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Guarding the Open Door: Non-party Participation Before The International Centre for Settlement of Investment Disputes

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Ross P. Buckley and Paul Blyschak

Abstract

Last year ICSID amended its rules to allow non-party submissions in arbitrations – the most significant rule changes in its history. ICSID has done so, in part, to respond to our changing world and preserve its own legitimacy. Our analysis suggests the amendments are well adapted to give ICSID tribunals the high degree of control they need to ensure that non-party interventions are to assist tribunals to reach the just decision not just appease the interests of the non-parties.

Guarding the Open Door: Non-party Participation Before The International Centre for Settlement of Investment Disputes

by

Ross P Buckley* and Paul Blyschak**

INTRODUCTION

The International Centre for Settlement of Investment Disputes was created in 1966 by the ICSID Convention¹ to provide a framework for the resolution of investment disputes between investors and nation States.² It is part of the World Bank group. It was designed to be self-contained and as transparent to involved parties as possible, and these principles are reflected in the Convention's provisions.³ Unlike most international commercial arbitrations, the arbitration law of the place of arbitration has no impact on ICSID proceedings.⁴ Financial obligations arising from ICSID awards are to be enforced in contracting States as though they are the final judgements of domestic courts. No recourse is to be had to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) or any other domestic laws or treaties.⁵

On April 10, 2006 ICSID implemented a series of changes to its Arbitration Rules. These include enhanced provisional measures, expedited review procedures and stricter arbitrator

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¹ Convention on the Settlement of Investment Disputes between States and Nationals of other States, October 14th, 1966 ('ICSID Convention').

² *See generally* RP Buckley, "Now We Have Come to the 'ICSID' Party: Are Its Awards Final and Enforceable?" (1992) 14 *Sydney Law Review* 358.

³ Lucy Reed, Jan Paulson, Nigel Blackaby, '*Guide to ICSID Arbitration*,' Kluwer Law International (2004), 8-9.

⁴ *Ibid.*

⁵ *Ibid.*

disclosure requirements. These are the first significant changes to ICSID's procedural process since the Convention came into force in 1966.

These changes were necessary. Foreign investment, particularly into developing countries, has exploded in recent years. The US\$75 billion dollars that crossed international borders for this purpose in the early 1990s had grown to over US\$400 billion by the end of 2004;⁶ and these funds are moving through progressively more complicated business arrangements into progressively more complicated regulatory environments. To date, over 2,000 bilateral investment treaties have been signed, more than 1,500 of which provide for ICSID as the forum for the settlement of ensuing disputes.⁷

One of the major challenges facing ICSID is that recently, investor-State disputes have been raising public interest issues traditionally absent from international commercial arbitration. This calls into question the suitability of the *in camera* proceedings traditionally used to determine such disputes.⁸ Confidentiality and privacy are fundamental to arbitration as a dispute settlement method. However, the political legitimacy of the process is put at risk if genuine stakeholders cannot participate in decisions affecting their rights and interests.

In an effort to balance these conflicting pressures, ICSID's amendments include provisions allowing for the participation of non-parties as *amicus curiae*, or as 'friends of the court.' Such parties are now able to make written submissions to the tribunal in an investment dispute provided they meet three requirements.⁹ First, the submission must be able to 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.' Second, the submission must 'address a matter within the scope of the dispute.' Finally, the party making the submission must have a 'significant interest in the proceeding.'

⁶ Roberto Danino, Secretary-General, ICSID 'Making the Most of International Investment Agreements: A Common Agenda,' Symposium Co-Organised by ICSID, OECD and UNCTAD, 12 December 2005, Paris <<http://www.oecd.org/dataoecd/5/8/36053800.pdf>> at 21 July 2006.

⁷ Ibid.

⁸ Catherine Yannaca-Small, 'Transparency and Third Party Participation in Investor-state Dispute Settlement Procedures,' International Investment Law: A Changing Landscape (2005), 9.

⁹ ICSID Convention, above n 1, Arbitration Rule 37.

The requirements are clear. Their implications are not. These amendments reflect some recent findings of other international investment dispute tribunals but differ substantially from other recent findings.¹⁰ ICSID tribunals have traditionally been eager to construe the scope of their powers as widely as possible. The willingness of arbitral tribunals to accept non-party submissions favours civil society groups such as non-government organisations. The ramifications for other interested parties, including individuals and businesses, as well as the investors and host States, are less clear.

This paper analyses this unexplored territory. We will argue that while ICSID has opened the door to non-party participation, it has done so in a careful and calculated way. ICSID has retained considerable control over who is entitled to make submissions to its tribunals, when, and to whose benefit. While it may appear that non-party participation has been allowed to appease public concern, it will also assist tribunals with their core dispute resolution function.

Our analysis is in four main parts. We begin by examining the structure of ICSID and the transparency issues leading to the non-party amendment. Part 2 considers the operational challenges facing ICSID and the degree to which non-party participation may aid in alleviating these pressures. Part 3 considers the construction of the non-party amendment and the discretion afforded to ICSID tribunals in its interpretation. Part 4 concludes by discussing the concerns ICSID will have to balance in deciding whether to allow non-party participations.

ICSID has responded to the changing world in which it operates. The non-party amendment is a small piece in the rapidly evolving framework of international investment law, but it is a piece that will influence the direction of the evolution.

PART 1: ICSID, TRANSPARENCY AND NON-PARTY PARTICIPATION

ICSID and its Critics

¹⁰ Several cases decided under Chapter 11 of NAFTA and under the UNICITRAL Model Arbitration Rules, including the *Methanex* case, will be discussed in detail later.

ICSID has strived to appear to be as neutral as possible. However in this, it has not entirely succeeded. On the one hand, it has been accused of being complicit with the World Bank in working against economic development.¹¹ (tautology) On the other hand, critics have attacked its role in ‘the historic secrecy surrounding the development of all aspects of the international investment law regime.’¹² In the recent words of the International Institute of Sustainable Development, ‘no other legal dispute settlement system under public international law ... prevents the publication of its determinations or relies in whole or in part on the publication of selected portions of a decision.’¹³ ICSID has been accused of unjustly denying public access, overlooking stakeholder dialogue and resisting the institutionalisation of procedural and administrative practices for promoting transparency.

