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REVISING THE UNCITRAL ARBITRATION RULES TO ADDRESS INVESTOR-STATE ARBITRATIONS

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NOTE

The United Nations Commission on International Trade Law (UNCITRAL) is currently revising its 1976 Arbitration Rules. UNCITRAL's Working Group II on Arbitration and Conciliation is tasked with preparing a draft of the revised Rules for the consideration of the Commission.

One issue before the Working Group is the need for specific provisions to ensure transparency in investor-State arbitrations. At its 46th session in February 2007, the Working Group agreed to revisit this issue after it had completed its first review of the revised provisions. This discussion is most likely to take place in the Working Group's next meeting in Vienna on 10-14 September 2007.

With a view to informing the discussion on how the UNCITRAL Rules should address investor-State arbitrations, CIEL and IISD released in February 2007 a background paper entitled, "Revising UNCITRAL Rules to Address State Arbitrations". This background paper was also discussed at a well-attended side event during Working Group II's February 2007 session. In light of various comments received on the paper and on the issue of investor-State arbitrations generally, CIEL and IISD have introduced several changes to the paper.

In particular, the revised paper focuses on investor-State arbitrations, rather than State arbitrations more broadly. The paper explains the fundamental public interest difference between such arbitrations and private commercial arbitration. The paper discusses how the UNCITRAL Rules can easily address this difference by introducing language to four provisions, namely articles 3, 15, 25 and 32. These would allow commercial arbitrations to proceed without any additional requirements and would not affect them in any manner. The paper thus demonstrates how simply the public interest needs of investor-State arbitrations can be addressed without causing disruption or complication to other types of arbitration conducted under the Rules.

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I. INTRODUCTION

The United Nations Commission on International Trade Law (UNCITRAL) agreed to give priority to the revision of its arbitration rules in July 2006.[1] The UNCITRAL Arbitration Rules have been in force since their adoption by UNCITRAL and the United Nations General Assembly in 1976. Over the last 30 years, the UNCITRAL Rules have inspired domestic legislation on arbitration and have been successfully used to resolve numerous private commercial disputes. More recently, they are increasingly being used in ways that were not anticipated by their drafters, for example in arbitrations pursuant to Bilateral Investment Treaties (BITs) that involve challenges to measures adopted by States in their sovereign capacity. In the current revision process, UNCITRAL faces the task of further strengthening its rules for commercial arbitrations while also accommodating the public dimensions involved in arbitrations brought by a foreign investor against a State("investor-State arbitrations").

Over the past two decades, the use of the UNCITRAL Arbitration Rules to resolve investment disputes brought by private investors against States has been one of the major developments in the arbitration landscape. It is likely today that the UNCITRAL Rules are the second most widely used rules for resolving such disputes (the first being the rules of the International Centre for Settlement of Investment Disputes (ICSID)). This development has resulted primarily from the proliferation of BITs and other investment treaties, many of which allow private investors to bring arbitral claims against host States and to choose the UNCITRAL Rules as the basis for these investor-State arbitrations.

There are now more than 2400 BITs, as well as a number of other trade agreements containing investor protection provisions. These agreements have spawned over 240 known investor-State arbitrations so far (over 200 of which were launched in the last five years), and their numbers continue to rise.[2] It is estimated that about 30% of these cases have used the UNCITRAL Rules.[3] In addition, UNCITRAL Rules are regularly used for investor-State arbitrations under contractual agreements. All of this means that the UNCITRAL Rules are an important part of public international law.

CIEL's and IISD's interest in the UNCITRAL Rules' revision process is limited to investor-State arbitrations; and our specific focus is on improving the rules on public notice of the proceedings, access to documents, open hearings, and *amicus curiae* briefs in respect of such arbitrations. This focus stems from the fact that investor-State arbitrations virtually always implicate the public interest in ways that private commercial arbitrations typically do not. This fundamental difference between investor-State arbitrations and commercial arbitrations has direct implications for the conduct of the arbitration, and the UNCITRAL Rules can easily address this difference by introducing language to four provisions, namely articles 3, 15, 25 and 32.

