

Balancing Transparency: The Value of Administrative Law and *Mathews-* Balancing to Investment Treaty Arbitrations

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Greater reliance on arbitration to resolve cross-border disputes raises concern with the adequacy of arbitration procedural rules. In investment arbitration, transparency in the arbitrable proceedings is closely linked to the public need to review state conduct. This article draws on the responsibility of the arbitrator to balance the interests involved in an arbitration. Due consideration is given to the Global Administrative Law Project, which views many challenges affecting arbitration as the first step towards developing a global unifying standard of procedure. American domestic administrative law provides sufficient guidance in determining adequate procedure. The Mathews standard is of great value to arbitrators, especially when prior court decisions have implicitly adopted a balancing standard when reviewing the arbitrator's discretion.

TRANSPARENCY IN INTERNATIONAL INVESTMENT ARBITRATION PROCEEDINGS

“Every thing secret degenerates, even the administration of justice; nothing is safe that does not show how it can bear discussion and publicity.”¹

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1. Letter from Lord Acton regarding Newman and the Council of Trent (Jan. 23, 1861), in LORD ACTON AND HIS CIRCLE, at 166 (Abbot Gasquet ed., 1909).

Since Lord Acton crafted these statements in 1861, private international arbitration has become the primary method of resolving cross-border disputes.² In the past fifteen years, states have increasingly taken advantage of international commercial arbitration to secure protection for their investors.³ Arbitration proceedings have changed to include matters affecting the interest of the public.⁴

It is not uncommon to feel the disdain for “obscure” arbitral tribunals which decide a dispute with significant impact on the public in confidential proceedings.⁵ To a layperson, a contracting state will seemingly transfer sovereignty to an arbitration tribunal when it resolves a dispute where the state is a party.⁶ In *Noble Ventures v. Romania*, for example, an American consulting company entered into a privatization agreement with Romania to invest in the largely undeveloped steel mill at Resita, Romania.⁷ The company to be acquired retained significant debt and was nearly insolvent.⁸ After worker protests ensued and a change in government occurred, the Romanian government refused to grant any form of debt relief.⁹ Noble Ventures, the investing company, brought an arbitration claim against the government for failing to provide fair and equitable treatment under the U.S.–Romanian Bilateral Investment Treaty (BIT).¹⁰

The legal debate centered around two issues: one, whether the BIT extended to contractual disputes as a result of an umbrella clause, and two, whether the acts entered by a state agency may be attributed to the Romanian state.¹¹ Although the Romanian government lost on the first legal issue,¹² it won on the second,¹³ thus averting a large payment for damages

2. Loukas Mistelis, *International Arbitration-Corporate Attitudes and Practices—12 Perceptions Tested: Myths, Data and Analysis Research Report*, 15 AM. REV. INT’L ARB. 525, 527-29 (2004). For a discussion of recent private international arbitration decisions, see GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 68-71 (2009).

3. More than 180 countries have signed over 2,500 bilateral or multilateral investment treaties containing arbitration provisions. United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2006*, available at <http://www.unctad.org/templates/webflyer.asp?intItemID=3968&lang=1>. The cost of arbitration has increased dramatically since the early nineties. See generally Peter Turner et al., *Investment Treaty Arbitration: An Australian Perspective*, 24 J. INT’L ARB. 103-128 (2007).

4. See GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 45 (2007).

5. See, e.g., Anthony DePalma, *NAFTA’s Powerful Little Secret: Obscure Tribunals Settle Disputes, But Go Too Far, Critics Say*, N.Y. TIMES, Mar. 11, 2001, at C1.

6. See *id.*

7. *Noble Ventures, Inc. v. Romania* (Award), ICSID ARB/01/11 para. 2 (2005).

8. *Id.*

9. *Id.* paras. 9-10.

10. *Id.* paras. 4, 12-13.

11. *Id.* para. 41.

12. *Id.* paras. 61-62.

with public funds.¹⁴ The public was able to scrutinize the *Noble Ventures* decision because the final award relied on transparent procedural rules and was available to the public.¹⁵ That is not always the case.¹⁶ Arbitration is traditionally a confidential process that derives its authority from a contractual obligation between the parties.¹⁷ Procedural requirements differ under various arbitration rules. The discrepancies between the different rules may create varied results. For instance, had the *Noble Ventures* arbitration been conducted under UNCITRAL Rules, the public would have had less access to information pertaining to the outcome of the arbitration unless the parties explicitly agreed to make the award public.¹⁸

In this context, the similarities between international investment treaty arbitration and administrative law resolve those challenges which result from the need for additional procedures in conducting a fair arbitration. Administrative law and investment treaty arbitration share a number of

13. *Id.* para. 86.

14. *Id.* paras. 235-36.

15. The arbitral tribunal applied the ICSID rules, which provide for relaxed procedural rules on amicus briefs and publication of awards. *Id.* para. 12.

16. Not all arbitration rules have relaxed confidentiality provisions. The 1992 U.S.–Romania Bilateral Investment Treaty empowers the aggrieved party to submit a dispute to arbitration under the ICSID Arbitration Rules, UNCITRAL Arbitration Rules, or the rules of any other arbitration institution. While ICSID Arbitration Rules permit publication of awards, UNCITRAL Arbitration Rules do not. See Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.–Rom., art. VI, para. 3, May 28, 1992, S. TREATY DOC. No. 102-36 (1992), available at http://www.sice.oas.org/Investment/BITSbyCountry/BITS/US_Romania.pdf (The *Noble Ventures* dispute was conducted under International Center for Settlement of Investment Disputes (ICSID) Arbitration Rules, pursuant to a 1992 treaty between the Government of the United States of America and Romania). See also Alina Nicolae, *Romania Wins International Arbitration with Noble Ventures, Inc.*, GOVERNANCE WORLD WATCH, Issue 76, Nov. 2005, available at <http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN021855.htm> (follow Private Sector Development, Europe/CIS, Romania).

17. Richard H. Kreindler, *The Law Applicable to International Investment Disputes*, in ARBITRATING FOREIGN INVESTMENT DISPUTES 437 (Norbert Horn & Stefan Kroll eds., 2004). At the heart of a contract that gives rise to an obligation to submit to arbitration is the arbitration agreement, which directs all parties to resolve disputes arising from the contract by arbitration. See generally MATTI S. KURKELA, DUE PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION 191 (2005).

18. See Cristina Ciobanu & Lidia Moise, *Romania a Castigat Marele Proces cu Noble Ventures*, EAFACERE.RO, Oct. 14, 2005, available at http://www.eafacere.ro/art_item.asp?artCatID=1&artID=1977. “The award may be made public only with the consent of both parties.” UNCITRAL Arbitration Rules, G.A. Res. 31/98, art. 32(5) (1976) [hereinafter UNCITRAL Rules].

similarities.¹⁹ Recent publications recognize the dogmatic challenges faced by both disciplines when it comes to procedure.²⁰

This article explores the links between investment treaty arbitration and administrative law in the context of the growing movement of global administrative law. The thesis of this article asserts that the shared links are useful in the elaboration of procedural rules for the conduct of investment treaty arbitrations, particularly related to transparency. This article further proposes that procedural due process, which provides basic minimum rights in administrative law and is embodied in the *Mathews*-balancing test,²¹ may be effectively applied in investment treaty arbitrations whenever arbitral tribunals decide on the level of transparency needed in arbitral proceedings.

I. BACKGROUND: TRANSPARENCY IN INVESTMENT ARBITRATION BY MEANS OF GLOBAL ADMINISTRATIVE LAW

This section discusses the background on relaxing the confidentiality provision of arbitration rules in the context of the seminal procedural order in the *Methanex* arbitration.²² During a procedural order in 2001, the arbitral tribunal in *Methanex Corp. v. United States* held that an arbitrator has broad powers when deciding transparency-related procedural questions.²³ This section explores the argument that investment arbitrations should be reviewed in the context of public law rather than contract law, with specific emphasis on administrative law.

A. *Investment Treaty Arbitration as Global Administrative Law*

Investment treaty arbitration resembles administrative adjudication.²⁴ In resolving an international dispute, a party may litigate, mediate, or

19. Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitrations as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, 137-38 (2006).