The recent amendments to ICSID’s Arbitration Rules to allow non-party participation are an attempt to respond to these concerns. ICSID cannot afford to be seen as having ‘outlived its original rationale.’¹⁴ It needs to be seen as capable of adapting to changing economic, legal and political realities. This is almost as true for the public and interest groups as it is for investors and host States. As critics have been eager to highlight, investment disputes are bearing less and less resemblance to the traditional commercial disputes ICSID was originally established to address.¹⁵

Public Calls for Transparency: the Methanex Case

Popular call for greater transparency in ICSID arbitration proceedings has not always been strong. Most investment disputes from the inception of ICSID to the 1990s concerned government expropriation of land and tangible property or interference with contractual rights.¹⁶ While at times very complex, such disputes did not unduly strain the closed arbitration process. However, over time, legislation has increased the scope for the exercise

¹¹ This criticism of ICSID and the World Bank is aimed at their theoretical foundation rather than their day to day operations; see Catherine Caufield, ‘*Masters of Illusion: The World Bank and the Poverty of Nations*,’ (1996).

¹² Howard Mann, Aaron Cosbey, Luke Peterson, Konrad von Moltke, ‘*Comments on ICSID Discussion Paper, “Possible Improvements of the Framework for ICSID Arbitration,”*’ International Institute for Sustainable Development, December 2004, <www.iisd.org/pdf/2004/investment_icsid_response.pdf> at 24 July 2006, at 2.

¹³ Ibid, 8.

¹⁴ Ibid, 3.

¹⁵ Ibid, 4.

¹⁶ M. Sornarajah, ‘*The Settlement of Foreign Investment Disputes*,’ Kluwer Law International (2000), 61-67.

of administrative discretion over the process of foreign investment.¹⁷ This has led to new forms of intangible assets crucial to investments and investors, particularly administrative licences necessary to use property in certain ways.¹⁸ Cases involving disputes over the interference with these rights have proven more controversial, particularly where the government action has ostensibly been taken for the direct benefit of the public.

An illuminating example is provided by the *Methanex case*.¹⁹ While a NAFTA Chapter 11 dispute rather than an ICSID one, it marks the first decision by a major international investment arbitral tribunal to accept non-party submissions. It also served as a crucial precedent for ICSID in its decision to allow non-party participation.

Methanex is a Canadian-based producer of methanol, a key component of MTBE, which is a compound used in the production of gasoline. It enjoyed huge sales of its product in California. When that State banned the use of MTBE, Methanex argued that the ban was ‘tantamount to an expropriation of the company’s investment’ and requested over a billion dollars in compensation.²⁰ California argued the ban was necessary because the compound was ‘contaminating drinking water supplies and therefore posing a significant risk to human health and safety, and the environment.’²¹

The tribunal decided that the Californian ban, including the legislative and scientific processes involved, had been enacted free of bias, corruption or ulterior motives.²² In so doing, the NAFTA panel felt compelled to accept third party submissions for the first time. The panel acknowledged that the substantive issues at stake differed acutely from those in traditional commercial arbitration because of the significant public interest.²³ As the right of Californians to safe drinking water was at stake, the panel accepted submissions as to the complexities of that right.

¹⁷ Ibid, 69.

¹⁸ Ibid, 69.

¹⁹ *Methanex Corporation v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits (August 3, 2005) Washington D.C., <www.state.gov/documents/organization/51052.pdf> at 12 December 2006.

²⁰ Howard Mann, ‘*The Final Decision in Methanex v United States: Some New Wine in Some New Bottles*,’ International Institute for Sustainable Development <http://www.iisd.org/pdf/2005/commentary_methanex.pdf> at July 20 2006, 2.

²¹ Ibid, 2.

²² Ibid, 2.

²³ Howard Mann, ‘Opening the Doors, At Least a Little: Comment on the *Amicus* Decision in *Methanex v United States*,’ *Review of European Community and International Environmental Law*, Vol 10, 2001, 241-245.

Indirect Expropriation and the Right to Regulate

The core legal issue in *Methanex* was whether California had engaged in unfair ‘indirect expropriation.’ This term, also known as ‘de-facto’, ‘creeping’, ‘constructive’ or ‘partial’ expropriation, has become increasingly popular in international investment circles. But the point at which legitimate government regulation becomes an unfair limitation on an investor’s ability to deal with its property is fuzzy.²⁴ Investors argue that such unexpected regulatory action is unjust, particularly when it decimates their profits or renders a venture uneconomic.²⁵ Host States argue that new legislation should not require the compensation of investors so long as it is applied in a non-discriminatory fashion for a legitimate purpose.²⁶

This was the point at issue in *Methanex*, and the main reason non-party submissions were made and accepted. According to the International Institute for Sustainable Development, two interrelated principles were at stake. The first was the scope of ‘indirect expropriation’. This is of immense public importance because it may limit the laws a government can pass without paying compensation.²⁷ The second is how NAFTA governments will undertake environmental and other public law-making in the future.²⁸

The *Methanex case* was not only about a corporation’s entitlement to compensation. At a deeper level it concerned the extent to which a popularly elected government is able to exercise its sovereign right to govern its people in their best interests. This is what drew such attention to the case and elicited such a strong response from public interest groups. The tribunal acknowledged that to deny third party submissions in such a case risked damaging the public credibility of Chapter 11 proceedings as a whole.²⁹

²⁴ Norbert Horn, ‘Arbitration and the Protection of Foreign Investment: Concepts and Means,’ *Arbitrating Foreign Investment Disputes: Procedure and Substantive Legal Aspects*, Norbert Horn Editor (2004), 3-33, 18-19.

²⁵ Ibid, 18-19.

²⁶ Thomas Walde, Abba Kolo, ‘Environmental Regulation, Investment Protection and “Regulatory Taking” in International Law,’ (2001) 50 *International and Comparative Law Quarterly*, 811-848.

²⁷ The International Institute for Sustainable Development, Petition to the Arbitral Tribunal in the arbitration under Chapter 11 of the North American Free Trade Agreement and the UNICITRAL Arbitration Rules between Methanex Corporation and United States of America, <www.iisd.org/pdf/methanex_petition_sept72000.pdf> at July 27 2006, at 3.1.

²⁸ Ibid, at 3.1.

