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Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures

OECD



TRANSPARENCY AND THIRD PARTY PARTICIPATION IN INVESTOR-STATE DISPUTE SETTLEMENT PROCEDURES

STATEMENT BY THE OECD INVESTMENT COMMITTEE

June 2005

There is a general understanding among the Members of the Investment Committee that additional transparency, in particular in relation to the publication of arbitral awards, subject to necessary safeguards for the protection of confidential business and governmental information, is desirable to enhance effectiveness and public acceptance of international investment arbitration, as well as contributing to the further development of a public body of jurisprudence. Members of the Investment Committee generally share the view that, especially insofar as proceedings raise important issues of public interest, it may also be desirable to allow third party participation, subject however to clear and specific guidelines.



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TRANSPARENCY AND THIRD PARTY PARTICIPATION IN INVESTOR-STATE DISPUTE SETTLEMENT PROCEDURES

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This document, derestricted under the OECD Secretary General's responsibility, has been developed as an input to the Investment Committee's work aimed at enhancing understanding of the role of transparency and third party participation in investor-state dispute settlement procedures.

This document benefited from discussions and a variety of perspectives in the Committee. The document as a factual survey, however, does not necessarily reflect the views of the OECD or those of its Member governments. It cannot be construed as prejudging ongoing or future negotiations or disputes pertaining to international investment agreements.

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TRANSPARENCY AND THIRD PARTY PARTICIPATION IN INVESTOR-STATE DISPUTE SETTLEMENT PROCEDURES

Introduction

1. The system of investment dispute settlement has borrowed its main elements from the system of commercial arbitration. However, investor-state disputes often raise public interest issues which are usually absent from international commercial arbitration. As a result, the traditional manner in which governmental measures are reviewed for compliance with international law in a private setting, i.e. confidential *in camera* proceedings has come under increased scrutiny and criticism.

2. The present document surveys the issues related to transparency and third party participation in investor-state dispute settlement procedures. Section I examines the way in which the current rules apply to these issues. Section II describes the steps taken to improve the transparency of the system at the governmental level, by the arbitral Tribunals and the International Centre for the Settlement of Investment Disputes (ICSID). Section III examines the perceived advantages as well as the challenges of additional transparency. The last section sums up.

I. Current arbitration rules provide for limited transparency

3. International arbitration can provide the advantage of impartial and competent decision making. A traditional commercial arbitration, between two private companies for instance, may run its course without public disclosure even of the existence of the dispute. Under the existing rules in this area, hearings are treated as entirely private matters and publication of the resulting award often depends on the decision of one or both parties. There are cases in which published awards are edited to obscure the identity of the parties.¹ The policy of confidentiality serves to expedite arbitrations, as well as to protect the confidentiality of information and reputation. There is no mechanism ensuring that the public will ever know about the claim brought, the positions taken by the parties, the decisions issued by the tribunals and the precise reasons for them. The notion that arbitrators (usually three) decide a purely commercial dispute behind closed doors “does not offend fundamental principles of justice”.² That the same three arbitrators may decide in the same way whether the measures taken by a government – which may raise sensitive issues of public policies³ – are compatible with an investment

1. See Jack J. Coe, Jr. SYMPOSIUM: INTERNATIONAL COMMERCIAL ARBITRATION: “*Taking Stock of NAFTA Chapter 11 in its Tenth year: An Interim Sketch of Selected Themes, Issues and Methods*” 36 Vanderbilt Journal of Transnational Law, 1381 October 2003.

2. Nigel Blackaby “*Public Interest and Investment Treaty Arbitration*”, Investment Treaties and Arbitration, ASA Swiss Arbitration Association, Conference in Zurich on January 25, 2002.

3. In the NAFTA context for instance: In *SD Myers*, Canada was required to pay damages for blocking the export to the US of hazardous waste products; in *Metalclad*, Mexico did not allow the construction of a toxic waste processing plant by issuing a decree to protect the area in question for environmental reasons; *Methanex* (a Canadian company) challenges California’s decision to ban the use of gasoline additive containing methanol.

treaty could be more problematic. Current arbitration procedures provide for varied degrees of transparency.

Registration of disputes

4. In treaties such as BITs or Energy Charter, for instance, which do not require investors to publicly manifest their intention to launch a dispute settlement process, public disclosure depends on the arbitral rules chosen by the Parties or the will of the Parties to make such a disclosure where the rules do not control the matter.

5. When ICSID⁴ is chosen as the arbitration facility, the ICSID Secretariat applies a policy of registering all cases (the register can also be found in its website). The register includes the name of the Parties involved in the dispute, the date of registration and a short description of the dispute.

6. On the other hand, if another institution is chosen (ICC or SCC), there is no publication of registered cases. Since investment disputes account for a small part of the submitted disputes, it is also difficult to have exact knowledge of the existence, the number and general nature of these investment disputes.

7. *Ad hoc* (non-institutional) arbitration, for its part, may take place anywhere without any requirement for registration. The most common rules used in an *ad hoc* arbitration are the UNCITRAL⁵ rules. An increasing number of cases based on UNCITRAL rules are offered nowadays the administrative support of the ICSID Secretariat.

Access to the proceedings and submissions by non-disputant parties

8. Confidentiality may also apply to the arbitration proceedings. NAFTA in its Articles 1128 and 1129 provides for access to the documents and submissions on issues of interpretation by non-disputant parties (but only by the two other governments party to NAFTA). These submissions are regularly posted on the web. Non-disputant private parties have no access to the proceedings unless there is consent of the parties to open or the Tribunal in its discretion opens up the proceedings to *amici curiae*, i.e. friends of the court. However, new developments are taking place in this regard and some new investment agreements as well as arbitral tribunals provide for interested third parties to participate in the proceedings and submit written submissions related to the case (see Section II).

