

PETITION FOR LIMITED PARTICIPATION AS NON-DISPUTING PARTIES IN TERMS OF ARTICLES 41(3), 27, 39, AND 35 OF THE ADDITIONAL FACILITY RULES

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Case number: ARB(AF)/07/01

between

PIERO FORESTI, LAURA DE CARLI & OTHERS

and

THE REPUBLIC OF SOUTH AFRICA

Petitioners:

The Centre for Applied Legal Studies (CALS)

The Center for International Environmental Law (CIEL)

The International Centre for the Legal Protection of Human Rights (INTERIGHTS)

The Legal Resources Centre (LRC)

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1. ORDERS SOUGHT

- 1.1 The Petitioners are two South African non-governmental organisations (“NGOs”) and two international NGOs. Acting collectively, they seek the following orders of the Tribunal in the arbitration concerning *Piero Foresti, Laura de Carli and Others v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/01 currently pending before the International Centre for Settlement of Investment Disputes:
- 1.1.1 Leave to file a written submission with the Tribunal regarding matters within the scope of the dispute;
- 1.1.2 Access to certain key arbitration documentation, subject to the redaction therefrom, upon the order of the Tribunal, of any commercially confidential or otherwise privileged information that is not relevant to the concerns of the Petitioners as non-disputing parties; and
- 1.1.3 Absent any objection by the Parties, permission to attend and present the Petitioners’ key submissions at the oral hearings when they take place, or in the alternative, to attend and/or observe the oral hearings.
- 1.2 The above three orders are sought pursuant to articles 41(3), 27 and 35, and 39, respectively, of Schedule C of the Additional Facility Rules of the International Centre for Settlement of Investment Disputes as amended and effective April 10, 2006. It is common cause that the Additional Facility Rules (the AF Rules) apply to the present arbitration per the election of ICSID arbitration by the Claimants.¹

2. OVERVIEW OF THE PETITION

¹ See Claimants’ Request for the registration of arbitration proceedings in accordance with article 2(1) of the Arbitration (Additional Facility) Rules of ICSID’s Additional Facility, dated 1 Nov 2006 (hereinafter “Claimants’ Request”). A copy of this request was generously provided to the petitioners by Claimants’ counsel by letter of 16 May 2007.

- 2.1 The Petitioners are all public interest organisations who seek to assist the Tribunal in its resolution of the dispute by raising and discussing relevant human rights-related issues and legal obligations arising within the scope of the dispute.
- 2.2 The Petition will proceed as follows. Part 3 provides a brief overview of the Petitioners. To enable the Tribunal to make a fully informed evaluation of the Petition, Annexure A provides detailed descriptions of the Petitioners, their organisational structures, affiliate relationships, and funding sources. Part 4 sets forth the major reasons for the Petition and describes the Petitioners' interest in the *Piero Foresti* dispute. Part 5 presents the Petitioners' request to be granted leave to file a written submission. In support of this request, Part 5 discusses: the scope of the Tribunal's powers under Article 41(3) to accept written submissions from non-disputing parties; the test to apply in determining the suitability of a specific petitioner to act as a non-disputing party; the suitability of the present Petitioners under this test; and the question of fairness to the Parties should the Tribunal grant the Petitioners' request.
- 2.3 Part 6 addresses the Tribunal's jurisdiction to grant the Petitioners' request for access to key arbitral documents. It describes the documents sought and the reasons therefor and outlines the Petitioners' position on the appropriate approach to document disclosure in this case. Part 7 follows a similar outline in respect of the Petitioners' request to attend and present key submissions at the oral hearings, or in the alternative, to attend or observe the oral hearings and to respond to any specific questions of the Tribunal.

3. BRIEF DESCRIPTION OF THE PETITIONERS

The South African petitioners

- 3.1 **The Centre for Applied Legal Studies (CALS)** is an independent research, advocacy and public interest litigation organisation committed to promoting democracy, justice and equality in South Africa and to addressing and undoing South Africa's legacy of oppression and discrimination. In all of its activities, CALS works toward the realisation of human rights for all South Africans under a

just constitutional and legal order. CALS pursues these goals through: undertaking rigorous research, writing, analysis and briefings; teaching and providing public education and training; the collection and dissemination of information and publications; participation in policy formulation, law reform, dispute resolution and institutional development and coordination; and the provision of legal advice and public interest litigation services.

3.2 **The Legal Resources Centre (LRC)** is a South African human rights organisation that seeks to use the law as an instrument of justice for the vulnerable and marginalised, including poor, homeless, and landless people and communities who suffer discrimination by reason of race, class, gender, disability or by reason of social, economic, and historical circumstances. The LRC promotes the South African Constitution's agenda of substantive equality across all facets of South African society through means that include impact litigation, law reform, participation in partnerships and development processes, education, and networking within South Africa, the African continent and at the international level.

3.3 CALS and the LRC are two of the leading human rights advocacy organisations in South Africa. Between them, they have litigated hundreds of human rights cases in the South African courts over a 30-year period. Both organisations have extensive experience in the protection and promotion of economic and social rights, including non-discrimination, formal and substantive equality rights, and the progressive realisation of rights through law. They have in-depth knowledge of local laws and circumstances and are well-placed to assist the Tribunal in understanding the domestic aspects of the public interest issues raised by this dispute.²

The international petitioners

² See Part 4 below.

3.4 **The Center for International Environmental Law (CIEL)** provides a wide range of services to clients and partners, including legal counsel, analysis, policy research, advocacy, education, training, and capacity building. The primary focus of this work is with developing country governments and civil society groups. Through its Trade and Sustainable Development Program, CIEL seeks to reform the global framework of economic law in order to promote human development and a healthy environment. CIEL has developed expertise in sustainable development and the broader international law issues that arise from investor-state arbitrations, including the relationship between international investment agreements and national development policy, the linkages between private agreements and international investment agreements, and the broader implications for environmental and human rights law of the interpretation of host state obligations under bilateral investment treaties. CIEL has been engaged in international trade and investment law issues since the early 1990s and has intervened previously in investor-state arbitrations, including *Methanex Corp v United State* (NAFTA),³ and *Suez et al v Argentina*⁴ and *Biwater v Tanzania*⁵ (both ICSID).

3.5 **The International Centre for the Legal Protection of Human Rights (INTERIGHTS)** is an independent international human rights law centre working to promote the effective realisation of international human rights standards through law. INTERIGHTS focuses on strategic litigation for the protection of human rights. It assists lawyers in bringing cases to international human rights bodies, disseminates information on international and comparative human rights law, and undertakes capacity building activities for lawyers and judges. INTERIGHTS maintains regional programmes in Africa and Europe as well as thematic programmes covering equality and non-discrimination, economic and

³ See *Methanex Corporation v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 (hereinafter *Methanex* Final Award).

⁴ See *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic*, Order in response to a Petition for Transparency and Participation as Amicus Curiae, ICSID Case No. ARB/03/19 (19 May 2005). For convenience, this case will hereinafter be referred to by its original short name of “*Aguas Argentinas*”.

⁵ See *Biwater (Gauff) Tanzania (Ltd) v United Republic of Tanzania*, Award, ICSID Case No. ARB/05/22 (24 July 2008) (hereinafter *Biwater* Final Award).

social rights and security and the rule of law. Over its 27-year history, INTERIGHTS has participated in human rights-promoting litigation efforts across a range of international, regional and domestic fora, including: the UN Human Rights Committee, the European Court of Human Rights, the European Committee of Social Rights, the African Commission on Human and Peoples' Rights, the Court of the Economic Community of West African States and the Inter-American Commission and Court on Human Rights.

- 3.6 Working together, CIEL and INTERIGHTS bring an important international NGO perspective on the public interest issues at stake in this dispute and the various international legal obligations which may impact upon the dispute. Both organisations have developed a deep understanding of the legal issues that arise out of disputes involving governmental obligations toward private parties and the impact of such disputes upon individual countries' attempts to pursue development options – particularly sustainable and equitable development – in a manner that is consonant with human rights obligations. CIEL and INTERIGHTS have invested heavily in addressing systemic issues that may threaten the achievement of human rights at the international level. Both organisations have an in-depth knowledge of states' international human rights obligations, the interactions between human rights norms and states' other legal obligations, and the approaches taken by other courts and tribunals in reconciling states' obligations. As such, they are well-placed to provide an international civil society perspective on how the Tribunal may take account of the international human rights issues raised by this dispute.

Coordination of efforts

- 3.7 The Petitioners herein have combined their requests in order to minimise any potential burden on the Tribunal and the Parties and to maximise the usefulness of their submissions. Acting collectively, the Petitioners bring the necessary experience and perspectives to address the public concerns that surround this case from multiple civil society angles. Should this Petition be granted, the Petitioners will continue to work together to present their views in a single integrated written submission that will be grounded in the relevant legal principles

and sources of law and will directly engage the issues before the Tribunal. To facilitate this cooperation and further minimise any communication burden, the LRC has agreed to act as coordinating counsel for the Petitioners collectively.

Individual and collective undertakings of the Petitioners

- 3.8 Individually and collectively, the Petitioners and their representatives hereby attest and affirm that they are independent public interest organisations and that they have no relationship, direct or indirect, with any party or any third party to this dispute which might give rise to any conflict of interest. The Petitioners have not received any assistance, financial or otherwise, from a party or a third party to this dispute in the preparation of this Petition. They will not receive any such assistance in the preparation of their non-disputing party submissions should this Petition be accepted by the Tribunal.

4. REASONS FOR THE PETITION

- 4.1 This arbitration gives rise to a number of issues that are of direct concern to South African citizens and the civil society groups that represent them, as well as a wide range of issues of concern to the citizens of all countries. The challenged legislation at the centre of the dispute, the Mineral and Petroleum Resources Development Act of 2002 (“the MPRDA”), was enacted in South Africa for important public policy reasons and in furtherance of constitutionally mandated goals. These include: human rights advancement, and in particular the pursuit of substantive equality; sustainable development; environmental protection; sound and prudent stewardship of the nation’s natural resources; and the need to proactively redress the apartheid history of exploitative labour practices, forced land deprivations, and discriminatory ownership policies which previously characterised South Africa’s mining sector for decades. As such, the arbitration raises important questions concerning, inter alia, the appropriate line between legitimate, non-compensable regulatory action and compensable expropriation under international law.

4.2 One particularly salient question that arises for the Tribunal's consideration and which may have serious domestic repercussions is the scope of the post-apartheid South African Government's ability, under domestic and international law, to implement legislative and policy decisions designed to redress the devastating socio-economic legacy left by apartheid. The Claimants have directly challenged certain social transformation aspects of the MPRDA – including certain Black Economic Empowerment policies – as expropriatory acts and/or violations of South Africa's fair and equitable treatment obligations under the bilateral investment treaties at issue in this matter.⁶ In doing so, they have put the international legality of such constitutionally mandated measures squarely in dispute.

4.3 While South Africa has made much progress toward the realisation of the right to equality and other human rights in the 15 years since its transition from apartheid to democratic rule, vast inequalities remain deeply entrenched in South African society. According to the most recent country report (2003) of the United Nations Development Programme,⁷ 62% of black South Africans lived below the national poverty line of ZAR 354⁸ per month per adult equivalent at the time of the survey. The comparable figure among white South Africans was 1.5%.⁹ Similarly, only 45% of black South Africans lived in formal housing, compared to 89% of members of other ethnic groups.¹⁰ The labour market was also rife with inequality, with 36.1% unemployment among the black South African population versus 12.4% among other groups.¹¹ Education levels, health care provision, HIV/AIDS infection rates, land ownership, and access to basic services (such as

⁶ See Claimants' Request, above n 1 at pp 9-10.

⁷ South Africa Human Development Report 2003, "The Challenge of Sustainable Development in South Africa: Unlocking People's Creativity", United Nations Development Programme (2003) (hereinafter Human Development Report) at ch 2, p. 41, table 2.20, available at: http://hdr.undp.org/en/reports/nationalreports/africa/southafrica/south_africa_2003_en.pdf.

⁸ The Rand, designated ZAR, is South Africa's national currency.

⁹ Human Development Report, above n 7 at ch. 2, p. 41, table 2.20.

¹⁰ Ibid at ch 2, p 34, table 2.16.

¹¹ Ibid at ch 2, p 20, table 2.7. These figures utilize the expanded definition of unemployment, which includes those job seekers who are employable and desire to work but have given up searching due to prolonged discouragement.

electricity, water, and sanitation) displayed similarly shocking disparities across racial groupings.¹² In terms of income inequality, South Africa continues to rank among the world's most unequal nations.¹³ Land ownership patterns display similar trends. Black South Africans, comprising around 79% of the population,¹⁴ were estimated to own only 18% of all land in South Africa at the end of 2008.¹⁵ These inequities are a direct result of past systematic discrimination against certain people groups. They can only be corrected through proactive measures.

