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

Cornel Marian*

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."

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

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. 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. 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. The company to be acquired retained significant debt and was nearly insolvent. After worker protests ensued and a change in government occurred, the Romanian government refused to grant any form of debt relief. 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).

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. Although the Romanian government lost on the first legal issue, it won on the second, thus averting a large payment for damages.


6. See id.


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. 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. That is not always the case. Arbitration is traditionally a confidential process that derives its authority from a contractual obligation between the parties. 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.

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.
17. Richard H. Kreindler, The Law Applicable to International Investment Disputes, in ARBITRANDING 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).
similarities.\textsuperscript{19} Recent publications recognize the dogmatic challenges faced by both disciplines when it comes to procedure.\textsuperscript{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,\textsuperscript{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 \textit{Methanex} arbitration.\textsuperscript{22} During a procedural order in 2001, the arbitral tribunal in \textit{Methanex Corp. v. United States} held that an arbitrator has broad powers when deciding transparency-related procedural questions.\textsuperscript{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.\textsuperscript{24} In resolving an international dispute, a party may litigate, mediate, or


\textsuperscript{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 \textit{Methanex Corp.}, Final Award].

\textsuperscript{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 \textit{Methanex Corp.}, Amicus Order].

\textsuperscript{24} See Hanna, supra note 20; Schill, supra note 20.
arbitrate.\textsuperscript{25} International arbitration, however, is "the principal alternative to commercial litigation before national courts."\textsuperscript{26} In a contract, parties agree to submit any disputes arising from the contract to an arbitral tribunal.\textsuperscript{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.\textsuperscript{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.\textsuperscript{29} Public international law regulates relations among states while offering indirect protection and obligations to private actors.\textsuperscript{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.\textsuperscript{31} As a result, the state enjoys wide discretion and the process itself becomes cumbersome.\textsuperscript{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.\textsuperscript{33} Arbitration has the purpose of providing


\textsuperscript{27} Id. at 1340-41.

\textsuperscript{28} BORN, supra note 2, at 311-16, 1004-07.


\textsuperscript{30} Coe, supra note 26, at 1343.

\textsuperscript{31} Id. at 1344-45.

\textsuperscript{32} Id. at 1345.

\textsuperscript{33} See, e.g., Giles Cuniberti & Charles Kaplan, \textit{Arbitrage et Volonté Implicite de l'État de Renoncer à Son Immunité d'Exécution}, 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,\textsuperscript{34} many of which arise in the context of a contracting state exercising domestic regulatory powers.\textsuperscript{35}

The Global Administrative Law Project at New York University School of Law addresses "the shift of regulatory decisionmaking from domestic to global"\textsuperscript{36} and the "vast increase in transnational regulation."\textsuperscript{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.\textsuperscript{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."\textsuperscript{39} Global administrative law seeks to resolve the problems associated with global governance.\textsuperscript{40} As a result, a global body of administrative law addresses the "accountability deficit" in transnational regulations.\textsuperscript{41}

Gus Van Harten and Martin Loughlin argue that investment treaty arbitration is "the clearest example of global administrative law."\textsuperscript{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."\textsuperscript{43} Where the subject matter differs from consensual arbitration to conventional international disputes,\textsuperscript{44} a different framework is necessary for evaluating procedural issues in investment arbitrations. Too often a regulatory relationship, not between
reciprocal equals but between a state and a foreign investor, triggers an investment treaty arbitration.

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." Recent literature suggests that investment treaty arbitration is a distinct form of arbitration with roots in public law.

International commercial arbitration provides an efficient way of resolving disputes by using contract law to resolve cross-border disputes. Pursuant to a binding agreement, parties agree to have all disputes resolved by arbitration. Unless the subject matter involves a nonarbitrable issue, 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.

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


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


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.

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

Where there is a contract between a state and an investor, "the contract will create its own justiciable rights and duties." 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. Investment treaties incorporate a private model of adjudicating disputes 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. The state agrees to resolve a dispute arising from its actions. 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. This limitation on sovereignty, however, does not absolve a state from its responsibility to the public.

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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.


63. See id. at 128.

64. See id. at 141.

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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. 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, 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.