20. See John Hanna, *Is Transparency of Governmental Administration Customary International Law in Investor-Sovereign Arbitrations? – Courts and Arbitrators May Differ*, 21 ARB. INT'L. 187-210 (2005); Stephan W. Schill, *Fair and Equitable Treatment Under Investment Treaties as an Embodiment of the Rule of Law* (Inst. for Int'l L. & Just., Working Paper 2006/6), available at <http://www.iilj.org/publications/documents/2006-6-GAL-Schill-web.pdf>.

21. See *Mathews v. Eldridge*, 424 U.S. 319 (1976).

22. *Methanex Corp. v. United States*, Final Award, 44 I.L.M. 1345 (2005) (NAFTA Ch. 11 Arb. Trib. 2005), available at http://naftaclaims.com/Disputes/USA/Methanex/Methanex_Final_Award.pdf [hereinafter *Methanex Corp.*, Final Award].

23. *Methanex Corp. v. United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae, (NAFTA Ch. 11 Arb. Trib. Jan. 15, 2001) para. 26 [hereinafter *Methanex Corp.*, Amicus Order].

24. See Hanna, *supra* note 20; Schill, *supra* note 20.

arbitrate.²⁵ International arbitration, however, is “the principal alternative to commercial litigation before national courts.”²⁶ In a contract, parties agree to submit any disputes arising from the contract to an arbitral tribunal.²⁷ The agreement to arbitrate is a separate and autonomous agreement that gives the contracting parties the authority to seek relief before a tribunal rather than submit themselves before a court of law.²⁸

A critical element of an arbitration is the nature of the dispute. Investment arbitration involves an investment interest of one or more contracting parties, usually an investment made by a private investor in a contracting state.²⁹ Public international law regulates relations among states while offering indirect protection and obligations to private actors.³⁰ When an injured party brings a claim for breach of international norms before an international court, standing to bring suit ordinarily resides with the aggrieved party’s state of nationality.³¹ As a result, the state enjoys wide discretion and the process itself becomes cumbersome.³²

International arbitration provides an advantage over litigation because arbitration keeps states accountable in front of a neutral arbitrable tribunal, as opposed to a domestic court.³³ Arbitration has the purpose of providing

25. See generally Leonard P. Reina, *Mediation vs. Arbitration vs. Litigation: What’s the Difference?*, FINDLAW.COM, June 1999, <http://library.findlaw.com/1999/Jun/1/129206.html> (last visited Dec. 18, 2009).

26. Jack J. Coe, Jr., *Transparency in the Resolution of Investor-State Disputes – Adoption, Adaptation, and NAFTA Leadership*, 54 U. KAN. L. REV. 1339, 1340 (2006).

27. *Id.* at 1340-41.

28. BORN, *supra* note 2, at 311-16, 1004-07.

29. See International Centre for Settlement of Investment Disputes, Disputes, Convention, Regulations & Rules, 17 U.S.T. 1270 art. 25(1) (1965) (amended in 2006), available at <http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp> [hereinafter Washington Convention] (stating that the Jurisdiction of ICSID extends “to any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State.”).

30. Coe, *supra* note 26, at 1343.

31. *Id.* at 1344-45.

32. *Id.* at 1345.

33. See, e.g., Giles Cuniberti & Charles Kaplan, *Arbitrage et Volonté Implicite de l’État de Renoncer à Son Immunité d’Execution*, LA SEMAINE JURIDIQUE Entreprise ET AFFAIRES 223 n.5 (2001) (discussing the *Creighton* decision by the French Cour de Cassation, where, inter alia, the Court held that in instances where a state signs an arbitration agreement, it must refer matters in dispute to the International Chamber of Commerce. The *Creighton* decision, however, does not limit the court to review whether a matter violates international public policy, or whether the matter is not arbitrable). Cour de Cassation [Cass. 1e civ] [First Civil Chambers], Mar. 16, 1999, Bulletin 1999 I Nr 88, 59.

an efficient solution to disputes,³⁴ many of which arise in the context of a contracting state exercising domestic regulatory powers.³⁵

The Global Administrative Law Project at New York University School of Law addresses “the shift of regulatory decisionmaking from domestic to global”³⁶ and the “vast increase in transnational regulation.”³⁷ At the core of the project lies the principle that “separate national regulatory and administrative bodies” do not effectively manage the legal challenges raised by interdependent cross-border dealings.³⁸ Motivated by economic and business decisions, transnational regulations often seek to eliminate “barriers to international trade and investment created by divergent national regulatory standards.”³⁹ Global administrative law seeks to resolve the problems associated with global governance.⁴⁰ As a result, a global body of administrative law addresses the “accountability deficit” in transnational regulations.⁴¹

Gus Van Harten and Martin Loughlin argue that investment treaty arbitration is “the clearest example of global administrative law.”⁴² The subject matter before an investment arbitration tribunal includes “disputes arising from the state’s relationships with individuals who are subject to the exercise of public authority by the state.”⁴³ Where the subject matter differs from consensual arbitration to conventional international disputes,⁴⁴ a different framework is necessary for evaluating procedural issues in investment arbitrations. Too often a regulatory relationship, not between

34. “[T]he primary goal of arbitration . . . is to provide the ‘efficient, economical, and expeditious resolution of private disputes.’” *City of Bridgeport v. Kasper Group, Inc.*, 899 A.2d 523, 534 (2006) (quoting *Wu v. Chang*, 823 A.2d 1197, 1201 (2003)).

35. *See, e.g., Metaclad Corp. v. United Mexican States*, ICSID Arb.(AF)/97/1 paras. 50-53 (2000) (where a local Mexican municipality refused to grant a permit to a landfill project).

36. Richard B. Stewart, *The Global Regulatory Challenge to U.S. Administrative Law*, 37 N.Y.U. J. INT’L L. & POL. 695 (2005).

37. *Id.* at 699.

38. *Id.*

39. *Id.*

40. Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15, 16 (2005), available at <http://iilj.org/GAL/documents/TheEmergenceofGlobalAdministrativeLaw.pdf>.

41. *Id.*

42. Van Harten & Loughlin, *supra* note 19, at 121, 124-27.

43. VAN HARTEN, *supra* note 4, at 45.

44. *Id.* The interests involved in WTO disputes between states differ from the consensual arbitration of commercial disputes between private parties.

reciprocal equals⁴⁵ but between a state and a foreign investor, triggers an investment treaty arbitration.⁴⁶

B. Investment Arbitration as Public Rather than Contract Law

Investment treaty arbitration is best understood “as a form of reciprocally consensual adjudication between an investor and a state.”⁴⁷ Recent literature suggests that investment treaty arbitration is a distinct form of arbitration with roots in public law.⁴⁸

International commercial arbitration provides an efficient way of resolving disputes by using contract law to resolve cross-border disputes.⁴⁹ Pursuant to a binding agreement, parties agree to have all disputes resolved by arbitration.⁵⁰ Unless the subject matter involves a nonarbitrable issue,⁵¹ courts are likely to respect the parties’ autonomy to contract and subsequently enforce an arbitration agreement. Induced by international treaty obligations and encouraged by the prospect of fewer cases, domestic courts presume the enforcement of the arbitration agreement and the recognition of an arbitral award.⁵²

Historically investment arbitrations involved disputes over natural resources and regulatory issues closely tied to national sovereignty.⁵³ In

45. *Id.*; See, e.g., Joseph Charles Lemire v. Ukraine (U.S. v. Ukr.), ICSID Arb(AF)/98/1 (2000). In *Lemire*, an American investor sought damages for a dispute concerning the issuance and operation of radio broadcasting licenses in Ukraine. *Id.* paras. 1, 13.

46. See VAN HARTEN, *supra* note 4, at 45.

47. *Id.*

48. See *id.* at 70.

49. See BORN, *supra* note 2, at 185-87. See also KURKELA, *supra* note 17, at 191-92.

50. Douglas Yarn, *The Death of ADR: A Cautionary Tale of Isomorphism Through Institutionalization*, 108 PENN ST. L. REV. 929, 933-35 (2004).

51. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(2)(b), June 10, 1958, 84 Stat. 692, 330 U.N.T.S. 3 [hereinafter New York Convention] (Non-arbitrable subject matter includes any issues that upon “[r]ecognition or enforcement of the arbitral award would be contrary to the public policy of that [enforcing] country.” *Id.* art. V(2)(b).