4.4 It was precisely in recognition of such realities that the drafters of the 1996 South African Constitution placed upon the Government concrete obligations in respect of positive human rights fulfilment, including in the area of equality rights. The Preamble to the Constitution states that the Constitution was adopted “recognis[ing] the injustices of our past” and that one of its purposes is to “improve the quality of life of all citizens and free the potential of each person”. The very first founding provision of the Constitution, section 1(a), provides that the founding values of the Republic of South Africa include “[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms”. As the South African Constitutional Court has stated:

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them,

¹² For an overview of the statistics, see *ibid* ch. 2. A more complete analysis of individual topics, including education, health, land ownership, and access to basic services can be found in later chapters of the same report.

¹³ Economists use the Gini coefficient to measure the extent of income inequality within countries. A Gini coefficient of 0.0 indicates perfect income equality between the richest and poorest groups, while a coefficient of 1.0 indicates perfect income inequality. South Africa's Gini coefficient rose from 0.596 in 1995 to 0.635 in 2001, a figure which “continues to place South Africa in the ranks of the most unequal societies in the world.” Human Development Report, above n 7 at ch 2, p 43.

¹⁴ Midyear Estimates 2003, Statistics South Africa, Statistical Release P0302, p. 6, table 1, available at: <http://www.statssa.gov.za/Publications/P0302/P03022003.pdf>.

¹⁵ “Who owns what land in South Africa?” Yolandi Groenewald, Mail & Guardian, 23 Jan 2009 (citing a 2008 state land audit by the Department of Land Affairs), available at: <http://www.mg.co.za/article/2009-01-23-who-owns-what-land-in-south-africa>.

and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.¹⁶

- 4.5 Section 9(2) of the Constitution authorises the state, in order to promote the achievement of equality – including the full and equal enjoyment of all rights and freedoms in the Bill of Rights – to take legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination. Section 25 of the Constitution, which protects the right to property, envisages the need for such measures by providing in section 25(4) that, for the purposes of the property clause, “the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources”. Section 25(5) goes a step further by obligating the State to “take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis”. Section 25(8) clarifies that no provision of the property clause “may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination” provided that any departure from the provisions of the property clause are in accordance with the Constitution’s general limitations clause.¹⁷

¹⁶ *Soobramoney v Minister of Health, KwaZulu-Natal*, 1998 (1) SA 765 (CC) at para 8.

¹⁷ The limitations clause is found in section 36 of the Constitution and reads as follows:

1. “The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
 - a. the nature of the right;
 - b. the importance of the purpose of the limitation;
 - c. the nature and extent of the limitation;
 - d. the relation between the limitation and its purpose; and
 - e. less restrictive means to achieve the purpose.
2. Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

4.6 These provisions make clear that the Government of South Africa operates under constitutional obligations to bring about the realisation of substantive equality in South Africa, including with respect to the nation's natural resource wealth. As is evident from its preamble, the MPRDA was enacted by the South African Parliament in an attempt to partially fulfil these constitutional obligations.¹⁸ For this reason, the Petitioners submit that a thorough understanding of the South African Government's constitutional human rights obligations is necessary for a proper interpretation of the MPRDA, which is, in turn, necessary in order to conduct a proper assessment of the MRPDA's validity under South Africa's bilateral investment treaties.

4.7 More broadly, the proper interpretation of substantive equality provisions under international human rights law and the ability of governments to pursue substantive equality (eg through "affirmative action" measures) without violating their international investment commitments are matters that affect all nations. The same is true of governments' ability to promote economic and social rights, such as the right to a healthy environment, the right to development, and other human rights by imposing environmental, labour, and other regulations upon mining operations. The concomitant international responsibility of investors to contribute to human rights fulfilment, environmental protection, and the social upliftment of affected workers and communities when exploiting a nation's natural resources is also a question of international concern.¹⁹ The human rights and sustainable development dimensions of this dispute are undeniably of public interest to the international community at large. The impact of this arbitration will accordingly reverberate far beyond the boundaries of this particular dispute.

¹⁸ See eg paras 5-7 of the Preamble to the MPRDA, which state:

"REAFFIRMING the State's commitment to bring about equitable access to South Africa's mineral and petroleum resources;

BEING COMMITTED to eradicating all forms of discriminatory practices in the mineral and petroleum industries;

CONSIDERING the State's obligation under the Constitution to take legislative and other measures to redress the results of past racial discrimination".

¹⁹ See eg principles 1 – 9 of the UN Global Compact (highlighting companies' responsibilities in respect of human rights, labour rights, and environmental protection), available at: <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>.

4.8 For these reasons, in establishing the international validity of South Africa's contested measures under the MPRDA, the Petitioners submit that the Tribunal must also have regard to international human rights law. Like the South African constitution, several international treaties to which South Africa is a party impose certain regulatory and other obligations upon the Government of South Africa in connection with the protection and promotion of human rights.

4.9 For example, the International Convention on the Elimination of all Forms of Racial Discrimination ("CERD") recognises that "special measures [may be taken] for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms".²⁰ The International Covenant on Civil and Political Rights ("ICCPR") recognises that "all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence".²¹ The ICCPR also protects the right to equality before the law and equal and effective protection against discrimination, which has been interpreted by the Human Rights Committee as:

"sometimes requir[ing] States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to

²⁰ International Convention on the Elimination of All Forms of Racial Discrimination (G.A. Res. 2106, Annex, U.N. GAOR, 20th Sess., Supp. No. 14 at 47, U.N. Doc. A/6014 (1966), *entered into force* Jan. 4, 1969), ratified by South Africa 10 Dec 1998 (hereinafter "CERD"), at art 1.4.

²¹ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, ratified by South Africa 10 March 1999 (hereinafter "ICCPR"), at art 1(2). Article 1(2) of the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), which has been signed by South Africa and which has been used by the Constitutional Court in the interpretation of the South African Constitution, is worded in identical terms. Article 2 of the ICESCR further provides that States Parties must "take steps ... with a view to achieving progressively the full realization of the rights" and must "guarantee" the rights "without discrimination of any kind". International Covenant on Economic, Social and Cultural Rights (G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16 at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976, signed by South Africa 3 Oct 1994 (hereinafter "ICESCR").

perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population.”

4.10 The Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) obliges states to undertake affirmative action and specifies that such measures should be aimed at addressing imbalances and past discriminatory practices.²² The African Charter on Human & Peoples’ Rights 1986 (Banjul Charter) recognises that the right to property may be encroached upon “in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws”²³ and entrenches the right of all peoples to “freely dispose of their wealth and national resources”, specifying that this right “shall be exercised in the exclusive interest of the people”.²⁴

4.11 In light of the above-described international and domestic legal obligations upon the Government of South Africa and the Claimants’ challenge to the validity of the Government’s social transformation measures under the MPRDA, the Tribunal will be required to determine, inter alia, the following issues of major public concern in resolving this dispute:

4.11.1 Whether particular types of human rights-promoting measures may infringe the fair and equitable treatment and/or expropriation provisions of South Africa’s bilateral investment treaties even though such measures are

²² Convention on the Elimination of All Forms of Discrimination against Women (G.A. Res. 34/180, U.N. GAOR 34th Sess., Supp. No. 46 at 193, U.N. Doc. A/34/46, *entered into force* Sept. 3, 1981), ratified by South Africa 15 Dec 1995 (hereinafter “CEDAW”), at art 4.

²³ African [Banjul] Charter on Human and Peoples’ Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986, ratified by South Africa 7 Sep 1996, at art 14.

²⁴ *Ibid* at art 21.

not only permissible but in certain respects obligatory under both international human rights law and South African constitutional law.

4.11.2 If so, whether and how the history behind the human rights-promoting measures, the proportionality of the measures taken in relation to their stated objectives, the international and/or constitutional legality of the measures under human rights law, and the potential impact of any financial award upon the Government's present and future ability to fulfil its domestic and international human rights obligations affect the proper interpretation of the "prompt, adequate and effective" compensation standard under the bilateral investment treaties.

4.12 In probing the validity of the Claimants' assertions, the Tribunal must determine the dispute in accordance with the applicable law, including the law specified by the BITs and/or the AF Rules²⁵ and any choice of law agreement that may have been concluded between the Parties.²⁶ The Petitioners recognise that the question of what constitutes "applicable" law is frequently contentious. The

²⁵ The Petitioners note the discrepancy in choice of law provisions between the two BITs at issue in this dispute. The BIT between South Africa and the Belgo-Luxembourg Economic Union specifies in Article 10(5) that:

"The tribunal shall decide on the basis of the national law, including the rules relating to conflicts of law, of the Contracting Party involved in the dispute in whose territory the investment has been made, the provisions of this Agreement, the terms of the specific agreement which may have been entered into regarding the investment as well as the principles of international law."

(Emphasis added.) The SA-Belgolux BIT therefore makes clear that both domestic and international law must be applied. The South Africa-Italy BIT, on the other hand, contains no choice of law provision. Article 54 of the AF Rules therefore effectively assigns a discretion concerning choice of law to the Tribunal, stating that in the absence of any agreement on choice of law, the Tribunal shall apply:

"(a) the law determined by the conflict of laws rules which it considers applicable and (b) such rules of international law as the Tribunal considers applicable."

Although this provision does not specifically require the Tribunal to apply domestic law, part (a) leaves ample room for the Tribunal to apply that law if it be "applicable". For the reasons outlined in this section, the Petitioners submit that the Tribunal should indeed consider both international and domestic human rights law when evaluating the consistency of the regulatory regime of the MPRDA with the Government's various obligations under the BITs.

²⁶ The Petitioners are unaware of any specific choice of law agreement between the Parties. Should any such agreement exist, the Petitioners have requested access to it in Part 6 below.

Petitioners are not privy to the positions of the Parties or any pronouncements of the Tribunal on this point. From the Petitioners' perspective, however, where a dispute requires a tribunal to characterise a particular governmental act either as a permissible regulatory action or as a compensable expropriation and, in the event of the latter, to determine the amount of the compensation due, the sources of law which give rise to that state's regulatory duties and which may affect its compensation obligations must be directly applicable. The Petitioners submit that a thorough consideration of South Africa's constitutional and international human rights obligations is therefore necessary for a proper determination of the investors' expropriation claims in this dispute.

4.13 The same is true of the Tribunal's consideration of the State's compliance with the fair and equitable treatment standard under the bilateral investment treaties invoked here. Previous investment tribunals have found that the fair and equitable treatment standard comprises several discrete components,²⁷ and the Petitioners submit that human rights law is relevant to some of them. For example, a consideration of the Government's legal obligations under human rights law is directly relevant to the question of whether the regulatory scheme promulgated by the MPRDA can be considered to have been done arbitrarily, in bad faith, or in a discriminatory fashion. Were the Tribunal to examine these and other components of the fair and equitable treatment standard without taking

²⁷ These include the obligation of the host state to:

- (1) ensure transparency of government regulatory processes and non-discrimination in their application (see *Metalclad Corp v. United Mexican States*, ICSID (NAFTA) Case No. ARB(AF)97/1, 16 ICSID Rev. – FILJ 168 (2001) [hereinafter *Metalclad*], paras 76ff and para 101);
- (2) provide full protection and security to foreign investments (see *Ronald S. Lauder v. The Czech Republic*, UNCITRAL Final Award of 3 September 2001, para 308);
- (3) act in good faith and in a non-arbitrary manner toward foreign investors (on good faith see *GAMI Investments, Inc. v. Government of the United Mexican States*, in proceedings pursuant to NAFTA Chapter 11 and the UNCITRAL Arbitration Rules (Nov. 15, 2004); on non-arbitrariness see *Case Concerning Elettronica Sicula, S.p.A. (ELSI)* (U.S. v. Italy), ICJ Judgment of 10 July, 1989, para 128);
- (4) treat foreign investments in a way that does not undermine the legitimate expectations taken into account by foreign investors in making their investments (see *Tecnicas Medicoamientales TECMED SA v. the United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003), para 154).

account of human rights law, it would risk creating an irreconcilable conflict between the South African Government's international legal obligations under human rights law, on the one hand, and its bilateral investment treaties, on the other.

4.14 An interconnected approach to international law is increasingly recognised by international courts and bodies in various spheres as fundamental. In making their submissions, the Petitioners would seek to assist the Tribunal in placing the BITs and other areas of states' obligations in context, highlighting the interrelationship between the above-mentioned applicable bodies of law, in order to promote a more coherent international legal framework. The Petitioners respectfully submit that a consideration of such submissions would assist the Tribunal in reaching a proper determination of the dispute.

4.15 The importance of avoiding any interpretive approach that would create an irreconcilable conflict between the relevant bilateral investment treaties and the human rights obligations described above goes well beyond this particular dispute. The other contracting States to the BITs underlying this dispute (Belgium, Luxembourg, and Italy) are all parties to the ICCPR, CERD, CEDAW, and ICESCR.²⁸ These treaties obligate them not only to respect and promote the relevant human rights within their own territories but also to cooperate in contributing to the promotion of those human rights extraterritorially.²⁹ As such,

²⁸ For the respective countries' dates of ratification, see the UN ratification tables for the relevant treaties, available at: <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>.