Access to the awards

9. There is no general binding rule for the publication of awards and they remain generally confidential unless the parties to the dispute agree to disclose them. However, NAFTA's Annex 1137.4 provides for the possibility of making the awards public. This Annex stipulates that if Canada and the US are the disputing Parties, either they (whoever is the disputing party in the specific case) or the disputing investor that is a party to the arbitration may make the award public. If Mexico is the disputing Party, the applicable arbitration rules apply to the publication of an award.

4. See worldbank.org/icsid. Two thirds of all cases brought to ICSID since 1966 were filed within the last five years. Fourteen NAFTA proceedings have been brought to ICSID since 1994 and six under the UNCITRAL rules.

5. Although UNCITRAL has a Secretariat, its Secretariat has no mandate to register cases or keep data of the use of its rules by investors.

10. According to the ICSID Convention,⁶ the Centre may publish an award only when both parties give their consent. The ICSID Secretariat encourages the parties to the dispute to make the awards public by posting them on the web and circulating them through its Foreign Investment Law Journal. Statistically, in about fifty per cent of the cases, ICSID obtains consent of the parties to publish the award. However, when one of the parties does not consent to the publication of the award by ICSID, the other party commonly releases it for publication by such other sources as *International Legal Materials*, the *Journal du Droit International* or *ICSID Reports*. If the Centre does not have the required consent of both parties for publication of the full text of the award and it is not published by another source, ICSID publishes (on its website and in the *ICSID Review – Foreign Investment Law Journal*) excerpts from the legal holdings of the award, pursuant to ICSID Arbitration Rule 48(4). In short, all ICSID arbitral awards, or at least their key legal holdings, are published.

11. The UNCITRAL rules⁷ provide that an award may be made public “only with the consent of the parties” and the same confidentiality requirements apply under the other institutional rules.

12. Today, several arbitration institutions, as well as independent publishers, have started to regularly publish arbitral awards. For example the ICC publishes sanitised extracts of awards (the names of the parties as well as relevant details are always omitted) in its regular periodical bulletin.⁸ Such publication of awards is done regularly unless the parties desire otherwise.

II. Steps towards additional transparency

13. The principle of public hearings in judicial proceedings is embodied in national laws. The closed doors approach of investment arbitration on issues of public interest, including the non-publication of awards in many cases, has engendered pressure from the public and interest groups to allow them access not only to the final arbitral award, but also to proceedings similar to those which they would have in national adjudication. Some States – in particular in the context of NAFTA – have taken steps in this direction, reflecting commitments to openness and transparency in dispute settlement procedures. In some cases, the existence of national laws related to freedom of information has brought in new developments which entail lower levels of confidentiality in existing processes. While tribunals’ practice is also evolving, ICSID as the main institutional body administering investment disputes has offered some reflections on improvements on both publication of awards and access of third parties.

States’ interpretations and declarations

14. In 2001, the NAFTA Free Trade Commission⁹ (FTC) issued an Interpretation clarifying that “nothing in the NAFTA” imposes a general duty of confidentiality precluding the parties from providing public access to documents submitted to or issued by a Chapter Eleven Tribunal, “apart from the limited specific exceptions set forth expressly in the relevant arbitral rules”. In addition, each

6. Article 48(5) of the ICSID Convention.

7. Article 32 (5) of the UNCITRAL Rules.

8. Bulletins are available at the International Court of Arbitration website <http://www.iccbooks.com/TopBannerSites/bulletin.asp>

9. NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001, available at <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp>. Or see, NAFTA Free Trade Commission, Clarifications Related to NAFTA Chapter 11, 31 July 2001, available at <http://www.ustr.gov/regions/whemisphere/nafta-chapter11.PDF>.

NAFTA country agreed to make available to the public “in a timely manner”¹⁰ all documents submitted to and issued by Chapter Eleven Tribunals other than confidential business information protected from disclosure under the relevant arbitral and domestic law rules.

15. The NAFTA FTC issued a second Statement in October 2003 by which it confirmed that no provision of NAFTA limits a Tribunal’s discretion to receive submissions from a third non-disputing party. The Statement also set forth guidelines for the procedures to be followed by prospective interested parties.

16. The NAFTA FTC at its joint statement of 16 July 2004 made a special mention to the progress of the transparency initiatives it had announced in its October 2003 Statement. It also welcomed the fact that Mexico joined the United States and Canada in their support of open hearings in the context of investor-states disputes. (The three NAFTA statements are reproduced in Annex 1).

International Agreements

Draft Multilateral Agreement on Investment (MAI)

17. Already in the 1990s, the draft Multilateral Agreement on Investment did not include a limitation in the publication of awards and provided that the award should be a publicly available document. However, appropriate safeguards for the protection of business confidential information were incorporated into the proposed publication criteria (see Annex 2).

New generation of investment agreements: Free Trade Agreements and New Model BITs

18. Renewed efforts towards a more transparent investment arbitration system are reflected in the investment provisions of the most recent US Free Trade Agreements as well as the new model US Bilateral Investment Treaty and Canada’s Foreign Investment Promotion and Protection Agreements (FIPA) Negotiating Programme.

19. Like NAFTA Article 1128, under the US FTAs with Chile,¹¹ Singapore,¹² Central America-Dominican Republic (CAFTA-DR)¹³ and Morocco,¹⁴ non-disputing State parties to these agreements may make oral and written submissions to the Tribunal on issues of interpretation. The latter FTAs also provide that Tribunals also has the authority to accept and consider written *amicus curiae* submissions from a person or entity that is not a party to the dispute. In terms of transparency of arbitral proceedings, the main documents¹⁵ related to the dispute settlement procedures must be made

10. *Idem.*

11. US-Chile Free Trade Agreement, signed on 6 June 2003, entered into force on 1 January 2004.

12. US-Singapore Free Trade Agreement signed on 6 May 2003, entered into force on 1 January 2004.

13. Central America –Dominican Republic Free Trade Agreement (CAFTA-DR) signed on August 5, 2004. The countries parties to the Agreement are: Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras and Nicaragua.