52. See Coe, *supra* note 26, at 1341-42.

53. See generally Guillermo Alvarez & William Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT’L L. 365, 367 (2003). Alvarez and Park state that:

During the late nineteenth and early twentieth centuries, developing countries often perceived investment arbitration as little more than an extension of gunboat diplomacy. Investor nations were seen to control the arbitral process in a way that permitted it to be used simply as a tool for extracting concessions from the host country.

these contexts, establishing whether a contracting state consented to arbitration is a procedural challenge.⁵⁴ To secure legal protection for their investors, states have increasingly relied on bilateral investment treaties to obtain consent from other contracting states seeking investment.⁵⁵ BITs are helpful in that they contain relevant provisions governing arbitration.⁵⁶ The United Nations Center for Trade and Development (UNCTAD) documented the drastic rise in BITs and their impact on resolving investment disputes.⁵⁷

Where there is a contract between a state and an investor, “the contract will create its own justiciable rights and duties.”⁵⁸ An investor’s underlying property rights, or the affirmative steps taken to seek relief in the contracting state’s court system, may preclude arbitrating the dispute before an investment arbitration tribunal.⁵⁹ Investment treaties incorporate a private model of adjudicating disputes⁶⁰ resembling commercial arbitration, where a state is a party to the dispute.

By signing a BIT, the state consents to resolve future disputes with private parties by means of investment arbitrations.⁶¹ The state agrees to resolve a dispute arising from its actions.⁶² Subsequently, the state limits its sovereignty when it transfers authority to an arbitration tribunal to adjudicate private disputes over such issues as regulatory actions rather than seek resolution in domestic courts.⁶³ This limitation on sovereignty, however, does not absolve a state from its responsibility to the public.⁶⁴ Although a

Id.

54. Even after the Washington Convention, obtaining consent from the states is a central issue in an investor–state arbitration. *See* CHRISTOPH SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 89-92 (2001) (discussing that consent of the parties is an essential element for the jurisdiction of the Center in addition to the nature of the dispute). *See also* Washington Convention, *supra* note 29, art. 25(1).

55. CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* 25 (2007). *See generally* Turner et al., *supra* note 3, at 103-04 (explaining the history of investment treaties, which led to their increase). “Generalisations drawn from these definitions should be treated with caution where jurisdiction is not based on a BIT.” SCHREUER, *supra* note 54, at 130.

56. *See* Turner et al., *supra* note 3, at 104.

57. UNCTAD, *supra* note 3. *See also* Turner et al., *supra* note 3, at 104 (stating that “[a]s certain as night following day, the proliferation of investment treaties has led to a surge in investment treaty claims.”).

58. MCLACHLAN ET AL., *supra* note 55, at 80.

59. *Id.*

60. VAN HARTEN, *supra* note 4, at 58-59.

61. *Id.* at 62-63.

62. *See* Van Harten & Loughlin, *supra* note 19, at 122-27.

63. *See id.* at 128.

64. *See id.* at 141.

state may decide to refer matters to arbitration, the state may not absolve itself from the duty to its people.

C. The Transparency Problem

The recent rise in international arbitration has revived the argument for transparency in arbitration.⁶⁵ Parties have tried to approach the question of transparency in a variety of ways. One approach is for the parties to agree on broad transparency provisions, directly in the contract or indirectly in a treaty,⁶⁶ on how to conduct any subsequent arbitrations. The North American Free Trade Agreement is the prime example of this approach, where Mexico, United States, and Canada entered into a multi-lateral treaty that has broad transparency requirements for the conduct of an arbitration.⁶⁷

Another approach is for the arbitration tribunal to use broad procedural powers when determining transparency provisions.⁶⁸ In the *Methanex* arbitration, the tribunal accepted amicus curiae briefs. This approach serves as the prime example of a tribunal using its broad procedural powers to decide what procedure is due.⁶⁹ Both approaches reach the same result, but the second relies on the arbitrator, not the parties, to address how much procedure is due.⁷⁰

In linking the public interest to the requirements of confidentiality, the *Methanex* tribunal adopted broad procedural powers in determining the adequacy of arbitration procedures.⁷¹ In *Methanex*, the tribunal admitted third-party submissions as a purely procedural order under the UNCITRAL Rules Article 15(1).⁷² The tribunal reasoned that the rights of the parties

65. Catherine Rogers, *Transparency in International Commercial Arbitration*, 54 U. KAN. L. REV. 1301, 1301-02 (2006).

66. See North American Free Trade Agreement (NAFTA), Annex 1137.4 U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, available at <http://www.sice.oas.org/trade/NAFTA/chap-111.asp>.

67. *Id.* art. 1137 (Annex 1137.4).

68. *Methanex Corp.*, Amicus Order, *supra* note 23, para. 29.

69. *Id.* para. 53.

70. Compare NAFTA, *supra* note 65, at ch. 11, art. 1137, with *Methanex Corp.*, Amicus Order, *supra* note 23, paras. 29-30.

71. *Methanex Corp.*, Amicus Order, *supra* note 23, paras. 29-30.

72. *Id.* para. 53. See also UNCITRAL Arbitration Rules, art. 15(1) (Dec. 15, 1975). "Subject to these [UNCITRAL Arbitration] Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his [or her] case." *Id.*

involved in the arbitration, “both procedural and substantive, remain juridically exactly the same before and after the receipt of such submissions; and the third-parties acquire no rights at all.”⁷³ The tribunal further noted that “a burden will be added if *amicus* submissions are presented to the Tribunal and the Disputing Parties seek to make submissions in response.”⁷⁴ Such burden “would be shared by both Disputing Parties.”⁷⁵ The tribunal reasoned that the “burden cannot be regarded as inevitably excessive for either of the [d]isputing [p]arties.”⁷⁶ The tribunal further held that, even after the admission of third-party submissions, “[t]he legal nature of the arbitration remains wholly unchanged.”⁷⁷

Various definitions convey different levels and types of transparency in international arbitrations.⁷⁸ These definitions conceptualize transparency in numerous contexts: ranging from arbitration procedures to the parties’ dealings.⁷⁹ In common terms, transparency is interpreted broadly to mean openness and accountability.⁸⁰ The legal meaning of transparency, however, tends to overlap with the concept of public access.⁸¹ One methodology, promoted by the Institute for International Sustainable Development (IISD), advocates the relaxation of four procedural provisions relating to: 1) public notice of arbitration proceedings, 2) access to documents, 3) open hearings, and 4) submissions of *amicus curiae* briefs.⁸² These procedural provisions are narrower and, as a result, facilitate the review of arbitration procedures for relaxing the confidentiality provisions.

Conclusively, the *Methanex* tribunal erred in stating that its decision to use broad procedural powers under UNCITRAL Rules Article 15(1) left the legal nature of the arbitration process unchanged.⁸³ No other tribunal, prior

73. *Methanex Corp.*, Amicus Order, *supra* note 23, para. 30.

74. *Id.* para. 35.

75. *Id.* para. 36.

76. *Id.*

77. *Id.* para. 30.

78. Rogers, *supra* note 65, at 1303.

79. *Id.* at 1303-10.

80. *Id.* at 1303.

81. *See id.*

82. INT’L INST. FOR SUSTAINABLE DEV., REVISING THE UNCITRAL ARBITRATION RULES TO ADDRESS STATE ARBITRATIONS 6 (2007), http://www.iisd.org/pdf/2007/investment_revising_uncitral_arbitration.pdf [hereinafter CIEL/IISD Paper].

83. *See, e.g.*, Paul Friedland, *The Amicus Role in International Arbitration*, in PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 321-24 (Loukas Mistelis & Julian Lew eds., 2006). The Tribunal stated:

Less important is the factor raised by the Claimant as to the danger of setting a precedent.

This Tribunal can set no legal precedent, in general or at all. It has no power to

to *Methanex*, has applied UNCITRAL Rules Article 15(1) so broadly.⁸⁴ At a minimum, the tribunal's decision generated significant debate over the relaxation of confidentiality provisions in arbitration rules.⁸⁵ This article reviews the debate on relaxing confidentiality provisions of arbitration rules by drawing on the tools available to arbitrators in the context of the four procedural elements delineated by IISD.

II. ANALYSIS: TOWARDS PROCEDURAL DUE PROCESS IN INVESTMENT ARBITRATIONS

The most distinctive similarity between investment arbitration and administrative adjudication is the great deference that both venues confer upon decision-makers when determining procedural and substantive matters that arise in the course of adjudication.⁸⁶ Over the last decade, American courts have applied procedural due process to determine how much procedure is due in international commercial arbitration.⁸⁷ The inquiry into due process is even more beneficial to determine how much procedure is due in international investment arbitration.

determine for other arbitration tribunals how to interpret Article 15(1); and in a later arbitration, there may be other circumstances leading that tribunal to exercise its discretion differently. For each arbitration, the decision must be made by its tribunal in the particular circumstances of that arbitration only.