²⁹ The exact content of states' extraterritorial obligations in respect of human rights promotion remains a matter of some debate. That some level of obligation exists, however, is broadly accepted. This is traced back to article 55 of the UN Charter (quoted, for example, in the preamble to the ICESCR), which requires all of its members to promote:

“conditions of economic and social progress and development; solutions of international economic, social, health, and related problems; and . . . universal respect for and observance of human rights and fundamental freedoms.”

Charter of the United Nations, 26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945. At an absolute minimum, the contracting parties to the major international human rights conventions listed above must not enter into treaties (such as BITs) that would undermine their ability to fulfil their own human rights obligations and must not interfere with other states' attempts to fulfil their human rights obligations under the conventions. Beyond this, strong legal arguments support a much richer interpretation of states' extraterritorial

any interpretation of the relevant BITs that conflicts with the clear obligations of states under these widely accepted human rights treaties would create a “double-bind” situation not only for the government of South Africa, but also for the other contracting Parties to the BITs, rendering it impossible for them to simultaneously fulfil their obligations under both sets of treaties. In view of the similarity of the relevant BITs to many of the more than 2600 BITs now in existence, this could also create difficulties for dozens of other states that are contracting parties to both human rights conventions and BITs. The Petitioners submit that it is therefore appropriate for the Tribunal to hear from leading international human rights organisations on the potential systemic impacts of this dispute.

- 4.16 The Petitioners are additionally concerned by the very real potential for two other conflicts to arise out of this dispute. The first is the possibility of conflicting rulings between this Tribunal and the South African courts concerning the scope of South Africa’s legitimate policy-making space in effectuating regulatory measures in furtherance of its human rights and sustainable development goals.³⁰ The Petitioners note that at least one challenge to the characterisation of the MPRDA as permissible regulation versus compensable expropriation is already underway in the domestic courts of South Africa.³¹ In an effort to

human rights obligations. See eg EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES, Coomans & Kamminga (eds), Maastricht Series in Human Rights (Intersentia 2004); Meron, T. “Extraterritoriality of Human Rights Treaties”, 89 *American Journal of International Law* 1995; Sigrun I. Skogly, BEYOND NATIONAL BORDERS: STATES’ HUMAN RIGHTS OBLIGATIONS IN INTERNATIONAL COOPERATION, (Intersentia 2006). See also Langford, M., “A Sort of Homecoming: Extraterritorial Obligations and the Right to Housing”, forthcoming in UNIVERSAL HUMAN RIGHTS AND EXTRATERRITORIAL OBLIGATIONS, Gibley & Skogley (eds), University of Pennsylvania Press (2009) at section 2.1 (discussing the extraterritorial application of article 1 of the ICCPR), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1314201.

³⁰ The very real likelihood of such a conflict has been publicly acknowledged by one of the claimants’ legal representatives. See para 7.3 below.

³¹ See *Agri South Africa v Minister of Minerals and Energy* (case number 55896/07); *Van Rooyen v Minister of Minerals and Energy* (case number 10235/08), consolidated action currently pending before the North Gauteng High Court, South Africa. On or around 20 May 2009, the defendant (the Minister of Minerals and Energy) published a notice in terms of Rule 16A of the High Court Rules of South Africa, giving notice of a constitutional issue that had arisen in the proceedings. The constitutional issues identified in the notice include whether the plaintiffs experienced, by virtue of the provisions of the MPRDA, a deprivation of rights or an expropriation and what compensation, if any, ought to be awarded to them in terms of the relevant provisions of the

advocate for consistent approaches under both international and domestic law, the South African Petitioners are launching a domestic amicus application to intervene in that case on grounds similar to those cited here. It is submitted that a consideration of the major public interest concerns of civil society representatives by both this Tribunal and the South African courts will help to reduce the likelihood of directly conflicting decisions.

4.17 The second potential clash concerns the validity of the BITs themselves. The South African Government's domestic constitutional obligations to pursue the progressive realisation of human rights – including substantive equality and the right to a healthy environment – are clear. Any award by this Tribunal that directly contradicts or effectively nullifies the South African Constitution, even if unwittingly, could potentially lead to a domestic invalidation of the BITs,³² which would obviously be to the detriment of all concerned.³³ The two South African Petitioners are both well-practiced at holding the South African Government accountable to its constitutional obligations. This risk, too, can therefore be minimised by considering submissions from the Petitioners in the present dispute.

4.18 In short, this arbitration raises issues of obvious public importance, including substantive equality and other human rights, environmental protection, sustainable development, and the respective roles of governments and investors in pursuing these goals. The consistency of South Africa's domestic constitutional obligations and its obligations arising out of international human rights law, on the one hand, and international investment treaties, on the other, has direct relevance to each of the Petitioners' mandates and activities at the

MPRDA and the South African Constitution.

³² Section 172.1.a. of the South African Constitution states that domestic courts "must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency".

³³ In this respect, the Petitioners draw the Tribunal's attention to the difficulties the Claimants would face in attempting to enforce any award issued pursuant to a BIT that has subsequently been declared unconstitutional by the South African courts. Such an invalidation would likewise pose serious difficulties for the government of South Africa in attracting and retaining foreign investment.

local, national and international levels. The interest of the Petitioners in all of these public concerns is longstanding, genuine and supported by their well-recognised expertise in these areas.

5. LEAVE TO FILE A WRITTEN SUBMISSION

Jurisdiction to accept written submissions from non-disputing parties

5.1 Article 41(3) of the AF Rules explicitly authorises the Tribunal to accept written submissions from non-disputing parties as follows:

“After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Article called the “non-disputing party”) to file a written submission with the Tribunal regarding a matter within the scope of the dispute.”

5.2 The Petitioners note that although the Tribunal must obtain the views of the Parties before making its decision, the Tribunal’s power to accept a non-disputing party submission is not subject to a veto by any Party.

5.3 This view was confirmed by the ICSID tribunal in the recent matter of *Biwater v Tanzania*.³⁴ In that case, the tribunal applied article 37(2) of the revised ICSID Rules and allowed five non-disputing party petitioners to file a joint written submission despite the strong objections of the claimant.³⁵ As article 37(2) of the revised ICSID Rules is virtually identical in its wording to article 41(3) of the AF Rules presently at issue,³⁶ the Petitioners submit that there is no reason why the

³⁴ *Biwater (Gauff) Tanzania (Ltd) v United Republic of Tanzania*, Procedural Order No. 5 (in response to a Petition for Amicus Curiae Status), ICSID Case No. ARB/05/22 (2 February 2007) (hereinafter *Biwater* Procedural Order No. 5).

³⁵ *Biwater* Procedural Order No. 5, *ibid*, at paras 49-61.

³⁶ The only difference between Rule 37(2) of the revised ICSID Rules (as amended and effective April 10, 2006) and Article 41(3) of the revised AF Rules that govern this dispute is the substitution of the word “Rule” in the former for the word “Article” in the latter. This merely reflects the difference in status between the two sets of rules. The ICSID Rules form a part of the treaty compact that is the ICSID Convention, whereas the Additional Facility Rules are separate from the Convention and apply only to disputes in which either the State party to the dispute or the State whose national is a party to the dispute is not a party to the ICSID Convention.

Tribunal should reach a different conclusion concerning its jurisdiction to accept a written submission from the Petitioners here.

- 5.4 Even before the ICSID Rules and AF Rules were revised in 2006 to explicitly allow tribunals to accept written submissions from non-disputing parties, numerous investment arbitration tribunals had already found such decisions to be within their inherent competence.³⁷
- 5.5 Indeed, the Petitioners submit that the practice has by now become so consistent across various arbitral fora and various sets of arbitration rules as to become an accepted feature of investor-state arbitration. The Petitioners do not wish to burden the Tribunal with a lengthy recitation of the history of non-party submissions to other tribunals. Instead, the Petitioners rely upon the jurisdiction explicitly conferred upon the Tribunal by Article 41(3) of the AF Rules. To the extent that the Tribunal considers the history behind the adoption of this article relevant to its decision, various examples of non-party submissions arising in investor-state disputes under both the ICSID and UNCITRAL rules have been provided in the footnotes.³⁸

³⁷ The first decision to allow non-party participation was taken by the NAFTA tribunal in *Methanex Corporation v United States of America*, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae, January 15, 2001 (hereinafter "*Methanex Amicus Order*"), available at: <http://naftaclaims.com/Disputes/USA/Methanex/MethanexDecisionReAuthorityAmicus.pdf>. The tribunal reached its decision over the express objections of the claimant. The same was true of the first two decisions on amicus submissions under the ICSID Rules. See *Aguas Argentinas* above n 4 and the decision of the identically composed tribunal in *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, Order in Response to a Petition for Participation as Amici Curiae, ICSID Case No. ARB/03/17 (17 March 2006) (hereinafter referred to by its original short form of "*Aguas Provinciales de Santa Fe*"). The Argentine tribunals referenced here applied the previous ICSID Rules, which were entirely silent as to the question of non-party submissions. Even so, the tribunals found they had the power to accept written submissions under Article 44 of the ICSID Convention, which stated: "If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question." See *Aguas Argentinas* Amicus Order, above n 4, at paras 10-16 and *Aguas Provinciales de Santa Fe* Amicus Order, infra at paras 11-16.

³⁸ See cases listed in n 37 *ibid*. Further examples include: *United Parcel Service Inc v Government of Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001 (a NAFTA claim under the UNCITRAL Rules), available at: <http://naftaclaims.com/Disputes/Canada/UPS/UPSDecisionReParticipationAmiciCuriae.pdf>; *Merrill & Ring Forestry LP v Government of Canada*, Tribunal Decision and Invitation Concerning Amicus Petition, July 31, 2008 (a NAFTA claim under the UNCITRAL Rules), available at:

5.6 For present purposes, it is sufficient to note that the 2006 revisions to the ICSID and AF Rules codified and regulated the practice, with a view to introducing greater clarity and predictability to the proceedings and to recognising the power of tribunals to accept written submissions from non-disputing parties. In light of the principle of effective interpretation (“*l’effet utile*”)³⁹ the Petitioners submit that the 2006 reforms are best interpreted in ways that facilitate the ability of non-disputing parties to make relevant and useful written submissions to ICSID tribunals.⁴⁰

The test to apply in determining the suitability of a non-disputing party petitioner

5.7 In addition to authorising the Tribunal to accept submissions from non-disputing parties, Article 41(3) prescribes certain factors which the Tribunal must take into account in determining whether to accept any such submission. The relevant portion of Article 41(3) reads as follows:

“In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

- (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective,

http://www.naftaclaims.com/Disputes/Canada/Merrill/Merrill_Ring-Canada-AmicusDecision.pdf.

³⁹ As explained in the statement of the Appellate Body in *United States – Gasoline*, “An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.” Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* (“*United States – Gasoline*”), WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, at p. 23. For a general discussion of this principle, see Yearbook of the International Law Commission, 1966, Vol. II A/CN.4/SER.A/1966/Add.1 at p. 219 and following. See also *Corfu Channel Case* (1949) I.C.J. Reports, p. 24 (International Court of Justice); *Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad)* (1994) I.C.J. Reports, p. 23, para 47 (International Court of Justice); and Oppenheim’s International Law (9th ed., Jennings and Watts eds, 1992), Vol. 1, 1280-1281.

⁴⁰ See eg Brigitte Stern, “Civil Society’s Voice in the Settlement of International Economic Disputes, *ICSID Review: Foreign Investment Law Journal*, Vol. 22 no. 2 (Fall 2007); Joachim Delaney & Daniel Magraw, “Procedural Transparency”, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW at 721, (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds) (Oxford University Press, 2008).

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.”

5.8 Sub-paragraphs (a) and (b) address the usefulness and relevance of the intended submission to the proceeding, while sub-paragraph (c) relates to the strength of a petitioner’s particular interest in the case. The Petitioners address each of these factors in turn below.

5.9 In addition, because the AF Rules do not provide an exhaustive test for determining the suitability of individual petitioners, the Petitioners will first address the considerations agreed by this Tribunal and the disputing Parties in their October 2008 communication to “persons and entities who may be interested in making non-disputing party applications”.⁴¹ The Petitioners note that this communication adopted the considerations cited by the first two ICSID tribunals to address the question (“the Argentine tribunals”).⁴² The communication proposes to determine the suitability of a specific non-disputing petitioner by reference to the following information:

- a. “The identity and background of the petitioner, the nature of its membership if it is an organization, and the nature of its relationships, if any, to the Parties in the dispute.
- b. The nature of the petitioner’s interest in the case.
- c. Whether the petitioner has received financial or other material support from any of the Parties or from any person connected with the Parties in this case.