²⁹ Howard Mann, above n 23, 241-245.

PART 2: OPERATIONAL CHALLENGES AND NON-PARTY PARTICIPATION

The Benefits of Non-Party Participation

Addressing the public's concerns was not the sole benefit to the *Methanex* tribunal of accepting non-party submissions- the submissions also appear to have assisted the tribunal in reaching a suitable decision.

A finding of indirect expropriation requires at least three issues be addressed³⁰:

1. the degree of interference with the investor's rights;³¹
2. the character of the governmental action in terms of purpose and context;³² and
3. whether the governmental action interferes with the investor's reasonable expectations.³³

Each of these issues may include sub-issues such as the severity³⁴ and duration³⁵ of the governmental action.

These are complex matters. It is likely the *Methanex* tribunal sought to have as much information as possible in front of it before ruling. The parties may have been able to supply the tribunal with comprehensive arguments detailing their expectations and intentions regarding the investment and regulation in question, but they may not have been able, or willing, to address adequately the many factors that needed to be considered in determining whether those expectations and actions were reasonable in the circumstances. This would have been particularly so with respect to whether the governmental action was proportionate

³⁰ Catherine Yannaca-Small, above n 8, at 43-72.

³¹ *Matos e Silva, Lda v. Portugal* App. No. 15777/89, 24 Eur. Ct. H.R. rep. 573, 600-01 (1996); *S.D Myers, Inc. v Canada* (13 November 2000) Partial Award; *Metalclad Corporation v United Mexican States* (Tribunal Decision (30 August 2000)); *Nycomb Synergetics Technology Holding AB, Stockholm v The Republic of Latvia*, Award, 16 December 2003; *CMS Gas Transmission Company v Argentine Republic*, Award, 12 May 2005.

³² *Tecnicas Medioambientales Tecmed S.A. v The United Mexican States*, ICSID Award Case No. ARB (AF)/00/2; *S.D Myers, Inc. v Canada* (13 November 2000) Partial Award; *Too v Greater Modesto Insurance Associates*, Award, 29 December 1989, 23 Iran-United States Cl. Trib. Rep. 378.

³³ *Lauder (U.S.) v Czech Republic* (Final Award) (3 September 2002), <www.mfcr.cz/scripts/hpe/default.asp> at 12 December 2006; *Marvin Roy Feldman Karpa (CEMSA) v United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award of 16 December 2002; *Starret Housing Corp. v Iran*, 4 Iran-United States C. Trib. Rep. 122, 154 (1983); *Metalclad Corporation v United Mexican States* (Tribunal Decision (30 August 2000)).

³⁴ *Starret Housing Corp. v Iran*, 4 Iran-United States C. Trib. Rep. 122, 154 (1983); *Marvin Roy Feldman Karpa (CEMSA) v United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award of 16 December 2002; *CME (Netherlands) v Czech Republic* (Partial Award) (13 September 2001) <www.mfcr.cz/scripts/hpe/default.asp> at 12 December 2006.

³⁵ *S.D Myers, Inc. v Canada* (13 November 2000) Partial Award; *Phelps Dodge*, 10 Iran-United States Cl. Trib. Rep; *Tippets v TAMS-AFFA Consulting Engineers of Iran*, 6 Cl. Trib. 219 (1984).

to the perceived change in environmental conditions.³⁶ California and Methanex would each have put forward the arguments most favourable to their cause. The Bluewater Network, Communities for a Better Environment and the Centre of International Environmental Law, three of the NGOs whose non-party submissions were accepted, may have had more widely informed perspectives and other information to offer.³⁷

Procedural Benefits: Other Examples from International Dispute Tribunals

Cases in which international tribunals accept non-party submissions for their content rather than their public relations effect represent a relatively high proportion of cases in which third parties have been given standing. Such cases include matters before NAFTA panels, World Trade Organisation (WTO) Panels and Appellate Body, and the US-Iran Claims Tribunal.

In the *UPS case* before the NAFTA panel, UPS claimed Canada Post was engaged in anti-competitive practices by using its letter monopoly infrastructure to reduce the costs of delivering its courier and parcel services. Several non-parties sought to participate in the dispute, including the Canadian Union of Postal Workers. The union, representing approximately 90,000 current and retired employees of Canada Post, claimed a 'direct interest' in the subject matter of the claim.³⁸ They cited concern over possible employment re-classifications, restructurings, lay-offs and permanent job reductions. The Council of Canadians, a non-governmental organisation with over 100,000 members concerned primarily with social programmes and the functioning of public institutions, also petitioned for participation. Their concerns included increased costs and decreased services, particularly for rural communities and the elderly.³⁹

The claims of the two groups did not relate directly to either the Canadian government's right to legislate or to UPS's right to operate in a competitive environment, but rather to the ramifications of the tribunal's decision on Canadian workers and consumers. In other words,

³⁶ Yannaca-Small, above no 8, 65.

³⁷ Howard Mann, above n 20, 2

³⁸ 'Petition to the Arbitral Tribunal: Canadian Union of Postal Workers and The Council of Canadians,' *United Parcel Service of America Inc v Government of Canada*

< www.dfait-maeci.gc.ca/tna-nac/documents/petitiontothearbitraltribunalCUP.pdf > at 29 July 2006, 22-28.

³⁹ Ibid, 28-34.

the non-parties sought to put before the tribunal the pecuniary rights and interests of parties beyond the dispute. This would appear to be a gross overextension of the traditional role of the *amicus curiae*. However, this did not lead the tribunal to refuse the tendered submissions. Instead, the panel disregarded the arguments offered but accepted the overall submissions for the value they might otherwise hold in illustrating the operation of the Canada Post system,⁴⁰ i.e. the panel was not interested in the effect of the dispute upon the non-parties but was interested in learning from their intimate familiarity with Canada's postal system.

WTO disputes are between national governments. ICSID disputes are between commercial entities and national governments. Nonetheless, the development of non-party participation before the WTO reflects the same concerns as in non-party participation in investment arbitration.

