Arbitral Tribunal would also need to address the question of how to ensure compliance by the Petitioners with any restrictions which it was necessary or appropriate to maintain or to impose.

67. This, therefore, is an issue that the Arbitral Tribunal intends to consider in the second stage of this procedure, as outlined in paragraph 60 above.

68. It follows that, for the time being only, and pending a further ruling after the April hearing, the Arbitral Tribunal denies the Petitioners' application for access to the documents filed by the parties in this arbitration.

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

69. Lastly, the Petitioners seek an order from the Arbitral Tribunal that the hearings be open to the public and that non-disputing parties or *amici* be allowed to reply directly to any questions directed to them by the Arbitral Tribunal concerning their submissions.

70. Rule 32(2) of the amended Arbitration Rules governs this issue. It has been set out earlier in this Order, but its opening words are clear, and condition the Arbitral Tribunal's powers in this regard: "*[u]nless either party objects, ...*"

71. In this case, Claimant objects to the presence of the Petitioners at the hearing. The Arbitral Tribunal therefore has no power to permit the Petitioners' presence or participation at the hearing, and must accordingly reject its application in this regard.

72. On the other hand, the Arbitral Tribunal reserves the right to ask the Petitioners specific questions in relation to their written submission, and to request the filing of further written submissions and/or documents or other evidence, which might assist in better understanding the Petitioners' position, whether before or after the hearing.

D. Publication of this Order

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

2 February 2007

The Arbitral Tribunal

Gary BORN

Toby LANDAU

Bernard HANOTIAU