This paper begins by explaining the public interest difference between investor-State arbitrations and private commercial arbitrations. It then discusses how the UNCITRAL Rules can address this difference, whilst further strengthening the significant contribution of the

[1] UNCITRAL Working Group II (Arbitration) began work on revising the rules in September 2006 in Vienna. The next meeting of the Working Group will take place during February 2007 in New York.
[2] Investor-State Disputes Arising From Investment Treaties: A Review, February 2006, UNCTAD/ITE/IIT/2005/4, page 5, available at http://www.unctad.org/en/docs/iteiit20054_en.pdf.
[3] Ibid.

UNCITRAL Rules to the resolution of commercial disputes and the development of economic relations. It ends with specific textual suggestions as to how this can be simply achieved, without disruption to the arbitral process.

II. The Public Interest Difference between Investor-State Arbitrations and Commercial Arbitrations

Arbitrations brought by an investor against a State ("investor-State arbitrations") differ significantly from commercial arbitrations involving only private parties because the former implicate the public interest in ways the latter do not. Our experience is that this fact is now widely acknowledged within the international arbitration community, but it is worth elaborating why the difference exists.

First, the very presence of a State as a party to the arbitration raises a public interest because the nationals and residents of that State have an interest in how the government acts during the arbitration and in the outcome of the arbitration. Moreover, the existence of this public interest has obvious implications for the conduct of the arbitration: according to principles of human rights law and good governance, government activities should be subject to basic requirements of transparency and public participation.[4]

Second, investor-State arbitrations often involve large potential monetary liability for public treasuries. And any award of compensation will affect the State's budget.[5] As above, the public's interest is clear.

Third, many investor-State arbitrations, such as those arising under treaties for the protection of investments, involve direct allegations of governmental misconduct. Again the public interest, e.g. in knowing what the allegations, facts and outcome are, is self-evident.

Finally, an increasing number of investor-State arbitrations raise profoundly important issues of public policy that penetrate deeply into domestic decision-making processes (as is described in greater detail below). Moreover, claimants may seek to invoke clauses that purport to constrain a State's power to regulate, such as stabilization clauses in host government agreements. In these cases, the public interest is also clear.

To illustrate, important public policy issues raised in recent investor-State arbitrations include challenges relating to:

- the drinking water supply system in Cochabamba, Bolivia (the riots in connection with this project resulted in many injuries and at least one death);
- Mexico's refusal to grant a permit to a hazardous waste site;
- a Tanzanian drinking water supply system;
- the judicial system in Mississippi, USA;
- California's ban on a polluting gasoline additive;
- Argentina's response to its fiscal crisis (37 cases in ICSID dealing, for example, with the sanitation and water system in Buenos Aires);

[4] These principles apply irrespective of whether the State is acting in a sovereign or commercial capacity (a distinction sometimes relevant to other issues such as State immunity).
[5] There has been an increasing number of awards over $100 million in such cases in the last year or two.

- Canada's ban on the export of a hazardous waste;
- a Mexican tax on high fructose corn syrup;
- Chile's system of allocating fishing permits; and
- South Africa's positive racial discrimination laws.

No one would seriously argue that governmental decision-making regarding the preceding list of issues should legitimately take place without any transparency or opportunity for public participation, even if the government itself is democratically elected. Yet decision-making without transparency or public participation is what can, and typically does, happen under the UNCITRAL Rules when these same issues and others like them, are decided by an arbitral panel.

Investor-State arbitrations conducted under the existing UNCITRAL Rules typically lack fundamental elements that characterize democratic legal systems governed by the rule of law. For example, it is often impossible for the public or other States to know even that an arbitration has been filed, what is at issue in an arbitration, what written and oral arguments are being advanced in a dispute, what the arbitrators' jurisdictional procedural rulings are, and what the ultimate decision is. The parties can, in theory, agree to make all that information public, but this rarely happens because there is usually at least one party that does not want sunshine and the possibility of public scrutiny. Similarly, although we believe that arbitral panels have the authority to accept *amicus curiae* briefs under the current rules, that authority is not explicit.

The secrecy shrouding investor-State arbitrations under the UNCITRAL Rules is inconsistent with other UN activities and approaches. It is particularly important that UNCITRAL, as a UN body, respect and promote transparency and public participation, in light of the UN Charter's commitment to human rights and good governance generally.

