

When Private Stakeholders Fail: Adapting Expropriation Challenges in Transnational Tribunals to New Governance Theories

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TABLE OF CONTENTS

I. INTRODUCTION	342
II. WHAT IS NEW GOVERNANCE?	345
III. INTERNATIONAL INVESTMENTS: LAW AND THE ARBITRATION MECHANISM	350
A. <i>The Legal Bases of International Investment Law and Bilateral Investment Treaties</i>	350
B. <i>Expropriation Principles</i>	351
C. <i>The Arbitration Mechanism: ICSID and Procedural Improvements</i>	353
1. <i>Procedures for Arbitrating Investment Disputes</i>	353
2. <i>Challenges to the Lack of Transparency in Investment Treaty Arbitration and Procedural Improvements in ICSID</i>	355
IV. CASE STUDIES: <i>METHANEX CORP. V. UNITED STATES AND BIWATER GAUFF LTD. V. TANZANIA</i>	357
A. <i>The State Regulations and Actions Challenged by the Investors as Expropriation</i>	357
B. <i>The Procedural Orders Allowing for Public Participation and the Amicus Briefs</i>	361
1. <i>The Procedural Order in Methanex Corp. v. United States</i>	361
2. <i>The Procedural Order Allowing Amici Participation in Biwater Gauff Ltd. v. Tanzania</i>	363
C. <i>The Amicus Briefs and the Final Awards of the Tribunals</i>	366
1. <i>The Briefs and Final Award in Methanex Corp. v. United States</i>	366
2. <i>The Briefs and Final Award in Biwater Gauff Ltd. v. Tanzania</i>	370
V. CONCLUSION: HARNESSING AND EXPANDING THE RIGHT OF PARTICIPATION	373
A. <i>The California Law and the Dar es Salaam Water and Sewage Services Project</i>	373

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B. <i>The Use of the Arbitration Mechanism to Allow Public Participation</i>	375
C. <i>The Arguments of the Amici and the Final Awards on the Merits</i>	377

I. INTRODUCTION

Countries around the world are having a difficult time maintaining clean water services for their citizens; indeed, one public interest group has remarked that, “[a] worldwide crisis over water is brewing.”¹ In response to this worldwide crisis, international organizations have begun encouraging developing countries to allow private entities to participate in providing water services to the public, termed “privatization.”² Privatization of water services was discussed at the World Health Forum on Promoting the Human Right to Water,³ and The International Monetary Fund made water privatization a condition of both its Enhanced Structural Adjustment Facility and Poverty Reduction and Growth Facility.⁴ Water privatization has been difficult and fairly unsuccessful thus far; however, it has been pushed through trade agreements and conditions on loans.⁵

After decades of difficulty with public water services, the Tanzanian government chose to privatize its water services by permitting corporations to bid on a water and sewage infrastructure project.⁶ A private corporation, City Water, contracted with a public provider of water to enhance the cleanliness and availability of water in Tanzania.⁷ Unfortunately, the water privatization project was unsuccessful,⁸ and is an example of how governments of developing countries are struggling with protecting their

¹ Public Citizen, *Water Privatization Overview*, available at <http://www.citizen.org/cmep/Water/general/>.

² Zarina Geloo, *Biwater vs Tanzania: Tears Flow Over Water Privatisation*, TERRAVIVA, Jan. 22, 2007, <http://www.ipsterraviva.net/tv/Nairobi/en/viewstory.asp?idnews=792>.

³ *Id.*

⁴ *Id.*

⁵ Dustin VanOverbeke, *Water Privatization Conflicts*, WATER IS LIFE (2004), available at <http://academic.evergreen.edu/g/grossmaz/VANOVEDR/>.

⁶ *Biwater Gauff (Tanzania) Ltd. (U.K.) v. United Republic of Tanzania*, Award, ICSID (W. Bank) Case No. ARB/05/22, para. 42 (July 24, 2008) [hereinafter *Biwater Award*].

⁷ *Id.* at para. 43.

⁸ *Id.* at para. 96.

citizens' rights to clean water. A woman in Tanzania described her access to water in 2008 through the Tanzanian privatization project:

The pressure was low so I had to install a pump just to get some . . . We get water without a pump at 5 or 6pm. Under [City Water Services] they still bring the bills, even if no water . . . Now sometimes the water is clean and sometimes it is dirty so I boil the water.⁹

Other individuals in similar situations described their experiences as having very little water every day, or only having access to water two days a week, or after midnight.¹⁰ This situation is the reality for many individuals in developing countries currently experiencing water privatization. Because international organizations have begun encouraging developing countries to privatize water services, many see privatization as a symptom of globalization.¹¹

While globalization is affecting water privatization in developing countries, it is also fostering exponential growth in the activity of international tribunals.¹² Examples of this growth include: the forming of the dispute mechanism at the World Trade Organization, "private rights of action in the North American Free Trade Agreement," and the International Tribunal on the Law of the Sea, which was created pursuant to the first treaty containing an intricate dispute settlement resolution mechanism.¹³ Indeed, the last decade has been called the "golden age" for dispute resolution.¹⁴ As the world moves into an increasingly integrated global system, the law must adapt and change to meet the system's needs. International law has been the traditional framework for the world to adapt to the new legal issues created by globalization.¹⁵ The cross-border legal framework is beginning to shift, however, from a system of international law, governing the interaction of states, to a system of transnational laws and norms governing the interaction

⁹ GREAT EXPECTATIONS: THE SAGA OF AN AFRICAN CITY, A UK COMPANY, THE WORLD BANK AND A POP SONG, WORLD DEVELOPMENT MOVEMENT 8 (2008) (on file with author).

¹⁰ *Id.*

¹¹ See Press Release, Public Citizen, Public Citizen Report Reveals World Bank Loans Continue to Promote Water Privatization (Apr. 22, 2004), <http://www.citizen.org/pressroom/release.cfm?ID=1695>.

¹² Christopher J. Borgen, *Transnational Tribunals and the Transmission of Norms: The Hegemony of Process*, 39 GEO. WASH. INT'L L. REV. 685, 685 (2007).

¹³ *Id.*

¹⁴ *Id.* at 686.

¹⁵ Duncan B. Hollis, *Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty*, 25 B.C. INT'L & COMP. L. REV. 235, 235–36 (2002).

between states and other entities such as corporations and non-governmental organizations.¹⁶

Traditionally in the United States, federal environmental laws have governed according to medium such as air, water, and waste. For example, The Clean Water Act is the primary mechanism for ensuring clean drinking water in the United States.¹⁷ New governance theories of environmental law posit, however, that a medium-based framework is perhaps not the most effective for environmental law.¹⁸ New governance theorists argue instead for the harnessing of cross-border networks through a system that maintains a flexible structure of regulation, allowing environmental law to adapt to changes in science and technology.¹⁹

This Note seeks to explore the interaction of two possibly competing systems: the international investment arbitration mechanism and the new face of environmental regulation based on new governance theories. The International Center for the Settlement of Investment Disputes (“ICSID”) arbitration mechanism has been changed to allow a limited right of public participation through the submission of amicus briefs, according to a new Rule governing ICSID arbitrations.²⁰ Similarly, the new U.S. Model Bilateral Investment Treaty now includes a provision relating to public participation in arbitration.²¹ The changes in ICSID toward greater transparency and engagement of the public have perhaps helped states defend expropriation challenges when the state is seeking to protect the health and safety of its citizens’ drinking water.

This Note will explore two ICSID arbitrations involving water regulation and the submission of amicus briefs: *Methanex Corp. v. United States*²² and

¹⁶ Borgen, *supra* note 12, at 686. Transnational law, for the purposes of this Note, means a legal system governing the relations between a foreign private party and a state. Transnational law is “[t]he amalgam of common principles of domestic and international law dealing esp. with problems arising from agreements made between sovereign states and foreign private parties.” BLACK’S LAW DICTIONARY 1505 (9th ed. 2004).

¹⁷ Clean Water Act, 33 U.S.C. §§ 1251–387 (2006).

¹⁸ Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 351–52 (2004).

¹⁹ ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 5 (2004).

²⁰ ICSID Convention, Regulations and Rules, Rule 37(2) (International Centre for Settlement of Investment Disputes Apr. 2006) [hereinafter ICSID Convention Rules].

²¹ United States Model Bilateral Investment Treaty, U.S. Dep’t of State & Office of the U.S. Trade Rep. (2004), available at <http://www.state.gov/documents/organization/117601.pdf> [hereinafter U.S. Model BIT] art. 28(3): (“The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party.”).

²² In the Matter of an International Arbitration Under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules Between

Biwater Gauff (Tanzania) v. The United Republic of Tanzania.²³ Both cases involve a foreign investor challenging a state's action as an expropriation, or taking, of their investment. This Note explores the difference between the two cases in light of new governance theories of regulation and the procedural improvements in ICSID arbitration. The changes in bilateral investment treaties and ICSID are likely to protect states against expropriation challenges made to traditional regulations. This student argues, however, that expropriation challenges will remain in place as new governance theories of regulation percolate into the frameworks of both domestic and international law. The actions taken by The Republic of Tanzania regarding the regulation of water, culminating in the expropriation challenge, are an example of new governance theories at work. This Note will explore the process and reasoning of the ICSID tribunal involving the challenge to Tanzania's new governance action and examine whether the recent improvements in ICSID arbitration equipped the Tribunal with tools to fairly arbitrate the action.

Part II of this Note explains the current scholarship on shifting forms of regulation, from traditional regulation to new governance. Part III describes the current state of international law and the transnational arbitration mechanism. Part IV examines two investor-state arbitrations that have allowed public participation—the first arbitration to allow public participation, *Methanex*, and a very recent case doing so, *Biwater*. Part V examines the arbitrations in light of new governance theories and the procedural improvements in transnational arbitration. Part V concludes by exploring how the *Biwater* tribunal implemented the right of public participation in transnational arbitration, and how the right may be harnessed and expanded in the future to adapt to the changing transnational world order.

II. WHAT IS NEW GOVERNANCE?

New governance theories have evolved as a shift from the theory focusing on the creation of the regulatory state developed during the New Deal.²⁴ The federal government worked toward achieving the goals of the

Methanex Corporation and United States of America, Final Award (Aug. 9, 2005), available at http://www.naftaclaims.com/disputes_us_6.htm (scroll down to select "Final Award, 9 August 2005").

²³ *Biwater Award*, *supra* note 6.