14. US-Morocco Free Trade Agreement signed on 15 June, 2004.

15. These documents include:

- (a) the notice of intent;
- (b) the notice of arbitration;
- (c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions;

public and the hearings must be open to the public. However, a safeguard is included for sensitive information which is protected accordingly (see Annex 3 for the relevant provisions).

20. The same provisions are found in the most recent version of the US draft Model Bilateral Investment Treaty (Articles 28 and 29).

21. Canada's new FIPA contains similar provisions. It promotes transparency by providing that "all documents submitted to or issued by the Tribunal, including transcripts of hearings, will be promptly made available to the public, subject to redaction for...privileged information". It also provides for all hearings to be open to the public and institutionalises the possibility for the acceptance of written *amicus curiae* submissions. The provisions in these agreements are compatible with ICSID and UNCITRAL rules which require the consent of both parties; the State parties have conditioned their consent upon transparency and therefore the investor/party to the dispute consents to the transparency provisions by initiating the proceedings pursuant to that agreement. (The relevant provisions of the US and Canada model agreements are reproduced in Annex 4).

Arbitral Tribunals

Publication of documents

Loewen case

22. The first NAFTA Chapter 11 case brought against the United States (*Loewen case*)¹⁶ required the arbitral tribunal to consider the United States obligation under its domestic law to release documents related to the arbitration proceedings. Indeed, the US Freedom of Information Act (FOIA)¹⁷ provides that any person has a right of access to federal agency records subject only to some specific exemptions. This right is enforceable in court. The *Loewen* Tribunal considered the United States request to release the documents and decided that there were no implied rules under the ICSID Additional Facility Rules and no general obligation of confidentiality in NAFTA arbitrations.¹⁸ In addition, based on the Loewen Group's request for clarification of this decision, the tribunal noted that

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- (d) minutes or transcripts of hearings of the tribunal, where available; and
 - (e) orders, awards, and decisions of the tribunal.

16. *Loewen Group, Inc and Raymond Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3 (Award) (June 26, 2003). The Loewen Group, Inc. ("TLGI"), a Canadian corporation involved in the death-care industry, and Raymond L. Loewen, its chairman and CEO at the time of the events at issue, had filed claims under the ICSID Additional Facility Rules in their individual capacities and on behalf of Loewen Group International, Inc., TLGI's U.S. subsidiary (collectively "Loewen"). Loewen sought damages for alleged injuries arising out of litigation in which the company was involved in Mississippi state courts in 1995-96. Loewen alleged violations of three provisions of NAFTA – the anti-discrimination principles set forth in Article 1102, the minimum standard of treatment required under Article 1105, and the prohibition against uncompensated expropriation set forth in Article 1110. Loewen requested damages in excess of \$600 million. On 26 June, 2003, the tribunal dismissed the claims against the United States in their entirety.

17. At present, some 50 countries, including developing countries, have passed laws equivalent to FOIA and more have laws either in the drafting stage or with legislatures; see www.freedominfo.org. Margrete Stevens, "The Right to Information and Investor-State Disputes: the Development of a New Procedural Framework in NAFTA Chapter 11 Arbitrations", Presentation in the Conference "International Economic Disputes-A Wider Perspective" St John's College, Cambridge, 1-3 April 2004.

18. *Idem*.

neither of its decisions was intended to affect any statutory obligation of disclosure by which any party might be bound.¹⁹ Following these decisions, the United States, complying with the FOIA, gradually released documents related to the case.

Amici Curiae submissions and open hearings

23. Two NAFTA Tribunals concluded in principle that they have the authority to accept *amici curiae* briefs: the *Methanex* and the *UPS* Tribunals. Open hearings were also allowed in these two cases and in a recent third case, *Canfor v. United States of America*.

Methanex case

24. The second NAFTA case against the United States was brought by a Canadian investor, *Methanex*.²⁰ In this case, the Parties agreed that orders, pleadings and awards could be made public by either side. A few months later, the *Methanex* Tribunal took a decision on public participation that is of groundbreaking relevance to UNCITRAL arbitrations, if not to all future investor-state arbitrations.²¹

25. The public participation issue was first raised in August 2000 through a “Petition”, seeking *amicus curiae* status²² for the International Institute for Sustainable Development (IISD).²³ This was followed in September by a submission from Earthjustice,²⁴ a US legal NGO, on behalf of other California-based environmental groups. The two NGOs were seeking the following results:

- i) permission to make written submissions in the case;
- ii) an order for the hearings to be made open to the public;
- iii) an order of disclosure to IISD of all documents for purposes of making the submissions
- iv) an order allowing for oral arguments to be made.

19. *Idem*.

20. This case concerns a US\$1 billion claim against the United States by a Canadian company, a major producer of methanol, a key component of a gasoline additive called MTBE. Methanex launched an international arbitration in response to the March 1999 order by the state of California to ban the use of MTBE by the end of 2002 because the additive was contaminating drinking water supplies, and was therefore posing a significant risk to human health and safety, and the environment. Methanex argues that the ineffective regulation and non-enforcement of domestic environmental laws including the U.S. Clean Water Act, is responsible for the presence of MTBE in California water supplies. It argues that the planned ban is tantamount to an expropriation of the company’s investment: a violation of NAFTA’s Article 1110 and was enacted in breach of the national treatment (Article 1102) and minimum international standards of treatment (Article 1105) provisions.