Commercial disputes involving only private parties, in contrast, do not necessarily concern the public interest or the public purse, and by definition do not involve the State or direct challenges to governmental conduct. For this reason, the specific suggestions in this paper are limited to the UNCITRAL Rules' treatment of investor-State arbitrations and do not concern private commercial arbitrations or the Working Group's consideration of the rules regarding such arbitrations in any way.

Investor-State arbitrations have a different need for public notice of the proceedings, access to documents, open hearings, and *amicus curiae* briefs. This is now widely recognized by the international community generally, and by ICSID in particular, which has reformed its arbitration rules to incorporate greater transparency and opportunity for public participation in investor-State arbitrations. The existing UNCITRAL rules, however, do not take account of the public interest dimensions of investor-State arbitrations. This is not surprising, because the existing rules were drafted primarily, if not exclusively, with commercial arbitrations in mind.

Moreover, CIEL and IISD believe that greater transparency and public input will enhance the UNCITRAL arbitration process. Arbitral decisions will be of higher quality and have greater credibility, as acknowledged by several arbitral decisions to date.[6] This in turn will support the development of the international laws that UNCITRAL arbitrations seek to

[6] E.g. Methanex Corporation v. United States, "Decision of the Tribunal on petitions from third persons to intervene as *amici curiae"*, 15 January 2001, page 22, paragraph 49.

enforce. Increased access to information will also facilitate long-term systemic reform; for example, at present, no one even knows how many investor-State arbitrations have been brought using UNCITRAL Rules or what the experiences of those arbitrations have been.

The question is thus how UNCITRAL Rules should incorporate effective transparency and public input into investor-State arbitrations. As described in detail below, we believe this can be done neatly, indeed surgically, with no impact on the applicability or functioning of the Rules in the commercial context. While the principles of good governance are very broad, their application to the UNCITRAL Rules, we believe, requires very few, and very specific, changes.

III. DISTINGUISHING INVESTOR-STATE ARBITRATIONS FROM COMMERCIAL ARBITRATIONS IN THE UNCITRAL RULES

The problems arising from the existing UNCITRAL Rules described above can be eliminated without either causing undue costs, delay or disruption to arbitrations or jeopardizing the substantive and procedural rights of the parties, if reforms are carefully designed to take into account the by now considerable experience gained in investment and trade disputes that have occurred under other rules. In addition, reform can strengthen the UNCITRAL Rules' primary focus on commercial disputes, while at the same time accommodating the public interest dimensions of investor-State arbitrations. A failure to do so would put UNCITRAL out-of-step with developments in other arbitral systems and with the UN system as a whole.

The key to success is to distinguish between commercial arbitrations (involving only private parties) and investor-State arbitrations (involving a private investor and a State)), and to attach requirements regarding public notice of proceedings, access to documents, open hearings, and *amicus curiae* briefs only to investor-State arbitrations. This will allow commercial arbitrations to proceed without any additional requirements and thus will not affect them in any manner.

The distinction between investor-State arbitrations and commercial arbitrations is not a new one. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("the ICSID Convention") was designed with this distinction in mind. In this regard, the key provision in the ICSID Convention is Article 25, which defines ICSID's jurisdiction to include "any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State". As ICSID remains the most commonly-used forum for resolving investor-State disputes, its approach has clearly proved a workable one.[7]

It is suggested that the UNCITRAL Rules adopt ICSID's approach to distinguish investor-State arbitrations from commercial arbitrations. In this light, an investor-State dispute is "a dispute arising directly out of an investment, between a State and a national of another State".

[7] See supra footnote 2, at page 3.

If, however, the ICSID approach is viewed as being too onerous for the UNCITRAL Rules, the rules could instead make a distinction based on whether the arbitration is brought pursuant to a treaty, such as a BIT. This approach would be very easy to administer (e.g., all cases brought under BITs involve a State, by definition), but it would fail to cover investor-State arbitrations that did not arise under a treaty but that nevertheless involved the public interests identified above. Examples of such cases include those that might arise under host government agreements between host governments and private investors. Distinguishing investor-State arbitrations by using an approach similar to that of the ICSID Convention is thus preferable.