Another approach is for the arbitration tribunal to use broad procedural powers when determining transparency provisions. 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. Both approaches reach the same result, but the second relies on the arbitrator, not the parties, to address how much procedure is due.

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

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.
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.” 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.” Such burden “would be shared by both Disputing Parties.” The tribunal reasoned that the “burden cannot be regarded as inevitably excessive for either of the [d]isputing [p]arties.” The tribunal further held that, even after the admission of third-party submissions, “[t]he legal nature of the arbitration remains wholly unchanged.”

Various definitions convey different levels and types of transparency in international arbitrations. These definitions conceptualize transparency in numerous contexts: ranging from arbitration procedures to the parties’ dealings. In common terms, transparency is interpreted broadly to mean openness and accountability. The legal meaning of transparency, however, tends to overlap with the concept of public access. 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. 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. No other tribunal, prior
to Methanex, has applied UNCITRAL Rules Article 15(1) so broadly. At a minimum, the tribunal’s decision generated significant debate over the relaxation of confidentiality provisions in arbitration rules. 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. Over the last decade, American courts have applied procedural due process to determine how much procedure is due in international commercial arbitration. The inquiry into due process is even more beneficial to determine how much procedure is due in international investment arbitration.

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 II 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.

A. Existing 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
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

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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.
110. See Van Harten & Loughlin, supra note 19, at 145-47.
111. See id. at 146-48.
decision in CMS v. Argentina. 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.

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. Methanex proves to be the seminal case in more than one respect. 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.

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. UNCITRAL Rules Article 25(4) is more restrictive—it allows public proceedings only upon the consent of both parties. 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.” 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).”).  
117. Methanex Corp., Final Award, supra note 22, Part I, para.8; See also VAN HARTEN, supra note 4, at 162.  
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).


\(^{129}\) "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.\textsuperscript{130} Third, the \textit{Methanex} tribunal reviewed any superseding obligations promulgated by the parties' agreements or other limitations on confidentiality.\textsuperscript{131} On the matter of public access to documents, the \textit{Methanex} tribunal held that "confidentiality is determined by the agreement of the Disputing Parties."\textsuperscript{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."\textsuperscript{133} Often, amicus curiae submissions include a request from third parties to have access to documents and relevant information to the case.\textsuperscript{134} The petition in \textit{InterAguas} involved, among others, a request for third-parties to have access to documents.\textsuperscript{135} In \textit{Methanex}, the tribunal decided that according to NAFTA provisions, third-parties have the same rights as the general public.\textsuperscript{136} As a result, at this third stage, the \textit{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.\textsuperscript{137}

As such, the \textit{Methanex} decision was the first decision to assert broad procedural powers by arbitrators on matters of transparency.\textsuperscript{138}

\textsuperscript{130} See \textit{Methanex Corp.}, Amicus Order, \textit{supra} note 23, paras. 40-41 (discussing any subsequent tensions with UNCITRAL Rules, \textit{supra} note 18, art. 25(4)).
\textsuperscript{131} See generally \textit{id.} para. 45.
\textsuperscript{132} \textit{id.} para. 46.
\textsuperscript{133} \textit{id.}
\textsuperscript{134} See, e.g., Aguas Provinciale de Santa Fe SA, Suez Sociedad General de Aguas de Barcelona SA and \textit{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 \textit{InterAguas}, Amicus Order].
\textsuperscript{135} \textit{id.}
\textsuperscript{136} \textit{Methanex Corp.}, Final Award, \textit{supra} note 22, para. 44; \textit{Methanex Corp.}, Amicus Order, \textit{supra} note 23, para. 46.
\textsuperscript{137} See, e.g., Cunningham v. Dep't of Civil Serv., 350 A.2d 58 (N.J. 1975).
\textsuperscript{138} See Mann, \textit{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. 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.

Nonetheless, the tribunal engaged in a balancing test to decide whether equal treatment of the parties had been violated. To begin, the tribunal addressed whether amici submissions burdened the parties. 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.

Next, the tribunal considered the burden on the parties in relation to the public interest involved in the arbitration. 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.

The tribunal further considered the cost that admission of amicus submissions would add to the arbitration. 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.” 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.” 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.
142. Id. para. 35.
143. Id. paras. 35-36.
144. Id. para. 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.  