21. *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions from Third Persons to intervene as “*amici curiae*”, 15 January 2001. The petitions and all the documents relevant to this case can be found on <http://www.state.gov/s/l/c5818.htm>.

22. For the history of these *amici curiae* submissions see Howard Mann’s “Opening the Doors, at least a little: Comment on the Amicus decision in *Methanex v. United States*” RECIEL 10 (2, 2002): 241-245.

23. The IISD is a Canadian-based NGO www.iisd.org/investment.

24. See Earthjustice’s website: <http://www.earthjustice.org>

26. In its decision, the Tribunal accepted the first three requests but did not allow for oral arguments to be made by *amici*.

27. In an important part of its reasons to allow *amici curiae* submissions, the Tribunal noted the large distinction between the substantive issues at stake in the arbitration before it as compared to traditional commercial arbitration. It stated that the present type of issues:

“...extend far beyond those raised by the usual transnational arbitration between commercial parties...the public interest in this arbitration arises from its subject-matter, as powerfully suggested in the Petitions”.²⁵

28. At the same time, Canada and the United States recognised in their submissions that the closed nature of Chapter 11 proceedings was damaging to the public credibility of the process itself.

29. The *Methanex* Tribunal issued a press release on 30 January 2004 indicating its decision to allow NGOs or other interested non-parties to apply to make submissions. In March 2004, the IISD and Earthjustice submitted their briefs to the Tribunal. Open hearings, broadcast live, took place in the World Bank headquarters on 7-17 June 2004.

United Parcel Services (UPS) case

30. In the *United Parcel Services of America v. Canada* case,²⁶ the Canadian Union of Postal Workers²⁷ and the Council of Canadians²⁸ made a case about having a direct interest in the subject matter of the claim and in the broader public policy implications of the dispute.²⁹ In addition, they noted their interest in addressing the lack of transparency that has historically attended international arbitral processes and based their request on Article 15(1)³⁰ of the UNCITRAL Arbitration Rules

25. Decision of the Tribunal, para. 49 see *op. cit.* No. 21.

26. Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae* (17 October 2001), available at <http://www.state.gov/documents/organization/6033.pdf>.

27. The Canadian Union of Postal Workers is a labour union which represents approximately 46000 operational employees and 40 000 retirees of Canada Post.

28. The Council of Canadians, founded in 1985, is a non-governmental organisation with more than 100,000 members which lobbies members of parliament, conducts research and runs national programmes related to the future of Canada's social programmes, the protection of public health and the environment and the functioning of public institutions.

29. UPS claims that Canada Post, which UPS alleges is a letter mail monopoly, engages in anti-competitive practices: in providing its non-monopoly courier and parcel services (Express post and Priority Courier), it, allegedly, unfairly uses its postal monopoly infrastructure to reduce the costs of delivering its non-monopoly services. UPS alleges that Canada has breached its obligations under the NAFTA (1) to supervise a "government monopoly" and "state entity" (Arts. 1502(3)(a) and 1503(2)); (2) to accord treatment no less favourable than it accords, in like circumstances, to its own investors (Article 1102); and (3) to accord treatment in accordance with international law (Article 1105). UPS seeks US\$160 million in damages.

30. Article 15(1) of the UNCITRAL Rules provides:

“Subject to these Rules the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case”.

which gives discretion to the arbitral tribunal to conduct the arbitration in a manner it finds appropriate. They petitioned the Tribunal requesting:³¹

- i) standing as parties to any proceedings related to the case;
- ii) in case of denial, the right to intervene as *amici curiae* in such proceedings to be accorded on terms that are consistent with the principles of fairness, equality and fundamental justice;
- iii) disclosure of the main documents³² related to the proceedings;
- iv) the right to make submissions concerning the place of arbitration;
- v) the right to make submissions concerning the jurisdiction of this Tribunal, and once they are fully known the arbitrability of the matters the disputing investor has raised; and,
- vi) an opportunity to amend the Petition as further details of the claim become known to the petitioners.

31. Canada and the US supported in their submissions the view that the Tribunal is authorised to accept written submissions from third parties as *amici curiae*, while Mexico disagreed.³³

32. The Tribunal considered that it was indeed within the scope of article 15(1) of the UNCITRAL rules to receive submissions offered by the third parties with the purpose of assisting the Tribunal in that process and found that it had power to accept such written *amicus* briefs from the Petitioners. In its decision it also recalled “the emphasis placed on the value of greater transparency for proceedings such as these. Such proceedings are not now, if they ever were, to be equated to the standard run of international commercial arbitration between private parties”.³⁴

33. In addition, both parties agreed to make publicly available, subject to the protection of confidential information: “pleadings, and submissions of any disputing party or NAFTA Party, together with their appendices and attached exhibits, including the note of intent, notice of arbitration, amended statement of claim, statement of defense, memorials, affidavits, responses to tribunal questions, transcripts of public hearings, correspondence to or from the Tribunal, and any awards, including procedural orders, rulings, preliminary and final awards.”

34. Parties to the dispute also agreed to make the hearings open to the public, subject to the protection of confidential information. The public hearings, broadcast live, took place in the World Bank headquarters on 29-31 July 2002.³⁵

31. See *op. No. 29 paragraph 1*.

32. Disclosure of the statement of claim and defence, memorials, counter-memorials, pre-hearing memoranda, witness statements and expert reports, including appendices and exhibits to such submissions, and any applications or motions to the Tribunal.

33. See *op. n. 29. paragraphs 8, 9, 10*.

34. See *op. n. 29 paragraph 70*.

35. ICSID Press Release: <http://www.worldbank.org/icsid/ups.htm>.

Canfor v. United States of America

35. In *Canfor v. United States of America* case,³⁶ the arbitral tribunal allowed and parties to the dispute agreed to make the hearings open to the public. The public hearings, broadcast live, were held on 7-9 December 2004 in the World Bank headquarters.