The first WTO case to accept non-party submissions was the *Shrimp/Turtle*⁴¹ dispute. The issue at hand resembled indirect expropriation. The main question was whether US legislation that prohibited the import of shrimp not caught by trawlers using 'turtle excluder devices' amounted to an unreasonable restraint on trading activities. The Appellate Body ruled WTO Panels could consider spontaneous submissions from non-governmental organizations so long as those submissions were 'pertinent' to the dispute at hand.⁴² This approach was subsequently affirmed in other disputes. In the *Australia Salmon*⁴³ dispute, which concerned quarantine measures banning the import of salmon products, the panel accepted submissions from two Australian fishermen on their professional views of relevant Australian sanitary standards. In the *British Steel Case*⁴⁴ about countervailing measures imposed by the United States, submissions from two industry groups representing the steel industry and steel workers' interests were considered. Although both were ultimately rejected, the Appellate Body took this opportunity to expand on its decision in *Shrimp/Turtle*

⁴⁰ 'Decision of the Tribunal on Petitions for Intervention and Participation as *Amicus Curiae*,' *United Parcel Service of America Inc v Government of Canada* <www.dfait-maeci.gc.ca/tna-nac/documents/IntVent_oct.pdf> at 29 July 2006, 44-65.

⁴¹ *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, 26 November 2001 WT/DS58/AB/R.

⁴² *Ibid.*, 79-91; Nicola Notaro, "Judicial Approaches to Trade and Environment: The EC and the WTO", Cameron May, London (2003), 228.

⁴³ *Australia – Measures Affecting Importation of Salmon*, 12 June 1998 WT/DS18/R.

⁴⁴ *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, 10 May 2000, WT/DS138/AR/R, 36-42.

by finding that the Body itself had the authority to accept non-party submissions as well as WTO Panels.⁴⁵

These findings were not greeted warmly by WTO members.⁴⁶ The Appellate Body's decision in *Shrimp/Turtle* gave rise to substantial criticism,⁴⁷ which intensified with the *British/Steel* decision.⁴⁸ However, the Appellate Body was not deterred. Neither did it defer to public pressure from interested non-parties. The *Shrimp/Turtle* decision to accept non-party submissions encouraged civil society groups to submit briefs to WTO Panels in later disputes in strong numbers.⁴⁹ This enthusiasm reached its peak during the course of the *EC – Asbestos* case which arose from a Canadian claim against a French Decree prohibiting the use of asbestos and asbestos-containing products.⁵⁰ Seventeen applications for permission to submit briefs were made by NGOs and business organizations after the Appellate Body adopted a temporary Additional Procedure outlining the necessary requirements. These included a statement on the objectives pursued by the applicant, the nature of the applicant's activities, its source of financing, and the legal issues its submission intended to address.⁵¹ Each of the seventeen submissions made was eventually rejected. Furthermore, the applications were each rejected with little explanation by the Appellate Body, much to the dissatisfaction of pro-NGO commentators.⁵² Just as the Appellate Body had not feared to tread on the toes of its Membership in accepting non-party participation,⁵³ neither did it hesitate to upset interested non-parties by rejecting their applications, even after having raised their expectations by the issue of the temporary Additional Procedure.⁵⁴ Like the NAFTA panel in the *UPS case*, the Appellate Body, quite properly in our submission, appeared most concerned with the potential benefits of its deliberations. The difference in

⁴⁵ Ibid, 39-42.

⁴⁶ Bradly Condon, *Environmental Sovereignty and the WTO: Trade Sanctions and International Law* (Ardsley, NY: Transnational Publishers, 2006), 275.

⁴⁷ Nicola Notaro, above n 42, 228.

⁴⁸ A.E. Appleton, "Amicus Curiae Submissions in the Carbon Steel Case: Another Rabbit from the Appellate Body's Hat?", *Journal on international Economic Law* (2000) 691-699, 691.

⁴⁹ Nicola Notaro, above n 42, 217.

⁵⁰ *European Communities – Measures Affecting the Prohibition of Asbestos and Asbestos Products*, adopted on 5 April 2001, Report of the Panel, WT/DS135/R and WT/DS135/R/Add.1, 18 September 2000; Report of the Appellate Body WT/DS135/AB/R, 12 March 2001.

⁵¹ Ibid, Appellate Body Report, ¶¶ 50-57.

⁵² See Geert A. Zonnekeyn, "The Appellate Body's Communication on Amicus Curiae Briefs in the Asbestos Case: An Echternach Procession?", *Journal of World Trade* 3 (2001) 553; Nicola Notaro, above n 42, 228-29.

⁵³ Bradly Condon, *Environmental Sovereignty and the WTO: Trade Sanctions and International Law* (Ardsley, NY: Transnational Publishers, 2006), 275; "Amicus Brief Storm Highlights WTO's Unease with External Transparency", *Bridges* 9 (2001) 1 and 4 <www.ictsd.org/English/BRIDGES4-9.pdf> at 11 December 2006.

⁵⁴ Nicola Notaro, above n 42, 228-29.

EC – Asbestos was that the Appellate Body could find no real benefit from non-party participation on the particular facts of the matter.

The *Iran-US Claims Tribunal* was established to settle the plethora of investment disputes that arose after the Iranian government nationalised the assets of US nationals. The tribunal arose from an agreement between the two States and was charged with resolving over 4,700 claims for compensation against Iran and its State enterprises. The tribunal decided that written submissions from non-party foreign banks ‘would not necessarily offend the philosophy of international arbitration involving States and non-State parties’ so long as the submissions proved useful.⁵⁵

Complexity and the Need for Resources

The common theme in the above examples is the acknowledgment by the tribunals that more information was needed than that presented by concerned parties. Such information may well be needed because of the increasing number and complexity of investment disputes, and the increasing pressure on tribunals to resolve disputes as quickly as possible.

ICSID’s workload has burgeoned.⁵⁶ In 1995 ISCID had five cases pending totalling US\$15 million in claims. By 2005 the figure had grown to 113 cases pending for in excess of US\$30 billion in claims. This has put a strain on every aspect of the centre’s operations, from preliminary procedures to publication of awards.⁵⁷

Several of the new ICSID amendments are specifically directed at this issue. Enhanced provisional measures have been put in place to afford ICSID tribunals greater control over the subject matter of investment disputes while their deliberations are in progress.⁵⁸ Expedited review procedures have been put in place to allow for the timely dismissal of claims judged to be prima facie unmeritorious.⁵⁹ Improved conciliation and assisted

⁵⁵ *Methanex v United States*, Decision of the Tribunal on Petitions of Third Persons to Intervene as *Amicus Curiae*, January 15, at 32, discussing the *Iran v United States*, Case A/15, Award No 63-A/15-FT, 2 Iran-US CTR 40, at 43.