Methanex Corp., Amicus Order, *supra* note 23, para. 51.

84. See Friedland, *supra* note 83, at 322-23. "[The Methanex Tribunal] found that this holding was supported by the practice of the Iran/US Claims Tribunal (although it appears that the practice has been limited)." *Id.*

85. See *id.* at 324. "There is also a broader argument, as suggested by the Respondent and Canada: the Chapter 11 arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive." *Id.* at 324 n.9 (quoting *Methanex Corp.*, Amicus Order, *supra* note 23, para. 49).

86. The Federal Arbitration Act recognized the provisions of the New York Convention, which define the limited grounds for challenging an arbitration award. See, e.g., *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in narrow circumstances" referring to 9 U.S.C. § 10). For judicial review of administrative action, see, e.g., *McPherson v. Employment Div.*, 591 P.2d 1381 (Or. 1979). In *McPherson*, the Oregon Supreme Court held that the agency had discretion to decide whether leaving for sexual harassment reasons constitutes "good cause" to leave a workplace. *Id.* at 1390.

87. See *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 146 (2d Cir. 1992).

A. *Existent Precedent that Applies Procedural Due Process to the Review of International Commercial Arbitration Awards for Appropriate Procedure*

The New York Convention, the universal multi-state treaty for the enforcement of international awards, imposes an obligation on each contracting state to recognize the written agreement by which parties undertake to submit to arbitration.⁸⁸ The Convention established the means to enforce arbitration awards by requiring member states to “recognize arbitral awards as binding.”⁸⁹ In *First Options of Chicago Inc. v. Kaplan*, the Court afforded great deference to an arbitrator’s judgment to decide matters within its jurisdiction.⁹⁰ Parties seeking to challenge an arbitrator’s decision must “overcome a powerful presumption that the arbitral body acted within its powers.”⁹¹ But in instances where a tribunal’s decision on procedural rules prevented the parties from presenting the case before the tribunal, the Second Circuit refused the enforcement of the award.⁹²

Article V(1) of the New York Convention lists the defenses a party may use to challenge the enforcement of an award.⁹³ Article V(1)(b) states that an award may not be recognized if “the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his [or her] case.”⁹⁴ In two subsequent decisions, *Iran Aircraft Industries v. Avco Corp.* and *Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier*, the Second Circuit held that Article V(1)(b) assumes a standard of procedural due process.⁹⁵

In *Avco*, the Second Circuit held that Article V(1)(b) “essentially sanctions the application of the forum state’s standards of due process,” and that due process rights are “entitled to full force under the [New York] Convention as defenses to enforcement [of an award].”⁹⁶ Relying on *Mathews v. Eldridge* to interpret the scope of due process, the Second Circuit found that, “due process is the opportunity to be heard ‘at a

88. See New York Convention, *supra* note 51, art. II(1).

89. *Id.* art. III.

90. *First Options*, 514 U.S. at 943.

91. *Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier*, 508 F.2d 969, 976 (2d Cir. 1974).

92. See *Iran Aircraft Indus.*, 980 F.2d at 146.

93. New York Convention, *supra* note 51, art. V(1).

94. *Id.* art. V(1)(b).

95. See *Parsons & Whittemore*, 508 F.2d at 976; *Iran Aircraft Indus.*, 980 F.2d at 146.

96. *Avco Corp.*, 980 F.2d at 145-46 (citing *Parsons & Whittemore*, 508 F.2d at 975-76).

meaningful time and in a meaningful manner.”⁹⁷ Thus, in *Avco*, the Second Circuit applied an administrative framework to review the procedure used by an arbitral tribunal.⁹⁸

B. The Value of Mathews-Balancing

Procedural elements of an arbitration fall within the scope of the New York Convention Article V(1)(b).⁹⁹ The balancing framework in *Mathews* is a useful tool for determining the level of transparency needed when arbitrating a dispute or enforcing an award.¹⁰⁰ The following analysis will show that *Mathews*-balancing was indirectly adopted in the *Methanex* decision and in subsequent ICSID decisions on accepting third-party submissions.

1. *Mathews*-Balancing Defined

American courts invoke the *Mathews*-balancing test to determine what process is due and when such process is due.¹⁰¹ Procedural due process is used to determine the minimum level of procedure in an administrative adjudication because it “imposes constraints on governmental decisions which deprive individuals of ‘liberty’ and ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment[s].”¹⁰² *Mathews* sets a minimum standard of procedure by stating the truism that due process “is not a technical conception with a fixed context unrelated to time, place and circumstances.”¹⁰³ In *Mathews*, the Court held that due process is flexible and involves a balancing of interests.¹⁰⁴

In *Mathews*, the Court held that due process requires the examination of three factors: 1) “the private interest that will be affected by the official action;” 2) “the risk of the erroneous deprivation of such interests through

97. *Id.* at 146 (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

98. *Id.* at 147.

99. New York Convention, *supra* note 51, art. V(1)(b).

100. *Mathews*, 424 U.S. at 332-34.

101. MICHAEL ASIMOW, ARTHUR BONFIELD & RONALD LEVIN, STATE AND FEDERAL ADMINISTRATIVE LAW 64 (2d ed. 1998).

102. *Mathews*, 424 U.S. at 332.

103. *See id.* at 334.

104. *Id.*

the procedure used,” relative to the probable value of any additional safeguards; and 3) the government’s interest and “the fiscal and administrative burdens that additional procedural requirements would entail” (*Mathews*-balancing test).¹⁰⁵

In investment arbitration, the state carries the cost and the burden of additional procedural requirements, much like the government does in administrative adjudication.¹⁰⁶ The idea that investment arbitration mirrors administrative law originates in the theory that investment arbitration, which obligates states to arbitrate disputes according to an investment treaty, constructs “a mechanism to control the [contracting state’s] exercise of public authority.”¹⁰⁷ By presiding over the dispute involving the state, an arbitral tribunal reviews the acts of the state. As a party to the dispute, the state may choose one arbitrator on a three-member tribunal, or it would have equal weight in choosing the sole arbitrator on a one-member tribunal.¹⁰⁸ This selection process resembles an agency employing an administrative judge to review agency actions.¹⁰⁹ Both scenarios mandate that the arbitrator or the administrative judge review procedural and enforcement mechanisms of government action affecting the public.¹¹⁰ The authority conveyed to the arbitration tribunal, as part of a bargain between a state and another party (whether an investor or a contracting state), makes the state the equivalent of the executive branch in domestic administrative law, whose actions are reviewed by an outside party with delegated authority.¹¹¹

Investment arbitration distinguishes between the rights of the foreign investors and the “legitimate sphere of operation of the host State.”¹¹² “The right of the host State to adopt its economic policies together with the rights of investors under a system of guarantees,” has come from the tribunal’s

105. *Id.* at 335.

106. Compare *Mathews*, 424 U.S. at 335-36, with *Kardassopolous v. Republic of Georgia*, Decision on Jurisdiction, Arb/05/18 ICSID (W. Bank) paras. 13, 16, 30-39 (2005) (discussing how the Republic of Georgia became a party to an arbitration when the State reorganized the domestic oil industry and acquired the interests of the claimant in a joint venture to build the Georgian pipelines).

107. Van Harten & Loughlin, *supra* note 19, at 146.

108. See International Chamber of Commerce, Rules of Arbitration, art. 8 para. 2 (1998), available at http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf [hereinafter ICC Rules]. A common practice is to appoint either a sole arbitrator (SA) or a three-member panel. Parties may also agree, or the domestic rules may specify, otherwise. *Id.*

109. See *McPherson v. Employment Div.*, 591 P.2d 1381, 1389-90 (Or. 1979) (Example of court’s deference to an administrative action).