Incorporating public notice of the proceedings, access to documents, open hearings, and *amicus curiae* briefs into investor-State arbitrations conducted under the UNCITRAL Rules can be accomplished by revising four provisions of the current rules: articles 3, 15, 25 and 32. These suggested revisions, which would not affect the resolution of commercial disputes, are elaborated below.

IV. PROPOSED REVISIONS TO FOUR PROVISIONS OF THE UNCITRAL RULES

There are four main provisions in the UNCITRAL Rules that have a significant bearing on transparency and public participation. Articles 25(4) and 32(5) explicitly deal with public access to information and to hearings. Article 3 deals with notice of the commencement of an arbitral proceeding. Article 15 is relevant because it confers on the arbitral tribunal a broad power to conduct arbitration proceedings "in such a manner as it considers appropriate". Revision of these four provisions is critically important to enhance good governance and address the public interest involved in investor-State arbitrations, and the suggested revisions are consistent with the international trend towards greater openness in investor-State arbitrations.

Each provision is considered below.

1. Access to awards – Article 32(5)

Article 32(5) of the UNCITRAL Rules, which deals with awards, provides:

The award may be made public only with the consent of both parties.

Pursuant to this provision, a State must seek and obtain approval from the other disputing party (for example a foreign investor) for the publication of the award, even to show it to its own citizens. A private party can thus block the publication of an award against the will of a State party (and vice-versa). This provision is woefully out-of-date.

Unlike the UNCITRAL Rules, the ICSID Arbitration Rules do not require the consent of the parties for the publication of arbitration awards. Consent of the parties is only required for publication by the Centre itself, not by the disputing parties. Each party is thus free to publish the award. Following the recent revision of its Rules, ICSID now retains authority to

"promptly include in its publications excerpts of the legal reasoning of the tribunal"[8], even when parties do not agree to the publication of the award by the Centre. The same language is also used in the Additional Facility Rules of ICSID.[9] UNCITRAL has no secretariat to oversee arbitrations and thus an approach requiring the excerpt of legal reasoning is presumably unavailable.

It is also notable that Annex 1137.4 of the North American Free Trade Agreement (NAFTA, which includes an investment chapter referring to ICSID and UNCITRAL rules) addresses the restrictions of UNCITRAL Rules and clarifies the text of the ICSID Rules by providing that in any dispute involving the Governments of Canada or the United States, either disputing party may make the award public.[10] This has now been applied in the growing number of US and Canadian BITs with developing countries, such as Singapore, Peru, Costa Rica, and many more.

We believe that all awards, including interim decisions and procedural decisions, should be available to the public (subject, of course, to redactions for confidential business information or information which is privileged or otherwise protected from disclosure under a party's domestic law), for the reasons identified above. This could be done by directing the arbitral tribunal to forward all awards to the UNCITRAL secretariat for posting on its website. Such posting could be done at minimal expense. At the very least, UNCITRAL should seize the opportunity of the current revision to allow parties to unilaterally make awards accessible to the public in an investor-State dispute.

PROPOSAL: Insert an additional phrase to Article 32(5) and a new Article 32(5) bis:

32(5): Except in a dispute arising directly out of an investment, between a State and a national of another State, the award may be made public only with the consent of the parties.

32(5) bis: In a dispute arising directly out of an investment, between a State and a national of another State, any award or other decision of the arbitral tribunal may be disclosed or made public by either of the parties without the consent of the other party; and the president of the tribunal is directed to dispatch a copy of all awards and other decisions to the UNCITRAL secretariat as they are issued, which shall without delay post them on the UNCITRAL website.

2. Access to the notice of arbitration – Article 3

Pursuant to Article 3(1) of the UNCITRAL Rules the party initiating recourse to arbitration is required to give to the other party a notice of arbitration. Nothing in Article 3 provides that the notice of arbitration be made known to the public, however. The current lack of a public register for arbitral proceedings between investors and States is in direct conflict with democratic principles of good governance. In particular, the public has the right to know about the initiation and thus the existence of an arbitral proceeding.