⁴¹ This agreement was communicated to the LRC by a September 2008 email from the Tribunal’s Secretary.

⁴² See the amicus orders in *Aguas Argentinas* above n 4 and *Aguas Provinciales de Santa Fe* above n 37. These two tribunals were identically-composed tribunals seized with certain disputes relating to the Argentine financial crisis under the previous ICSID Rules. For convenience, these tribunals are herein referred to as “the Argentine tribunals” collectively.

d. The reasons why the tribunal should accept the petitioner's written submission."⁴³

5.10 The Argentine tribunals described these considerations as encapsulating the usual criteria applied by many jurisdictions and arbitral fora in evaluating the suitability of applicants to serve as *amici curiae* namely: expertise, experience, and independence.⁴⁴

5.11 The Petitioners submit that the elements listed in sub-paragraphs (b) and (d) of the agreed test are essentially subsumed within the list of factors now set out in Article 41(3) of the amended AF Rules. As such, these elements will be addressed together with the Article 41(3) factors below. The considerations mentioned in sub-paragraphs (a) and (c) of the agreed test are addressed immediately below as a preliminary matter.

The suitability of the Petitioners under the agreed test

5.12 Part 3 of the Petition has already partially addressed the elements referred to in sub-paragraphs (a) and (c) of the agreed considerations above. Annexure A to this Petition traverses those elements in further detail. In particular, the information provided in Annexure A below demonstrates that the Petitioners are public interest organisations funded by independent donors and that neither they nor their donors have any relationship to the Parties or the subject matter of the

⁴³ *Aguas Argentinas and Aguas Provinciales de Santa Fe Amicus Orders*, *ibid*, at paras 25 and 24, respectively. The Argentine tribunals' test for evaluating the suitability of a petitioner was most recently cited and discussed by five non-party petitioners in the ICSID matter of *Biwater v Tanzania*. *Biwater* Procedural Order No. 5, above n 34. In interpreting and applying Article 37(2) of the current ICSID Rules – which is virtually identical to Article 41(3) of the AF Rules presently at issue – the *Biwater* tribunal appears to have implicitly accepted the relevance of the Argentine tribunals' test. Although the Argentine and Tanzanian cases fell under the previous and current ICSID Rules rather than the current AF Rules, the Petitioners agree that the relevant considerations in this case are substantially similar; the same test should therefore apply.

⁴⁴ *Aguas Argentinas Amicus order*, above n 4, at paras 17, 24. Indeed, the four above-quoted considerations are also reflective of the test enunciated by the NAFTA Free Trade Commission in its statement authorising submissions by non-disputing parties in NAFTA cases. See Statement of the Free Trade Commission on non-disputing party participation, available at: <http://www.naftaclaims.com/Papers/Nondisputing-en.pdf>.

dispute which might give rise to a conflict of interest. As such, the Petitioners meet the criterion of independence.

- 5.13 Moreover, Part 3 and Annexure A both demonstrate the Petitioners' ample expertise in all of the subject areas related to their intended submissions as well as their vast experience in presenting meaningful non-party submissions to various courts and tribunals. The Petitioners therefore submit that the criteria of experience and expertise are duly satisfied.

The suitability of the Petitioners under Article 41(3) of the AF Rules

- 5.14 The requirements set forth by Article 41(3) were quoted above. The Petitioners point out that they are limited in their ability to demonstrate fully their satisfaction of each of these requirements by reason of the limited knowledge they have been able to glean of the dispute to-date. The prejudicial effect of this transparency deficit, and specifically the lack of access to the key arbitration documents, upon the Petitioners' ability to draft a useful and unique written submission will be taken up in Part 6 below.

- 5.15 For present purposes, the Petitioners request that the Tribunal bear in mind the difficulties faced by the Petitioners in attempting to satisfy the Article 41(3) factors without first having sight of the arbitral documents. Should the Tribunal not be satisfied with the Petitioners' below submissions concerning one or more factors, the Petitioners request that the Tribunal afford them an opportunity to rectify any shortcomings by disclosing to the Petitioners sufficient information to allow the Petitioners to fully meet the requirements of Article 41(3) prior to ruling on this Petition.

(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

- 5.16 The Petitioners fully appreciate the requirement that their submission must address matters, whether factual or legal, related to the proceeding. As Part 4

above has shown, the specific public interest issues that the Petitioners intend to take up arise as a direct consequence of the Claimants' BITs-based challenges to the MPRDA and the South African government's Black Economic Empowerment efforts under the Mining Charter. These challenges necessarily implicate and require a careful consideration of the international law on human rights and sustainable development, the South African Constitution's human rights and socio-economic transformation imperatives as effectuated through the MPRDA, and the consistency of these bodies of law with South Africa's obligations under international investment treaties. The Petitioners' public interest concerns are therefore directly related to and inseparably intertwined with the core legal and factual issues that will be addressed in the arbitration.

5.17 The requirement that Petitioners bring a "perspective, particular knowledge or insight that differs from that of the disputing parties" is also satisfied here. As Parts 3 and 4 above have shown, the starting perspectives of the Petitioners as wholly independent civil society organisations with specialised expertise in human rights, the environment, and sustainable development issues clearly differ from the starting perspectives of the Parties. This much is evident from the countless occasions on which the Petitioners have acted to defend civil society concerns against intrusions by both government and private actors.

5.18 Of course, it is impossible for the Petitioners to guarantee – without first viewing the Parties' pleadings – that the Petitioners' submissions on any specific issue will differ from those of the Parties. However, one can and should anticipate that the Petitioners' differing expertise and insights will lead to different submissions in this case. Where the differences in argument are likely to be insignificant, the Petitioners undertake to exercise their discretion and to refrain from making submissions on such issues.⁴⁵

⁴⁵ This is in accordance with the *Biwater* tribunal's caution that non-disputing parties should not "consider themselves as simply in the same position as either party's lawyers". *Biwater* Procedural Order No 5, above n 34 at para 64.

5.19 The risk of duplication will in any event be eliminated if the Petitioners' request for access to certain documents is granted. The Petitioners have intentionally formulated that request in such a way as to enable them to ensure that they will bring relevant and helpful submissions.

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

5.20 The Petitioners understand this to mean that they must limit their submissions to matters specifically at issue in this dispute, as opposed to addressing matters that do not fall within the scope of the arbitral mandate. Likewise, the Petitioners understand this criterion to mean that they will not introduce new contested issues that could expand the dispute. The Petitioners undertake to submit only such legal and factual arguments as are relevant to the subject matter of this dispute and which fall within the jurisdiction of the Tribunal to consider. To the extent that other concerns may arise having lesser connection to the primary aspects of the dispute, the Petitioners undertake to refrain from addressing any matters not central to the proceeding.

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

5.21 The Petitioners have relied upon their knowledge of the case to-date and the legal issues it is likely to raise in order to demonstrate why they have a significant interest in the proceeding. The public interest issues identified above fall directly within the expertise and mandates of the Petitioners. The Petitioners therefore submit that this test has been met.

Fairness to the Parties

5.22 Article 41(3) of the AF Rules protects the Parties' interests in the fair and efficient functioning of the arbitration. The final sentence of that article stipulates:

“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.”

5.23 The Petitioners are sensitive to the need to ensure that any submission to be filed by them must comply with these parameters. Two points are noteworthy in this regard. The first relates to the timeliness of the Petition and the second to the question of burden and prejudice to the Parties.

(i) Timeliness of the Petition

5.24 The timeliness of this Petition is relevant to the Tribunal's consideration of whether a submission by the Petitioners would disrupt the proceedings. As the Tribunal is aware, at least one of the Petitioners (the LRC) first obtained a copy of the Claimants' initial request for the registration of the arbitration directly from the Claimants' attorneys by a letter of 16 May 2007. However, the Petitioners submit that they have only recently been put in a position to decide positively in favour of submitting this Petition. It will be seen that in the above-referenced letter the Claimants' attorneys stated:

“Our clients are anxious to maintain the good relations existing between the Government and themselves in the hope that the differences between them may rapidly be satisfactorily resolved independently of arbitration. It is much to be hoped that nothing that any third parties may do will hinder this important process.”⁴⁶

5.25 The Petitioners have not been privy to any direct information from either party concerning any potential settlement negotiations. However, the above-quoted letter strongly intimated that such negotiations were in progress, and occasional press reports have seemed to confirm this. The Petitioners are all non-profit organisations operating on tight budgets and with limited personnel. As such, they did not wish to expend valuable time and resources in preparing an Article 41(3) petition too early, only to discover that the matter had been settled “independently of arbitration”.

⁴⁶ See Webber Wentzel Bowens' corrected reply to the Legal Resources Centre, dated 16 May 2007, bottom of p 2.

5.26 The joinder of two additional claimants in July of 2008 and the subsequent 8-month-long delay before the filing of the Government's counter-memorial generated new uncertainties for the Petitioners as to: whether the proceedings were moving forward, whether an additional round of briefings would take place, and whether a new round of settlement negotiations (encompassing the new claimants) would commence. These uncertainties were further compounded by the recent suspension of the proceedings and by the absence of any procedural decisions or announcements concerning the Tribunal's revised timelines on the ICSID website.⁴⁷

5.27 The Petitioners elected to move forward with preparing the Petition when they read of the suspension of the arbitration in a press report in late March, 2009. The Petitioners worked diligently and without undue delay to coordinate their interests and efforts and to ready this Petition for submission to the Tribunal as swiftly as possible. Meanwhile, by a letter of 19 June 2009, the Petitioners requested from the Secretary of the Tribunal an updated timeline of the proceedings. A reply received by email on 14 July 2009 indicates that the Claimants' Reply is due to be filed on 15 October 2009 and the Government's Rejoinder on 12 February 2010, and the hearing is scheduled to take place from 12 – 23 April 2010. The Petitioners submit that there remains ample time for the Tribunal to rule on this Petition, for the Petitioners to file a written submission, and for all Parties to respond to such submission prior to these deadlines. The Petitioners therefore respectfully submit that the Petition is timely.

⁴⁷ By letter of 26 September, 2008, the Tribunal's Secretary communicated the Tribunal's announced timeline at that juncture as follows:

"The Claimants submitted a Memorial on July 31, 2008. The Respondent shall submit a Counter-Memorial on or before February 25, 2009. The Claimants shall submit a Reply on or before June 25, 2009. The Respondent shall submit a Rejoinder on or before October 23, 2009."

It would appear from the ICSID website that the Government's February 25th deadline was not met. The Petitioners were unsure as to how the timeline may have been affected by the delayed filing of the Government's counter-memorial and the subsequent suspension of the proceedings on March 28th, 2009. The Petitioners therefore wrote to the Secretary on 19 June 2009 (the date on which the suspension was reported to expire) seeking further clarification of the timeline.

(ii) Burden and prejudice to the Parties

5.28 As noted above, the Petitioners are acting collectively to bring a single written submission in order to minimise the burden on the Parties and the Tribunal. The Petitioners' designation of the LRC to act as coordinating counsel for all of the Petitioners further reduces any communication costs or burdens on the Parties and the Tribunal. It should be noted that the Petitioners and their representatives are all highly experienced in bringing non-party submissions in domestic and international fora. In no case has any Petitioner been sanctioned or cited with disapproval by any court or tribunal for unduly burdening or prejudicing any party or engaging in any otherwise unprofessional conduct. On the contrary, previous investment tribunals that have accepted submissions from non-disputing party petitioners have acknowledged the helpful assistance of such submissions to the better resolution of the disputes before them.⁴⁸

5.29 Finally, the Tribunal is master of its own proceeding and is fully competent to take any necessary steps to prevent undue burden or unfair prejudice to the Parties. Such steps might include the establishment of appropriate filing deadlines to allow the Petitioners to make a meaningful submission while also affording the Parties adequate time to reply to such a submission; the imposition of page limits; or any other such procedural prescriptions. The Petitioners therefore submit that the granting of this request to file a written submission will not unduly burden or unfairly prejudice the Parties.

6. ACCESS TO KEY ARBITRAL DOCUMENTS

The jurisdiction of the Tribunal to grant access to arbitral documents

6.1 The AF Rules are silent as to whether, and in what circumstances, non-disputing parties may be granted access to the arbitral filings of the parties in order to facilitate the filing of a useful written submission. Articles 27 and 35 of the AF

⁴⁸ See *Methanex Final Award*), above n 3, at p 13, para 27; *Biwater Final Award*, above n 5, at para 392.

Rules, however, afford the Tribunal a wide discretion in determining any question of procedure not otherwise covered by the Rules. Article 27 reads: “The Tribunal shall make the orders required for the conduct of the proceeding.” Article 35 supplements this broad power by stating: “If any question of procedure arises which is not covered by these Rules or any rules agreed by the parties, the Tribunal shall decide the question.”⁴⁹

6.2 Neither of these powers is subject to the consent or veto of any party. The Petitioners therefore submit that the resolution of this request for access to certain documents lies entirely within the discretion of the Tribunal.⁵⁰ Moreover, for the reasons that follow, the Petitioners submit that the Tribunal should exercise its discretion in favour of granting access to certain documents in order to allow the Petitioners to make meaningful submissions as non-disputing parties.