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. 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.

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. 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.”

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.” 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. 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)).


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." 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." 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. 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." The tribunal established a mechanism that "safeguard[s] due process and equal treatment as well as the efficiency of the proceedings." 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. 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. Third, where the tribunal did apply the condition, directly or indirectly, and admitted the submissions, the amicus curiae favored the contracting state.

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 294
In *Methanex*, two parties, IISD and a consortium of organizations under the leadership of Earthjustice, submitted amicus curiae briefs. Earthjustice’s brief disproportionately favored the interests of the contracting state. The IISD’s brief addressed the issue of sustainable development in the context of the *Methanex* decision, clearly benefiting the contracting state. In *Aguas II*, the tribunal also admitted third-party submissions when the submissions disproportionately favored the position of the contracting state, even when the facts did not indicate that the dispute involved an easy decision. Therefore, case law suggests that the third parties from submitting the petition at a later day. Inter*Aguas*, Amicus Order, *supra* note 134, para. 34.

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.

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 Inter*Aguas*, 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. 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. In the American administrative framework, constitutionally-mandated procedural due process safeguards the rights of a private party before a governmental agency. 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. 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.

The Second Circuit reviewed the exercise of arbitrators’ broad procedural powers for any violation of procedural due process. 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

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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 & Whittemore Overseas Co. v. Société Générale 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.


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.  

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. The courts’ deference to tribunals becomes problematic when tribunals rely on the rationale in Methanex to broaden their procedural power. Administrative law, which emphasizes a wall of separation between the agency and the administrative judge, 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.


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.


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. 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. The clearest instance of bias in the conduct of an arbitration is the arbitrator’s undisclosed financial interest. The bias from undisclosed financial interest may extend to the arbitrator’s prior involvement in the parties’ dispute. 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. Courts have held that an arbitrator “may develop an opinion during the course of the hearing and express it.”

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. The court stated that impartiality does not mean indifference. Absent “the actual existence of bias,” the court would not reverse a decision by an administrative law judge on grounds of bias.

Unlike judges, arbitrators compete in an adjudicatory service to provide “an efficacious and economically viable service for their clients.” 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.


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)).


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.\footnote{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. \textit{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.” \textit{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. \textit{Id.} at 1469-70.}

Administrative law, at least in the United States, explicitly mandates that an agency shall separate its prosecutory and adjudicatory functions.\footnote{“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, \textit{supra} note 178, at 18.} 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.\footnote{Many arbitration rules provide for institutional appointment in multi-party arbitrations. \textit{See generally} International Chamber of Commerce, Arbitration Rules Art. 10(2) (1997), \textit{available at} http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf.}

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.\footnote{\textit{See} MICHAEL REISMAN, INTERNATIONAL COMMERCIAL ARBITRATION 20 (1997).} 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.\footnote{\textit{See} KATHERINE LYNCH, THE FORCES OF ECONOMIC GLOBALIZATION: CHALLENGES TO THE REGIME OF INTERNATIONAL COMMERCIAL ARBITRATION 19 (Julian Lew ed., 2003).}

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

\footnotesize{189. \textit{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. \textit{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.” \textit{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. \textit{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, \textit{supra} note 178, at 18.


at large when issues of public interest arise in an investment dispute.\textsuperscript{194} Most of the examples drawn in this paper rely on American domestic administrative law.\textsuperscript{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.\textsuperscript{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.\textsuperscript{197} A pressing debate currently ensues at UNCITRAL over whether UNCITRAL Rules should be relaxed to include amicus curiae briefs.\textsuperscript{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 preparatoire to Article 15(1), relied upon by the Methanex tribunal, articulates the flexibility in the conduct of the

\textsuperscript{194} Id.

\textsuperscript{195} See Kingsbury et al., supra note 40, at 16.

\textsuperscript{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 Derains & Eric Schwartz, A GUIDE TO THE NEW ICC RULES OF ARBITRATION 170 (1998).

\textsuperscript{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.

proceedings and the reliance on the expertise of the arbitrators as the hallmarks of arbitration. 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. American case law contains two relevant decisions that link procedural due process to international commercial arbitration. 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.


200. See supra text accompanying note 47.

201. See supra text accompanying note 95.