²⁴ Lobel, *supra* note 18, at 351–52. This Note combines “new governance” theories into one category for the purposes of examining the implementations of the larger theory in the context of transnational arbitration. New governance theories in reality are innumerable and distinctive and include “reflexive law, soft law, collaborative governance, democratic experimentalism, responsive regulation, outsourcing regulation,

New Deal—“relief, recovery and reform”—by creating heavy administrative regulation.²⁵ The paradigmatic shift initiated during the New Deal involved increased reliance on experts and the creation of centralized regulatory agencies that initiated “top-down” policies.²⁶ “The central proposition of the New Deal regulatory model was that a few well-educated, specially trained, and publicly appointed professionals could make the best decisions about national policies.”²⁷ The New Deal led to the vast expansion of the administrative state and deference to agency expertise.²⁸

In environmental law, debates over the proper type of regulation have traditionally centered around who should regulate—usually in the context of federal versus state regulation—and whether a market-based or “command and control” approach was more suitable.²⁹ Federal environmental laws have been the subject of several commerce clause challenges in the United States, as Congress’s regulation of water, air, and endangered species is difficult to fit into traditional commerce clause jurisprudence.³⁰ Federal environmental laws in the United States have traditionally been separated by medium.³¹ The Clean Water Act, for example, makes the addition of a pollutant from a point source into navigable waters illegal;³² and the Clean Air Act allows the EPA to set National Ambient Air Quality Standards for air quality safety.³³ From this style of regulation by medium, environmental regulators have shifted toward implementing regional programs that encourage private actors to participate in the regulatory process in addition to governments.³⁴ This shift

reconstitutive law, post-regulatory law, revitalizing regulation, regulatory pluralism, decentering regulation, meta-regulation, contractarian law, communicative governance, negotiated governance, destabilization rights, cooperative implementation, interactive compliance, public laboratories, deepened democracy and empowered participatory governance, pragmatic lawyering, nonrival partnership, and a daring legal system.” *Id.* at 346–47 (internal quotation marks and footnotes omitted).

²⁵ *Id.* at 351–52.

²⁶ *Id.* at 371.

²⁷ *Id.*

²⁸ *Id.* at 373.

²⁹ Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795, 797 (2005).

³⁰ See, e.g., *Rapanos v. United States*, 547 U.S. 715, 724 (2006); *Solid Waste Agency v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 175 (2001); *Gibbs v. Babbitt*, 214 F.3d 483, 489 (4th Cir. 2000).

³¹ E.g., Clean Water Act, 33 U.S.C. §§ 1251–387 (2006).

³² *Id.* §§ 1311, 1362.

³³ 42 U.S.C. § 7409 (2006).

³⁴ Annecoos Wiersema, *A Train Without Tracks: Rethinking the Place of Law and Goals in Environmental and Natural Resources Law*, 38 ENVTL. L. 1239, 1241 (2008).

has been termed “new governance.”³⁵ Two examples of new governance projects include the Chesapeake Bay Program and the Ramsar Convention on Wetlands.³⁶

New governance challenges the idea of the super regulatory state and focuses on stakeholder participation—at all levels of government, citizen groups, and industry—in regulatory action and integrating top-down and bottom-up policies.³⁷ New legal theories relating specifically to environmental law posit that the federal versus state and “command and control” versus market-based distinctions oversimplify the complexities of regulating the environment.³⁸ Scholars now generally accept the proposition that environmental law must remain flexible in order to adapt to scientific changes in ecosystems that are constantly in flux.³⁹ New governance theorists argue that the way to facilitate this adaptive system is to engage multiple stakeholders, with differing views and types of expertise, when formulating policies.⁴⁰ In this collaborative system, individuals and industries that were once the subject of regulation are now participants in the process, engaging in dialogue and information sharing.⁴¹

New governance scholarship in recent years has focused on the increase in private actors—both non-profit and for profit—in domestic and international law; indeed, many commentators suggest that these actors now

³⁵ *Id.*

³⁶ *Id.* at 1265. The Chesapeake Bay program focuses on the preservation of blue crab in the Bay. The program took into account the concerns of Chesapeake Bay residents, as the Bay and the blue crab in it are a source of pride for the residents, making it an example of new governance. The Ramsar Convention on Wetlands has been hailed as a “model of innovation” because it engages both the Secretariat and member states, and has the ability to respond in the face of ecological changes. *Id.* at 1266.

³⁷ Lobel, *supra* note 18, at 373.

³⁸ Freeman & Farber, *supra* note 29, at 797–98. (“It seems increasingly indisputable, after decades of environmental regulation and management, that success with every environmental problem, including habitat conservation, air pollution control, water allocation, hazardous waste remediation, and wetlands restoration, requires not only a suite of complementary regulatory tools and the coordination of multiple levels of government, but also a wide variety of informal implementation mechanisms and the ongoing participation of key stakeholders.”).

³⁹ Wiersema, *supra* note 34, at 1249. Professor Wiersema challenges, however, that before we completely accept the new governance procedural theories of current scholars, we reassess the need for substantive changes in the form of concrete goals in environmental law. “[I]n order to ensure that the train does not fall off its tracks, these goals should be entrenched into law with attributes of certainty and predictability.” *Id.* at 1299.

⁴⁰ Lobel, *supra* note 18, at 374.

⁴¹ *Id.*

play a critical role.⁴² Not only do private actors have a role as participants in the negotiation of new projects, they also have a role in implementing those projects. One segment of new governance theories focuses on sharing the government's involvement in activities traditionally considered under its domain with the involvement of private industry.⁴³ Implementation sharing creates interaction between the private and public sector and also "leads to fluid and permeable boundaries" between the two.⁴⁴

On the international plane and in the context of a stewardship model, Anne-Marie Slaughter describes the role of governments in a "new world order" as that of disaggregated actors.⁴⁵ Stewardship is a theory substantiating a government's right to protect the environment through the proposition that all governments and citizens have a duty to maintain the earth for themselves and protect it for future generations.⁴⁶ The old model of international law rests on the idea that each state is a unified entity with international law creating relationships and intergovernmental organizations between states.⁴⁷ The globalized world creates the need for more law to govern the exponential number of global interactions, yet a centralized world government is a proposition that most fear; Slaughter describes this as the "globalization paradox."⁴⁸ Slaughter's solution is for government entities, as disaggregated actors, to form cross-border networks.

The role of different state actors, she argues, should be seen as forming networks with other state actors across borders. This can lead to a system of "global governance" without the problematic centralized world

⁴² *E.g.*, Freeman & Farber, *supra* note 29, at 803.

⁴³ Lobel, *supra* note 18, at 374.

⁴⁴ *Id.*

⁴⁵ SLAUGHTER, *supra* note 19, at 5 ("Start thinking about a world of governments, with all the different institutions that perform the basic functions of governments—legislation, adjudication, implementation—interacting both with each other domestically and also with their foreign and supranational counterparts.").

⁴⁶ This model has received little recognition from legal scholars in the United States. GLICKSMAN ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 25 (5th ed. 2007). One state court that has accepted the theory wrote, "[T]he clear policy underlying Florida environmental regulation is that our society is to be the steward of the natural world, not its unreasoning overlord." *Dep't of Cmty. Affairs v. Moorman*, 664 So. 2d 930, 932 (Fla. 1995).

⁴⁷ SLAUGHTER, *supra* note 19, at 12. This is similar to the concept of a person colloquially describing "the government." The individual knows that the government is made up of many different moving parts, for example, Congress, the judiciary, and executive agencies. The individual still describes "the government," however, as a generic disembodied entity; Slaughter challenges this paradigm. *Id.* at 4.

⁴⁸ *Id.* at 8–10.

government.⁴⁹ These networks may be both vertical—such as the interaction between Member States and the European Union—and horizontal. Slaughter argues that there is a “blind spot” in the international system: the fact that smaller government units on their own are not recognized as having an international role.⁵⁰ These networks of smaller governmental bodies have been forming for many years; yet, international law has not recognized the disaggregated networks for what they are.⁵¹ One example of this idea is the environmental enforcement network formed by the three NAFTA countries, the United States, Mexico and Canada, which has “enhanced the effectiveness of environmental regulation in all three states”⁵²

Currently, governments have tapped into foreign networking by engaging in “regulatory export.”⁵³ For example, as of 2004, the EPA offered over twenty courses to foreign countries, instructing them in how to enforce their environmental laws or run their counterpart agencies.⁵⁴ Essentially, these trainings teach states how to model their environmental regulations after those of the United States and share technologies developed by United States firms in complying with environmental law, hence the term “regulatory export.”⁵⁵ In contrast to teaching other states how to model their regulation after the United States, Slaughter argues that the role of each state should be to set the problem solving process in motion and then allow other stakeholders to work out the solution.⁵⁶ This will lead states to discover new “parallel networks” that will create cross-border information sharing beyond mere regulatory export.⁵⁷

⁴⁹ Slaughter describes the problem of global governance as a “tri-lemma.” A centralized, powerful world government would place too much power in the hands of one entity. However, without such a system there is little room for accountability on the part of people making decisions. *Id.* at 10.

⁵⁰ *Id.* at 33.

⁵¹ *Id.* at 14.

⁵² SLAUGHTER, *supra* note 19, at 2.

⁵³ *Id.* at 172 (quoting Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT’L L. 1, 32–33 (2002)).

⁵⁴ *Id.* at 173.

⁵⁵ *Id.*

⁵⁶ *Id.* at 193.

⁵⁷ SLAUGHTER, *supra* note 19, at 194. Slaughter warns that these sorts of practices will need constant evolution. *Id.*

III. INTERNATIONAL INVESTMENTS: LAW AND THE ARBITRATION MECHANISM

A. *The Legal Bases of International Investment Law and Bilateral Investment Treaties*

Developing the appropriate legal balance between states and foreign investors in the realm of investment disputes was difficult initially because: (1) investors are neither protected by the laws of the host-state nor are investors the subject of public international law, and (2) a state's breach of a contract between itself and a foreign investor is unlikely to rise to the level of a violation of international law.⁵⁸ In response to these difficulties, states began entering into Bilateral Investment Treaties (BITs), which is an agreement between two states containing provisions designed to protect foreign investors.⁵⁹ BITs "form a bridge" between private investors and host-states by providing investors with protection when investing in a foreign state that they would not otherwise receive under international law.⁶⁰ The legal protection for the investor falls under the law of the host-state; however, the law of the host-state must conform to the host-state and investor-state BIT.⁶¹ Many BITs were initially entered into between developed and developing countries.⁶² In recent years, however, developing countries have signed BITs among themselves and with developed countries.⁶³

BITs contain several provisions, including definitions of "investor" and "investment," an agreement as to how disputes will be settled, and the standard of treatment the foreign investor will receive.⁶⁴ BITs often lack an

⁵⁸ SURYA P. SUBEDI, INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE 135 (2008); see also Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1537 (2005).

⁵⁹ SUBEDI, *supra* note 58, at 135.

⁶⁰ *Id.*

⁶¹ *Id.* at 83.

⁶² *Id.*

⁶³ Franck, *supra* note 58, at 1527. Many important investment treaty cases are arbitrated because of a dispute arising under a regional trade agreement, such as NAFTA or CAFTA. These regional trade agreements are, of course, not bilateral investment treaties, but they contain similar expropriation provisions, discussed below. See *infra* Part III.B. NAFTA Section 1102 is the provision under which *Methanex Corp. v. United States* was arbitrated.

⁶⁴ SUBEDI, *supra* note 58, at 84. A threshold issue that must be decided before a foreign party and host-state may submit a dispute to arbitration is whether the dispute involves a transaction that rises to the legal definition of "investment." Franck, *supra*

enumeration of the principles of law that will be used in the event that arbitration is necessary to settle a dispute.⁶⁵ Of the BITs that do define which principles of law will govern the arbitration of a dispute, most use phrases such as “generally recognised rules and principles of international law.”⁶⁶ International investment law relies mainly on principles of customary international law,⁶⁷ including the principles of state responsibility and fair and equitable treatment.⁶⁸ The latter principle prohibits states that have some sort of agreement with the investor’s state—usually a BIT, a fair trade agreement, or a WTO agreement—from discriminating against a foreign investor in contravention of that agreement.⁶⁹ BITs are remarkable because they create substantive rights for the foreign investor and because they offer foreign investors a remedy for the denial of those rights.⁷⁰ Investment treaties play an important role for investors both in choosing where to invest and in determining how to structure the investment.⁷¹ The 2004 United States Model BIT contains a provision stipulating that if an investment dispute must go to arbitration, the arbitration of the dispute should involve public participation.⁷²

B. *Expropriation Principles*

The principle that has received the most attention and been the subject of most controversies regarding international investment is expropriation.⁷³

note 58, at 1533. Because the Convention does not define the term, BITs will usually contain definitions of both “investor” and “investment.”