110. See Van Harten & Loughlin, *supra* note 19, at 145-47.

111. See *id.* at 146-48.

112. MCLACHLAN ET AL., *supra* note 55, at 21 (quoting *CMS Gas Transmission Co. v. Argentina*, 7 ICSID Rep. 492, 499 (2003)).

decision in *CMS v. Argentina*.¹¹³ The quote, however, may have similarly addressed the competing interests of an administrative agency to exercise its powers against the rights of the citizens affected by administrative action.¹¹⁴

2. *Mathews*-Balancing in *Methanex* and ICSID Arbitrations

The *Mathews*-balancing test is inherent in the *Methanex* decision and in the arbitration decisions that followed. *Methanex* revolutionized the debate on transparency provisions in investment arbitration when it interpreted UNCITRAL Rules Article 15(1) to permit the admission of third-party submissions.¹¹⁵ *Methanex* proves to be the seminal case in more than one respect.¹¹⁶ Not only did the arbitration tribunal allow third-party submissions, but also in June 2004, the *Methanex* tribunal was the first investment arbitral tribunal to open its arbitration hearings to the public.¹¹⁷

Arbitration rules range in their provisions governing public hearings. ICSID Arbitration Rule 32(2) provides the arbitrator with wide discretion to open proceedings to the public.¹¹⁸ UNCITRAL Rules Article 25(4) is more restrictive—it allows public proceedings only upon the consent of both parties.¹¹⁹ ICC Arbitration Rules are the most restrictive, where “the sessions of the Court, whether plenary or those of a Committee of the Court, are open only to its members and to the Secretariat.”¹²⁰ Although the balancing test is not explicit in the *Methanex* tribunal’s rationale, the

113. *Id.*

114. See ASIMOW ET AL., *supra* note 101, at 11 (discussing agency discretion).

115. Friedland, *supra* note 83, at 321 (“On the first requirement—arbitral power to accept *amicus* submissions—the decisions which have received the most attention are those by two NAFTA tribunals (*Methanex* and *UPS*).”).

116. See Howard Mann, *The Final Decision in Methanex v. United States: Some New Wine in New Bottles* 11-13 (2005), available at http://www.iisd.org/pdf/2005/commentary_methanex.pdf.

117. *Methanex Corp.*, Final Award, *supra* note 22, Part I, para.8; See also VAN HARTEN, *supra* note 4, at 162.

118. International Centre for Settlement of Investment Disputes, *Rules of Procedure for Arbitration Proceedings*, Rule 32(2) (amended 2006), available at <http://www.worldbank.org/icsid/basicdoc/partF.htm> [hereinafter ICSID Rules].

119. UNCITRAL Rules, *supra* note 18, art. 25, para. 4.

120. ICC Rules, *supra* note 108, Appendix II art. 1, para. 1.

Methanex decision applied a two-step balancing review, which arbitral tribunals subsequently adopted in the *Aguas* arbitrations.¹²¹

First, the *Methanex* tribunal examined the scope of the arbitration rules to determine whether third parties may submit briefs.¹²² *Methanex* was a NAFTA arbitration, conducted under UNCITRAL Rules, with NAFTA Chapter 11 supplying additional provisions.¹²³ On publishing an award, UNCITRAL Rules provide that an award “be made public only with the consent of both parties.”¹²⁴ The Tribunal relied on UNCITRAL Rules Article 15(1) to determine the acceptance of amicus briefs as a procedural matter, supported by the practices of other leading inter-governmental institutions.¹²⁵

Second, the *Methanex* tribunal reviewed whether the broad application of Article 15(1) contradicted other UNCITRAL Rules.¹²⁶ Article 25 provides that, “hearings shall be held *in camera* unless the parties agree otherwise.”¹²⁷ Prior to *Methanex*, NAFTA did not specify whether arbitration hearings should be made public.¹²⁸ The arbitration was opened to the public when the parties indicated a specific choice of procedure and such choice was within the arbitration rules.¹²⁹ Thus, when the arbitral tribunal

121. The arbitral tribunal in *Aguas Argentinas* had to rule on petitions for amicus curiae briefs on two separate occasions. See *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. v. Argentine Republic*, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, ICSID Arb/03/19 (2005) [hereinafter *Aguas I*, Amicus Order]. In both cases, the tribunal used the same test, discussed below, but in the first instance, the tribunal denied the petition. *Id.* In the second instance, the tribunal permitted the petitions. *Id.*

122. See *Methanex Corp.*, Amicus Order, *supra* note 23, para. 8.

123. *Methanex Corp.*, Final Award, *supra* note 22, Part II-B, para. 1.

124. UNCITRAL Rules, *supra* note 18, art. 32(5).

125. See *Methanex Corp.*, Amicus Order, *supra* note 23, paras. 29, 31-34.

126. *Id.* paras. 40-41.

127. UNCITRAL Rules, *supra* note 18, art. 25(4).

128. Dep’t of Foreign Affairs and Int’l Trade News Release No. 152, NAFTA Free Trade Commission Joint Statement (Oct. 7, 2003), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/statement.aspx?lang=en>. Only after *Methanex*, NAFTA Commission issued a joint statement that NAFTA arbitrations are open to the public. *Id.*; see also Meg Kinnear, *Transparency and Third-Party Participation in Investor-State Dispute Settlement Procedures*, Organisation for Economic Cooperation and Development (2005), available at <http://www.oecd.org/dataoecd/25/3/34786913.pdf>.

129. “This main hearing addressed all issues of jurisdiction and merits arising from Methanex’s amended claim (excepting only quantum). By agreement of the Disputing Parties, it was held in public, excepting one procedural issue heard *in camera* at Methanex’s request.” *Methanex Corp.*, Final Award, *supra* note 22, Part I-A, para. 8.

evaluated the admission of third-party briefs, the tribunal ruled on whether other provisions mandated reading Article 15(1) narrowly.¹³⁰

Third, the *Methanex* tribunal reviewed any superseding obligations promulgated by the parties' agreements or other limitations on confidentiality.¹³¹ On the matter of public access to documents, the *Methanex* tribunal held that "confidentiality is determined by the agreement of the Disputing Parties."¹³² They further noted that pursuant to NAFTA Rules, each party is at liberty to disclose the major pleadings of the tribunal "subject to redaction of the Trade Secret information."¹³³ Often, amicus curiae submissions include a request from third parties to have access to documents and relevant information to the case.¹³⁴ The petition in *InterAguas* involved, among others, a request for third-parties to have access to documents.¹³⁵ In *Methanex*, the tribunal decided that according to NAFTA provisions, third-parties have the same rights as the general public.¹³⁶ As a result, at this third stage, the *Methanex* tribunal evaluated superseding obligations and the relevance of the transparency procedures in relation to the parties' choice to disclose information or trade secrets.

The tribunal's inquiry does not differ from a preliminary inquiry arising in the review of administrative proceedings, when a court must evaluate whether an agency's action is of a particular applicability, whether a statute requires a hearing on the record, and whether the agency action triggers a constitutional requirement for a hearing on the record.¹³⁷

As such, the *Methanex* decision was the first decision to assert broad procedural powers by arbitrators on matters of transparency.¹³⁸ The

130. See *Methanex Corp.*, Amicus Order, *supra* note 23, paras. 40-41 (discussing any subsequent tensions with UNCITRAL Rules, *supra* note 18, art. 25(4)).

131. See generally *id.* para. 45.

132. *Id.* para. 46.

133. *Id.*

134. See, e.g., *Aguas Provinciale de Santa Fe SA, Suez Sociedad General de Aguas de Barcelona SA and InterAguas Servicios Integrale de Aqua SA v. Argentine Republic*, Order in Response to a Petition for Participation as Amicus Curiae, ICSID ARB/03/17 para. 1. (2006), available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docID=DC512_En&caseID=C18 (follow pending cases) [hereinafter *InterAguas*, Amicus Order].

135. *Id.*

136. *Methanex Corp.*, Final Award, *supra* note 22, para. 44; *Methanex Corp.*, Amicus Order, *supra* note 23, para. 46.