ICSID Secretariat proposal

36. In 2004, ICSID Secretariat presented draft proposals on possible improvements of the framework for ICSID arbitration, including in relation to transparency and third party participation.³⁷ Following comments received by various interested constituencies, amendments to these draft proposals were presented in March 2005.

37. As mentioned above, the main legal holdings of all ICSID arbitral awards are now published. An important consideration is, however, the timeliness of publication when many cases involving similar issues are pending. It is not until several months have passed that ICSID receives the consent of both parties for it to publish an award. In the meantime, ICSID might publish excerpts of the main holdings, while it awaits the consents for publication of the full text. ICSID Secretariat proposes to amend Arbitration Rule 48(4) and the corresponding provision of the Additional Facility Arbitration Rules, Article 53(3) to make it mandatory for ICSID to publish promptly the excerpts of the legal conclusions or the Tribunal.

38. While in the two previously mentioned cases under the UNCITRAL Rules³⁸ the tribunals confirmed that they had broad authority to accept and consider submissions from third parties, arbitrations under the ICSID and Additional Facility Arbitration Rules have not seen similar precedents. ICSID Secretariat proposes by amendments of ICSID Arbitration Rule 37 and Article 41 of the Additional Facility Arbitration Rules regarding evidence, that tribunals would have the authority, after consulting both parties as far as possible, to accept and consider submissions from third parties. The amendments set out conditions for the submissions – for example, the demonstration by the non-disputing party that its submission brings a particular knowledge or insight, addresses a matter within the scope of the dispute and that the non-disputing party has a significant interest in the proceedings..

36. Canfor Corporation, a Canadian forest products company, has delivered a notice of arbitration under the countervailing duty and material injury determinations on softwood lumber. The U.S. Department of Commerce issued final antidumping and countervailing duty determinations on softwood lumber in March 2002. In May 2002, the U.S. International Trade Commission issued a final determination that the U.S. softwood lumber industry was threatened with material injury by reason of imports from Canada of softwood lumber. As a result of those determinations, a Canfor subsidiary is required to pay increased duties on softwood lumber products imported to the United States. Canfor's notice alleges that the United States, by virtue of these determinations, has breached NAFTA Chapter Eleven by not according it national treatment (Art. 1102) or most-favoured nation treatment (Art. 1103); by not according it treatment in accordance with international law (Art. 1105); and by expropriating its investment without compensation (Art. 1110). The notice claims damages of not less than \$250 million.

37. "Possible Improvements of the Framework for ICSID Arbitration: ICSID Secretariat Discussion Paper" 22 October, 2004. Full text is available at: www.worldbank.org/icsid/improve-arb.htm.

38. For the UNCITRAL Arbitration Rules, see www.uncitral.org.

39. According to the ICSID and Additional Facility Arbitration Rules, the tribunal may allow other persons to attend the hearings only “with the consent of the parties”.³⁹ Hearings open to the public have been consented to by the parties in two cases administered by ICSID under the UNCITRAL Rules. ICSID Secretariat proposes that Arbitration Rule 32(2) and Article 39(2) of the Additional Facility Arbitration Rules be amended so that the consent of both parties would no longer be obligatory for decisions of the tribunal to permit additional categories of persons to attend the hearings or even to open them to the public. According to the ICSID draft proposal, “after consultation with the Secretary General and the parties as far as possible, the Tribunal may allow other persons to attend or observe the hearings by establishing procedures for the protection of proprietary information and appropriate logistical arrangements.

III. Perceived advantages and challenges of additional transparency

40. This section examines the case for additional transparency as well as the need for careful consideration of its modalities, based on the results of stakeholder consultations held in OECD, ICSID and other fora.

Publication of awards

41. Investment arbitral awards may have a significant impact on the State’s future conduct, the national budget and the welfare of the people, so the public interest in investment disputes is understandable. Increased transparency can contribute to enhancing effectiveness and continued acceptance of the system of investment arbitration.

42. There are a growing number of arbitration awards which are likely to influence future cases and this has argued for their systematic and quick publication. This is considered to enhance the equality of the parties, since today some parties and their representatives do not have the same knowledge of and access to the most recent and yet unpublished opinions. The publication of arbitral awards would contribute to the further development of a public body of jurisprudence which would allow investors and host states to understand how investment agreements are interpreted and applied and ultimately contribute to a more predictable and consistent system. States reading an award are also free to consider whether there is anything in the award that needs to be taken into account in their future negotiations.

43. At the same time, it is understood that any publication of awards should take into account the protection of confidential business and governmental information. The business community has made known its expectation that full clarity would be provided about which parts of the arbitration proceedings would be covered by extended transparency requirements under a reformed ICSID framework. There is also a view that the consent of the parties for the publication of the award should be requested at the close of the oral proceedings, rather than after the award is rendered. In this case however, this would mean that the parties may be willing to consent to the publication of the award before they know the outcome.

44. In addition to any possible changes of the ICSID Rules and in order to have increasing transparency, the question has been raised as to whether it might also be necessary to include or modify language in the Bilateral Investment Treaties involving as many countries as possible. Some consider a consistent practice defensible on a case-by-case basis preferable than any new rules on this matter. It has also been suggested that a common approach among treaty partners would be preferable to having dispersed provisions, as this would also ensure that arbitration awards may be published

39. ICSID Arbitration Rule 32(2); Additional Facility Arbitration Rules, Art. 39(2).

under the other applicable arbitration rules e.g. UNCITRAL, ICC, SCC or *ad hoc*. There is also a view that when the institutional rules, such as the ICC for example, require confidentiality, the institutional rules should prevail.