⁶⁵ SUBEDI, *supra* note 58, at 102.

⁶⁶ *Id.*

⁶⁷ Customary international law is “in most cases [] regarded as general law which countries may codify, specify, or derogate from through treaties.” Ole Kristian Fauchald, *The Legal Reasoning of ICSID Tribunals—An Empirical Analysis*, 19 EUR. J. INT’L L. 301, 324 (2008).

⁶⁸ SUBEDI, *supra* note 58, at 56. The state responsibility principle is contained in the Draft Articles on Responsibility of States for Internationally Wrongful Acts. Article One of this document states: “Every internationally wrongful act of a State entails the international responsibility of that State.” *Id.* at 56 n.2 (quoting INT’L LAW COMM’N, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, U.N. GAOR, 56th Sess., Supp. No. 10, para. 76, U.N. Doc. A/56/10 (Nov. 2001)).

⁶⁹ *Id.* at 75.

⁷⁰ Franck, *supra* note 58, at 1529.

⁷¹ *Id.* at 1525.

⁷² U.S. Model BIT, *supra* note 21, art. 28(3) (“The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party.”).

⁷³ SUBEDI, *supra* note 58, at 74.

Expropriation is a “centuries-old principle of foreign investment law” that prohibits a country from expropriating—or taking—a foreign investment unless certain conditions are met.⁷⁴ In order for a state to have the right to expropriate a foreign investment: (1) the expropriation must be for a public purpose, (2) the expropriation must be non-discriminatory, (3) the investment must be expropriated in accordance with “applicable laws and due process” and (4) full compensation must be paid.⁷⁵ Discriminatory takings, the second condition listed above, involve the investor claiming that the host-state is treating the investor, as a foreign entity, differently than domestic investors. There are different standards for the level of treatment that should be afforded to a foreign investor.⁷⁶ For example, the “like circumstances” standard requires a host-state to treat an investor the same as other investors in “like circumstances.”⁷⁷ When a situation meets the four conditions that allow expropriation, the state must compensate the investor.⁷⁸

There are two types of expropriation: direct and indirect.⁷⁹ Direct expropriation constitutes the actual taking of property by the government; this is the simpler and less controversial form of expropriation.⁸⁰ Indirect expropriation can come in several forms, such as creeping expropriation or regulatory expropriation.⁸¹ Creeping expropriation involves the host government taking actions that generally decrease the value of the

⁷⁴ *Id.*

⁷⁵ *Id.* International law scholars have debated the precise meaning and contours of each of these conditions. Indeed, Subedi notes, “questions such as what constitutes an expropriation; what is a ‘public purpose’; what constitutes discrimination; and what is meant by full compensation have been the matter of acute controversy” *Id.* For example, Higgins describes the “public purpose principle” as “a means of differentiating takings for purely private gain on the part of the ruler from those for reasons related to the economic preferences of the country concerned.” *Id.* at 75 (quoting Roslyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, in 176 RECUEIL DES COURS 259, 371 (Hague Acad. of Int’l Law 1982)).

⁷⁶ *Id.*

⁷⁷ See, e.g., North American Free Trade Agreement, U.S.-Can.-Mex., art. 1102(1), Dec. 17, 1992, 32 I.L.M. 605 (1993) [hereinafter NAFTA] (“Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”).

⁷⁸ SUBEDI, *supra* note 58, at 74. The amount of compensation is another aspect of expropriation law that has received a great amount of attention from commentators and has been the subject of much jurisprudence. *Id.*

⁷⁹ *Id.* at 75.

⁸⁰ *Id.*

⁸¹ *Id.* at 76–77.

investment, while regulatory expropriation involves a challenge to a measure taken by a host-state when the measure can have the effect of reducing the economic value of the asset owned.⁸²

The 2004 U.S. Model BIT includes language indicating that a state has a right to enact environmental regulations—and thus that the regulations should not be the subject of an expropriation action—in order to (1) “compl[y] with [other] laws [or obligations] and regulations,” (2) “protect human, animal, or plant life or health,” and (3) conserve “living or non-living exhaustible natural resources.”⁸³ Such action should not be considered an expropriation of an investment as long as the action is not “applied in an arbitrary or unjustifiable manner” and “do[es] not constitute a disguised restriction on international trade or investment.”⁸⁴ These provisions are, however, simply part of the draft BIT for the United States and are thus only the starting point for negotiating new BITs.

C. *The Arbitration Mechanism: ICSID and Procedural Improvements*

1. *Procedures for Arbitrating Investment Disputes*

The International Centre for Settlement of Investment Disputes (ICSID) was organized by the World Bank specifically to address the problem of foreign investors obliged to bring a claim arising out of a legal dispute regarding their investment in a host-state’s domestic court.⁸⁵ Forcing litigation in a host-state’s domestic court subjected the investor to the uncertainty of the state’s domestic political system and thus discouraged foreign investment.⁸⁶ Investment treaty arbitration has greatly increased in the last six or seven years, and transnational investment tribunals are now flooded with arbitrations.⁸⁷ Professor Susan Franck notes that the shift to

⁸² *Id.*

⁸³ U.S. Model BIT, *supra* note 21, art. 8(3)(c); *see also id.* art. 12(2) (“Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.”).

⁸⁴ *Id.* art. 8(3)(c).

⁸⁵ SUBEDI, *supra* note 58, at 30.

⁸⁶ *Id.* The legal bases of international investment law may come from one of seven sources: (1) the ICSID Convention, (2) multilateral investment treaties such as NAFTA, (3) bilateral investment treaties, (4) customary international law, (5) general principles of law, (6) agreements between the parties or decisions by the parties and (7) domestic legislation. Fauchald, *supra* note 67, at 303.

⁸⁷ Franck, *supra* note 58, at 1538–39.

investment treaty arbitration is remarkable because the arbitration mechanism allows investors to act as “private attorney generals,” and “places the enforcement of public international law rights into the hands of private individuals and corporations.”⁸⁸

ICSID is merely one arbitration system that may be convened to resolve international investment disputes arising out of an alleged breach of a bilateral investment treaty. In general, investment treaties usually offer investors a choice of resolving a dispute through arbitration or a court system; the treaties also give investors the choice of which arbitration system will govern the dispute.⁸⁹ In addition to ICSID, organized under the auspices of the World Bank, investors may have the choice of bringing a dispute under the rules of several other arbitral tribunals, including the United Nations Commission on International Trade Law (“UNCITRAL”), the International Chamber of Commerce (“ICC”), or the Stockholm Chamber of Commerce (“SCC”).⁹⁰ The process of initiating an investment dispute begins with the foreign investor determining whether it has standing to pursue arbitration under the relevant treaty.⁹¹ After the arbitration is initiated,⁹² the parties appoint an arbitral tribunal, usually consisting of three arbitrators, with one arbitrator appointed by each party and the third arbitrator appointed according to the consensus of the first two appointees.⁹³ The procedure the tribunal follows during the arbitration depends on the specific claim involved and the rules chosen to govern the dispute.⁹⁴

ICSID grants parties the right to file arbitration disputes at their facilities in light of a legal dispute between a host-state and foreign investor.⁹⁵ Article 25(1) of the ICSID Convention grants the tribunal jurisdiction over the claim as long as both parties consent to the arbitration.⁹⁶ In order to

⁸⁸ *Id.* at 1538.

⁸⁹ *Id.* at 1541.

⁹⁰ *Id.*

⁹¹ *Id.* at 1542.

⁹² This initiation process normally involves: “(1) submitting a notice of dispute to the Sovereign, (2) complying with the applicable waiting period, (3) electing where to resolve the dispute, and (4) taking the chosen procedure forward in accordance with the chosen mechanisms articulated in the investment treaty.” *Id.* at 1543.

⁹³ Franck, *supra* note 58, at 1543–44.

⁹⁴ *Id.* at 1543.

⁹⁵ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 1(2), *approved* Mar. 18, 1965, 17.1 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

⁹⁶ *Id.* art. 25(1) (“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a

arbitrate a dispute at ICSID, therefore, the parties to the dispute must be parties to the ICSID Convention. As of March of 2010, there were 155 parties to the ICSID Convention.⁹⁷ Commentators have hailed ICSID as the new frontier in investor-state dispute resolution because the purpose in drafting the ICSID Convention was to “balance the interests of both private investors and States,” and it has been generally recognized as accomplishing that goal.⁹⁸ Transnational investment tribunals, because they are modeled after commercial tribunals, have traditionally maintained “strong presumptions of confidentiality.”⁹⁹

2. *Challenges to the Lack of Transparency in Investment Treaty Arbitration and Procedural Improvements in ICSID*

Investor-state arbitration has traditionally been opaque: only parties to the dispute were allowed to participate in the decision, the documents concerning the arbitration remained confidential, and the decisions of tribunals have not been consistently published.¹⁰⁰ Commentators have vehemently criticized this opaqueness because the opaqueness has traditionally remained even when an investor challenges action taken by a host-state that the host-state considers to be in the public interest.¹⁰¹ Commentators argue that the investor-state arbitration mechanism should engage the public interest by allowing the participation of amicus curiae and that investor-state mechanisms should allow non-disputing parties—or amici—access to documents involving the arbitration so the amici may file a

national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.”).

⁹⁷ International Centre for Settlement of Investment Disputes, <http://icsid.worldbank.org/> (follow “Member States” hyperlink) (last visited March 10, 2010).

⁹⁸ Sandra L. Caruba, *Resolving International Investment Disputes in a Globalized World*, 13 N.Z. BUS. L.Q. 128, 141 (2007).

⁹⁹ Franck, *supra* note 58, at 1544.

¹⁰⁰ *Id.* at 1544–45.

¹⁰¹ See Caruba, *supra* note 98, at 148; Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT’L L. 775, 784–87 (2008); Franck, *supra* note 58, at 1545; J. Anthony VanDuzer, *Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation*, 52 MCGILL L.J. 681, 681 (2007); Kara Dougherty, Note, *Methanex v. United States: The Realignment of NAFTA Chapter 11 with Environmental Regulation*, 27 NW. J. INT’L L. & BUS. 735, 752 (2007).

useful brief.¹⁰² Describing the suggestions made by commentators to increase the legitimacy of the investment arbitration process, Professor Franck identified two ideas as having potential: (1) the amendment of the arbitration rules to allow the consideration of non-disputing parties and (2) the amendment of bilateral investment treaties to recognize public participation and the publication of decisions.¹⁰³ Both of Professor Franck's suggestions have been implemented: first, by the amendment of the ICSID Rules to allow non-disputing parties to participate in certain arbitrations at the discretion of the relevant tribunal, and second, by the 2004 U.S. Model BIT provisions providing that decisions should be public and non-disputing parties may be allowed to participate in the case when it involves the public interest.¹⁰⁴

The ICSID Convention Rules were amended in 2006 to allow the participation of non-disputing parties at the discretion of the Tribunal when:

(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.¹⁰⁵

Rule 37(2) also requires the Tribunal to consult both parties before allowing the submission of amicus briefs by non-disputing parties and states that the Tribunal should not allow submissions if they would unfairly prejudice either of the parties.¹⁰⁶ The final sentence of Rule 37 states: "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."¹⁰⁷

The case studies below explore two investment treaty arbitrations. The first case study explores *Methanex Corp. v. United States*, an arbitration allowing the submission of amicus briefs under NAFTA Chapter 11 where the dispute was arbitrated according to the UNCITRAL Rules. The second

¹⁰² See, e.g., VanDuzer, *supra* note 101, at 708.