137. See, e.g., *Cunningham v. Dep't of Civil Serv.*, 350 A.2d 58 (N.J. 1975).

138. See *Mann*, *supra* 116, at 13.

tribunal's rationale reflects a justification to admit third-party submissions, rather than set a standard for when submissions may be admitted.¹³⁹ The tribunal's position is understandable. The tribunal had no reason to prescribe guidelines to admit submissions when it opened third-party submissions for the first time.¹⁴⁰

Nonetheless, the tribunal engaged in a balancing test to decide whether equal treatment of the parties had been violated.¹⁴¹ To begin, the tribunal addressed whether amici submissions burdened the parties.¹⁴² The tribunal held that although the burden of amicus briefs was a potential risk because the parties will be obliged to make submissions in response, the burden was shared by both parties without violating the equal treatment of the parties.¹⁴³ Next, the tribunal considered the burden on the parties in relation to the public interest involved in the arbitration.¹⁴⁴ Since the dispute had significant ramifications on the public, the tribunal held it was appropriate to hear from other parties who reflected or accounted for the interest of the public.¹⁴⁵

The tribunal further considered the cost that admission of amicus submissions would add to the arbitration.¹⁴⁶ The tribunal stated that any amicus submissions are "more likely to run counter to the Claimant's [investor's] position and eventually . . . support the Respondent's [State's] case."¹⁴⁷ Here, the tribunal revealed the possibility that one party (in *Methanex*, the investor) would not be treated equally, especially when the tribunal agreed with the contracting state that "the arbitral process could . . . be harmed if seen as duly secretive."¹⁴⁸ At the core of the *Methanex* decision was a balancing test that permitted the tribunal to admit

139. *Methanex Corp.*, Amicus Order, *supra* note 23, paras. 24-34.

140. *See Mann*, *supra* 116, at 12.

141. *Methanex Corp.*, Amicus Order, *supra* note 23, paras. 35-37.

142. *Id.* para. 35.

143. *Id.* paras. 35-36.

144. *Id.* paras. 37, 49.

145. *Id.* para. 49 ("There is an undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties.").

146. *Id.* paras. 49-50.

147. *Id.* para. 50.

148. *Id.* para. 49. ("In this regard, the Tribunal's willingness to receive *amicus* submissions might support the process in general and this arbitration in particular; whereas a blanket refusal could do positive harm.").

submissions from third-parties by weighing in the benefit of the submissions with the relative burden it may impose on the tribunal and the parties.¹⁴⁹

Since *Methanex*, ICSID tribunals have adopted a flexible balancing test closely resembling the *Mathews*-balancing test on reviewing issues of amicus curiae submissions. In the two *Aguas* cases, the tribunals applied a flexible balancing test for reviewing the admission of amicus curiae briefs.¹⁵⁰ The tribunal evaluated the amici parties' qualifications and interests after reviewing its powers under the governing arbitration rules and the possibility of conflict with other rules.¹⁵¹

In the two *Aguas* cases, the tribunal relied heavily on the *Methanex* decision to conclude that the tribunal had the broad power to admit amicus curiae submissions.¹⁵² The *Aguas* decisions use a three-prong test when deciding whether amicus curiae submissions may be admitted, reviewing: "a) the appropriateness of the subject matter of the case; b) the suitability of a given nonparty to act as *amicus curiae* in that case; and c) the procedure by which the *amicus* submission is made and considered."¹⁵³

The first prong of the *Aguas* test involves any dealing with the subject matter in which the public interest is involved and the tribunal's decision has "the potential, directly or indirectly, to affect persons beyond those immediately involved as parties in the case."¹⁵⁴ The similarity with the *Mathews*-balancing test is striking. In the context of investment treaty arbitrations, the affected interest of "persons beyond those immediately involved as parties" relates to the interest of all parties affected by the proceedings, including the party itself.¹⁵⁵ Although broader, this prong is no different than the private interest involved in administrative proceedings

149. NAFTA later set a twenty page limit for amicus briefs. See Friedland, *supra* note 83, at 324 (referring to NAFTA Free Trade Commission, *Statement of the Free Trade Commission on Non-Disputing Party Participation* B(3)(b) (Oct. 7, 2003)).

150. Compare *Aguas I*, Amicus Order, *supra* note 121, para. 17, with *Sociedad General de Aguas de Barcelona, S.A. v. Republic of Argentina*, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an Amicus Curiae Submission, Suez, ICSID Arb/03/19 (2007) paras. 14, 15 [hereinafter *Aguas II*, Amicus Order]. See also *InterAguas*, Amicus Order, *supra* note 134, paras. 17, 21.

151. *InterAguas*, Amicus Order, *supra* note 134, para. 17.

152. *Id.* para. 14. See also *Aguas I*, Amicus Order, *supra* note 121, paras. 4-7, 14-15.

153. *InterAguas*, Amicus Order, *supra* note 134, para. 17. See also *Aguas I*, Amicus Order, *supra* note 121, para. 17; *Aguas II*, Amicus Order, *supra* note 150, paras. 14-15.

154. See *InterAguas*, Amicus Order, *supra* note 134, para. 18; *Aguas I*, Amicus Order, *supra* note 121, para. 19.

155. See *Aguas I*, Amicus Order, *supra* note 121, para. 19-20.

where the administrative judge must balance the interests of the defending party.

Further, the suitability of the specific parties to act as amici will depend on “the [t]ribunal’s satisfaction that [the parties] have the expertise, experience and independence to be of assistance in this case.”¹⁵⁶ This consideration of the *Aguas* cases incorporates *Mathews*’ second prong, which weighs the “risk of an erroneous deprivation of such interest through the procedures used” in relation to the “probable value, if any, of additional or substitute procedural safeguards.”¹⁵⁷ The tribunal’s review of the third-party’s “expertise, experience and independence” will test for any risk that such submissions will mislead the reader.¹⁵⁸ Therefore, the second condition in the *Aguas* cases reinforces the similarity between the tribunal’s test and *Mathews*-balancing.

Lastly, the procedure by which third-parties present their case must “protect the substantive and procedural rights of the parties.”¹⁵⁹ The tribunal established a mechanism that “safeguard[s] due process and equal treatment as well as the efficiency of the proceedings.”¹⁶⁰ At first glance, this condition departs from the *Mathews*-balancing test because the additional procedure burdens both parties in investment parties, whereby the additional procedure burdens only one party—the government—in administrative proceedings.

However, three considerations point to a different conclusion. First, the tribunal in the *InterAguas* case did not apply the third prong because the tribunal dismissed the qualification of the third-parties on the first two grounds.¹⁶¹ Second, the tribunal listed three elements that often work in conflict with each other: 1) due process; 2) equal treatment; and 3) efficiency of the arbitration proceedings.¹⁶² Third, where the tribunal did apply the condition, directly or indirectly, and admitted the submissions, the amicus curiae favored the contracting state.¹⁶³

156. *InterAguas*, Amicus Order, *supra* note 134, para. 23. *See also Aguas I*, Amicus Order, *supra* note 121, para. 24.

157. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

158. *See also Aguas I*, Amicus Order, *supra* note 121, para. 24.

159. *InterAguas*, Amicus Order, *supra* note 134, para. 28. *See also Aguas I*, Amicus Order, *supra* note 121, para. 29.

160. *See InterAguas*, Amicus Order, *supra* note 134, para. 28. *See also Aguas I*, Amicus Order, *supra* note 121, para. 29.

161. *InterAguas*, Amicus Order, *supra* note 134, paras. 29-30.

162. *See id.* para. 28.

163. *See Aguas I*, Amicus Order, *supra* note 121, para. 18. Note that this paper does not posit that if the briefs benefit the contracting state, the tribunal will admit the briefs. In *InterAguas*, the tribunal declined to admit the briefs when the briefs would have benefited the contracting state. One may, however, observe that the tribunal did not foreclose the

In *Methanex*, two parties, IISD and a consortium of organizations under the leadership of Earthjustice, submitted amicus curiae briefs.¹⁶⁴ Earthjustice's brief disproportionately favored the interests of the contracting state.¹⁶⁵ The IISD's brief addressed the issue of sustainable development in the context of the *Methanex* decision, clearly benefiting the contracting state.¹⁶⁶ In *Aguas II*, the tribunal also admitted third-party submissions when the submissions disproportionately favored the position of the contracting state,¹⁶⁷ even when the facts did not indicate that the dispute involved an easy decision.¹⁶⁸ Therefore, case law suggests that the third

parties from submitting the petition at a later day. *InterAguas*, Amicus Order, *supra* note 134, para. 34.

164. *Methanex Corp.*, Amicus Order, *supra* note 23, paras. 5-7.

165. See *Methanex Corp. v. United States*, Amicus Submission of Non-Disputing Parties of Bluewater Network, Communities for a Better Environment and Center for International Environmental Law (NAFTA Ch. 11 Arb. Trib. Mar. 9, 2004), available at <http://www.state.gov/documents/organization/30472.pdf>. "A decision requiring the United States to compensate Methanex will not only pressure California to rescind important environmental and health measures, but will also compromise the legitimate powers of governments to protect the health, safety and the environment of their citizens." *Id.* para. 44.