⁵⁶ Roberto Danino, above n 6.

⁵⁷ *Ibid.*

⁵⁸ ICSID Convention, above n 1, Arbitration Rule 39.

⁵⁹ *Ibid.*, Arbitration Rule 41.

negotiation mechanisms have been implemented to quickly resolve disputes that do not require full scale arbitration.⁶⁰

However, ICSID tribunals remain constrained by procedural limits. Unlike other international dispute settlement bodies like the WTO Appellate Body, they do not enjoy the ability to conduct investigations on their own initiative. Rather, they rely primarily on the written submissions of the opposing parties.⁶¹ These are in turn limited by the absence of depositions and the inability of parties to obtain evidence favourable to their case from their opponents.⁶² This problem is particularly acute in the case of uncooperative parties.⁶³ In this regard, while ICSID has given its tribunals the means to better deal with claims, these amendments do not necessarily give its tribunals the means to better explore the disputes. Non-party participation, on the other hand, permits this, and it is in this light that the full potential benefits of such participation should be understood.

PART 3: ICSID AND ITS DISCRETION

The Structure of Arbitration Rule 37

Arbitration Rule 37 stipulates that three requirements be met for a non-party to make submissions to an ICSID tribunal. First, the submission must be able to 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.’ Second, the submission must ‘address a matter within the scope of the dispute.’ Finally, the party making the submission must have a ‘significant interest in the proceeding.’

Two aspects of these requirements are of particular importance. The first is that while the tribunal is required to consult with the concerned investor and host State, the tribunal may accept a non-party submission over their objections. The other is that the third requirement, that the non-party has a ‘significant interest’ in the proceeding, represents an expansion of the *amicus curiae* test.

⁶⁰ Roberto Danino, above n 6.

⁶¹ Lucy Reed, above n 3, 83.

⁶² Ibid, 84-85.

⁶³ In *AGIP Co. SpA (Italy) v. People's Republic of the Congo (Case No. ARB/77/1)*, the Congo's failure to produce documentation ordered by the tribunal was reflected in the assessment of damages.

The willingness of ICSID tribunals to accept non-party submissions over the possible objections of investors and host States is important because it indicates how seriously ICSID now treats transparency and public participation. ICSID acknowledges it is accountable not only to its members, but also to their constituencies.

The requirement that interested non-parties have a ‘significant interest’ in the relevant proceedings is more subtle in its expression, but more important in its effect. The panel in the *Methanex case* asked only that interested non-parties address an issue of concern in a manner not covered by the disputing parties, the ‘significant interest’ test imposes the added requirement of adequate standing. This is an indefinite requirement that each tribunal will be free to determine at its discretion.

ICSID’s Interpretation of Its Own Provisions

The doctrine of ‘competence-competence’ in most international commercial arbitration systems operates to ensure that the tribunal in question is the sole judge of its own authority.⁶⁴ In relation to ICSID tribunals this principle is enshrined in Article 44 of the Convention which provides that ‘if any question of procedure arises which is not covered by the Arbitration Rules or any rules agreed to by the parties, the tribunal shall decide the question.’ In other words, where a point of procedure is in doubt, the tribunal is all-powerful.

The best example of this principle in operation has been the approach of ICSID tribunals to the question of their jurisdiction.⁶⁵ This issue is central to the function of ICSID, as a tribunal must first decide whether a dispute before it involves an investment under Article 25⁶⁶ before it can begin its deliberations. This term was left undefined by the Convention to give each tribunal a wide range of interpretation.⁶⁷ The result has been the identification of investment disputes in an extraordinary range of circumstances. In one of the first ICSID

⁶⁴ See, for examples, ICC Rules 15(1) as discussed by Craig, W, Park, W & Paulsson, J ‘*Annotated Guide to the 1998 ICC Arbitration Rules*,’ (1998).

⁶⁵ Generally on the jurisdiction of ICSID, see Buckley, above n 2.

⁶⁶ ICSID Convention, above n 1.

⁶⁷ Lucy Reed, above n 3, 7.

cases it was held that an investment dispute may arise about pre-contractual expenditures.⁶⁸ In a more recent case it was held that various types of loans are capable of giving a commercial entity adequate standing to commence proceedings.⁶⁹ In another case it was held that the revocation by a central bank of a banking licence could constitute a breach of an investment treaty.⁷⁰

ICSID tribunals will enjoy the same freedom of interpretation in relation to the ‘significant interest’ test under Arbitration Rule 37. As with ‘investment’ in Article 25, the term has been left completely undefined. The doctrine of ‘competence-competence’ will ensure that the validity of the tribunal’s decision on the meaning of this element ‘significant interest’ may be interpreted to mean a pecuniary or proprietary interest,⁷¹ an interest beyond that of an ordinary member of the public,⁷² or a mere intellectual or emotional interest.⁷³ It may require ‘special damage’, it may not.⁷⁴

The possibilities are numerous, and the provision is only beginning to be tested. However, this freedom of interpretation enjoyed by ICSID should not tempt it to approach its new-found power lightly. Over time, applications of the test in different circumstances will determine the sorts of parties that will be allowed to make non-party submissions. The case of non-governmental organisations provides a particularly enlightening example.

Interpretations and Consequences: the Case of Non-Governmental Organisations

All of the non-party participants allowed to make submissions to the Tribunal in the *Methanex case* were non-government organisations. This is not surprising. NGOs often have widely-recognised expertise in their fields, substantial resources and wide public and

⁶⁸ *Mihaly International Corporation v Democratic Socialist Republic of Sri Lanka* (ICSID Case No ARB/00/2).

⁶⁹ *Fedax N.V. v The Republic of Venezuela* (ICSID Case No. ARB/96/3).

⁷⁰ Margrete Stevens, Senior Counsel, ICSID, ‘*Arbitration and Investment Disputes – Are We Heading in the Right Direction?*’ A Paper delivered at the AAA/Canadian Bar Association Conference on “International Dispute Resolution – A View From Within,” held in Montreal on April 26-27, 2002, <www.worldbank.org/icsid/news/n-19-1-4.htm> at 29 July 2006.