The need for a balanced approach to disclosure of documents

6.3 The Petitioners are sensitive to the difficult questions that come into play in considering the disclosure of documents to non-parties to an arbitral proceeding. Every arbitral tribunal is tasked with protecting the rights and legitimate expectations of the parties to the arbitration agreement in an efficient and just arbitral proceeding. However, the Petitioners believe that an outright refusal of document disclosure is neither necessary nor appropriate in this case.

⁴⁹ Petitioners are not aware of any prior agreement between the parties concerning the disclosure of arbitral documents generally or of specific arbitral documents in particular. Neither are the Petitioners aware of any order concerning the confidentiality of the Parties’ filings that may have been issued by the Tribunal to-date. The Petitioners note, however, that even if such a procedural order has been issued, the Tribunal retains the power, pursuant to Article 46 (2) of the AF Rules, to alter its previous orders to any extent it deems necessary. Article 46 concerns “Provisional Measures of Protection.” Paragraph 1 of that article allows the parties to request provisional measures, while paragraph 2 states: “The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.”

⁵⁰ The decision of the *Biwater* tribunal implicitly affirms the Petitioners’ view on this point. See *Biwater* Procedural Order No 5, above n 34, at paras 66-68.

6.4 Instead, the Petitioners submit that a balanced approach to document disclosure is called for here. Such an approach would take into account not only the rights and interests of the Parties to this dispute, but also: the disclosure obligations that attach to the Government of South Africa under domestic, regional and international law; the nature of investor-state arbitration as a dispute resolution mechanism under public international law; and the pragmatic considerations that will determine the Petitioners' ability to make relevant and useful written submissions to the Tribunal as required by Article 41(3) of the AF Rules.

Protecting the rights of the Parties while also giving effect to the State's disclosure obligations under domestic, regional and international law

6.5 The Petitioners submit that a proper approach to disclosure of documents must take into account the Government of South Africa's domestic, regional and international law obligations in respect of the public's right of access to information held by the State. These derive from constitutional and statutory provisions and from international human rights law on the right to access to information.

6.6 The South African Constitution provides that "[e]veryone has the right of access to any information held by the state"⁵¹ and requires any limitations of this right to be carried out "only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society".⁵² The

⁵¹ Section 32 of the South African Constitution, titled "Access to information", states:

1. "Everyone has the right of access to—
 - a. any information held by the state; and
 - b. any information that is held by another person and that is required for the exercise or protection of any rights.
2. National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state."

⁵² Section 36 of the South African Constitution, titled "Limitation of rights", narrowly delineates the circumstance in which any right contained in the Bill of Rights (including the right of access to information) may be limited, as follows:

1. "The rights in the Bill of Rights may be limited only in terms of law of general

South African Parliament has given effect to this right through the Promotion of Access to Information Act (“PAIA”),⁵³ which requires the Government, upon application, to disclose any information it holds subject to certain narrow exceptions concerning information that is specifically protected from disclosure.⁵⁴ The South African Constitutional Court has in turn developed an interpretive approach which examines all government obligations in light of the principles of openness and accountability as prescribed by the Constitution.⁵⁵ It is therefore clear that the documents submitted by the Government in this dispute are subject to a presumption of disclosure under South African law, subject only to limited exceptions. Indeed, the Petitioners note that other civil society organisations in South Africa have already obtained some documents related to this proceeding by means of a PAIA request.⁵⁶

application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- a. the nature of the right;
- b. the importance of the purpose of the limitation;
- c. the nature and extent of the limitation;
- d. the relation between the limitation and its purpose; and
- e. less restrictive means to achieve the purpose.

2. Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

⁵³ Act no 2 of 2000.

⁵⁴ Exceptions include information that is legally privileged, commercially confidential, or relating to matters of state security. See chapter 4 of PAIA, *ibid*, titled “grounds for refusal of access to records”.

⁵⁵ See eg *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others*, 2005 (2) SA 359 (CC), at paras 74-78 (citing sections 1, 41(1), 195, and 36(1) of the South African Constitution and establishing the importance of openness and accountability in all government conduct). See also *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa and Another*, 2008 (5) SA 31 (CC) at para 41 (as a consequence of the right to open justice, the media had a right to gain access to, observe and report on the administration of justice and the right to have access to papers and written arguments which were an integral part of court proceedings, subject to such limitations as might be warranted on a case-by-case basis in order to ensure a fair trial); *Trustees, Biowatch Trust v Registrar: Genetic Resources, and Others* 2005 (4) SA 111 (T) (upholding the requests of a trust, whose aims related to nature conservation, for information relating to matters of environmental concern).

⁵⁶ For example, English-language copies of the relevant BITs were obtained via such a request. None of the Petitioners herein took part in the PAIA request referenced. That request was

6.7 The Government's general duty of disclosure is likewise evident under international and regional law. The United Nations has long made clear that "[f]reedom of information is a fundamental human right and [...] the touchstone of all freedoms to which the United Nations is consecrated."⁵⁷ The right to seek and receive information has been recognised under international law since the 1948 adoption of the Universal Declaration of Human Rights (UDHR).⁵⁸ Article 19 of the UDHR states: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." The International Covenant on Civil and Political Rights ("ICCPR"), to which South Africa is a party, has transformed the UDHR's commitment on access to information into binding treaty law. Article 19 of the ICCPR guarantees to everyone the right to "seek, receive and impart information"⁵⁹ subject to only such legal restrictions as are "necessary".⁶⁰ This obligation has been interpreted as including a right of access to information held by government bodies, including judicial bodies, in whatever form it is stored.⁶¹ Article 9.1 of the African Charter

processed prior to the lodging of the Parties' legal memorials in this dispute. The Petitioners are, however, of the view that the Government's legal filings are now also subject to disclosure under PAIA. The Petitioners hereby reserve their right to pursue PAIA disclosures related to this arbitration should it become necessary to do so. Moreover, it should be noted that any information disclosed by means of a PAIA request can be freely disclosed to other interested parties.

⁵⁷ UN General Assembly, (1946) Resolution 59(1), 65th Plenary Meeting, December 14.

⁵⁸ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

⁵⁹ ICCPR above n 21, at art 19.2.

⁶⁰ Ibid at art 19.3.

⁶¹ See eg "Civil and Political Rights Including the Question of Freedom of Expression", Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain, Economic and Social Counsel, E/CN.4/2000/63 (18 January 2000) at paras 42-44, stating, in part (para 44):

"Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; "information" includes all records held by a public body, regardless of the form in which it is stored; [...] A refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest;"

on Human and Peoples' Rights⁶² also protects every individual's right to receive information, and the African Commission on Human and Peoples' Rights ("African Commission") has emphasised that this right includes the right of access to information held by public bodies "subject only to clearly defined rules established by law."⁶³

6.8 Other regional human rights courts have taken similar pro-disclosure stances in cases raising transparency questions. The *Claude Reyes* decision by the Inter-American Court of Human Rights, which involved a pre-establishment investment decision, expressed the "principle of maximum disclosure", whereby the state is under a positive obligation to ensure access to information of public interest that it holds.⁶⁴ Similarly, the *Társaság* decision by the European Court of Human Rights, which involved judicial disclosure, emphasised the "vital role" of "public watchdogs" in connection with freedom of expression and access to information in a democratic society.⁶⁵

6.9 While the primary duty of disclosure under these bodies of laws attaches to the State, the domestic, regional, and international law instruments highlighted above also make provision for the disclosure of information held by private parties where that information is needed in order to exercise or protect a right. For

See also the subsequent report of Special Rapporteur Ambeyi Ligabo, E/CN.4/2005/64 (17 December 2004) on the same subject, stating at para 39:

"all information held by public bodies shall be publicly available unless it is subject to a legitimate exemption, and all bodies performing public functions, including governmental, legislative and judicial bodies, should be obliged to respond to requests for information."

⁶² See above n 23.

⁶³ Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples' Rights, 32nd Ordinary Session, Banjul, The Gambia, 17 - 23 October 2002, at Part IV ("Freedom of Information").

⁶⁴ *Claude Reyes et al v Chile*, Judgment of September 19, 2006 (Merits, Reparations, and Costs), Inter-American Court of Human Rights, available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf.

⁶⁵ *Társaság A Szabadságjogokért v Hungary*, Application no 37374/05, Judgment of 14 April 2009, European Court of Human Rights, at para 38, available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=11&portal=hbkm&action=html&highlight=hungary&sessionid=25896128&skin=hudoc-en>.

example, Section 32.1.b. of the South African Constitution guarantees everyone the right of access to “any information that is held by another person and that is required for the exercise or protection of any rights.”⁶⁶ Part IV.2. of the African Commission’s Declaration of Principles on Freedom of Expression in Africa protects the right of access to information held by private parties in nearly identical terms.⁶⁷ These protections are in line with the principle laid down by Article 28 of the UDHR, which states “[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.” The Petitioners have demonstrated in Part 4 above that important human rights may potentially be affected by the outcome of this dispute and by the impact of this Tribunal’s decision on future investor-state arbitrations. There is therefore a strong argument that the obligations of disclosure referenced here may attach not only to the State but to the Tribunal and the Claimants as well.

6.10 Although the above-described legal instruments and decisions create a strong presumption in favour of disclosure obligations, they also make clear that the right of access to information is not absolute. Certain restrictions may at times be necessary to protect the rights of states or of private parties. Examples include information that is legally privileged, commercially proprietary, or related to sensitive national security interests of the state.⁶⁸ According to the respective Courts and interpretive bodies, these restrictions are to be interpreted narrowly

⁶⁶ See above n 51.

⁶⁷ See above n 63. On the international level, the UN Committee tasked with monitoring the implementation of the right of access to information under article 19 of the ICCPR has not yet issued any general statements concerning the right of access to information held by non-state parties. However, other UN Committees have asserted such a right in relation to the exercise of other human rights. See eg General Comment 15 on the Right to Water, Committee on Economic Social and Cultural Rights, (Twenty-ninth session, 2002), E/2003/22 (2002) 120 at para 48, stating:

“The right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to water must be an integral part of any policy, programme or strategy concerning water. Individuals and groups should be given full and equal access to information concerning water, water services and the environment, held by public authorities or third parties.”

⁶⁸ See above n 52, n 54 and n 61. See also below discussion of NAFTA approach at para 6.14 and n 72.

and are themselves subject to strict requirements, including that they be necessary in a democratic society.⁶⁹ The Petitioners submit that the well-established permissible restrictions on the right of access to information, as promulgated under the relevant domestic, regional, and international laws, are sufficient to accommodate any privileged or proprietary information that may be held by the Parties here. However, they could hardly justify the refusal to disclose key documents of dispute resolution proceedings, such as pleadings, procedural orders, jurisdictional decisions or decisions on the merits, particularly under the AF Rules which do not prohibit disclosure of such documents.

6.11 In short, the present state of regional and international human rights law on access to information combined with the Constitutional and legislative guarantees in South Africa demonstrate that transparency must be the starting point and default position in the conduct of any proceeding involving the State. The Petitioners submit that investment arbitration is no exception. Permissible restrictions can only be justified in exceptional circumstances. Moreover, since transparency is a crucial element of procedural integrity in any proceeding that may potentially affect non-parties, a lack of transparency undermines the integrity of investor-state arbitrations no less than court proceedings. The Petitioners therefore submit that the above-highlighted access to information obligations point in favour of disclosure here, where obvious issues of public concern are raised by the dispute and certain duties of disclosure attach at least to the State Party.⁷⁰

Protecting the rights of the Parties while also acknowledging the public international law nature of investor-state arbitration

⁶⁹ Ibid.

⁷⁰ The Petitioners recognise that this Tribunal is not the proper forum for the direct vindication of the Petitioners' right of access to information. However, the Petitioners submit that it would be appropriate for the Tribunal, in responding to this request for document disclosure, to take into account the rights of the Petitioners and the disclosure obligations upon the Parties (and particularly the State) which would likely be upheld by the courts and tribunals that are tasked with adjudicative oversight of the legal instruments mentioned above. In this way, the Tribunal can protect the procedural integrity of its own proceedings while also minimising the likelihood of any potential conflict with the respective courts and tribunals on the question of access to information.