¹⁰³ Franck, *supra* note 58, at 1602–04, 1616–17.

¹⁰⁴ See U.S. Model BIT, *supra* note 21, arts. 11(2), 28(3); ICSID Convention Rules, *supra* note 20, Rule 37(2).

¹⁰⁵ ICSID Convention Rules, *supra* note 20, Rule 37(2).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

case study explores *Biwater Gauff Ltd. v. Tanzania*, a very recent case allowing the submission of amicus briefs where a dispute was brought under a bilateral investment treaty, and arbitrated according to the ICSID rules, with Rule 37(2) as the basis for the submission of the amicus briefs. This Note explores these case studies with three objectives in mind. First, this Note analyzes the nature of the state action in each case that was subject to the expropriation challenge in light of whether the state action taken is an example of traditional state regulation or new governance regulation. Second, this Note compares the procedural awards granting the non-disputing parties the right to file the briefs and the arguments made in the briefs themselves. The goal here is to understand how non-disputing parties are currently harnessing their right to participate in transnational investment arbitration. Finally, this Note looks to the potential brought by Rule 37(2) and the new provisions in the 2004 U.S. Model BIT for harnessing and expanding the right of NGOs to participate in investment treaty arbitration, and how the new governance model can contribute to that expansion.

IV. CASE STUDIES: *METHANEX CORP. V. UNITED STATES* AND *BIWATER GAUFF LTD. V. TANZANIA*

A. *The State Regulations and Actions Challenged by the Investors as Expropriation*

In *Methanex Corp. v. United States*, a Canadian producer of methanol brought a claim against the United States for expropriation pursuant to NAFTA Chapter 11.¹⁰⁸ The claim was brought under Articles 1116(1) and 1117(1) of NAFTA; as amended, the complaint alleged breaches of Articles 1102, 1105 and 1110 of NAFTA.¹⁰⁹ Methanex's challenge was to a newly passed California law—the MTBE Public Health and Environment Protection Act of 1997—outlawing the use of methyl tertiary butyl ether (MTBE), an oxygenate additive in gasoline.¹¹⁰ The *Methanex* claim was brought in 1999 and the final award was rendered in 2005.¹¹¹

¹⁰⁸ *Methanex Corp. v. United States*, Final Award of the Tribunal on Jurisdiction and Merits pt. I, Preface, para. 1, 44 I.L.M. 1345, 1345 (NAFTA Ch. 11 Arb. Trib. 2005), available at <http://www.state.gov/documents/organization/51052.pdf> [hereinafter *Methanex Final Award*].

¹⁰⁹ *Methanex Final Award*, *supra* note 108, pt. I, Preface, at paras. 2, 4.

¹¹⁰ Dougherty, *supra* note 101, at 736 (“Gasoline manufacturers began using MTBE in 1979 as a source of octane as lead was phased out of gasoline and, more recently, as an oxygenate to meet the requirements of the Clean Air Act Amendments of 1990.”).

¹¹¹ *Id.* at 740.

After researchers issued a study finding that MTBE was dangerous in drinking water, Governor Gray Davis issued an executive order to phase out the use of MTBE as a gasoline additive in California.¹¹² The California legislature endorsed this executive order through Senate Bill 989.¹¹³ Methanex was a Canadian manufacturer of methanol, the primary ingredient in MTBE. It argued that the United States was discriminating against it in passing the California law.¹¹⁴ Methanex's theory was that the MTBE Public Health and Environment Protection Act of 1997 expropriated its investment because California was intending to use ethanol instead of MTBE as a gasoline additive.¹¹⁵ Ethanol producers in the United States were receiving more favorable treatment than Methanex, the company argued, because California was treating Methanex differently than it was treating ethanol producers, and ethanol producers were in "like circumstances" with Methanex.¹¹⁶ *Methanex Corp. v. United States* represents the first case brought by an investor challenging an environmental regulation passed by the United States.¹¹⁷ *Methanex* is an example of "regulatory expropriation" because the corporation challenged a traditional regulation passed by "old governance" theories.

The other case studied here, *Biwater Gauff Ltd. v. United Republic of Tanzania*, was more complicated. To summarize, *Biwater* involved a water and sewage infrastructure project in Dar es Salaam, Tanzania.¹¹⁸ *Biwater Gauff* was an investment vehicle established in England and Wales; the investment vehicle then established a company in Tanzania, City Water Services Limited (City Water).¹¹⁹ City Water contracted with a public corporation in Tanzania, Dar es Salaam Water and Sewerage Authority (DAWASA), for the implementation of the sewage infrastructure project.¹²⁰ The two contracting parties, City Water and DAWASA, had a dispute and City Water decided to ask for arbitration.¹²¹ After City Water initiated arbitration procedures, the Tanzanian government deported several members

¹¹² *Id.* at 739.

¹¹³ *Id.*

¹¹⁴ *Id.* at 740.

¹¹⁵ *Id.* at 749.

¹¹⁶ Dougherty, *supra* note 101, at 749.

¹¹⁷ *Id.* at 740.

¹¹⁸ Martina Polasek, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Introductory Note to Three Procedural Orders, ICSID Case No. ARB/05/22, 22 ICSID REV.—FOREIGN INVESTMENT L.J. 149, 149 (2007).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 149–50.

of City Water's senior management.¹²² DAWASA and the Republic of Tanzania seized City Water's assets.¹²³ Biwater then submitted a claim requesting arbitration under the ICSID rules, invoking the bilateral investment treaty between the United Kingdom and the United Republic of Tanzania.¹²⁴ The case involved a claim of roughly \$20 million.¹²⁵

The details of the case were quite complicated. The Republic of Tanzania was initially awarded \$140 million in World Bank, African Development Bank, and European Investment Bank funding to increase infrastructure for its water and sewage project.¹²⁶ Tanzania accepted bids for the project, called the "Dar es Salaam Water Supply and Sanitation Project."¹²⁷ Two corporations submitted a joint bid: Biwater International Limited, incorporated under English and Welsh law, and HP Gauff Ingenieure, a German corporation.¹²⁸ The two corporations then incorporated Biwater Gauff for the purposes of the Dar es Salaam water and sewage project.¹²⁹ Under the terms of the bid, the party winning the bid was required to create a local Tanzanian operating company and a minimum number of shares in the local company were to be held by either a Tanzanian company or a Tanzanian individual.¹³⁰ The local Tanzanian company incorporated by Biwater Gauff was City Water.¹³¹ City Water contracted with DAWASA, a Tanzanian public corporation, to implement the project.¹³²

There were three contracts entered into by the operating company: (1) the Water and Sewerage Lease Contract, (2) the Supply and Installation of Plant and Equipment Contract and (3) the Contract for the Procurement of Goods.¹³³ The lease contract, which the Tribunal noted was the most important of the three, provided that City Water would provide water and sewage services on behalf of DAWASA, and City Water would implement certain aspects of the project.¹³⁴ DAWASA handed over all of its "day-to-

¹²² *Id.* at 150.

¹²³ *Id.*

¹²⁴ Polasek, *supra* note 118, at 150.

¹²⁵ *Id.*

¹²⁶ Biwater Award, *supra* note 6, at para. 3.

¹²⁷ *Id.*

¹²⁸ *Id.* at para. 4.

¹²⁹ *Id.*

¹³⁰ *Id.* at para. 5.

¹³¹ *Id.*

¹³² Polasek, *supra* note 118, at 149.

¹³³ Biwater Award, *supra* note 6, at para. 6.

¹³⁴ *Id.* at para. 9.

day activities” to City Water, and City Water was then in charge of providing services to the designated areas in and around Dar es Salaam.¹³⁵

At the time the parties entered the lease contract, the water situation in Dar es Salaam was “precarious,” according to the World Bank.¹³⁶ “Poor management, lack of resources, increased demand and insufficient capital expenditures over a period of decades had led to a progressive worsening of the situation.”¹³⁷ The power to regulate water in Tanzania had been formally granted to the National Urban Water Authority, a public entity that provided water free of charge.¹³⁸ Because of the poor state of water services, the Tanzanian government sought to reform its policies regarding water services through decentralization beginning in the 1990s.¹³⁹ DAWASA had been in charge of providing water services to the citizens of Dar es Salaam as a decentralized regional entity, but had not succeeded in providing services as the “existing infrastructure proved to be insufficient to do so.”¹⁴⁰ Involving a private actor, Biwater Gauff, in the project bidding and implementation was a “keystone of the reform process.”¹⁴¹

Unfortunately, the private stakeholders in this action failed to implement the project successfully. City Water was not successful in providing water and sewage services to the people of Dar es Salaam because the project proved too ambitious. In response to the failure of City Water to provide services, the Tanzanian government initiated a series of actions culminating in a notice to terminate the lease contract, the seizure of City Water’s assets, and the deportation of City Water’s management.¹⁴² Biwater Gauff challenged these events as an expropriation under the BIT between the United Kingdom and Tanzania on the ground that Tanzania breached several

¹³⁵ *Id.*

¹³⁶ *Id.* at para. 96.

¹³⁷ *Id.*

¹³⁸ *Id.* at para. 98.

¹³⁹ Biwater Award, *supra* note 6, at para. 97.

¹⁴⁰ *Id.* at para. 8.

¹⁴¹ *Id.* at para. 97.

¹⁴² *Id.* at para. 15. The events leading up to the seizure of assets and the deportation of City Water officials were: (1) on May 13, 2005, the Minister of Water and Livestock Development sought to terminate the lease contract, (2) on May 16 2005, “a call was made on the entire amount of the performance bond established by City Water in connection with the lease contract,” (3) on May 17, 2005, “DAWASA issued a notice for a reinstatement of the performance bond,” and (4) on May 24, 2005, the Tanzania Revenue Authority withdrew City Water’s VAT exemption. *Id.* The notice to terminate the lease was issued on May 25, 2005, and the Tanzanian government seized City Water’s assets and deported City Water’s senior management on June 1, 2005. *Id.*

of its obligations.¹⁴³ Biwater argued that Tanzania had breached “its obligations to grant fair and equitable treatment, not to take unreasonable and discriminatory measures, the obligation to grant full protection and security to investors and to guarantee the unrestricted transfer of funds.”¹⁴⁴

B. *The Procedural Orders Allowing for Public Participation and the Amicus Briefs*

1. *The Procedural Order in Methanex Corp. v. United States*

The International Institute for Sustainable Development (IISD), Communities for a Better Environment, Bluewater Network, and the Center For International Environmental Law (CIEL) sought permission to intervene as amicus curiae in *Methanex Corp. v. United States*.¹⁴⁵ The Tribunal would have jurisdiction to allow the submission of briefs, according to the amici, or petitioners, under Article 15 of the UNCITRAL Rules.¹⁴⁶ Article 15(1) of the UNCITRAL Rules grants a tribunal arbitrating a dispute according to its rules the broad procedural discretion to conduct the arbitration in a manner the tribunal sees fit.¹⁴⁷ IISD argued that it should have the right to intervene in *Methanex* because of the public importance of the decision the Tribunal would render in the case, the “critical impact” the Tribunal’s decision would have on public welfare in the United States, and because the participation of the petitioners would help allay the public outcry over the investor’s challenge to the California law.¹⁴⁸ IISD also noted that the absence of an appellate mechanism for the consideration of the Tribunal’s decision enhanced the importance of the public participation.¹⁴⁹ The other

¹⁴³ *Id.* at para. 16.