[8] Article 48(4).
[9] Article 53(3).
[10] Where Mexico is the disputing Party, however, the applicable arbitration rules apply to the publication of an award.

We propose that once the tribunal is appointed, its president should be required to transmit a copy of the notice of arbitration and the agreement on the composition of the tribunal to the UNCITRAL secretariat, which would then post both documents on the UNCITRAL website. This would bring the UNCITRAL Rules in line with other rules and processes, such as those under ICSID, pursuant to which a public register of all arbitrations is already maintained. Similarly, the WTO systematically posts requests for consultation and the subsequent requests for establishment of a panel on its website.

PROPOSAL: Insert a new paragraph to Article 3:

3(5): Following the appointment of the arbitral tribunal in a dispute arising directly out of an investment, between a State and a national of another State, the president of the tribunal shall forthwith dispatch a copy of the notice of arbitration and the agreement on the composition of the tribunal to the UNCITRAL secretariat, which shall post them on the UNCITRAL website without delay.

3. Access to oral hearings – Article 25(4)

Article 25(4) of the UNCITRAL Rules stipulates that:

> *Hearings shall be held in camera unless the parties agree otherwise. […]*

While this rule may be appropriate for disputes involving private parties, in investor-State arbitrations, we believe that hearings should be open to the public as they frequently entail important matters of public policy and always involve the public interest (as explained in detail above). Open hearings in court and arbitration proceedings are nothing new. Hearings in domestic court proceedings involving public law are generally open to the public, as are hearings at the International Court of Justice, for instance[11]. Several hearings in investor-State disputes have now been made open to the public, in each instance without disruption to, or delay of, the proceedings. Logistical problems regarding space and public access have also been solved, both in domestic court proceedings and, more recently, in ICSID proceedings. The WTO has also held public hearings in disputes without disruption, delay or undue expense. Both the ICSID and WTO open hearings were conducted with the public watching the hearing via closed circuit television in a separate room. Another approach would be to web cast hearings, as is done by some domestic court systems.

The United States[12] and Canada have taken unilateral actions to promote open hearings. In a 7 October 2003 Statement of Canada on Open Hearings in NAFTA Chapter Eleven Arbitration, Canada declared:

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[11] Article 59 of the Statute of the International Court of Justice provides:
The hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted. Such a decision or demand may concern either the whole or part of the hearing, and may be made at any time.

[12] Canadian Department of Foreign Affairs and International Trade, Statement of the United States on Open Hearings in NAFTA Chapter Eleven Arbitrations, available at

> *Canada affirms that it will consent, and will request the consent of disputing investors and, as applicable, tribunals, that hearings in Chapter Eleven disputes to which it is a party be open for the public, except to ensure the protection of confidential information, including confidential business information.*[13]

Furthermore, in 2004, Mexico decided to join Canada and the United States in supporting open hearings for NAFTA investor-State disputes.[14]

The United States has negotiated BITs or free trade agreements (FTAs) with Chile, Singapore, Uruguay, Peru and Colombia, and the Central American countries, all of which expressly provide for investment arbitration, including under the UNCITRAL rules, and for open hearings in the conduct of the arbitration. For example, the US-Chile FTA provides that, "The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements."[15] In addition to open hearings, the treaty provides that the respondent shall make available to the public the minutes or transcripts of hearings of the tribunal.[16]

As with the publication of awards, it is extraordinary that a private party can prevent a State from opening a hearing involving the State as a party. We thus prefer a rule, such as that adopted by the most recent generation of FTAs and BITs, that would make open hearings the norm in investor-State arbitrations (subject, of course, to exceptions to protect confidential business information and information which is privileged or otherwise protected from disclosure under that party's domestic law).

The Paulsson/Petrochilos report[17] recognizes the consistent trend, especially in investor-State arbitrations, to move towards transparency and also recognizes the importance of open hearings and its relevance for the involvement of friends of the court. It proposes to add a sentence to Article 25(4) of the current UNCITRAL rules that would permit an arbitral tribunal to allow a third party to attend all or part of the hearings, subject to appropriate logistical arrangement and protection of proprietary or privileged information.[18]

We suggest that the Working Group revise Article 25(4) of the UNCITRAL Rules in order to reflect the historical developments and consistent trends over the past decade.