Third Party Participation

45. The issues of allowing third party submissions and access to hearings, require a more qualified approach. Although in principle there is merit in allowing interested parties to provide submissions and also allow open hearings, a widely-held view is that it would be preferable that third party participation be subject to specific rules and guidelines and close monitoring based on the following considerations:

- It is important to have a threshold showing of substantive and legitimate interest by the third parties and also have them demonstrate that they are accountable, professional and transparent themselves by disclosing the origin of the funds with which they operate⁴⁰.
- Ensure that they are independent and not backed by any of the disputing parties.
- Ensure that the terms of their participation do not enable them to either dictate the outcome or change the rules in the middle of the case.
- Avoid giving non-governmental organisations a higher standing than the non-disputing governments; allow them to submit amicus briefs but not to call witnesses, nor to have the possibility to amend the claims or independently affect the process.
- Transparency in the proceedings could be enhanced by having at least part of the hearings held in the country or area where the problem has arisen.

46. There is an important linkage between third party participation and access to all documents related to the dispute, including notices of intent and arbitration, pleadings, memorials and briefs if third party submissions are required to demonstrate a substantive interest and address all matters within the scope of the dispute. At present, several countries⁴¹ allow for access to such documents, subject to safeguards for the protection of confidential information. As mentioned above, examples of such access linked to *amici curiae* submissions and/or open hearings are the three NAFTA cases (*Methanex*, *UPS* and *Canfor*). For international investment agreements that do not provide for third party participation including access to documents and open hearings, tribunals will continue to deal with requests for access on an *ad hoc* basis, taking into account the intent of the parties.

⁴⁰ In a recent WTO case, the WTO Tribunal refused to consider an amicus brief which made public certain information ordered by the WTO to be kept confidential. The Tribunal found that this was not appropriate behaviour for a “friend of the tribunal”.

⁴¹ These countries include: the NAFTA countries, based on the Free Trade Commission’s Interpretation of 2001; Canada and the United States based on their model BITs and Chile, Singapore, Central America-Dominican Republic and Morocco, based on their FTAs with the United States.

IV. Summing up

47. Investment arbitration and in particular investor/state, has borrowed its main elements from commercial arbitration. Whether confidentiality at all stages – from the registration of the dispute to the publication of awards – should be applied for matters of general public interest found in investment arbitration has been questioned.

48. Public interest groups have been advocating more transparency and participation in the proceedings in order to enhance the acceptability and credibility of arbitral decisions. A few governments, committed to openness and transparency -- often called for by their freedom of information acts -- are publishing the arbitration proceedings and awards and are inserting relevant provisions in their new model investment agreements. ICSID is proposing to modify its rules in order to take into account these new developments. Finally, breakthrough developments occurred recently with three tribunals' decisions to allow interested parties to submit briefs and/or to allow for open hearings.

49. Although there is support among governments for the publication of arbitral awards subject to necessary safeguards for the protection of confidential business and governmental information, there is a more qualified reaction to third party participation including public access to other documents submitted to or issued by a tribunal. Monitoring as well as specific rules and guidelines are considered by many Members important to guide third party participation either in the form of *amici curiae* submissions or open hearings.

ANNEX 1. NAFTA FREE TRADE COMMISSION'S INTERPRETATIONS AND STATEMENTS

1. Access to documents (July 31, 2001)

Having reviewed the operation of proceedings conducted under Chapter Eleven of the North American Free Trade Agreement, the Free Trade Commission hereby adopts the following interpretations of Chapter Eleven in order to clarify and reaffirm the meaning of certain of its provisions:

A. Access to documents

1. Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and, subject to the application of Article 1137(4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal.
2. In the application of the foregoing:
 - a. In accordance with Article 1120(2), the NAFTA Parties agree that nothing in the relevant arbitral rules imposes a general duty of confidentiality or precludes the Parties from providing public access to documents submitted to, or issued by, Chapter Eleven tribunals, apart from the limited specific exceptions set forth expressly in those rules.
 - b. Each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of:
 - i. confidential business information;
 - ii. information which is privileged or otherwise protected from disclosure under the Party's domestic law; and
 - iii. information which the Party must withhold pursuant to the relevant arbitral rules, as applied.
 - c. The Parties reaffirm that disputing parties may disclose to other persons in connection with the arbitral proceedings such unredacted documents as they consider necessary for the preparation of their cases, but they shall ensure that those persons protect the confidential information in such documents.
 - d. The Parties further reaffirm that the Governments of Canada, the United Mexican States and the United States of America may share with officials of their respective federal, state or provincial governments all relevant documents in the course of dispute settlement under Chapter Eleven of NAFTA, including confidential information.

3. The Parties confirm that nothing in this interpretation shall be construed to require any Party to furnish or allow access to information that it may withhold in accordance with Articles 2102 or 2105.

2. Statement of the Free Trade Commission on non-disputing party participation (October 2003)

A. *Non-disputing party participation*

1. No provision of the North American Free Trade Agreement (“NAFTA”) limits a Tribunal’s discretion to accept written submissions from a person or entity that is not a disputing party (a “non-disputing party”).
2. Nothing in this statement by the Free Trade Commission (“the FTC”) prejudices the rights of NAFTA Parties under Article 1128 of the NAFTA.
3. Considering that written submissions by non-disputing parties in arbitrations under Section B of Chapter 11 of NAFTA may affect the operation of the Chapter, and in the interests of fairness and the orderly conduct of arbitrations under Chapter 11, the FTC recommends that Chapter 11 Tribunals adopt the following procedures with respect to such submissions.