¹⁴⁴ *Id.*

¹⁴⁵ *Methanex Corp. v. United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amicus Curiae, para. 5 (NAFTA Ch. 11 Arb. Trib. 2004) [hereinafter *Methanex Amicus Decision*].

¹⁴⁶ *Id.* at para. 5.

¹⁴⁷ *Arbitration Rules of the United Nations Commission on International Trade Law*, G.A. Res. 31/98, at Art. 15(1), U.N. GAOR, 31st Sess., Supp. No. 17, U.N. Doc. A/31/17 (Dec. 15, 1976) [hereinafter *UNCITRAL Rules*], available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html. The full text of Article 15(1) states: “Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.” *Id.*

¹⁴⁸ *Methanex Amicus Decision*, *supra* note 145, at para. 5.

¹⁴⁹ *Id.* at para. 6.

petitioners—Communities for a Better Environment, Bluewater Network, and the Center for International Environmental Law—stressed that their ability to participate was crucial because of the public support for the intervention and the fact that the outcome of the arbitration would affect the willingness of states to pass environmental regulation.¹⁵⁰

The two NAFTA countries that were not parties to the dispute, Canada and Mexico, submitted arguments to the Tribunal on whether the Tribunal should consider the amicus submissions; Canada essentially paralleled the arguments of the United States, while Mexico fell in line with the claimant-investor, Methanex.¹⁵¹ Methanex argued that NAFTA's provisions required documents prepared in anticipation of arbitration be kept confidential and that the Tribunal had no jurisdiction to allow the petitioners to intervene.¹⁵² There were two other dangers noted by Methanex here: first, that the disputing parties would not have the opportunity to test the factual bases of the non-disputing parties' submissions and second, that allowing the submission in this case would set a damaging precedent to investors seeking to resolve transnational disputes by arbitration.¹⁵³

The United States, as the Respondent, argued that there was an "inherent flexibility" in the UNCITRAL Rules that granted the Tribunal discretion to allow the submissions of briefs, and neither the UNCITRAL rules nor NAFTA prohibited the Tribunal from considering submissions of non-disputing parties.¹⁵⁴ The United States indicated public participation in this case was important because a State was involved as the Respondent.¹⁵⁵ Here, unlike commercial arbitration, the Tribunal was responsible for interpreting principles of public international law, and the decision of the Tribunal would affect more actors than the disputing parties in the case.¹⁵⁶

The Tribunal agreed with the United States that no provision of the UNCITRAL Rules or NAFTA expressly forbade or expressly allowed the submissions of non-disputing parties; therefore, the Tribunal considered the question under its general procedural powers according to the UNCITRAL Rules.¹⁵⁷ Article 15(1) of the UNCITRAL Rules grants the Tribunal broad discretion in determining how to conduct the arbitration; the Tribunal noted, however, that it did not have the power to grant the petitioners the right to

¹⁵⁰ *Id.* at para. 8.

¹⁵¹ *Id.* at para. 3.

¹⁵² *Id.* at para. 12–13.

¹⁵³ *Id.* at para. 14.

¹⁵⁴ Methanex Amicus Decision, *supra* note 145, at paras. 17, 19.

¹⁵⁵ *Id.* at para. 17.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at para. 24.

engage in the arbitration as parties, nor could the Tribunal grant the petitioners any substantive rights.¹⁵⁸ The Tribunal did state that allowing the petitioners to submit amicus curiae briefs would not affect the substantive rights of either of the disputing parties.¹⁵⁹ The Tribunal concluded that it had the power to consider submissions of the petitioners under Article 15(1) because of the general public importance and implications of the expropriation challenge to a state law. Interestingly, the Tribunal also noted that allowing submissions would be likely to benefit the arbitral process by opening the process to the non-disputing parties and increasing its transparency.¹⁶⁰ The notion of increasing the transparency and procedural legitimacy of the investment arbitration process was included in the United States and Canada's submissions regarding the petition to file amicus briefs.¹⁶¹

2. *The Procedural Order Allowing Amici Participation in Biwater Gauff Ltd. v. Tanzania*

There were five parties that sought to file amicus briefs in *Biwater*: (1) The Lawyers' Environmental Action Team (LEAT), (2) The Legal and Human Rights Centre ("LHRC"), (3) The Tanzania Gender Networking Program (TGNP), (4) The Center for International Environmental Law (CIEL), and (5) The International Institute for Sustainable Development (IISD).¹⁶² Procedural Order No. 5 began by listing each party's qualifying

¹⁵⁸ *Id.* at para. 27.

¹⁵⁹ *Methanex Amicus Decision*, *supra* note 145, at para. 31. In considering the question of whether to allow amicus submissions, the Tribunal looked to an interpretive note of the Iran-U.S. Claims Tribunal on the interpretation of UNCITRAL Rule 15 that stated, "The arbitral tribunal may . . . permit such Government or person to assist the arbitral tribunal by presenting written and [or] oral statements." *Id.* at para. 32. The Tribunal in *Methanex* also compared UNCITRAL Article 15(1) to the WTO rules, and noted the reluctance of the International Court of Justice to consider amicus briefs. *Id.* at paras. 33–34.

¹⁶⁰ *Id.* at para. 49.

¹⁶¹ *Id.* As to other factors, the Tribunal considered the prejudice to the parties in allowing the submission (because here the amici would be entering the picture on the side of the United States to the detriment of the investor) and the increased cost of allowing the submissions as relevant factors to the decision. The investor's argument that allowing the submission of briefs here would set an unwieldy precedent for future tribunals was not persuasive as the arbitration system is not currently bound by precedent, and each tribunal is tasked with considering the scope of Article 15 in relation to the facts of the arbitral dispute before it. *Id.* at paras. 50–51.

¹⁶² *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Procedural Order No. 5, ICSID (W. Bank) Case No. ARB/05/22, para. 1 (2007) [hereinafter *Biwater Procedural Order No. 5*].

credentials for participating as amici in the case.¹⁶³ The Tribunal noted that two of the petitioners were the same as the amici in *Methanex*: IISD and CIEL.¹⁶⁴ The petitioners stated that the arbitration, because of its subject matter, concerned not only the Tanzanian government and City Water, but all developing countries currently seeking to privatize water services.¹⁶⁵ Indeed, the petitioners argued that the arbitration between Biwater Gauff and Tanzania would affect the entire international community because of its “broader sustainable development” implications and because the privatization of water services in Tanzania was one of the goals of the UN Millennium Declaration.¹⁶⁶ Before its decision, the Tribunal noted that the petitioners had a “longstanding, genuine” interest in issues such as these, and that the petitioners’ interests were “supported by their well-recognized expertise on such issues.”¹⁶⁷ In addition to the factors enumerated in Rule 37, the petitioners argued that the Tribunal should also consider the fact that these parties had a history of amicus participation with no abuse, and that the Tribunal should also consider the legitimacy and transparency of the arbitral process when determining whether to allow the submissions.¹⁶⁸

The claimant-investor, Biwater Gauff, argued that the petitioners’ expertise on the subject was irrelevant to the case; the privatization of water for purposes of the arbitration only relate to the investor and the host-state.¹⁶⁹ City Water had left Tanzania and was not arbitrating the dispute in order to return and complete the project—it was only seeking compensation. Therefore, City Water would have no further relation to the project, and because the amici were concerned with the implementation of the water and sewage project, their arguments were irrelevant to the arbitration.¹⁷⁰ The Respondent’s argument was less strong; the State noted the expertise of the parties seeking to file briefs, admitted that it was difficult to know whether the briefs would assist the Tribunal—a requirement of Rule 37(2)—and also noted that the petitioners’ track record indicated that they would not be

¹⁶³ *Id.* at para. 11.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at para. 12.

¹⁶⁶ *Id.* at para. 13. “How international investment agreements, which by and large share similar structures and substantive content, can be applied to govern foreign investment in major infrastructure projects is asserted to be of critical concern for the sustainable development of these countries” *Id.* at para. 14.

¹⁶⁷ Biwater Procedural Order No. 5, *supra* note 162, at paras. 23–24.

¹⁶⁸ *Id.* at para. 15.

¹⁶⁹ *Id.* at para. 31.

¹⁷⁰ *Id.* at para. 32. “Policy and political issues do not bear on the factual and legal issues in this dispute.” *Id.* at para. 35.

disruptive or cause harm to the arbitral process.¹⁷¹

The Tribunal's decision noted first, while the petitioners were petitioning for amicus curiae "status," there is no general amici "status" in ICSID arbitrations and that the determination for allowing submissions had to be made on an ad hoc basis.¹⁷² The Tribunal then decided that the petitioners here fell within the three requirements of Rule 37—the submission must assist the Tribunal, be within the scope of the dispute, and the groups writing the submission must have "specialized knowledge" on the subject—and adopted language from the procedural order in *Methanex*. In adopting language from *Methanex*, the Tribunal stated:

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.¹⁷³

The Tribunal then noted the same concerns as the *Methanex* Tribunal: the cost of the arbitration would be raised by allowing written submissions of amici, and the allowance of submissions would prejudice the claimant-investor in this case, as the submissions would favor the Respondent Tanzania.¹⁷⁴ Because of these competing concerns, the Tribunal decided a two-stage process would help the balance of the submissions: (1) the petitioners were to file a joint brief, and then each disputing party was to consider whether it would respond to the amicus brief and discuss their idea with the other party, then (2) after the Tribunal consulted with the parties on the submissions, it was to issue procedural orders allowing for responses to

¹⁷¹ *Id.* at paras. 42–44.

¹⁷² Biwater Procedural Order No. 5, *supra* note 162, at para. 46. The Tribunal noted that the ICSID rules only allow for two "carefully delimited" rights: the right to file a written submission and the right to attend hearings according to Rule 32(2). The Tribunal did not wish to foster a misconception that the granting of a petitioner to submit amicus curiae briefs automatically encompassed the right to attend hearings and be able to view the documents of the parties. *Id.* at para. 46.

¹⁷³ *Id.* at para. 51. The Tribunal also quoted again from the *Methanex* procedural order allowing amicus submissions: "the acceptance of amicus submissions would have the additional desirable consequence of increasing the transparency of investor state arbitration." *Methanex Amicus Decision*, *supra* note 145, at para. 49.