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http://www.ustr.gov/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file143_3602.pdf (last visited 14 July 2006)

[13] Canadian Department of Foreign Affairs and International Trade, Statement of Canada on Open Hearings in NAFTA Chapter Eleven Arbitrations, (7 Oct. 2003). (last visited 14 July 2006)

[14] NAFTA Free Trade Commission Joint Statement, "Decade of Achievement", available at http://www.dfait-maeci.gc.ca/nafta-alena/JS-SanAntonio-en.asp, (last visited 14 July 2006). By the end of 2004, three NAFTA tribunals had allowed open hearings: *UPS*, *Methanex*, and *Canfor v. United States.*

[15] US-Chile Free Trade Agreement, Article 10.20(2).

[16] Id. at Article 10.20 (1)(d).

[17] "Revision of the UNCITRAL Arbitration Rules" a report by Jan Paulsson and Georgios Petrochilos, Freshfields Bruckhaus Deringer, Paris, commissioned by the UNCITRAL secretariat, 2006.

[18] The text proposed in the Paulsson/Petrochilos report reads "After consulting the parties and having regard to the circumstances and article 15, paragraph 1, the arbitral tribunal may allow a third party to attend all or part of the hearings, subject to appropriate logistical arrangements. The arbitral tribunal shall for such cases issue necessary directions under article 15, paragraph 1 for the protection of proprietary or privileged information."

PROPOSAL: Insert an additional phrase to Article 25(4) and a new Article 25(4) bis:

25(4): Except in a dispute arising directly out of an investment, between a State and a national of another State, hearings shall be held in camera unless the parties agree otherwise. […]

25(4) bis: In a dispute arising directly out of an investment, between a State and a national of another State, hearings shall be open to the public. The tribunal shall establish appropriate logistical arrangements, including procedures for the protection of confidential business information and information which is privileged or otherwise protected from disclosure under a party's domestic law.

4. Access to materials during the proceedings – Article 15(3)

The current UNCITRAL Rules are silent with respect to the confidentiality of the materials produced during the proceedings. Article 15(3) only addresses a related issue and reads as follows:

> *All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party.*

As a consequence, the arbitration materials, including the pleadings, are not subject to a confidentiality obligation unless the tribunal orders otherwise. At the Working Group meeting held in Vienna in September 2006 some delegations were in favor of an extension of the confidentiality obligation to the proceedings. While in commercial disputes between private parties an explicit confidentiality rule might be useful, and was suggested in the Paulsson/Petrochilos report, we submit that such an extension would be completely inappropriate in investor-State arbitrations. A rule that would prevent a government from making its own submissions available to the public, for instance, would fly in the face of principles of good governance and human rights, and thus undermine the credibility and legitimacy of the arbitral proceedings. Further, access to documents produced in the arbitration is necessary to operationalize provisions regarding *amicus curiae* submissions (discussed below). For example, a non-disputing party requesting leave to submit an *amicus curiae* brief to a tribunal could not elaborate on whether its perspective, knowledge or insight is different from the disputing parties' or useful to the tribunal, if the record remains secret. Likewise, it would be impossible for a non-disputing party to prepare a submission within the scope of the dispute when access to pleadings is denied.

NAFTA parties have addressed the issue of confidentiality of documents in the 31 July 2001 Notes of Interpretation of Certain Chapter Eleven Provisions, pursuant to which the Free Trade Commission declares: "Nothing in NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration and nothing in NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal".[19] The Interpretation also requires NAFTA Parties to make all documents publicly available "in a timely manner," subject to certain protections for

[19] NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter Eleven Provisions (31 July 2001), §§ A1-A2a. [hereinafter Interpretation]

confidential business and information which is privileged or otherwise protected from disclosure under a Party's domestic law.[20]

The United States has also maintained that a Chapter Eleven tribunal cannot insulate any documents otherwise obtainable through the U.S. Freedom of Information Act (FOIA), the major U.S. law on public access to information. In addition, all the FTAs and BITs negotiated by the United States referred to above expressly provide for the transparency of the arbitration, including access to documents in arbitrations under the UNCITRAL rules.