⁷¹ Applications for judicial review under administrative law provide examples of various approaches taken to the interpretation of a ‘significant’ or ‘sufficient’ interest in Australian jurisprudence; *see, for example, Attorney-General for the State of New South Wales; Ex rel Tooth and Co Ltd v The Brewery Employees Union of NSW* (the *Union Label case*) (1908) 6 CLR 469.

⁷² *Administrative Decisions (Judicial Review Act) 1977* (Cth), section 3(4)(a)(i), *Tooheys Ltd v Minister for Business and Consumer Affairs* (1981) 36 ALR 64.

⁷³ *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493.

⁷⁴ *Bateman’s Bay Local Aboriginal Land Council v Aboriginal Benefit Fund Ltd* (1998) 194 CLR 247.

professional networks. They may be capable of producing persuasive arguments on complex contemporary issues. They are also accustomed to mobilizing their forces in various kinds of legal, political and social contexts either working independently or with other NGOs. Examples of such activism have become commonplace in recent decades, from the lesser known criticism of Enron's Dabhol energy project in India⁷⁵ to such well known examples as the frustration of the OECD's attempt to introduce a Multilateral Agreement on Investment.⁷⁶

In this light, there seems every reason to expect NGOs to seek to exploit the opportunity opened by these non-party participation amendments. They are well positioned and motivated to do so. However, the 'significant interest' test means their chances of success are less predictable. NGOs will be vulnerable to the 'significant interest' requirement to different degrees depending on their purpose and constitution, and the nature and location of the investment dispute.

If ICSID tribunals decide that a 'significant interest' requires a proprietary or pecuniary interest, NGOs would be severely prejudiced. Typically not-for-profit institutions, they are unlikely to be prejudiced financially and are unlikely to be directly connected to any disputes save for those in their immediate vicinity. In the vast majority of circumstances they may be found to be incidental players, barely associated with an investment.

If ICSID tribunals interpret 'significant interest' as requiring 'special damage,' NGOs may be less disadvantaged. Instead of having to establish a financial interest in the dispute they could instead rely on the interests of their membership. They could argue that they represent the concerns of the public or of special interest groups interested in the issue at hand. This could include the interests of local workers, or the environmental concerns of local citizens. However, NGOs would remain susceptible to the charge that they are insufficiently connected to the people they claim to represent. This is particularly so because NGOs often engage in causes far removed geographically, and at times politically, from the interests of their members and sponsors.

⁷⁵ 'The Enron Corporation: Corporate Complicity in Human Rights Violations,' *Human Rights Watch* (1997), <<http://www.hrw.org/reports/1999/enron>> at 14 August 2006.

⁷⁶ M. Sornarajah, above n 16, 4.

The most NGO-friendly approach available to ICSID tribunals would be to interpret ‘significant interest’ as being satisfied by an ‘intellectual or emotional interest.’ This is the typical connection such organisations will share with a dispute. Rather than having to prove that their or their members’ interests were directly affected, NGOs would instead only need to establish a satisfactory nexus between their objects and purpose and the dispute. Such was the case in the relationship between the various NGOs and the dispute in *Methanex*, and such is the only test a majority of NGOs can expect to pass in the future with any frequency.

PART 4: CONSIDERATIONS IN ALLOWING NON-PARTY PARTICIPATION

The Future of Non-Party Participation

The scope of the ‘sufficient interest’ test is not the only question ICSID tribunals will need to resolve. Now it has acknowledged that international investment arbitration is accountable to interests outside those of the immediate disputants, ICSID will need to endeavour to balance the competing interests of parties and non-parties in an appropriate and acceptable fashion.

In this regard, future ICSID tribunals will do well to consider several important factors each time they contemplate accepting a non-party submission. First, they must be careful to apply the non-party amendment in a consistent manner. Second, they must apply it conscious of the impact it may have on both immediate and future dispute resolution processes. Finally, they must apply it with an eye on the general development and direction of international investment law. Non-party participation reflects ICSID’s desire to remain legitimate before the wider international community, but it cannot pursue this goal at the risk of losing legitimacy before the States and investors who use it.

Consistency of Interpretation and Application

Even though all participating non-parties in the *Methanex case* were non-governmental organisations, the tribunal did not rule that submissions would be limited to such groups. The tribunal ruled on the degree to which it expected a third party to be able to aid it in its



work,⁷⁷ but not on the categories of third parties that might be able to do so. ICSID has likewise made no ruling in this regard. The only term used in Rule 37 is a ‘non-disputing party’. The only limitations on who may constitute a ‘non-disputing party’ relate to what it may be able to add to the proceedings, and why.

In theory this leaves it open for any group or entity to approach ICSID with a submission related to a dispute. They may include unions and private business entities, as well as NGOs, as in the NAFTA Chapter 11, WTO and Iran-US claims disputes considered above. They may also include private individuals should they be able to establish both sufficient expertise and complete financial independence from the dispute (in the sense that they have no financial interest whatsoever in the outcome of the dispute and are not being funded to participate by a third party).⁷⁸

ICSID Tribunals should therefore be careful to adopt a uniform approach to the ‘sufficient interest’ test and apply it predictably and without too great an eye on the political ramifications of denying an interested non-party standing. While NGOs appear the most probable non-party participants, they should perhaps not be advantaged at the expense of other groups with less popular support. Neither should participation be limited to groups or individuals representing social, rather than commercial, concerns. Legitimacy demands transparency and, often, equality.

Procedural and Equitable Concerns

A fundamental characteristic of ICSID arbitration is that the State of the investor involved is precluded from intervening in the dispute,⁷⁹ including by means of diplomatic protection or by bringing an international claim against the home State.⁸⁰ Non-party participation allows other voices to be heard, although not those of another sovereign State. It may therefore tend

⁷⁷ *Methanex v United States*, Decision of the Tribunal on Petitions of Third Persons to Intervene as *Amicus Curiae*, January 15, 2001
<<http://www.naftaclaims.com/Disputes/USA/Methanex/MethanexDecisionReAuthorityAmicus.pdf>> at 22 July 2006, 21-22.