¹⁷⁴ Biwater Procedural Order No. 5, *supra* note 162, at paras. 57–60.

the amicus submissions if the parties choose to do so.¹⁷⁵

C. *The Amicus Briefs and the Final Awards of the Tribunals*

1. *The Briefs and Final Award in Methanex Corp. v. United States*

There were two briefs filed by environmental organizations in *Methanex Corp. v. United States*. The first brief was written by Earthjustice for itself, Bluewater Network, Communities for a Better Environment, and The Center For International Environmental Law. The joint brief began its arguments, after indicating that it agreed with the arguments of the United States, by asserting that the Tribunal should apply customary principles of international law in making its decision.¹⁷⁶ There were several supporting bases for the use of international legal principles: NAFTA indicates that the Tribunal should be guided by principles of international law, and Methanex repeatedly relied on international legal principles in making its arguments.¹⁷⁷ The non-disputing parties in the joint brief averred that the Tribunal should take account of the presumption of legitimacy.¹⁷⁸ Not only did the principle of legitimacy apply, the joint brief stated, but the Tribunal should apply a “special” presumption of legitimacy in this case because NAFTA and the North American Agreement on Environmental Co-operation (“NAAEC”) “explicitly preserve the right of each Party government to protect the environment.”¹⁷⁹

The joint brief argued that the precautionary principle—which is widely accepted in international law—should be applied here because California not only has the right to protect its citizens’ drinking water, it has a duty to do so under the International Covenant on Civil and Political Rights (“ICCPR”).¹⁸⁰

¹⁷⁵ *Id.* at para. 60.

¹⁷⁶ *Methanex Corp. v. United States*, Submission of Non-Disputing Parties, Bluewater Network, Communities for a Better Environment, and Center for International Environmental Law, para. 2 (NAFTA Ch. 11 Arb. Trib. 2004) [hereinafter *Methanex Bluewater Submission*].

¹⁷⁷ *Id.*

¹⁷⁸ This principle presumes that a law enacted for justifiable reasons on the basis of a genuine and proper governmental purpose—such as the health and safety of its citizens—is legitimate. G.C. Christie, *What Constitutes a Taking of Property Under International Law*, 38 BRITISH YEARBOOK OF INT’L L. 307, 338 (1962).

¹⁷⁹ *Methanex Bluewater Submission*, *supra* note 176, at para. 6.

¹⁸⁰ The precautionary principle allows a government to regulate an activity that is possibly or probably harming the environment, even if the government does not have definitive evidence on the matter. Science and Environmental Health Network, <http://www.sehn.org/ppfaqs.html> (last visited Feb. 14, 2009). “It must [] be up to the

Finally, the joint brief indicated that the Tribunal should take account of the principles of subsidiarity and of public participation.¹⁸¹ Because the California legislature enacted the now-challenged state law banning MTBE pursuant to the voice of the people, the Tribunal should give that law due deference.¹⁸²

Other arguments in this joint brief revolve around the idea of the “least restrictive trade” requirement under the WTO.¹⁸³ Methanex argued here that the “least restrictive trade” requirement embodied in the WTO should inform the Tribunal’s definition of discrimination under NAFTA. The brief says, in comparing NAFTA to the WTO, that:

[I]nvestment disciplines implicate much broader range of government regulation and thus require a broad focus in identifying the criteria relevant to determine illegitimate discrimination. A narrow analysis that looks only at economic competition would ignore circumstances that explain the need for health and environmental measures and that are therefore relevant to determining legitimate intent.¹⁸⁴

The International Institute for Sustainable Development also filed a brief in *Methanex*. The IISD brief starts off by noting two preliminary issues: first, that investor-state arbitration is not meant to be an insurance policy for investors in foreign countries, and second, that investors are presumed to be “intelligent and aware” of the environment they are investing in.¹⁸⁵ Here, this means that Methanex should have recognized California as a global leader in environmental regulation, and that the political culture of the United States in general may foster new, not-completely-foreseen legislation.¹⁸⁶ The IISD brief went on to argue for the United States under the principles of international law and national sovereignty, similar to the joint brief.

government, not an international tribunal, to make any judgments required by the existence of conflicting evidence or different scientific principles.” Methanex Bluewater Submission, *supra* note 176, at para. 15.

¹⁸¹ The principle of subsidiarity is generally accepted in both international law and European Union law. Subsidiarity provides that “environmental issues are best addressed at the lowest level of government.” Methanex Bluewater Submission, *supra* note 176, at para. 19. The principle of public participation facilitates the involvement of interested parties, or stakeholders, in making a decision.

¹⁸² *Id.* at para. 20.

¹⁸³ *Id.* at para. 28.

¹⁸⁴ *Id.* at para. 31.

¹⁸⁵ Methanex Corp. v. United States, Submission of Non-Disputing Party International Institute for Sustainable Development paras. 3–4 (NAFTA Ch. 11 Arb. Trib. 2004) [hereinafter Methanex Sustainable Development Submission].

¹⁸⁶ *Id.* at paras. 5–6.

IISD then focused specifically on the text of NAFTA and whether NAFTA's provisions allowed Methanex to argue that the law passed by California was an illegitimately protectionist measure.¹⁸⁷ International law does not, IISD argued, specifically make protectionism illegal.¹⁸⁸ The abstract idea of "garden variety" protectionism does not exist as a legal principle and therefore was not sufficient for Methanex's claim of discrimination.¹⁸⁹ Methanex argued that the definition of "like circumstances" under NAFTA Article 1102 should have a similar meaning to the definition of "like products" in the WTO agreement. In response to Methanex's argument,¹⁹⁰ IISD noted that the rules for "like products" were established using general principles like risk assessment, risk management, and the precautionary principle.¹⁹¹ IISD could find no evidence that NAFTA was intended to treat foreign investors better than domestic investors, and in this case, the "like circumstances" language from Section 1102 of NAFTA was satisfied because all producers of methanol would be treated the same under the new California law.

The Tribunal in *Methanex Corp. v. United States* began its conclusion regarding the scientific findings that formed the basis for the California law with a note of deference to the California legislature. The Tribunal indicated that California had the right to determine how to evaluate risk and allocate appropriate margins of safety for clean drinking water.¹⁹² While scientists did not uniformly accept the report issued by The University of California and used by the California legislature as evidence of the damaging effects of MTBE, the report was subject to peer review and publication.¹⁹³ The

¹⁸⁷ *Id.* at paras. 12–17.

¹⁸⁸ *Id.* at para. 12.

¹⁸⁹ *Id.* at para. 15.

¹⁹⁰ NAFTA, *supra* note 77, at art. 1102; Methanex Final Award, *supra* note 108, pt. IV, ch. B, at paras. 3–7.

¹⁹¹ Methanex Sustainable Development Submission, *supra* note 185, at para. 19. This portion of the brief included a fairly complicated argument about the application of the environmental exception embodied in the WTO and its relation to NAFTA. Only when a complaining state establishes that a state has breached a WTO rule does the environmental exception apply. The exception does not apply to NAFTA Chapter 11, furthermore, because it only relates to disputes between two states. The brief averred that Chapter 11 of NAFTA is a "largely self-contained" set of rules that deal with investor-state relations. *Id.* at para. 21. See also William D. Ruckelshaus, *Risk, Science, and Democracy*, ISSUES IN SCI. & TECH. 19–38 (1985).

¹⁹² Methanex Final Award, *supra* note 108, pt. III, ch. B, at para. 44.

¹⁹³ *Id.* pt. III, ch. A, at para. 101. A University of California report noted that several municipalities in the state had to shut down their public drinking water because of the MTBE leakage. This study then caught the attention of the California legislature, which directed researchers to consider whether MTBE had contaminated other areas' drinking

Tribunal likely framed its decision in this way in light of Methanex's arguments that it should be entitled to compensation. This level of deference given by the Tribunal to the scientific findings of the committee no doubt relates to California's duty to regulate clean water under the ICCPR, the precautionary principle, and other principles of international law mentioned in the joint amicus brief.

The Tribunal then indicated the methodology that Methanex wanted it to adopt in this case was a "connect-the-dots" methodology. The Tribunal noted "six dots" in Methanex's chain of inferences: (1) that California was "trying [] without success" to develop an in-state ethanol industry;¹⁹⁴ (2) that the allegations of MTBE leaking into California's groundwater were merely a pretense to allow California to favor the ethanol industry over MTBE producers;¹⁹⁵ (3) California's discriminatory intent was indicated by the fact that the decision to make MTBE illegally favored ethanol and by ADM's support of the ban;¹⁹⁶ (4) the United States allowed political contributions by corporations, here ADM, to government officials, but did not allow campaign contributions to be exchanged for a particular government action;¹⁹⁷ (5) ADM had a dinner meeting at its headquarters for Governor Gray Davis, which evinces an intent to favor the ethanol industry;¹⁹⁸ (6) as evidence of discriminatory intent, Methanex produced evidence by its Director of Government and Industry Relations that a lobbyist had told him that a California Senator had made a remark "if you're here on an MTBE issue, you're [meaning out of luck]."¹⁹⁹ These "dots" were not enough to allow the Tribunal to conclude that there was a discriminatory intent present in this

water. These researchers were supposed to include public policy recommendations in their report as well as cost benefit analysis after assessing the scientific data. The study that resulted from this research was the Health and Environmental Assessment of MTBE: Report to the Governor and Legislature of the State of California as sponsored by SB 521. This is the study the Tribunal is referring to in its report. Dougherty, *supra* note 101, at 738.

¹⁹⁴ Methanex Final Award, *supra* note 108, pt. III, ch. B, at para. 4.

¹⁹⁵ *Id.* pt. III, ch. B, at paras. 9–14.

¹⁹⁶ *Id.* pt. III, ch. B, at paras. 13–16

¹⁹⁷ *See id.* pt. III, ch. B, at paras. 17–33.

¹⁹⁸ *Id.* pt. III, ch. B, at paras. 34–46. The Tribunal and both disputing parties agreed that if Methanex could establish a "quid pro quo" exchange of campaign contributions for the banning of MTBE it would constitute a violation of United States campaign finance law. Methanex was unable to offer any evidence to that fact, nor was there evidence that the banning of MTBE or methanol was discussed at this dinner. The tribunal was unwilling to infer discrimination in light of the campaign contributions. *Id.* pt. III, ch. B, at para. 37.

¹⁹⁹ *Id.* pt. III, ch. B, at para. 47 (alteration in original).

case.²⁰⁰ Because the economic interests of foreign investors had previously been elevated under NAFTA “to the same plan as the public policy concerns that drive environmental regulation,” *Methanex* narrows the reach of the doctrine of expropriation under international investment law and gives States room to maneuver within their regulatory authority.²⁰¹

2. *The Briefs and Final Award in Biwater Gauff Ltd. v. Tanzania*

Amici were granted the right to file briefs in *Biwater* according to Procedural Order No. 5 and pursuant to the newly amended ICSID Rule 37(2).²⁰² The amici, however, were unable to obtain access to the documents involved in the arbitration, including the legal arguments of the parties.²⁰³ Because of this, the amici discerned the legal arguments of the parties as best they could from public documents and made arguments they thought would be relevant.²⁰⁴ The amicus brief in *Biwater* starts out arguing, similarly to the brief in *Methanex*, that bilateral investment treaties are not insurance policies against bad investments, and that investors are considered responsible for knowing the environment in which they are investing.²⁰⁵ After noting more specific investor responsibilities—such as the duty to conduct proper due diligence and risk assessment—the brief implicates the principle of *pacta sunt servanda*.²⁰⁶ The amici note that good faith in contract is absolutely necessary in this context, because when a private actor fails to comply with the good faith principle in a contract involving an

²⁰⁰ *Methanex Final Award*, *supra* note 108, pt. III, ch. B, at para. 52. The Tribunal indicated that it would have been able to accept *Methanex*’s argument if “(i) [these dots] were . . . the only dots, (ii) they were to be accepted at face value as submitted by *Methanex*; and, moreover, (iii) they were carefully connected as *Methanex* proposes.” *Id.*

²⁰¹ *Id.* pt. III, ch. B, at para. 52.