A clear and consistent trend towards allowing public access to documents in proceedings is also developing in the World Trade Organization (WTO). In addition to panel and Appellate Body rulings, the WTO also typically makes several documents available on its website, including the request for consultation and the subsequent request for establishment of a panel, the notification of appeal, and status reports.

For the reasons provided above, and in line with trends in public international law processes, we believe the UNCITRAL Rules should include a rule providing guidance to arbitral tribunals in favor of transparency in disputes between an investor and a State with respect to arbitration materials, including pleadings.

PROPOSAL: Insert two additional sentences to Article 15(3):

15(3): All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party. In a dispute arising directly out of an investment, between a State and a national of another State, the secretary of the tribunal shall forthwith dispatch in electronic form a copy of all documents received or issued by the tribunal to the UNCITRAL secretariat, subject to redaction of confidential business information and information which is privileged or otherwise protected from disclosure under a party's domestic law. The UNCITRAL secretariat shall post all such documents on the UNCITRAL website without delay.

5. Ability to provide input to the tribunal – new Article 15(4)

The UNCITRAL Arbitration Rules are silent with respect to the possibility of tribunals to accept and consider *amicus curiae* briefs. Article 15(1) addresses generally the authority of the arbitral tribunal and has been held to confer the power on the tribunal to accept *amicus curiae* briefs, for instance in the *Methanex* case. Article 15(1) provides as follows:

> *Subject to these 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 case.*

[20] *Id.* at § A2b (providing exceptions for (i) confidential business information; (ii) information which is privileged or otherwise protected from disclosure under law; and (iii) information that must be withheld pursuant to relevant arbitral rules). The Interpretation also provides exceptions under NAFTA Articles 2101 (national security) and 2105 (information that would impede law enforcement or affect personal privacy), FTC Interpretation, *supra* note 1, at § A3.

Until the 2006 revision of the ICSID Arbitration Rules, the ICSID Rules, too, were silent with respect to the *amicus curiae* question. However, under the "old" ICSID rules, the practice had already emerged for tribunals to accept briefs of *amici*. For example, in the *Suez/Vivendi* case, the ICSID tribunal unanimously concluded that Article 44 of the ICSID Convention, which grants the tribunal residual power to decide procedural questions not treated in the Convention itself or the rules applicable to a given dispute, "grants it the power to admit *amicus curiae* submissions from suitable non-parties in appropriate cases".[21] The revised ICSID rules integrate that practice in an explicit provision allowing tribunals to accept amicus briefs, with or without the consent of the parties.

Rule 37(2) of the new ICSID Arbitration Rules provides, *inter alia*:

> *Submissions of non-disputing parties to the tribunal*
>
> *After consulting both parties, the tribunal may allow 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 regarding a matter within the scope of the dispute.*

The ICSID provision permits a tribunal to allow *amicus* participation without the approval of one or both of the arbitrating parties. While Rule 37(2) requires a tribunal to consult with the parties, it does not allow either or both parties together to veto a decision by a tribunal. This is consistent with the very concept of a friend of the court that serves to provide useful information to the tribunal, while leaving it up to the tribunal to determine how to use that information.

The Paulsson/Petrochilos report supports the view that the UNCITRAL Rules should provide explicit rules regarding *amicus curiae* briefs. The authors write:

> Article 15(1) of the Rules, providing that the "tribunal may conduct the arbitration in such manner as it considers appropriate", has been held to confer the power on the tribunal to accept *amicus curiae* briefs in written form. Especially in light of the frequent use of the UNCITRAL Rules in arbitrations under international investment treaties, we believe and propose that such a power should be made explicit in the Rules.[22] [footnotes omitted]

We agree that the UNCITRAL Rules should include an explicit reference to *amicus curiae* briefs and propose to use a provision along the lines of Article 37(2) of the amended ICSID Arbitration Rules. Article 37(2), which has been in effect since April 2006, provides the tribunal with the power to allow friends of court to file a written submission, and sets out parameters how this should be done.[23]

Finally, experience suggests that the process for *amicus* submissions (including the procedure for seeking permission of the tribunal) should be standardized to ensure it is effective. The NAFTA States have adopted a special process for this, which could be adapted with little difficulty to the UNCITRAL Rules.