B. *Procedures*

1. Any non-disputing party that is a person of a Party, or that has a significant presence in the territory of a Party, that wishes to file a written submission with the Tribunal (the “applicant”) will apply for leave from the Tribunal to file such a submission. The applicant will attach the submission to the application.
2. The application for leave to file a non-disputing party submission will:
 - (a) be made in writing, dated and signed by the person filing the application, and include the address and other contact details of the applicant;
 - (b) be no longer than 5 typed pages;
 - (c) describe the applicant, including, where relevant, its membership and legal status (e.g., company, trade association or other non-governmental organization), its general objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the applicant);
 - (d) disclose whether or not the applicant has any affiliation, direct or indirect, with any disputing party;
 - (e) identify any government, person or organization that has provided any financial or other assistance in preparing the submission;
 - (f) specify the nature of the interest that the applicant has in the arbitration;
 - (g) identify the specific issues of fact or law in the arbitration that the applicant has addressed in its written submission;

- (h) explain, by reference to the factors specified in paragraph 6, why the Tribunal should accept the submission; and
 - (i) be made in a language of the arbitration.
- 3. The submission filed by a non-disputing party will:
 - (a) be dated and signed by the person filing the submission;
 - (b) be concise, and in no case longer than 20 typed pages, including any appendices;
 - (c) set out a precise statement supporting the applicant's position on the issues; and
 - (d) only address matters within the scope of the dispute.
- 4. The application for leave to file a non-disputing party submission and the submission will be served on all disputing parties and the Tribunal.
- 5. The Tribunal will set an appropriate date by which the disputing parties may comment on the application for leave to file a non-disputing party submission.
- 6. In determining whether to grant leave to file a non-disputing party submission, the Tribunal will consider, among other things, the extent to which:
 - (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
 - (b) the non-disputing party submission would address matters within the scope of the dispute;
 - (c) the non-disputing party has a significant interest in the arbitration; and
 - (d) there is a public interest in the subject-matter of the arbitration.
- 7. The Tribunal will ensure that:
 - (a) any non-disputing party submission avoids disrupting the proceedings; and
 - (b) neither disputing party is unduly burdened or unfairly prejudiced by such submissions.
- 8. The Tribunal will render a decision on whether to grant leave to file a non-disputing party submission. If leave to file a non-disputing party submission is granted, the Tribunal will set an appropriate date by which the disputing parties may respond in writing to the non-disputing party submission. By that date, non-disputing NAFTA Parties may, pursuant to Article 1128, address any issues of interpretation of the Agreement presented in the non-disputing party submission.
- 9. The granting of leave to file a non-disputing party submission does not require the Tribunal to address that submission at any point in the arbitration. The granting of leave to file a non-disputing party submission does not entitle the non-disputing party that filed the submission to make further submissions in the arbitration.

10. Access to documents by non-disputing parties that file applications under these procedures will be governed by the FTC's Note of July 31, 2001.

3. NAFTA Free Trade Commission Joint Statement on the Decade of achievement (San Antonio, 16 July, 2004)

"...We are pleased that the transparency initiatives we took during our October 2003 meeting have already begun to improve the operation of the investment chapter investor-state dispute-settlement mechanism. Earlier this year, for the first time a tribunal accepted written submissions from a non-disputing party and adopted the procedures that we recommended following our October 7, 2003 meeting in Montreal, for the handling of such submissions.

We were pleased Mexico has now joined Canada and the United States in supporting open hearings for investor-state disputes. In addition, we have agreed that the same degree of openness should apply to proceedings under the Dispute Settlement provisions of Chapter 20 of the NAFTA, and asked officials to develop rules governing open hearings for such proceedings..."

**ANNEX 2. THE MULTILATERAL AGREEMENT ON INVESTMENT:
DRAFT CONSOLIDATED TEXT⁴²**

INVESTOR-STATE PROCEDURES

Article 16. Final awards

- d. The award shall be drafted consistently with the requirements of paragraph 17 and **shall be a publicly available document**. A copy of the award shall be delivered to the Parties Group by the Secretary-General of ICSID, for an award under the ICSID Convention or the Rules of the ICSID Additional Facility; by the Secretary-General of the ICC International Court of Arbitration, for an award under its rules; and by the tribunal, for an award under the UNCITRAL rules.

Article 17. Confidential and Proprietary Information

Parties and other participants in proceedings shall protect any confidential or proprietary information which may be revealed in the course of the proceedings and which is designated as such by the party providing the information. They shall not reveal such information without written authorization from the party which provided it.

42. See <http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf>.

**ANNEX 3. PROVISIONS ON TRANSPARENCY OF PROCEEDINGS IN U.S. FREE TRADE
AGREEMENTS WITH CHILE, SINGAPORE, CENTRAL AMERICA-DOMINICAN
REPUBLIC (CAFTA-DR)
AND MOROCCO**

An example: CAFTA-DR

Article 10.20: Conduct of the Arbitration

1. The disputing parties may agree on the legal place of any arbitration under the arbitral rules applicable under Article 10.16.3. If the disputing parties fail to reach agreement, the tribunal shall determine the place in accordance with the applicable arbitral rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.
2. A non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement.
3. The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party.

[...]

Article 10.21: Transparency of Arbitral Proceedings

1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Parties and make them available to the public:
 - (a) the notice of intent;
 - (b) the notice of arbitration;
 - (c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 10.20.2 and 10.20.3 and Article 10.25;
 - (d) minutes or transcripts of hearings of the tribunal, where available; and
 - (e) orders, awards, and decisions of the tribunal.
2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.

3. Nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 21.2 (Essential Security) or Article 21.5 (Disclosure of Information).
4. Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:
 - (a) Subject to subparagraph (d), neither the disputing parties nor the tribunal shall disclose to any non-disputing Party or to the public any protected information where the disputing party that provided the information clearly designates it in accordance with subparagraph (b);
 - (b) Any disputing party claiming that certain information constitutes protected information shall clearly designate the information at the time it is submitted to the tribunal;
 - (c) A disputing party shall, at the same time that it submits a document containing information claimed to be protected information, submit a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the non-disputing Parties and made public in accordance with paragraph 1; and
 - (d) The tribunal shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may (i) withdraw all or part of its submission containing such information, or (ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph (c). In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under (i) by the disputing party that first submitted the information or re-designate the information consistent with the designation under (ii) of the disputing party that first submitted the information.
5. Nothing in this Section requires a respondent to withhold from the public information required to be disclosed by its laws.

ANNEX 4. MODEL BILATERAL INVESTMENT TREATIES

1. Draft United States Model BIT

Article 28: Conduct of the Arbitration

1. The disputing parties may agree on the legal place of any arbitration under the arbitral rules applicable under Article 24(3). If the disputing parties fail to reach agreement, the tribunal shall determine the place in accordance with the applicable arbitral rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.
2. A non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Treaty.
3. The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party.

Article 29: Transparency of Arbitral Proceedings

1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Parties and make them available to the public:
 - (a) the notice of intent referred to in article 24(2);
 - (b) the notice of arbitration referred to in article 24(4);
 - (c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 28(2) [Non-Disputing Party submissions] and (3) [*Amicus* Submissions] and Article 33 [Consolidation];
 - (d) minutes or transcripts of hearings of the tribunal, where available; and
 - (e) orders, awards, and decisions of the tribunal.
2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.
3. Nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 18

[Essential Security Article] or Article 19 [Disclosure of Information Article].

4. Protected information shall, if such information is submitted to the tribunal, be protected from disclosure in accordance with the following procedures:
 - (a) Subject to subparagraph 4(d), neither the disputing parties nor the tribunal shall disclose to the non-disputing Party or to the public any protected information where the disputing party that provided the information clearly designates it in accordance with paragraph 4(b);
 - (b) Any disputing party claiming that certain information constitutes protected information shall clearly designate the information at the time it is submitted to the tribunal;
 - (c) A disputing party shall, at the same time that it submits a document containing information claimed to be protected information, submit a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the non-disputing Parties and made public in accordance with paragraph 1.
 - (d) The tribunal shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may (i) withdraw all or part of its submission containing such information, or (ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and 4(c). In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under (i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under (ii) of the disputing party that first submitted the information.
5. Nothing in this Section requires a respondent to withhold from the public information required to be disclosed by its laws.

2. Canada's Draft Foreign Investment Protection and Promotion Agreement

Article 38. Public Access to Hearings and Documents

1. Hearings held under this Section shall be open to the public. To the extent necessary to ensure the protection of confidential information, including business confidential information, the Tribunal may hold portions of hearings in camera.
2. The Tribunal shall establish procedures for the protection of confidential information and appropriate logistical arrangements for open hearings, in consultation with the disputing parties.
3. All documents submitted to, or issued by, the Tribunal shall be publicly available, unless the disputing parties otherwise agree, subject to the deletion of confidential information.
4. Notwithstanding paragraph 3, any Tribunal award under this Section shall be publicly available, subject to the deletion of confidential information.
5. A disputing party may disclose to other persons in connection with the arbitral proceedings such unredacted documents as it considers necessary for the preparation of its case, but it shall ensure that those persons protect the confidential information in such documents.
6. The Parties may share with officials of their respective federal and sub-national governments all relevant unredacted documents in the course of dispute settlement under this Agreement, but they shall ensure that those persons protect any confidential information in such documents.
7. As provided under Article 10(4) and (5), the Tribunal shall not require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party's law protecting Cabinet confidences, personal privacy or the financial affairs and accounts of individual customers of financial institutions, or which it determines to be contrary to its essential security.
8. To the extent that a Tribunal's confidentiality order designates information as confidential and a Party's law on access to information requires public access to that information, the Party's law on access to information shall prevail. However, a Party should endeavour to apply its law on access to information so as to protect information designated confidential by the Tribunal.

Article 39. Submissions by a Non-Disputing Party

1. Any non-disputing party that is a person of a Party, or has a significant presence in the territory of a Party, that wishes to file a written submission with a Tribunal (the “applicant”) shall apply for leave from the Tribunal to file such a submission, in accordance with Annex C.39. The applicant shall attach the submission to the application.
2. The applicant shall serve the application for leave to file a non-disputing party submission and the submission on all disputing parties and the Tribunal.
3. The Tribunal shall set an appropriate date for the disputing parties to comment on the application for leave to file a non-disputing party submission.
4. In determining whether to grant leave to file a non-disputing party submission, the Tribunal shall consider, among other things, the extent to which:
 - (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
 - (b) the non-disputing party submission would address a matter within the scope of the dispute;
 - (c) the non-disputing party has a significant interest in the arbitration; and
 - (d) there is a public interest in the subject-matter of the arbitration.
5. The Tribunal shall ensure that:
 - (a) any non-disputing party submission does not disrupt the proceedings; and
 - (b) neither disputing party is unduly burdened or unfairly prejudiced by such submissions.
6. The Tribunal shall decide whether to grant leave to file a non-disputing party submission. If leave to file a non-disputing party submission is granted, the Tribunal shall set an appropriate date for the disputing parties to respond in writing to the non-disputing party submission. By that date, the non-disputing Party may, pursuant to Article 34 (Participation by the Non-Disputing Party), address any issues of interpretation of this Agreement presented in the non-disputing party submission.
7. The Tribunal that grants leave to file a non-disputing party submission is not required to address the submission at any point in the arbitration, nor is the non-disputing party that files the submission entitled to make further submissions in the arbitration.
8. Access to hearings and documents by non-disputing parties that file applications under these procedures shall be governed by the provisions pertaining to public access to hearings and documents under Article 38 (Public Access to Hearings and Documents).