²⁰² *See Caruba*, *supra* note 98, at 142.

²⁰³ Brief of Amici, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID (W. Bank) Case No. ARB/05/22 at para. 12 [hereinafter *Biwater Amici Brief*]; *Biwater Award*, *supra* note 6, at para. 143.

²⁰⁴ *Biwater Amici Brief*, *supra* note 203, at para. 14.

²⁰⁵ *Id.* at paras. 16–17 (citing *Caffeine v. Spain* and *MTD v. Chile*). The amici also cite to a decision of the International Court of Justice (ICJ), *Case Concerning Electronic Sicula S.P.A.* and an article by Prof. Peter Muchlinski, that recognizes the principle of investor responsibility, and in the latter, that the principle is emerging as part of international investment law. *Id.* at paras. 20, 23.

²⁰⁶ *Id.* at para. 32. *Pacta Sunt Servanda* is a longstanding principle of good faith in contract: promises must be kept. *Caruba*, *supra* note 98, at 138. The fact that the amici are using this principle here is interesting because it is normally the investor who argues *pacta sunt servanda* should apply, and the country argues based on the principle of *rebus sic stantibus*, that circumstances change. *Id.*

international investment the private actor does not only harm the other contracting party, it harms the public.²⁰⁷ The principle of *pacta sunt servanda* remained, according to the amici, “the most critical bulwark against such a result.”²⁰⁸

The brief moves on to address the recognition of the “urgency of water access needs . . . in the developing world” from the World Summit on Sustainable Development in 2002.²⁰⁹ The private sector was involved in this summit, according to the amici, and the claimant-investor here, Biwater, had explicitly acknowledged the need for safe drinking water in developing countries.²¹⁰ The amici also note that the right to clean drinking water has been accepted in international law as a basic human right.²¹¹ “Amici submit that human rights and sustainable development issues must be factors that condition the nature and extent of the investor’s responsibilities, and the balance of rights and obligations between the investor and host state.”²¹² The brief applies these legal principles to the investor in the case by submitting that Biwater failed in its legal obligations as an investor.²¹³

In its conclusion, the brief then argues that the “connect-the-dots” methodology that was used in *Methanex*—by the claimant against the State—should be applied against the investor here. The amici’s legal theory was that Biwater was strategically bidding low on the contracts so as to be able to renegotiate later. This strategy could be found by connecting several of the dots of Biwater’s actions. Two of the dots included a failure to properly conduct due diligence and a renegotiation beginning only sixteen months after the original contract was entered into.²¹⁴ There was no other plausible way to explain the combination of facts about the company’s actions here, the amici argued, other than that it was employing a renegotiation strategy.²¹⁵ “Indeed, it is hard to conceive of another business rationale that would explain this combination of factors.”²¹⁶

The Tribunal described the arguments of the amici in its Final Award and noted that the submissions were helpful. Biwater Gauff argued that Tanzania had expropriated its investment in the action taken by the government when

²⁰⁷ Biwater Amici Brief, *supra* note 203, at para. 33.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at para. 45.

²¹⁰ *Id.* at para. 46–47.

²¹¹ *Id.* at para. 48.

²¹² *Id.* at para. 51.

²¹³ Biwater Amici Brief, *supra* note 203, at para. 54.

²¹⁴ *Id.* at para. 84.

²¹⁵ *Id.* at para. 86.

²¹⁶ *Id.*

the Lease Contract was failing.²¹⁷ The arguments of BGT amounted to a “‘creeping’ expropriation” challenge.²¹⁸ The challenge was brought under Article 5 of the BIT between the UK and Tanzania.²¹⁹ In evaluating the expropriation claims, the Tribunal noted that other tribunals in similar cases have examined the government action based on the effects the action had on the investor.²²⁰ The Tribunal stated, however, that “there is nothing to require such effects be economic in nature.”²²¹ The Tribunal concluded on the expropriation issue that the right of Biwater as delineated in the lease contract had been expropriated. The initial claims of Biwater relating to the performance of the lease contract did not amount to an expropriation; however, the press release issued by Minister Lowassa and followed by a political rally amounted to an expropriation because the acts involved the State exercising its administrative authority.²²² The other actions were merely contract terminations, which do not rise to the level of a breach of international law.²²³ The Tribunal agreed that Tanzania had violated the rights of the Biwater to be free from expropriation. It refused, however, to grant the corporation any damages.²²⁴ Both parties consented to the

²¹⁷ Biwater Award, *supra* note 6, at para. 399.

²¹⁸ *Id.* at para. 456.

²¹⁹ Article 5 of the BIT between the UK and Tanzania states that investments shall not be “nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation . . . in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation . . .” *Id.* at para. 394.

²²⁰ *Id.* at para. 463.

²²¹ *Id.* at para. 464. “A distinction must be drawn between (a) interference with rights and (b) economic loss. A substantial interference with rights may well occur without actually causing any economic damage which can be quantified in terms of due compensation. In other words, the fact that the effect of conduct must be considered in deciding whether an indirect expropriation has occurred, does not necessarily import an economic test.” *Id.* (emphasis omitted).

²²² *Id.* at paras. 497–98.

²²³ *See* SUBEDI, *supra* note 58, at 76.

²²⁴ Biwater Gauff (Tanzania) Ltd. (U.K.) v. United Republic of Tanzania, Introductory Note to Three Procedural Orders, ICSID (W. Bank) Case No. ARB/05/22 (2008) (on file with author). Not only did the Tribunal in this case refuse to grant damages to the corporation, but the government of Tanzania actually received a damages award due to the decision to privatize from an UNCITRAL Tribunal in January of 2008. *Id.* Because the corporation was in liquidation at the time this Note was written, however, it is unclear whether the government of Tanzania and the authorities of Dar es Salaam will ever receive any of the 3M GBP.

publication of the final award, but the legal documents and arguments of the parties have not been released.²²⁵

V. CONCLUSION: HARNESSING AND EXPANDING THE RIGHT OF PARTICIPATION

This student seeks to comparatively analyze *Methanex* and *Biwater* based on (1) the state actions challenged as expropriations, (2) the legal basis for the submissions of the amicus brief and each Tribunal's reasoning for allowing the submissions, and (3) the arguments of the amici. While the right for groups with specialized knowledge to publicly participate in ICSID is certainly an improvement in the transparency of transnational arbitration, there may be ways to further adapt the system to the changing regulatory structure in the world. As disaggregated networks form, the transnational arbitration system may be able to engage the networks as participants in the process, using Rule 37 as the crack to explore this possibility. Because the state in transnational arbitration has international legal obligations while the investor does not, the transnational arbitration process is asymmetrical in nature. This Note analyzes the procedure, briefs, and final awards in *Methanex* and *Biwater* for the possibility of equal obligations on the part of all three parties: the state, the investor, and the amici.

A. *The California Law and the Dar es Salaam Water and Sewage Services Project*

Methanex and *Biwater* demonstrate similar expropriation challenges to two diametric forms of regulation. *Methanex* involved a regulation passed by the State of California, The MTBE Public Health and Environment Protection Act of 1997, initially brought about by Executive Order. The passing of the MTBE Public Health and Environment Protection Act sought to regulate the use of MTBE in gasoline, thus making the industrial actor in the case the subject of the regulation. *Methanex* is, therefore, an example of a traditional regulation challenged by the private actor.

Biwater involved an entirely different situation; the action challenged in *Biwater* can be viewed through the lens of new governance regulation for several reasons. First, the Tanzanian law evolved from a centralized national authority in charge of water services to decentralized, regional authorities that had to charge for water and sewage services. Second, the involvement of private actors in the process was central to the Tanzanian reform as private actors were allowed to bid on the contract and implement the project. *Biwater* Gauff, as a stakeholder, had to implement the crucially important

²²⁵ *Biwater* Award, *supra* note 6, at para. 477.

task of providing water services. Finally, the participation of the organizations providing funds for water services improvement in Tanzania—the World Bank, the African Development Bank, and the European Investment Bank—rounded out the stakeholders in the action to include not only government and private actors, but also international organizations. As discussed above, the task of remedying the precarious situation of water services in Dar es Salaam was severely difficult, and the private stakeholders in the action failed to execute the contract as planned. The actions taken by the government, then, were in response to this failure.

The key difference to note between *Methanex* and *Biwater* is the action taken by each government after the law was passed, in *Methanex*, or the project was implemented, in *Biwater*. The United States, through the State of California, passed the MTBE Public Health and Environment Protection Act legitimately under its sovereign authority. After passing the law, the state of California did not have to take any further action. When *Methanex* brought the expropriation claim, both the presumption of legitimacy and public participation protected the United States, as a representative of California, throughout the course of the arbitration. Thus, the Tribunal decided on the merits that the United States had not expropriated *Methanex*'s investment. The public outcry relating to the expropriation claim was due to *Methanex* challenging the MTBE Act. Once California had passed the Act, it did not have to take any further action to remedy what it saw as a public policy problem—the use of a dangerous chemical in gasoline.

Conversely, when the project in Tanzania began to fail because the private actors had been entrusted with too ambitious of a project and were not keeping their end of the bargain, the Tanzanian government was forced to take action. The situation that evolved in *Biwater*, then, encompassed public outcry at the private stakeholders and required the government to take action to correct the problem. This government action was the subject of the expropriation challenge after the corporation had failed in implementing the project. The Dar es Salaam Water and Sewerage Infrastructure project demonstrates that new governance forms of regulation may breed a new brand of expropriation challenges in the future. When private stakeholders fail, the public outcry against the project will require the government to take action, as the government is accountable to its citizens while the private actor is not. In light of current expropriation doctrine—and according to *Biwater*—the actions taken by the government in exercising its executive authority may amount to an expropriation challenge. This result is particularly harsh in the context of a country like Tanzania that, according to the amici, has been struggling with providing water services for decades and was implementing a plan in accordance with the UN Millennium Declaration.

In order to maintain flexibility to be able to adapt to the “New World Order,” the transnational arbitration mechanism must continue its

engagement of the public interest through Rule 37 while adapting to perhaps allow the participation of cross-border networks in the arbitration. For example, the co-operative international agreement for the enforcement of environmental laws between the three NAFTA countries could participate in an arbitral dispute between investors arising out of NAFTA. This would be a way to expand the use of Rule 37(2) by including a party that has unique expertise on the subject, and that has been cooperating on enforcement of a specific treaty. Furthermore, allowing a cooperative network to participate as an amici would, in this example, include actors from all three NAFTA countries in the arbitral process. Broadening the type of actors who participate in the arbitral process would, perhaps, lessen the prejudice of written submissions against the investor.