166. *Methanex Corp. v. United States*, Amicus Curiae Submissions by the International Institute for Sustainable Development (NAFTA Ch. 11 Arb. Trib. Mar. 9, 2004), available at <http://www.state.gov/documents/organization/30475.pdf>.

The United States political system cannot be put on trial in an investor-state arbitration.

In so far as Methanex has stated it is not arguing there was any criminal corruption or wrongdoing, it must fit its case into a narrow window between not putting the system on trial as a whole, and its own admission there was no criminal conduct. IISD submits that Methanex has failed to find such a window here.

Id. para. 6.

167. See generally *Suez, Sociedad General de Aguas de Barcelona, S.A. v. Republic of Argentina*, Brief for Centro de Estudios Legales y Sociales et al., ICSID Arb/03/19 (2007), available at http://www.ciel.org/Publications/SUEZ_Amicus_English_4Apr07.pdf. Amici argued "that the question whether governmental conduct is equivalent to an expropriation, or alternatively the legitimate exercise of regulatory powers, can also benefit from a human rights analysis." *Id.* para. 1. In *Aguas Argentinas* where the tribunal first codified the three-conditions test observed in *InterAguas*, the tribunal granted the intervention of third-party submissions and deferred till the parties intervention two years later. *Compare Aguas I*, Amicus Order, *supra* note 121, para. 33, with *Aguas II*, Amicus Order, *supra* note 150, para. 27.

168. The tribunal encountered numerous objections in this arbitration, so the amicus briefs added to the cost of the dispute. See *Suez, Sociedad General de Aguas de Barcelona, S.A. v. Argentine Republic*, Introductory Note, 21 ICSID REV. FOREIGN INVESTMENT L.J. 339, ICSID Arb/03/19 (2006). The case involves a challenge to the Argentinean authority to exercise emergency measures in late 2001 and 2002, which allegedly constituted a breach of the contracting state's obligations under the BIT. *Id.* at 339. The tribunal had to rule on a challenge to an arbitrator's independence because an arbitrator, Professor Kaufmann-Kohler, had been an arbitrator in a previous case that rendered an award against Argentina. *Aguas Provinciale SA, Suez, Sociedad*

prong of the *InterAguas* balancing test is met when third-party submissions do not burden the contracting state.

3. *Mathews*-Balancing Test in the Enforcement of an Investment Award

Domestic courts do not appear to have reviewed amicus curiae decisions in *Methanex* and related cases.¹⁶⁹ This trend is not likely to continue if arbitrators rely on broad procedural powers to relax confidentiality requirements. Case law in the United States suggests that an arbitrator's reliance on broad procedural powers, as manifested in *Methanex*, will be upheld unless other contradicting issues appear.¹⁷⁰

In the American administrative framework, constitutionally-mandated procedural due process safeguards the rights of a private party before a governmental agency.¹⁷¹ The New York Convention does not have the supreme authority of the U.S. Constitution, but the Convention retains an overwhelming binding authority on subsequent arbitrations and court challenges.¹⁷² The Convention has the ultimate binding effect of a multiparty international treaty, even when other treaties add additional specific obligations, e.g., multilateral treaties such as NAFTA, or bilateral agreements such as BITs.¹⁷³

The Second Circuit reviewed the exercise of arbitrators' broad procedural powers for any violation of procedural due process.¹⁷⁴ Outside of the United States, this review may be equally relevant where a tribunal will consider: 1) the private interests of the parties, 2) the risk of an erroneous deprivation of such interest, and 3) the burden that the relaxation of

General De Aguas de Barcelona SA v. Argentine Republic, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, ICSID Arb/03/19 (2007) para. 12.

169. See generally MCLACHLAN, *supra* note 55, at 57-60. Note that the tribunal decision in *Methanex* to admit third party submissions was not challenged in a court; also, the decisions in *UPS v. Canada* and *Vivendi Universal v. Argentine Republic* were not challenged either. *Id.*

170. *Parsons & Whitmore Overseas Co. v. Societ  Generale de L'Industrie du Papier*, 508 F.2d 969, 977 (2d Cir. 1974) ("Although the Convention recognizes that an award may not be enforced where predicated on a subject matter outside the arbitrator's jurisdiction, it does not sanction second-guessing the arbitrator's construction of the parties' agreement."). *Id.*

171. See Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 471 (1986).

172. See generally JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION (1981).

173. See Van Harten & Loughlin, *supra* note 19, 135-36.

174. See *supra* notes 95-98 and accompanying text for a discussion of *Avco* and *Parsons & Whittemore* cases.

confidentiality provisions may exert on the contracting state in investment treaty arbitrations.¹⁷⁵

III. BEYOND TRANSPARENCY

The link between investment treaty arbitration and administrative law is also relevant when examining the subject of arbitrator bias and the permeation of American values. In these two contexts, domestic administrative law may be of additional assistance.

A. Bias

In both investment treaty arbitration and administrative law, courts will not reverse a decision on the appearance of impartiality.¹⁷⁶ The courts' deference to tribunals becomes problematic when tribunals rely on the rationale in *Methanex* to broaden their procedural power.¹⁷⁷ Administrative law, which emphasizes a wall of separation between the agency and the administrative judge,¹⁷⁸ provides a useful solution to the potential problem of arbitrator's bias.

175. The issue of confidentiality persistently emerges in international arbitration. Specific rules have been applied by the signatory states to NAFTA where the United States and Canada make pleadings publicly available pursuant to freedom of information legislation. Other states such as Argentina have made public the names of counsel and have indicated they will publish pleadings. This is a very different from the traditions of commercial arbitration where confidentiality is still presumed to reign. However, the presumption has little basis in concrete rules and the fortress of confidentiality has often turned out to be a castle of cards, even in commercial cases.

Nigel Blackaby, *Investment Arbitration and Commercial Arbitration (or the Tale of the Dolphin and the Shark)*, in *PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION* 217, 226 (Loukas Mistelis & Julian Lew eds., 2006).

176. Compare *Andrews v. Agric. Labor Relations Bd.*, 623 P.2d 151, 156 (Cal. 1981), with Bernard Hanotiau, *Misdeeds, Wrongful Conduct and Illegality in Arbitral Awards*, in *INTERNATIONAL COMMERCIAL ARBITRATION: ICCA INTERNATIONAL ARBITRATION CONGRESS* 261 (Jan van den Berg ed., 2002). While the appearance of impartiality is not grounds for striking down an award, a court will look at favoritism and ex parte as sufficient ground to refuse enforcement of an award. *Id.* at 264.

177. *InterAguas*, Amicus Order, *supra* note 134, para. 14. See also *Aguas I*, Amicus Order, *supra* note 121, paras. 4-7, 14-15.

178. See generally Jeff Bush & Kristal Knutson, *The Building and Maintenance of "Ethics Walls" in Administrative Adjudicatory Proceedings*, 24 J. NAT'L ASS'N ADMIN. L. JUDGES 1 (2004).

The chief characteristic of the agency control organizational structure is that the administrative agency or board consistently maintains control and oversight over all these competing functions. . . . Citizens outside of the bureaucracy often perceive a maze of

First, both fields confront the challenge of giving their respective decision-makers the appropriate amount of decisional independence.¹⁷⁹ Every arbitrator must remain independent of the parties involved in the arbitration, regardless of whether the parties directly appoint the arbitrator, as it is the case with a three-member tribunal, or whether the parties jointly appoint the arbitrator, as it is the case with a sole arbitrator.¹⁸⁰ The clearest instance of bias in the conduct of an arbitration is the arbitrator's undisclosed financial interest.¹⁸¹ The bias from undisclosed financial interest may extend to the arbitrator's prior involvement in the parties' dispute.¹⁸² Upon a challenge to the validity of an arbitration award, courts have generally rejected claims that an arbitrator's conduct alone was evidence of improper bias.¹⁸³ Courts have held that an arbitrator "may develop an opinion during the course of the hearing and express it."¹⁸⁴

Administrative law appears to allow judges to maintain some bias in their decision-making. In *Andrews*, the California Supreme Court held that the mere appearance of bias will not disqualify a judicial officer.¹⁸⁵ The court stated that impartiality does not mean indifference.¹⁸⁶ Absent "the actual existence of bias," the court would not reverse a decision by an administrative law judge on grounds of bias.¹⁸⁷

Unlike judges, arbitrators compete in an adjudicatory service to provide "an efficacious and economically viable service for their clients."¹⁸⁸ When reviewing a commercial award on a challenge to the arbitrator's

lawyers and suspect that all government employees are in cahoots with one another. This sentiment is particularly prevalent where the hearing official works directly within the agency. In these cases, the agency's control structure makes ethics walls particularly important, because no apparent organizational barrier exists.