⁷⁸ Order in Response to a Petition for Participation as *Amicus Curiae*, “*Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. (Claimants) and The Argentine Republic (Respondent)* ICSID Case No. ARB/03/17, March 17th, 2006, <www.worldbank.org/icsid/cases/ARB0317-AC-en.pdf> at 10 August 2006, 24.

⁷⁹ Ray August, ‘*International Business Law: Text, Cases, and Readings 4th Edition*,’ (2004), 134-135.

⁸⁰ ICSID Convention, above n 1, Article 27(1).

toward creating the sort of unequal burden on one of the disputing parties the ICSID system was designed to prevent.⁸¹ In allowing non-party participation, ICSID tribunals must be careful to prevent such an unequal burden from arising.

To do so, ICSID tribunals should deny standing to, or ignore the submissions of, parties who are unable to demonstrate that they are accountable, professional and transparent⁸² and parties who are unwilling to disclose the source of their operational funding or who otherwise lack independence from one of the disputing parties.⁸³ ICSID tribunals should be careful to deny standing to, or ignore submissions of, unreasonable ‘meddlers’ seeking involvement where they have no proper case or for ulterior motives. NGOs may be pseudo-political bodies. While public pressure on ICSID to consider the submissions of a popular NGO in relation to a well-publicised investment dispute may be strong, it must be careful to do so in the pursuit of justice for the parties, not because of the public pressure. ICSID tribunals should also ensure non-parties do not participate in ways that allow them to dictate the progress of proceedings⁸⁴ and should ignore submissions by non-parties that could adequately have been made by the parties themselves. Although all seventeen non-party applications made to the WTO Appellate Body in *EC – Asbestos* were eventually rejected, the acceptance by the Panel of two non-party briefs attached to the EC’s arguments in the dispute’s first instance was not questioned.⁸⁵ This follows the Appellate Body’s ruling in *Shrimp/Turtle* permitting non-party briefs where they are endorsed by and incorporated into a party’s submissions. ICSID should take the same approach and recognise there is no need for a non-party to stand alone when it could better assist a party already involved.

Non-party Participation and International Investment Law

Some commentators insist that international investment law is at a crossroads. They say it is passing through a crucial juncture that will determine who will control its future direction.⁸⁶ At the heart of this battle is the increasing power of multinational corporations to shape

⁸¹ Howard Mann, above n 23, 241-245.

⁸² Catherine Yannaca-Small, above n 8, 25-26

⁸³ Ibid, 25-26.

⁸⁴ Ibid, 25-26.

⁸⁵ *European Communities – Measures Affecting the Prohibition of Asbestos and Asbestos Products*, adopted on 5 April 2001, Report of the Panel, WT/DS135/R and WT/DS135/R/Add.1, 18 September 2000, ¶¶ 6.1-6.4 and 8.12-8.14.

⁸⁶ M. Sornarajah, above n 16, 10.

international legal norms to their ends. As a private, consensual mechanism of dispute settlement, international investment arbitration is a mechanism through which corporate and commercial interests can be given expression.⁸⁷ These include the primacy of property rights and free-market principles and the sanctity of contract and the rights to compensation contracts bestow. Often in opposition are the arguments of nation States. These include that State sovereignty allows for the restructuring of contracts and that the doctrine of *rebus sic stantibus* limits the binding force of obligations to the extent that the circumstances surrounding their creation continue to be the same.⁸⁸

Others commentators identify not only a power struggle but a structural crisis. Behind this concern is a number of conflicting findings by bodies deciding similar fact cases involving similar investment rights,⁸⁹ the result of which has been confusion over the specific rights of States and investors in these situations.⁹⁰ The examples are growing with the popularity of investment disputes. The ICSID judgements of *SGS v Pakistan*⁹¹ and *SGS v Philippines*⁹² have been criticised for their different findings regarding the scope of ‘umbrella clauses’ to protect investors’ contractual rights against interference from an administrative or legislative act.⁹³ The *Lauder Arbitrations* made arbitration history by, within a span of ten days, arriving at fundamentally different conclusions regarding the same media investment made by the Dutch corporate arm of a US investor into the Czech Republic.⁹⁴ The NAFTA cases *Myers v Canada*⁹⁵ and *Metalclad v Mexico*⁹⁶ proved contentious for their opposed approaches to the meaning of the obligation of ‘fair and equitable treatment’ owed by governments to investors.⁹⁷ This particular inconsistency has recently been resolved by the

⁸⁷ Y. Dezalay and B. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*, University of Chicago Press (1996).

⁸⁸ M. Sornarajah, above n 16, 81.

⁸⁹ Susan D Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, Fordham Law Review vol.73 (2005) 1521-1625, at 1546, 1558.

⁹⁰ Ibid, 1523.

⁹¹ *SGS Societe Generale de Surveillance S.A. v Islamic Republic of Pakistan*, Decision on Jurisdiction (ICSID Case No. ARB/01/13 2003) <www.worldbank.org/icsid/case/SGS-decision.pdf> at August 1 2006.

⁹² *SGS Societe Generale de Surveillance S.A. v Republic of the Philipines* (ICSID Case No. ARB/01/13 2004) <www.worldbank.org/icsid/case/SGSvPhil-final.pdf> at August 1 2006.

⁹³ Susan D Franck, above n 89, 1568-1569.

⁹⁴ Susan D Franck, above n 89, 1559; see *Lauder v Czech Republic*, Final Award (2001) (UNCITRAL) [London Award] <www.cetv-net.com/iFiles/1439-lauder-cr_eng.pdf> ; *Czech Republic B.V. v Czech Republic*, Partial Award (2001) [Stockholm Award] <www.mfcr.cz/static/Arbitraz/en/PartialAward.pdf>

⁹⁵ *S.D. Myers, Inc v Canada* Award (2000) (UNCITRAL) <www.naftalog.org> at August 1 2006.

⁹⁶ *Metalclad Corporation v United Mexico States* (ICSID Case No ARB/97/1 (2000)

<www.worldbank.org/icsid/cases/mm-award-e.pdf> at August 1 2006.