B. The Use of the Arbitration Mechanism to Allow Public Participation

In amending the ICSID Convention rules to allow groups with “specialized knowledge” to participate in investor-state arbitrations, the ICSID rules grant parties the right to participate in cases involving the public interest. The procedural orders in each case stated that the public interest was undoubtedly present because of the right of individuals to have access to clean drinking water free from polluting toxins and clean sewage systems.²²⁶ The Tribunal in *Methanex*, however, had to grapple with the question of whether it had the power to consider submissions of the petitioners at all.²²⁷ The struggle of the Tribunal in *Methanex* involved examining a broad procedural right with no express statement forbidding or allowing the participation. The Tribunal allowing the amicus submissions did so completely of its own accord, based upon public outcry over the challenge to the California law. The procedural order in *Biwater* demonstrated the power Rule 37 grants a tribunal to allow public participation.²²⁸ The Tribunal in *Biwater* did not have to engage in an analysis of its own authority to allow written submissions by non-disputing parties; it simply plugged in Rule 37 and weighed the factors enumerated in the rule.²²⁹

Interestingly, both procedural orders relied, perhaps heavily, on the appearance of legitimacy in the arbitral process.²³⁰ The Tribunal examined

²²⁶ *Biwater* Procedural Order No. 5, *supra* note 162, at paras. 12–13; *Methanex* Amicus Decision, *supra* note 145, at para. 31.

²²⁷ *Methanex* Amicus Decision, *supra* note 145, at para. 24.

²²⁸ *See Biwater* Procedural Order No. 5, *supra* note 162, at paras. 50–61.

²²⁹ *See id.*

²³⁰ *See id.* at para. 51 (quoting *Methanex* Amicus Decision, *supra* note 145, at para. 49).

each of the three conditions required by Rule 37 before the Tribunal could allow the submission of amicus briefs. Those three factors are: (1) the petitioners must have “specialized knowledge” related to the dispute that would “assist” the Tribunal in coming to a decision, (2) the amicus submissions must address a matter within the scope of the dispute and (3) the petitioners seeking to file submissions must have a “significant interest” in the dispute.²³¹ The Tribunal in Procedural Order No. 5, in *Biwater*, listed the petitioners’ qualifications and found that the petitioners had the “specialized knowledge” required by Rule 37 to file written submissions.²³² The qualifications listed were also a basis for the Tribunal to decide that the parties had a “significant interest in the proceeding.”²³³ The other two factors were, however, more difficult for the Tribunal to discern at the time the petitioners filed their request to submit amicus briefs. Whether the petitioners would assist the Tribunal with their submissions, and whether the petitioners would address a matter within the scope of the dispute were unknown. The Tribunal relied on the previous participation of the petitioners in determining that they would not “disrupt the proceeding” under the last sentence of Rule 37(2).²³⁴ The Tribunal also had to consider the additional cost in allowing the submissions—renting the ICSID arbitration facilities costs \$3000 per day—and the possible prejudice to the investor.

Because several of the factors enumerated in Rule 37(2) could not be evaluated by the Tribunal at the time of its procedural order, the decision to allow the written submissions seemed to rest on the other two factors. The petitioners argued that amicus participation is now the norm in investment treaty arbitration cases involving the public interest, and not allowing the submissions would contribute to further challenges to the legitimacy of the investment treaty arbitration process. In response to these arguments, the Tribunal adopted the language of *Methanex* in allowing the submissions. The language in *Methanex* was, obviously, written before the existence of Rule 37(2), and involved an expropriation challenge under NAFTA—instead of a BIT—and the UNCITRAL arbitration rules.

The primary value of Rule 37(2), therefore, in determining whether to allow written submissions by non-disputing parties is its place in the ICSID arbitration rules. Expressly granting the tribunal the discretion to allow the submissions shields the tribunal from having to ask whether the allowance of written submissions is within its power. The factors that will influence the tribunal’s decision, however, in deciding whether to allow the submissions,

²³¹ ICSID Convention Rules, *supra* note 20, at Rule 37(2).

²³² *Biwater* Procedural Order No. 5, *supra* note 162, at para. 50.

²³³ *Id.*; ICSID Convention Rules, *supra* note 20, at Rule 37(2)(c).

²³⁴ ICSID Convention Rules, *supra* note 20, at Rule 37(2).

still seem to rest on the public outcry surrounding the expropriation claim and the appearance of legitimacy in the arbitration. These factors are not enumerated in Rule 37(2), but the Tribunal in *Biwater* allowed their consideration by deciding that the list of factors in Rule 37(2) was not exhaustive. The focus on the appearance of legitimacy is troubling, as allowing the briefs may appease the public, but does not require the tribunal to consider the briefs in making its decision. This, however, is the challenge of all procedural improvements to legal systems. The outcome of the process is perhaps affected and perhaps not. Here, there is no way to know for sure if the submissions of the amici had any effect on the Tribunal.

C. *The Arguments of the Amici and the Final Awards on the Merits*

The briefs in *Methanex* focused their arguments on recognized international law principles traditionally given to states exercising their sovereign authority: the principle of legitimacy, public participation, and the precautionary principle. These arguments were relevant as the expropriation challenge was to a California law. In *Biwater*, however, the briefs differed from the *Methanex* arguments and were reversed from the norm. The amici implicated the principle of *pacta sunt servanda*, that promises must be kept in arguing that the claimant-investor in the case failed to uphold its contract responsibilities. In traditional cases, the investor argues the principle of *pacta sunt servanda*, while the state argues *rec sic stantibus*, that circumstances change. When the expropriation claim is brought to challenge a new governance action, however, the arguments are reversed.

The expropriation challenge to the new governance action then leaves the state and investor with asymmetrical responsibilities: both parties are required to comply with the principles of *pacta sunt servanda* and *rec sic stantibus*. The state has dual obligations, however, both as a contracting party constrained by contract principles and as a sovereign nation. Only the state's actions may amount to both a breach of a contract obligation and an expropriation action.²³⁵ For example, an ICSID Tribunal in *Waste Management v. Mexico* noted that “[a] failing enterprise is not expropriated just because the debts are not paid or other contractual obligations are not fulfilled.”²³⁶ However, the Tribunal in *Biwater* stated that the absence of

²³⁵ The contract breaches in *Biwater* were governed by another arbitration under the UNCITRAL Rules. This arbitration granted the Republic damages due to the investor's breach of its obligations. The ICSID Tribunal in *Biwater* noted that the contract breach was evidence of expropriation, but was not dispositive of the issue. *Biwater Award*, *supra* note 6, at para. 470. “[I]n determining the treaty claims as between BGT and the Republic, it is impossible to disregard the way in which the Lease Contract was concluded, performed, renegotiated, and terminated.” *Id.*

²³⁶ *Id.* at para. 432 (quoting *Waste Management v. Mexico*).

economic damage does not mean that the State had not expropriated the investment.

In the *Biwater* challenge, then, the decision rested on the fact that the investor had not been damaged by the expropriation. Because a state has responsibility for any “internationally wrongful act”—defined as “an act or omission which is attributable to the State under international law and a breach of an international obligation of the State”—the state is required to make reparations for injury caused.²³⁷ When the state causes an expropriation, the state must pay the investor “restitutionary damages.”²³⁸ In order for the state to be required to pay those damages, there must be a sufficient causal link between the state’s action and the damages suffered by the investor.²³⁹ The Tribunal in *Biwater* concluded that, by the time Tanzania took the actions that amounted to expropriation, the economic value of the investment in the project had already deteriorated, and therefore, that the Republic’s expropriatory actions did not cause any damage to *Biwater*.²⁴⁰ The only appropriate remedy, then, for the State’s conduct was “declaratory in nature.”²⁴¹

The Final Award in *Biwater* is important in relation to the amicus briefs in three ways. First, the expropriation decision does not mention the amici’s “connect the dots” theory borrowed from the Final Award in *Methanex*. Second, the amicus briefs in both cases, *Methanex* and *Biwater*, began by arguing that the principle of investor responsibility is becoming a customary principle in international law. Finally, the asymmetrical expropriation decision demonstrates the difficulty tribunals will have deciding disputes challenging new governance actions. The “connect the dots” theory argued by the investor in *Methanex* and used by the amici in *Biwater* represents the thread of consistency brought to the arbitral process by the allowance of written submissions in cases involving the public interest, a thread further evinced by the arguments in both briefs that the principle of investor responsibility is an emerging concept in international law.

Notably, the Tribunal in *Biwater* did not accept the “connect the dots” methodology offered by the amici to parallel the argument by the investors in *Methanex*. The Tribunal noted that the amici’s arguments were helpful and informed its analysis, but did not indicate that the amici’s arguments succeeded in any particular place in the Final Award. Because the amici were not allowed access to the documents in *Biwater*, they were forced to create

²³⁷ *Id.* at para. 773.

²³⁸ *Id.* at paras. 773–74.

²³⁹ *Id.* at para. 780.

²⁴⁰ *Id.* at para. 798.

²⁴¹ *Biwater* Award, *supra* note 6, at para. 807.

an argument based on public documentation. The ICSID rules do not currently allow amici granted the right to file written submissions access to documents involving the arbitration. Rule 32 states that the Tribunal may allow non-disputing parties to be present at the oral hearing; however, either party may veto and disallow non-disputing parties to witness the oral hearing.²⁴² Amendments to the ICSID rules are limited by the ICSID convention, and there still remains a strong presumption of confidentiality in transnational arbitration.²⁴³

This Note argues, however, that private foreign investors should have an obligation to disclose certain information because of the substantive rights granted to the investor by the host-state and investor-state's BIT. These rules could be structured so that the disclosures did not run afoul of corporate disclosure rules. New governance theories are giving private stakeholders the ability to participate in the governance and implementation process, while seeking to facilitate information sharing and group problem solving. In light of the additional opportunities for private actors to participate in the governance process, these actors should have corollary obligations to allow certain individuals access to certain documents when a dispute arises. Requiring this disclosure will encourage symmetry of all three parties in transnational arbitration: the state, the investor, and the non-disputing party.

Finally, amici are able to bring new principles of law to the attention of the arbitral tribunal because of their expertise in the area and their focus on evolving principles of law. The emerging principle of investor responsibility, argued by the amici in both cases, will potentially help cure the asymmetry in expropriation challenges to new governance actions by obliging the investor to act in a certain way. The investor's obligations to act in accordance with the principle of investor responsibility may parallel the obligation the state has to not expropriate the investment. Recognizing the responsibility of the investor will allow the state to take action due to public outcry when private stakeholders are unable to perform the contract duties required of them as a foreign investor. The state will still have an international obligation to secure the rights of the investor, thus, the investor will still be protected from expropriation. The principle of investor responsibility, however, will elevate the position of the investor to, if not a parallel responsibility, a similar plane. This emerging principle of customary international law is important in the context of regulatory evolution.

The transnational arbitration mechanism has experienced new growth and responded to concerns about transparency through the amendment of the arbitration rules and, perhaps in the future, the amendment of BITs to contain provisions protecting a state from challenges to its enacted regulations. The

²⁴² ICSID Convention Rules, *supra* note 20, at Rule 32.

²⁴³ *See* Franck, *supra* note 58, at 1537.

proliferation of the participation of NGOs in the transnational arbitration system has helped in this transparency as well. It is important to remember, however, that as non-state actors are increasing their participation in transnational arbitration, private actors are increasing their participation in projects that may be challenged on the international plane. This leads to asymmetry in legal obligations of the investor and host-state, and the legal principles of international investment law must adapt as more new governance actions are challenged as expropriations.