- 6.12 A second question that arises is whether traditional notions of privacy and confidentiality developed in the private commercial arbitration context are applicable to investor-state arbitrations arising under public international law. The Petitioners respect the nature of arbitration as a consent-based form of dispute resolution frequently designated by parties to a particular arbitration agreement. The privacy and confidentiality of traditional commercial arbitral proceedings is often justified in view of: 1) the private (as opposed to public) identities of the parties and the private nature of their arbitral agreement; 2) the limited scope of the subject matter covered by the agreement and the limited number of parties subject to it; and 3) the presumption that the legal effects of the arbitration's outcome will not extend beyond the consenting parties.
- 6.13 The case for privacy and confidentiality is much weaker, however, in respect of investor-state arbitrations, which: 1) by definition involve a public party and arise out of public international legal texts; 2) may concern a potentially unlimited range of subject matters brought by a potentially unlimited number of claimants under multiple different investment treaties; and 3) may result in outcomes significantly impacting upon the public interest without the public's involvement in or specific consent to the arbitration.
- 6.14 Numerous scholars, international governing bodies and civil society organisations have challenged the appropriateness of non-transparent procedures in the conduct of investor-state arbitrations.⁷¹ In fact, the clear trend

⁷¹ See eg L. Yves Fortier, "Investment Protection and the Rule of Law: Change or Decline?", speech delivered to the British Institute of International and Comparative Law, 50th Anniversary Event Series, at pp 13ff and the references cited therein, available at: http://www.arbitration-icca.org/media/0/12392785460140/0732_001.pdf, stating "The lack of transparency in investment treaty arbitration is perhaps the most widely shared criticism of the system". See also J Anthony VanDuzer, "Enhancing the Legitimacy of Investor-State Arbitration through Transparency and Amicus Curiae Participation", *McGill Law Review*, vol 52, no 4, 2007; Jack J. Coe, "Transparency in the Resolution of Investor-State Disputes: Adoption, Adaption, and NAFTA Leadership", *Kansas Law Review*, vol 54, 2006; Meg Kinnear, "Transparency and Third-Party Participation in Investor-State Dispute Settlement", paper delivered at a symposium titled "Making the Most of International Investment Agreements: A Common Agenda", co-organised by ICSID, OECD, and UNCTAD (12 Dec 2005, Paris), available at: <http://www.oecd.org/dataoecd/6/25/36979626.pdf>; "Transparency and Third-Party Participation in Investor-State Dispute Settlement Procedures",

has been towards greater transparency in such arbitrations, including with respect to document disclosure. The Petitioners draw the Tribunal's attention to the transparency interpretation adopted by the NAFTA states, by which those states committed to provide timely public access to all documents submitted to or issued by a NAFTA chapter 11 (investor-state) arbitral tribunal, subject only to necessary redactions of:

- i. "confidential business information;
- ii. information which is privileged or otherwise protected from disclosure under the Party's domestic law; and
- iii. information which the Party must withhold pursuant to the relevant arbitral rules, as applied."⁷²

6.15 It is important to note that the NAFTA states adopted this statement on the grounds of an absence of any provision to the contrary in the NAFTA text. The situation is thus comparable to the one currently facing this Tribunal: nothing in either of the applicable BITs nor in the AF Rules prevents the Tribunal from granting disclosure of arbitral documents in this case. In view of the strong legal presumptions in favour of document disclosure described above, the Petitioners submit that it would be appropriate for the Tribunal to follow the NAFTA states' approach in the present dispute.

Protecting the rights of the Parties while also giving practical effect to the ability of non-disputing parties to make useful written submissions in terms of Article 41(3) of the AF Rules

6.16 From a pragmatic viewpoint, the Petitioners submit that a blanket refusal approach would be overly taxing on the Petitioners as resource-constrained civil society organisations, which may decide, after reviewing the relevant documents,

Statement by the OECD Investment Committee (June 2005), available at: <http://www.oecd.org/dataoecd/25/3/34786913.pdf>; Fiona Marshall, "Advances in Investor-State Arbitration" report on the 2nd Annual Forum of Developing Country Investment Negotiators, International Institute for Sustainable Development (3-4 Nov 2008, Marrakech), available at: http://www.iisd.org/pdf/2008/dci_advances_arbitration.pdf; "Behind Closed Doors: Investment, arbitration and secrecy, The Economist (print edition), Apr 23, 2009, available at: http://www.economist.com/world/international/displayStory.cfm?story_id=13527961;

⁷² Notes of Interpretation of Certain Chapter 11 Provisions, Statement of the NAFTA Free Trade Commission (31 July 2001) at para A.2.b, available at: http://www.naftaclaims.com/files/NAFTA_Comm_1105_Transparency.pdf.

that they do not wish to intervene at all or that their intended intervention can be significantly narrowed. For example, it may become clear that some of the Petitioner's concerns have already been adequately addressed by one or more Parties to the dispute. If such is the case, a sensible document disclosure policy would allow the Petitioners to avoid the unnecessary expenditure of resources while also reducing the corresponding burdens upon the Tribunal and the Parties.

6.17 Moreover, as non-disputing parties whose rights and legitimate interests are potentially affected by matters arising within the scope of a BIT-based ICSID dispute, the Petitioners should be placed in a position to advocate for their interests to the best of their ability.⁷³ Unlike submissions by parties, non-disputing party submissions often face strict page limits. The non-disputing party Petitioners must therefore possess a sufficient knowledge of the Parties' perspectives to focus their own submissions on the specific issues on which their perspectives and arguments differ most.

6.18 Having access to the relevant documents, which contain and support the contentions of the disputing Parties, delineate the issues before the Tribunal, and describe the process which the Tribunal will follow, will also enable the Petitioners to be of the greatest possible assistance to the Tribunal in its determination of the dispute. Without such access, the Petitioners are compelled to make any submissions on the basis of assumptions and speculation.

6.19 Indeed, the Petitioners believe that full transparency and full participation rights for non-disputing parties are the only possible means by which civil society organisations can truly be empowered to protect the public interest in investor-state arbitrations. The Petitioners however recognise that – in contrast to the NAFTA setting – the debate on this issue in the ICSID context has not yet been resolved at the systemic level. The Petitioners therefore suggest a pragmatic

⁷³ See above para 5.6 and n 39 on the principle of effective interpretation (*"l'effet utile"*).

middle ground for the purposes of this case in which appropriate considerations for the Tribunal might include:

- i) the relevance of the documents requested to the Petitioners' stated interests and concerns;⁷⁴
- ii) the degree of prejudice to the Petitioners' interests likely to arise if the request is denied;⁷⁵ and
- iii) the extent to which the disputing Parties' confidential business information and other legally privileged information may be protected by redaction rather than outright refusal of disclosure requests.

6.20 With these factors in mind, the Petitioners have voluntarily limited their requests to those documents which they believe, based upon their limited knowledge of the dispute, are likely to be of relevance to the Petitioners' concerns as described in Part 4 above. The Petitioners ask that the Tribunal exercise its discretion in such a way as to safeguard the Petitioners' ability to meaningfully present their views on all of the public interest issues that may arise within the scope of this dispute. Should any of the requested documents contain any confidential or otherwise legally protected information, the Petitioners request that the Tribunal order the redaction of the affected documents to the extent it deems necessary.

Documents requested by the Petitioners and the reasons therefor

6.21 In view of the foregoing factors, the Petitioners request access to and provide reasons for such access in respect of the following arbitral documentation, subject to the appropriate redaction therefrom, upon the order of the Tribunal, of

⁷⁴ In case of doubt, the Petitioners submit that it should be for the Petitioners to decide whether or not a given document may be relevant to their concerns.

⁷⁵ Relevant considerations would include: the inability of the Petitioners to make reasoned decisions concerning whether to file a written submission; inability to make useful, well-informed arguments in any written submission; inability to narrow the scope of the intended arguments to perspectives not already canvassed by the Parties, and the potential for misguided submissions due to lack of information.

any commercially confidential or otherwise privileged information that is not relevant to the concerns of the Petitioners as non-disputing parties:

6.21.1 Request: any procedural rulings or orders of the Tribunal relating to the time and place of the arbitration proceedings, including filing deadlines for written submissions and dates and locations of any oral hearings that may have been scheduled;

Reasons: to enable the Petitioners to follow the progress of the proceedings, to conduct the preparation of their submissions accordingly, and to know when any decisions concerning the outcome of specific steps in the proceeding may be expected.

6.21.2 Request: Any rulings or orders of the Tribunal or any agreement between the Parties concerning the seat of the arbitration, the choice of law to be applied, and the conflict of laws rules to be applied;

Reasons: to inform the Petitioners as to any specific decisions or agreements concerning the applicable law and the relevant conflict of laws rules, so that the Petitioners may focus their submissions accordingly.⁷⁶

6.21.3 Request: Any request for joinder that has been filed by additional claimants, along with the Tribunal's rulings or orders on such requests;

Reasons: to inform the Petitioners of the bases for the claims lodged by any additional parties, and to alert the Petitioners as to whether any additional BITs have been brought within the terms of the dispute by reason of the joining claimants' nationalities.

⁷⁶ See above n 25, highlighting the discrepancy between the choice of law approach implicated by the two applicable BITs. Since both BITs' choice of law clauses may be overridden by a choice of law agreement as between the parties to the dispute, the Petitioners seek clarification as to whether any particular choice of law agreement exists or whether the Tribunal has made any pronouncements concerning the choice of law.

6.21.4 Request: The written legal submissions (memorials) filed by the Parties with the Tribunal to-date, together with any annexes that contain legal opinions that may be of relevance to the Petitioners' stated concerns;

Reasons: to inform the Petitioners of the precise questions that are at issue in the dispute and the perspectives of the Parties thereupon, so that the Petitioners may: avoid any unnecessary duplication; focus the scope of their intended submissions; and optimally utilise the space allotted in their written submissions by addressing only those issues having the greatest potential impact upon the public interest and in which the Petitioners' perspectives differ most from those of the Parties.⁷⁷

6.21.5 Request: Any written replies filed by any Party in response to any legal submissions of any other Party as specified in the previous sub-paragraph;

Reasons: *ibid.*

6.21.6 Request: Any submissions of the Parties that may be filed with the Tribunal in response to this Petition and, if the Petitioners are granted leave to file a written submission, any subsequent observations thereon that may be filed by any Party;

Reasons: to inform the Petitioners of the Parties' positions on the Petitioners' filings and to enable the Petitioners to respond appropriately if necessary and as directed by the Tribunal.

⁷⁷ The Petitioners are particularly concerned by the reported length of the Government's filings, which, according to a press report of Friday 3 April 2009, comprises some 450 pages, four witness statements, five expert reports, and 19 volumes of documentary evidence and legal authorities. The press report is available at: http://www.fin24.com/articles/default/display_article.aspx?Channel=News_Home&ArticleId=1518-1786_2494588&IsColumnistStory=False. The Petitioners have no idea whether the government may have raised some of the Petitioners' public interest concerns in its own filings. To the extent that it has, the Petitioners have no wish to waste scarce resources in duplicating arguments.

6.21.7 Any future procedural rulings or orders of the Tribunal or filings of the Parties that may fall within the scope of the documents requested in the foregoing sub-paragraphs.

Reasons: as listed in the foregoing sub-paragraphs.

6.22 The Petitioners respectfully submit that the foregoing requests ought to be granted not only to ensure that the Petitioners may meaningfully contribute as non-disputing parties to the proceeding, but also to enable the Tribunal more effectively to ensure, in terms of Article 41(3) of the AF Rules, that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice the Parties with potentially duplicative or irrelevant information.

6.23 For the avoidance of doubt, the Petitioners do not at this time request the disclosure of any purely evidentiary annexures of any Party relating to the specific business operations of the Claimants or the specific actions or inactions of the Government with respect to any application to convert mining rights under the MPRDA. The Petitioners do however reserve their right to request such disclosures should it become clear that specific evidentiary information is necessary in order to enable the informed and useful written submission of the Petitioners in relation to any of their public interest concerns.

6.24 One final point bears mentioning. The Petitioners have contacted the representatives of the Parties and have requested their voluntary disclosure of the above-listed documents. This request has been conveyed by means of a letter that is being transmitted simultaneously with this Petition. The Petitioners are hopeful that the Parties will indeed accede to such request, in which case the above document disclosure requests may fall away entirely. The Petitioners undertake to promptly inform the Tribunal should this be the case.

7. ACCESS TO THE ORAL HEARINGS

- 7.1 The Petitioners recognise that the scope of the Tribunal’s powers in authorising the participation of non-disputing parties is not unlimited. Article 39 of the AF Rules governs the oral procedure. Under part (2) of that article, the Tribunal “may allow [non-parties] ... to attend or observe all or part of the hearings, subject to appropriate logistical arrangements.” However, this is subject to the proviso that the Tribunal may not exercise this discretion if any of the disputing parties objects.
- 7.2 The Petitioners submit that it would be in the interests of justice and in the best interests of the Parties to allow the Petitioners to attend the oral hearings. The general transparency concerns discussed in Part 6 above are apposite here. As stated by the *Methanex* tribunal: “the arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive.”⁷⁸ This is especially relevant in the present case, where public interest concerns have been raised not only by the Petitioners but also in numerous media reports.
- 7.3 A 2007 summary of the case appearing on ELawNet pointed out that while South African mining companies have largely accepted the social transformation aspects of the MPRDA, the *Piero Foresti* claimants are specifically challenging the international legality of Black Economic Empowerment measures.⁷⁹ Another 2007 report cited the comments of one of the Claimants’ lawyers on the dispute as follows:

“According to Mr. Leon, the key tenets of the new mining regime, including the Black Economic Empowerment requirements, ‘potentially conflict with South Africa’s international law obligations’. Mr. Leon opined that bilateral investment treaties should afford foreign investors higher levels of financial compensation than would be available under South Africa’s Constitution. He added that by signing and ratifying a series of bilateral investment treaties,

⁷⁸ *Methanex* Amicus Order, above n 37, at para 49.