⁹⁷ Susan D Franck, above n 89, 1574-1576.

judgement of the NAFTA Panel in Thunderbird Gaming,⁹⁸ but the potential for such a result being repeated nonetheless remains. As ICSID has frankly conceded, ‘the scope for inconsistent decisions in regard to essentially the same issues is obvious.’⁹⁹

ICSID tribunals should not become actively engaged in these debates, but should remain conscious of their progress. Non-party participation at ICSID need not be directed at bringing international investment law into cohesion, but neither should it be allowed to unduly complicate the law. Non-party participation introduces a new perspective. ICSID should seek to ensure that this additional perspective is directed toward resolving the immediate question rather than expanding a dispute unreasonably.

CONCLUSION

ICSID’s non-party participation amendments are the result of a lengthy process to identify the challenges posed by contemporary international investment transactions. It began with a client survey to better understand what nations and investors thought of their proceedings before ICSID tribunals and was developed further through a series of consultations with different stakeholders around the world including government agencies, arbitration experts, non-government organisations and multinational corporations.¹⁰⁰ Preliminary amendments were then proposed by ICSID and later adjusted after a second round of surveys of member governments.¹⁰¹

ICSID can afford to be no less conscientious going forward. Non-party participation has been enshrined in ICSID’s Arbitration Rules and its tribunals given absolute discretion over its exercise, but the issue remains potentially volatile. The rapid evolution of arbitration as the favoured vehicle of foreign investment dispute resolution has led to strong competition

⁹⁸ *International Thunderbird Gaming Corporation v The United Mexican States* (UNCITRAL) <www.naftaclaims.com/Disputes/Mexico/Thunderbird/Thunderbird_Award.pdf> at 10 December 2006.

⁹⁹ Antonio R Parra, ‘Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment,’ 12 *ICSID Review of Foreign Investment Law Journal* (1997), 352. See also Brower, Fair and Equitable Treatment Under NAFTA’s Investment Chapter, 96 *Am. Soc’y Int’l L. Proc.* 9 (2002).

¹⁰⁰ Roberto Danino, above n 6.

¹⁰¹ Investment Treaty News (ITN), March 29, 2006, Published by the International Institute for Sustainable Development <www.iisd.org/investment/itn> at 1 August 2006.

at the international level.¹⁰² Although ICSID is at present the most popular venue for investment treaty arbitration, this is by no means its birthright.

It is likely investors will be the most difficult to keep happy. Multinational corporations have become accustomed to being the target of criticism from NGOs and the general media, and may well see non-party participation as another avenue for such disparagement. Of course, these amendments could equally provide an opening for interest groups advocating commercial interests and philosophies, but such groups may be less organised or energetic than contemporary activist movements.

The approval of host States will likely prove easier to retain. The perception has developed that the playing field between States and investors is not level. Investors tend to be large, well-financed multinational businesses. The clauses that allow them to bring arbitral proceedings against sovereign States are typically broad.¹⁰³ Host States, on the other hand, may be developing countries with far fewer legal resources. They may also be susceptible to multiple, simultaneous claims such as recently experienced by Argentina.¹⁰⁴ Non-party participation may assist in compensating for these asymmetries. It will allow all relevant arguments to be made by those best placed to make them.¹⁰⁵

Although public sentiment was the main force behind ICSID's decision to institutionalise non-party participation, it should not be afforded primacy. The scope and purpose of non-party participation must be kept in perspective.¹⁰⁶ Non-parties are not to have rights in relation to the immediate proceedings. They are not to be given access to the arguments of either party or to the specifics of the dispute. They are not allowed to dispute the submissions of the parties or to present oral arguments. As ICSID has recently underlined,

¹⁰² Roger W. Rosendahl, 'Political, Economic and Cultural Obstacles to Effective Arbitration of Foreign Investment Disputes,' *Arbitrating Foreign Investment Disputes: Procedure and Substantive Legal Aspects*, Norbert Horn Editor (2004).

¹⁰³ Margrete Stevens, above n 70.

¹⁰⁴ 'Getting Serious,' *The Economist Print Edition*, May 19th, 2005.

¹⁰⁵ Andrea Bjorklund, 'The Participation of Amici Curiae in NAFTA Chapter Eleven Cases,' Essay papers on investment protection – Ad Hoc Experts Group on Investment Rules, <www.dfait-maeci.gc.ca/tna-nac/participate-en.asp> at 27 July 2006.

¹⁰⁶ Dierk Ullrich, 'Intervenors for the Public good? Amici Curiae and NAFTA Arbitrations,' UBC Faculty of Law Jubilee Event, International Trade and Intellectual Property Panel, <www.fmdlaw.com/WEB/FMDWEBSITE.NSF/AllDoc/AE5FBABD944C41F285256A6C005F175F?OpenDocument> at 19 August 2006.

the ultimate goal in accepting non-party submissions is not to appease factional interests or introduce new parties but simply to reach the correct, just decision.¹⁰⁷

ICSID has opened its doors, but it has in no way diminished its control. Its overriding imperative remains to provide as impartial a forum as possible for the settlement of investment disputes. In this regard, it is unclear whether future ICSID tribunals will feel the same need to accept non-party submissions in the absence of public pressure to do so. While media coverage of ICSID has increased over recent years, the coverage remains limited to particular interest groups.¹⁰⁸ ICSID is not a household name. Interest groups and political pressure converged to lead to the non-party participation amendments, but it remains to be seen if similar forces will coalesce behind any but the most controversial of disputes in the future.

Whatever the case, ICSID Tribunals are well positioned to manage the challenges ahead. The construction of the non-party participation amendment is flexible enough to allow for different interpretations as different tribunals find convenient, whether to appease public outcry or satisfy their own investigative interests. They need only be careful to remain focused on their primary obligation of satisfactorily resolving the dispute at hand. So far non-party participation has proven most effective in disputes involving indirect expropriation arising from environmental and health measures. However, there are indications it may become equally important in such areas as anti-trust, consumer protection and securities regulation.¹⁰⁹ ICSID has proven to be an adaptable creature. These amendments and the dynamic nature of international investment transactions should ensure it remains so.

¹⁰⁷ Order in response to a Petition for Transparency and Participation as *Amicus Curiae*, *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A (Claimants) and The Argentine Republic (Respondent)* ICSID Case No. ARB/03/19, May 19th, 2005, ¶ 24.

¹⁰⁸ Andrea Bjorklund, above n 105.

¹⁰⁹ M. Sornarajah, *The International Law on Foreign Investment*, Cambridge University Press (2004), 283.