Id. at 8.

179. Compare ICC Rules, *supra* note 108, art. 7, with *Andrews*, 623 P.2d at 157-58.

180. "Every arbitrator must be and remain independent of the parties involved in the arbitration." ICC Rules, *supra* note 108, art.7(1).

181. See BORN, *supra* note 2, at 1517 (referring to *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197 (11th Cir. 1982)).

182. *Id.* at 868 (referring to *Veritas Shipping Corp. v. Anglo-Canadian Cement, Ltd.*, [1966] 1 Lloyd's List L. Rep. 76 (Q.B. 1965)).

183. *Id.* at 873 (referring to Judgment of 24 Nov. 1994, XXI Y.B. Comm. Arb. 635 (Rotterdam Rechtbank) (1996)).

184. *Id.* (citing *Hayne, Miller & Farmi, Inc. v. Flume*, 888 F.Supp. 949 (E.D. Wis. 1995)).

185. *Andrews v. Agric. Labor Relations Bd.*, 623 P.2d 151, 155-57 (Cal. 1981).

186. "The right to an impartial trier of fact is not synonymous with the claimed right to a trier completely indifferent to the general subject matter of the claim before him." *Id.* at 155.

187. *Id.* at 157.

188. *Van Harten & Loughlin*, *supra* note 19, at 148. See also BORN, *supra* note 2, at 1467-68.

independence, the court will often apply national standards to determine impartiality.¹⁸⁹

Administrative law, at least in the United States, explicitly mandates that an agency shall separate its prosecutory and adjudicatory functions.¹⁹⁰ A similar separation of interests is necessary for the preservation of a sustainable environment for arbitration. While tribunals rely on broad powers to determine procedure, a “wall of separation” must be reinforced between the interests of the client, which selected the arbitrator, and the duties of the arbitrator to the tribunal. Enforcing a “wall” between the arbitrator and the client may be achieved by greater reliance on arbitration institutions to appoint arbitrators on behalf of the parties.¹⁹¹

B. *Obfuscation*

Complete judicialization of international commercial arbitrations is neither possible nor desired. The international legal community is rightfully concerned that international arbitration has become an American-style trial.¹⁹² The transformation of arbitration procedures towards what has been called “Americanization” of international business law includes the use of broad evidentiary rules and cross-examination of witnesses.¹⁹³

The viable concern that arbitration may develop into an American-style trial ought not to obfuscate the point that arbitrators have a duty to the public

189. *Id.* at 1468-69. United States courts have previously applied a standard of whether “reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration” to determine an arbitrator’s partiality. *Id.* at 1469 (citing *Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters’ Benefits Funds*, 748 F.2d 79 (2d Cir. 1984)). One must note an important distinction between arbitrators and judges (including administrative judges): “[the] ‘appearance of impartiality’ ground of disqualification for judges does not apply to arbitrators” *Id.* at 1469 (citing *Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, 307 F.3d 617, 621 (7th Cir. 2002)). However, one shall also note that the United States Supreme Court has not spoken on the precise standards of impartiality for arbitrators. *Id.* at 1469-70.

190. “‘And, of course, an impartial decision maker is essential.’ No matter how strong and thick the walls are, the crucial player in this process is the hearing official.” *Bush & Knutson, supra* note 178, at 18.

191. Many arbitration rules provide for institutional appointment in multi-party arbitrations. *See generally* International Chamber of Commerce, Arbitration Rules Art. 10(2) (1997), available at http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf.

192. *See* MICHAEL REISMAN, INTERNATIONAL COMMERCIAL ARBITRATION 20 (1997).

193. *See* KATHERINE LYNCH, THE FORCES OF ECONOMIC GLOBALIZATION: CHALLENGES TO THE REGIME OF INTERNATIONAL COMMERCIAL ARBITRATION 19 (Julian Lew ed., 2003).

at large when issues of public interest arise in an investment dispute.¹⁹⁴ Most of the examples drawn in this paper rely on American domestic administrative law.¹⁹⁵ As the world moves toward a more integrated body of administrative law, the outcry against an American legal framework should not belittle the legitimate contributions that American jurisprudence has made to the development of an international body of law.

C. *Strengthening the Link*

In revising their arbitration rules, institutions have generally kept up with any new issues or contentions emerging in the academic discourse or local courts.¹⁹⁶ ICSID, the institution most affected by the *Methanex* decision because its arbitration provisions apply solely to investment arbitrations, amended its arbitration rules in 2006 to permit tribunals to admit third-party submissions.¹⁹⁷ A pressing debate currently ensues at UNCITRAL over whether UNCITRAL Rules should be relaxed to include amicus curiae briefs.¹⁹⁸

Where arbitration rules are not revised to account directly for the *Methanex* decision, these rules should examine the broad procedural powers available to arbitrators. Those provisions of the rules that confer broad authority to arbitrators should account for all of the defenses in Article V(1) of the New York Convention that permit a reviewing court to invalidate an award. The *travaux préparatoire* to Article 15(1), relied upon by the *Methanex* tribunal, articulates the flexibility in the conduct of the

194. *Id.*

195. See Kingsbury et al., *supra* note 40, at 16.

196. ICC revised its arbitration rules in 1998, by adopting art. 10(2) after the French Cour de Cassation held, in *Dutco*, that the parties enjoyed a right to equality and such right could not be waived until after the dispute has started. See YVES DERAÏNS & ERIC SCHWARTZ, A GUIDE TO THE NEW ICC RULES OF ARBITRATION 170 (1998).

197. ICSID Convention: Rules and Regulations, April 2006, art. 37(2), http://www.worldbank.org/icsid/basicdoc/CRR_English-findal.pdf (The revised Rule 37(2) provides the guidelines by which a tribunal may admit third-party submissions “after consulting both parties . . . a person or entity that is not a party to the dispute (in this Rule called the ‘non-disputing party’) to file a written submission with the Tribunal.”). *Id.*

198. See, e.g., U.N. Comm’n on Int’l Law, *Report of the Working Group on Arbitration and Conciliation on the Work*, 47th sess., ¶¶ 95, 99, U.N. Doc. A/CN.9/641 (Sept. 10-14, 2007), available at

<http://daccessdds.un.org/doc/UNDOC/GEN/V07/870/53/PDF/V0787053.pdf?OpenElement> (deferring the heated discussion on transparency to later sessions); see also James E. Castello, *Report on the UNCITRAL Arbitration Working Group*, 63 DISP. RESOL. J. 7 (2008) (“Following significant discussion, the Working Group deferred detailed consideration of these proposals pending completion of its work on other revisions and receipt of further guidance from the Commission on the transparency issue.”).

proceedings and the reliance on the expertise of the arbitrators as the hallmarks of arbitration.¹⁹⁹ Administrative law may provide successful guidance to prescribe the level of flexibility permitted in arbitrators' decision-making.

IV. CONCLUSION

After the *Methanex* decision, what standard should the arbitrators use in exercising broad procedural powers when relaxing confidentiality provisions for the conduct of an arbitration?

The Global Administrative Law Project may provide the relevant starting point. Understanding investment treaty arbitrations through administrative law reconciles the dogmatic difference between contract law and public international law.²⁰⁰ American case law contains two relevant decisions that link procedural due process to international commercial arbitration.²⁰¹ Examining investment arbitration as global administrative law provides a valuable insight on how to address the desirability of additional procedural provisions, such as transparency, when superseding interests of the public are involved. With the *Mathews*-balancing test, American jurisprudence provides a useful tool to balance the interests demanding greater transparency in the administration of an arbitration and accounting for the broad procedural powers available to an arbitrator.

199. *Report of the Secretary-General: Revised Draft Set of Arbitration Rules for Optional Use in Ad Hoc Arbitration Relating to International Trade (UNCITRAL Arbitration Rules)(addendum): Commentary on the Draft UNCITRAL Arbitration Rules*, in 7 UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW YEARBOOK 172, para 1. (1975), available at http://www.uncitral.org/pdf/english/yearbooks/yb-1976-e/yb_1976_e.pdf.

200. See *supra* text accompanying note 47.

201. See *supra* text accompanying note 95.