⁷⁹ See Summary by J Michael Judin, “The International Centre for Settlement of Investment Disputes – Piero Foresti, Laura De Carli and others v. Republic of South Africa (Case No. ARB (AF)/07/1)”, available at: http://www.elawnet.co.za/elawnetdata/publications/public000079_publ.pdf.

South Africa 'has, in effect, outsourced the adjudication of key elements of its public policy to foreign arbitral tribunals'.⁸⁰

- 7.4 These reports have already generated a significant backlash from civil society groups and academics in South Africa and around the world.⁸¹ The intensity of this backlash is likely to increase if it is now perceived that a “secret” hearing will determine very important legal and policy questions concerning constitutional rights and obligations in South Africa. Such media reports generate negative publicity for the Claimants, which is also likely to increase if it is perceived that they have sought to enforce their rights through a secretive or non-transparent process. It is therefore important for the arbitral hearings to be conducted openly.
- 7.5 The Petitioners submit that the need for a public hearing is particularly strong in this case, given the harrowing and still recent historical backdrop against which it takes place. Secret and non-transparent decision-making was a major hallmark of the apartheid regime and its colonial predecessors. Through the aggressive use of such secret means, the previous regime and its private sector collaborators successfully oppressed the majority of the South African populace for generations. It is therefore unsurprising that the very civil society groups which helped to vindicate the right to formal equality of millions of marginalised, oppressed, and disenfranchised South Africans only 15 years ago should strongly object to any secret adjudication of issues which may now adversely impact upon the right to substantive equality under international law and the South African Constitution. The Petitioners submit that the Parties and the Tribunal in this dispute may best accommodate these deep-seated sensitivities

⁸⁰ “More details emerge of miner’s case against South Africa”, by Luke Eric Peterson, in *Investment Treaty News*, November 30, 2007 (quoting an October 1, 2007 address by Peter Leon to Harvard Law students), available at: http://www.iisd.org/pdf/2007/itn_nov30_2007.pdf.

⁸¹ See eg the discussion and press reports cited in Daniel Aguirre, *THE HUMAN RIGHT TO DEVELOPMENT IN A GLOBALIZED WORLD* (Ashgate Publishing, Oct 2008) at pp 163-170. See also Sarah Anderson & Sara Grusky, “Challenging Corporate Investor Rule: How the World Bank’s Investment Court, Free Trade Agreements, and Bilateral Investment Treaties have Unleashed a New Era of Corporate Power and What to Do About It” (April 2007) at pp 12-13, available at: <http://www.ips-dc.org/reports/070430-challengingcorporateminvestorrule.pdf>; IIA Insider, “Tribunal Selected to Hear Case Against South Africa”, Issue 2 (Autumn 2007) at pp 3ff, available at: http://www.iisd.org/pdf/2007/iaa_insighter_issue_2.pdf.

by conducting the present proceedings in accordance with the *de jure*⁸² and *de facto*⁸³ presumptions of openness and cooperation that have come to characterise South African society since the fall of apartheid.

7.6 In the words of Chief Justice Langa of the Constitutional Court of South Africa:

“ . . . open justice is observed in the ordinary course in that the public are able to attend all hearings. The press are also entitled to be there, and are able to report as extensively as they wish and they do so. [...]

Courts should in principle welcome public exposure of their work in the courtroom, subject of course to their obligation to ensure that proceedings are fair. The foundational constitutional values of accountability, responsiveness and openness apply to the functioning of the judiciary as much as to other branches of government. The values underpin both the right to a fair trial and the right to a public hearing (i.e. the principle of open courtrooms). The public is entitled to know exactly how the judiciary works and to be reassured that it always functions within the terms of the law and according to the time-honoured standards of independence, integrity, impartiality and fairness.”⁸⁴

The Petitioners respectfully submit that the same reasoning applies to any proceeding, including arbitral proceedings, in which the obligations of the state and its regulatory space under public international law fall to be determined. This is particularly so in cases such as the present one, where important human rights and other public interests may be affected by the outcome of the proceeding.

7.7 For all of these reasons, the Petitioners request that the Tribunal grant their request to attend and present key submissions in respect of their important public interest concerns at the oral hearings. The Petitioners have simultaneously sent

⁸² On the legal requirements of openness, accountability, and democratic participation in the South African context, see eg sections 1, 32, 39, 41, 59, 72, 81, 101, 118, 181, 184, 187, and 195 of the South African Constitution.

⁸³ The Petitioners gratefully acknowledge the Claimants’ voluntary disclosure of their initial arbitration request as an example of such cooperation. See above n 1.

⁸⁴ *South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC) (per Langa CJ et al) at paras 31 and 32.

letters to the Parties asking that they not object to this request.⁸⁵ The Petitioners emphasise that they are all recognised professionals in their fields, and consequently no special arrangement is necessary to ensure safety or to prevent potential disruption of the proceedings.

7.8 In the alternative, in the event that one or more Parties objects to the presentation of submissions by the Petitioners at the hearings, the Petitioners request that the Tribunal at least allow the Petitioners to attend the hearings as observers⁸⁶ and that it also consider opening the hearings to the public,⁸⁷ potentially via a webcasting of the proceedings as was recently done in the *Abyei* matter conducted before the Permanent Court of Arbitration.⁸⁸ Again, the Petitioners have, in letters to the Parties, respectfully asked that the Parties make no objection to these requests. The Petitioners point to the above-described experience of NAFTA investor-state tribunals as evidence that public hearings can be conducted without disruption.⁸⁹

⁸⁵ Unless one of the Parties objects, the Petitioners submit that the Tribunal may grant this request in terms of its powers under Articles 27 and 35 of the AF Rules as described in para 6.1 above.

⁸⁶ In this regard, the Petitioners note that there has never been a recorded instance of non-disputing party petitioners disrupting or otherwise hindering the efficient functioning of any arbitral hearing conducted pursuant to the North American Free Trade Agreement, nor in any hearing before a WTO dispute settlement body.

⁸⁷ The Petitioners are mindful that they cannot claim to represent the entire spectrum of individuals and civil society organisations which might have an interest in attending the hearings. For this reason, the Petitioners submit that it would be appropriate for the Tribunal to open the hearings to the public generally.

⁸⁸ *Government of Sudan v the Sudan People's Liberation Movement/Army (Abyei Arbitration)* (PCA), pleadings and oral hearings available for download on the PCA's website at: http://www.pca-cpa.org/showpage.asp?pag_id=1318. The Petitioners submit that Articles 27 and 35 of the AF Rules empower the Tribunal to authorise public hearings and/or public broadcasts of the hearings in such a way as to preserve the fairness and integrity of the proceedings. The authority of courts and tribunals to allow and regulate media broadcastings of proceedings has also been recognised under South African law. See *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC) (2007 (1) SACR 408; 2007 (2) BCLR 167) (discussing the discretion of courts to regulate their own processes regarding the broadcasting of proceedings by the media).

⁸⁹ Consider eg the publicly conducted hearings in the *Methanex* matter, above n 3, which were described as having gone off "without difficulty". Barton Legum, "Introductory Note to *Methanex Corporation v United States of America*", 44 ILM 1343 (2005).

7.9 Finally, in the event that one or more Parties objects even to the Petitioners' non-participatory attendance at the oral hearings and the public's non-participatory observance thereof, the Petitioners ask the Tribunal to reserve its right to request written clarification from the Petitioners concerning their written submissions should the Tribunal deem this necessary.

7.10 The Petitioners submit that it would be appropriate for the Tribunal, in the interests of a just and fair resolution of the dispute, and in order to facilitate the Tribunal's decision-making in respect of the complex interplay between national and international interests raised therein, to grant the Petitioners' requests to the maximum extent of its jurisdiction.

8. SUMMARY OF THE PETITION AND ORDERS SOUGHT

8.1 In view of the foregoing, the Petitioners respectfully request that the Tribunal grant the Petitioners:

8.1.1 Leave to file a written submission concerning matters within the scope of the dispute, as outlined in Parts 4 and 5 above;

8.1.2 Access to the specific arbitral documents indicated in Part 6 above, for the purpose of enabling useful, unique, and well-informed submissions by the Petitioners; and

8.1.3 Absent any objection by the Parties, permission to attend and present the Petitioners' key submissions at the oral hearings when they take place, or in the alternative, to attend and/or observe the oral hearings.

Respectfully submitted on behalf of:

THE CENTRE FOR APPLIED LEGAL STUDIES

THE CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW

THE INTERNATIONAL CENTRE FOR THE LEGAL PROTECTION OF HUMAN RIGHTS

THE LEGAL RESOURCES CENTRE

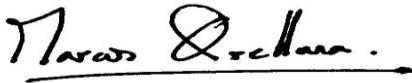
SIGNED and DATED at OXFORD this

17th day of JULY 2009



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ANNEXURE A: DETAILED DESCRIPTION OF THE PETITIONERS

The Centre for Applied Legal Studies

The Centre for Applied Legal Studies (CALS) is an independent research, advocacy and public interest litigation organisation committed to promoting democracy, justice and equality in South Africa and to addressing and undoing South Africa's legacy of oppression and discrimination. In all of its activities, CALS works toward the realisation of human rights for all South Africans under a just constitutional and legal order. CALS pursues these goals through: undertaking rigorous research, writing, analysis and briefings; teaching and providing public education and training; the collection and dissemination of information and publications; participation in policy formulation, law reform, dispute resolution and institutional development and coordination; and the provision of legal advice and public interest litigation services.

CALS was founded by Professor John Dugard in 1978 as an applied research centre within the Faculty of Law at the University of the Witwatersrand. It started with three staff members at a time when public interest law groups did not exist in South Africa. During the apartheid years, CALS was a pioneer in promoting human rights through research, education, public impact litigation and extra-curial mediation.

In the early 1990s, when the African National Congress and other prohibited political parties were "unbanned" by the apartheid government, CALS became active in numerous facets of the process of building and consolidating democracy in South Africa. CALS staff members participated in the writing of the new Constitution through submissions and testimony before the Constitutional drafting assembly. CALS also intervened as amicus curiae in many early constitutional cases under the interim and final South African Constitutions, including landmark cases on the death penalty and equality.

Around the same time, CALS launched several targeted research programmes focusing on key areas of human rights, including the Aids Law Project (1993);⁹⁰ the Gender Research Programme (1992); the Land Rights Research Programme (1991); and the Law and Transformation Programme (2001). CALS' current programmes, in particular its Environmental Law Programme, Justice Programme and Local Government Programme, have successfully built upon these earlier efforts and have greatly extended CALS' involvement in advancing the rights and public interest concerns of South Africans.

CALS' work in recent years has increasingly focused on issues of implementation and enforcement of rights and on "law in practice". This has generated a renewed emphasis on litigation and advocacy in the area of socio-economic rights, particularly concerning laws and policies designed to redress past legacies of racial discrimination, including the historical misappropriation of national resources. CALS continues to intervene regularly as *amicus curiae* before the domestic courts of South Africa.

CALS is a grant-funded organisation that is part of the University of the Witwatersrand in Johannesburg. The University is a juristic person and a tertiary education institution registered in terms of the Higher Education Act No 101 of 1997, as amended by Section 25 of the Higher Education Amendment Act No 23 of 2001. CALS' aforementioned functions have been approved by the Vice-Chancellor of the University in terms of its rules, policies and procedures.⁹¹

CALS originally received seed funding from the Ford Foundation, the Carnegie Corporation and the Rockefeller Brothers' Fund. Today, CALS receives institutional support from the University and financial support from donor organisations around the world, including the Ford Foundation, the Norwegian Centre for Human Rights and the Royal Netherlands Embassy. CALS retains full control over the content of its work and projects, regardless of funding source.

⁹⁰ This Project was eventually spun out into a separate, independent organisation and is therefore no longer part of CALS.

⁹¹ Because of its institutional affiliation with the University of the Witwatersrand, the legal personality of CALS derives from that of the University. CALS therefore routinely obtains the consent of the University to all of its litigation efforts. Such consent has been granted in this case.

Dr Jackie Dugard is a senior researcher at CALS, focusing on socio-economic rights, distributional justice, and access to justice for the poor. She will act as the instructing representative for CALS. Dr Dugard has published numerous articles and papers on issues of human rights and public interest concerns and has led CALS' efforts in several direct litigation and amicus interventions.

Further information on CALS can be obtained at: <http://www.law.wits.ac.za/cals>.

The Center for International Environmental Law

The Center for International Environmental Law (CIEL) is a registered 501(c)(3) non-profit organisation under the laws of the United States of America and the regulations of the US Internal Revenue Service. It is incorporated as such in Washington, District of Columbia. CIEL has offices in Washington, DC and Geneva working to provide legal support to persons and civil society organisations around the world.

CIEL is not a membership-based organisation but an independent, non-governmental organisation. CIEL's mission is to use international law, institutions and processes to protect the environment, human health and human rights, seeking to create a just and sustainable world. Founded in 1989, CIEL plays a key leadership role in establishing a firm foundation of legal analysis to strengthen progressive efforts by civil society globally.

CIEL provides a wide range of services to clients and partners, including legal counsel, analysis, policy research, advocacy, education, training, and capacity building. The primary focus of this work is with developing country governments and civil society groups. CIEL staff are well-trained in international, common and civil law systems, come from five continents, are of different cultural and religious backgrounds and have broad legal perspectives due, inter alia, to their diverse backgrounds and training. Most have international law experience working with their home governments as well.

CIEL's Trade and Sustainable Development Program seeks to reform the global framework of economic law in order to promote human development and a healthy environment. CIEL has been engaged in international trade and investment law issues since the early 1990s.

For example, CIEL participated in the first investor-state arbitration in which amicus submissions were allowed, *Methanex Corp v United States*,⁹² as well as in amicus submissions in the ICSID matters of *Suez et al v Argentina*⁹³ and *Biwater v Tanzania*.⁹⁴ CIEL's amicus submissions were expressly cited with approval by the tribunals in both the *Methanex* and *Biwater* cases.⁹⁵ CIEL also prompted the World Trade Organisation's Appellate Body to recognise its authority to consider amicus curiae briefs from civil society groups in the landmark *Shrimp/Turtle* case.⁹⁶

CIEL's Human Rights and Environment Program seeks to identify and develop connections between international environmental law and human rights law and to promote a more just, equitable and sustainable approach to development and natural resource management. CIEL has represented indigenous peoples and other local communities before human rights bodies in cases involving mining, extractive industries, and threats of forceful displacement. CIEL also has experience intervening as amicus curiae before the Inter-American Court of Human Rights.

CIEL and its staff have published a number of papers and books on international trade law and international investment law.⁹⁷ CIEL also recently co-organised a conference on human rights issues arising out of investor-state arbitrations with the American University Washington College of Law and has presented papers on the human rights and investment interface in various forums, including a workshop organized by "Rights and Democracy".

Funding for CIEL's Trade and Sustainable Development Program is provided by foundations, including the Charles Stewart Mott Foundation, the Rockefeller Foundation and the Ford

⁹² *Methanex* Final Award, above n 3.

⁹³ See *Aguas Argentinas* Amicus Order, above n 4.

⁹⁴ *Biwater* Final Award, above n 5.

⁹⁵ *Methanex Final Award*, above n 3, at page 13, para 27; *Biwater* Final Award above n 5, at para 392. Note that the tribunal in the *Aguas Argentinas* case has not yet issued a final award.

⁹⁶ See *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, Report of the Appellate Body (Oct. 12, 1998).

⁹⁷ These include, most recently, "Science, Risk and Uncertainty: Public Health Measures and Investment Disciplines" in *New Aspects of International Investment Law* (Colloquies/Workshops of the Hague Academy 2007); *Fresh Water and International Economic Law* (Oxford University Press, 2005) and *Trade and Environment: A Guide to WTO Jurisprudence* (Earthscan, 2005).

Foundation, as well as governments and intergovernmental and non-governmental organisations. CIEL's Human Rights and Environment Program has received funding from the Rausing Trust and the Moriah Fund. CIEL retains full control over the content of its work and projects, regardless of funding source.

Marcos Orellana is a senior attorney with CIEL's Washington DC office, where he directs the Trade and Sustainable Development Program, and an adjunct professor at the Washington College of Law, where he teaches courses related to investment and human rights law. He will act as instructing attorney for CIEL. He is an experienced international lawyer and academic and has previously been involved in amicus submissions in investment and trade law cases.

More information on CIEL can be found at www.ciel.org.

The International Centre for the Legal Protection of Human Rights (INTERIGHTS)

INTERIGHTS is an independent international human rights law centre. It was established in 1982 and is based in London. It works to promote the effective realisation of international human rights standards through law. To this end, INTERIGHTS provides advice on the use of international and comparative law, assists lawyers in bringing cases to international human rights bodies, disseminates information on international and comparative human rights law, and undertakes capacity building activities for lawyers and judges.

In addition to regional programmes in Africa and Europe, INTERIGHTS has strategic thematic programmes which focus specifically on the issues at stake in the present case, namely equality and non-discrimination, economic and social rights, and security and the rule of law. A critical aspect of INTERIGHTS' work involves conducting strategic litigation on these issues in a broad range of international, regional and national fora. This includes the selective filing of third party interventions before various courts and tribunals on points of law that are of key importance to human rights protection and on which its knowledge of international and comparative practice might assist the respective bodies' deliberations.

INTERIGHTS has litigated before a range of adjudicative bodies concerning a variety of human rights issues, including those relating to equality and non-discrimination, economic

and social rights, and the relationship between human rights and other legal norms. These bodies include the UN Human Rights Committee, the European Court of Human Rights, the European Committee on Social Rights, the African Commission on Human and Peoples' Rights, the Court of the Economic Community of West African States and the Inter-American Court and Commission on Human Rights.

INTERIGHTS holds consultative status with the United Nations' Economic and Social Council, the Council of Europe, and the African Commission on Human and Peoples' Rights. It is accredited with the Commonwealth Secretariat and is authorised to present collective complaints under the European Social Charter.

INTERIGHTS receives funding from a variety of donors, including foundations, governmental development agencies, and private law firms. Major funders over the past five years have included the John D. and Catherine T. MacArthur Foundation, the Ford Foundation, the Open Society Institute, the Swedish International Development Cooperation Agency, the UK Foreign and Commonwealth Office, and others. A complete list of funders is available upon request. During the last financial year for which accounts are available, no single funder provided more than 17% of INTERIGHTS' total funding. INTERIGHTS maintains full control over the content of its work and programmes regardless of funding source.

Iain Byrne is a Senior Lawyer at INTERIGHTS, overseeing the organisation's litigation work on economic and social rights. He has litigated widely in domestic tribunals across the Commonwealth and has participated in litigation and advocacy efforts before the European Committee of Social Rights, the European Court of Human Rights and the UN Human Rights Committee. Since 2000, Mr Byrne has been a Fellow of the Human Rights Centre, University of Essex, where he also teaches LLM and MA courses focusing on economic, social and cultural rights. He has lectured widely in the UK and abroad and has conducted training courses for the United Nations, Amnesty International and the British Council in Europe, Latin America, Africa, South Asia and the Pacific. Mr Byrne has authored numerous articles, papers and books on human rights and democracy issues.⁹⁸ He will serve as instructing attorney for INTERIGHTS.

⁹⁸ These include: *The Human Rights of Street Children: A Practical Manual for Advocates*; *Blackstone's Human Rights Digest* with Keir Starmer QC; *Democracy Under Blair: A Democratic*

More information on INTERIGHTS is available at: www.interights.org.

The Legal Resources Centre

Established in 1979, the Legal Resources Centre (LRC) is a South African human rights organisation that seeks to use the law as an instrument of justice for the vulnerable and marginalised, including poor, homeless, and landless people and communities who suffer discrimination by reason of race, class, gender, disability or by reason of social, economic, and historical circumstances. The LRC promotes the South African Constitution's agenda of substantive equality across all facets of South African society. It seeks to contribute to the development of a progressive human rights jurisprudence and to the social and economic transformation of society.

The LRC essentially functions as an independent law clinic that seeks creative and effective solutions for its clients by employing a range of strategies, including impact litigation, law reform, participation in partnerships and development processes, and education and networking within and outside South Africa.

In pursuit of its organisational goals, the LRC has served as the legal representative to marginalised persons and groups whose rights have been violated in many human rights related cases within the South African courts. It has also represented amicus petitioners in numerous domestic cases⁹⁹ and has previously participated in regional advocacy work in the

Audit of the UK with Stuart Weir et al; and, most recently, *Unequal Britain: an Economic and Social Rights Audit of the UK* with Stuart Weir et al.

⁹⁹ It should be noted that the South African legal system maintains a divide between attorneys and advocates. Attorneys provide legal counsel to clients in routine non-court-related legal transactions and are regulated by the Law Society of South Africa. Except in limited circumstances, attorneys are not entitled to appear before the courts. Advocates, on the other hand, appear on behalf of parties and third-party interveners – including amicus petitioners – before the South African courts and are regulated by the General Council of the Bar of South Africa and their constituent Bars in the Provinces in which they are based. Thus, even where a petitioning amicus organisation is itself composed primarily of lawyers, it is quite usual in the South African context for an outside advocate to appear on behalf of the amicus petitioner. In keeping with the South African practice, the advocates that have been briefed to assist the Petitioners here are Geoff Budlender, SC and Max du Plessis. In addition, Julie Maupin, an American lawyer, has been retained as an independent legal consultant in respect of international investment law issues.

African Commission on Human and People's Rights, in which it has been accorded observer status, and as a member of the Coalition for an Effective African Court.

Over the years, the LRC has developed a deep expertise across 11 major "issue" areas, including: land, social security, housing and planning, environment, children, women, refugees, civil society, the Constitution and the rule of law, continental outreach, and access to justice. The LRC currently employs more than 65 lawyers and staff who work across these issue areas in its four regional offices in Johannesburg, Durban, Grahamstown and Cape Town, and in its Constitutional Litigation Unit, which is based in Johannesburg.

Since 2007 the LRC has become increasingly involved in education and advocacy efforts concerning the human rights implications of South Africa's bilateral investment treaties. This involvement was prompted by the LRC's observation of the growing number of cases in which human rights have been directly or indirectly impacted by investor-state arbitration awards. Concerned that such awards might in future inhibit the South African government's ability to carry out its constitutional mandate to implement key societal transformation measures and redress the legacy of apartheid, the LRC has invested in training dedicated staff members to work on human rights issues arising out of international investment treaties. These LRC attorneys have participated in several conferences and workshops on human rights and international investment law.

The LRC has been proactive in assembling the present coalition of Petitioners and coordinating their efforts in respect of this Petition. Given its deep expertise in all areas of public interest litigation within South Africa and its vast experience representing amicus petitioners before various courts and tribunals, the LRC will act as coordinating counsel for the Petitioners collectively.¹⁰⁰

The LRC is a tax-exempt, non-profit organisation constituted in terms of Section 21 of the South African Companies Act. It receives regular funding from the Legal Assistance Trust, a British charitable trust, and the Southern Africa Legal Services Foundation, an American charitable organisation. The LRC also receives financial support from individual donors via its website and on a project-by-project basis from numerous other foundations and trusts. A

¹⁰⁰ See *ibid* on the attorney/advocate divide within South African legal culture.

complete listing of past donors is available on the LRC's website. With respect to its involvement in education, advocacy and litigation efforts concerning human rights issues connected with South Africa's numerous bilateral investment treaties, the LRC currently receives financial support from the Norwegian Centre for Human Rights. The LRC maintains full control over the content of its work and projects, regardless of funding source.

Steve Kahanovitz is a senior attorney based in the LRC's Cape Town office, and Jason Brickhill is an attorney in the LRC's Constitutional Litigation Unit, based in Johannesburg. They will act as instructing attorneys for the LRC. In addition, they will take instructions from the designated CIEL, CALS and INTERRIGHTS representatives and will act as coordinating counsel for the Petitioners collectively. Much of Mr Kahanovitz's work for LRC has focused on the realisation of socio-economic rights and constitutional transformation imperatives on behalf of the LRC's poor clients. He has often acted for amici curiae in cases before the Constitutional Court of South Africa. Mr Brickhill has particular experience in constitutional rights litigation in the South African courts, including the Constitutional Court. He has published several articles and contributed to books and other publications in the field of South African constitutional law.

More information on the LRC can be found at www.lrc.org.za.

Individual and collective undertakings of the Petitioners

Individually and collectively, the Petitioners and their representatives hereby attest and affirm that they have no relationship, direct or indirect, with any party or any third party to this dispute which might give rise to any conflict of interest. The Petitioners have not received any assistance, financial or otherwise, from a party or a third party to this dispute in the preparation of this Petition. They will not receive any such assistance in the preparation of their non-disputing party submissions should this Petition be accepted by the Tribunal.