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[21] Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A., v. The Argentine Republic, *Order in Response to a Petition for Transparency and Participation as Amicus Curiae,* ICSID Case No. ARB/03/19 (May 19, 2005), para. 16.
[22] Paragraph 133.
[23] The same language is used in the amended Additional Facility Rules at Schedule C, 41 (3).

PROPOSAL: Add a new paragraph (4) to Article 15 providing as follows:

15(4): *In a dispute arising directly out of an investment, between a State and a national of another State, the tribunal may allow 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 regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the tribunal shall consider, among other things, the extent to which :*

(a) the non-disputing party submission would assist the tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; and

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

The tribunal shall ensure that non-disputing party submissions do not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on non-disputing party submissions.

ANNEX

COMPARISON OF PROVISIONS OF THE EXISTING RULES AND THE PROPOSED RULES

Article	Existing Rule	Proposed Changes	Proposed Rule
3(5)		**3(5)** Following the appointment of an arbitral tribunal in a dispute arising directly out of an investment, between a State and a national of another State, the president of the tribunal shall forthwith dispatch a copy of the notice of arbitration and the agreement on the composition of the tribunal to the UNCITRAL secretariat, which shall post it on the UNCITRAL website without delay.	**3(5)** Following the appointment of an arbitral tribunal in a dispute arising directly out of an investment, between a State and a national of another State, the president of the tribunal shall forthwith dispatch a copy of the notice of arbitration and the agreement on the composition of the tribunal to the UNCITRAL secretariat, which shall post it on the UNCITRAL website without delay.
15(3)	**15(3)** All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party.	**15(3)** All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party. In a dispute arising directly out of an investment, between a State and a national of another State, the secretary of the tribunal shall forthwith dispatch in electronic form a copy of all documents received or issued by the tribunal to the UNCITRAL secretariat, subject to redaction of confidential business information and information which is privileged or otherwise protected from disclosure under a party's domestic law. The UNCITRAL secretariat shall post all such documents on the UNCITRAL website without delay.	**15(3)** All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party. In a dispute arising directly out of an investment, between a State and a national of another State, the secretary of the tribunal shall forthwith dispatch in electronic form a copy of all documents received or issued by the tribunal to the UNCITRAL secretariat, subject to redaction of confidential business information and information which is privileged or otherwise protected from disclosure under a party's domestic law. The UNCITRAL secretariat shall post all such documents on the UNCITRAL website without delay.
15(4)		**15(4)** In a dispute arising directly out of an investment, between a State and a national of another State, the tribunal may allow 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 regarding a matter within the scope of the dispute. In determining whether to allow	**15(4)** In a dispute arising directly out of an investment, between a State and a national of another State, the tribunal may allow 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 regarding a matter within the scope of the dispute. In determining whether to allow such

		such a filing, the tribunal shall consider, among other things, the extent to which: (a) the non-disputing party submission would assist the tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; and (b) the non-disputing party submission would address a matter within the scope of the dispute. The tribunal shall ensure that the non-disputing submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.	a filing, the tribunal shall consider, among other things, the extent to which: (a) the non-disputing party submission would assist the tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; and (b) the non-disputing party submission would address a matter within the scope of the dispute. The tribunal shall ensure that the non-disputing submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.
25(4) **25(4) bis**	Hearings shall be held *in camera* unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are examined.	**25(4)** Except in a dispute arising directly out of an investment, between a State and a national of another State, hearings shall be held *in camera* unless the parties agree otherwise. […] **25(4) bis** In a dispute arising directly out of an investment, between a State and a national of another State, hearings shall be open to the public. The tribunal shall establish appropriate logistical arrangements, including procedures for the protection of confidential business information or information which is privileged or otherwise protected from disclosure under a party's domestic law.	**25(4)** Except in a dispute arising directly out of an investment, between a State and a national of another State, hearings shall be held *in camera* unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are examined. **25(4) bis** In a dispute arising directly out of an investment, between a State and a national of another State, hearings shall be open to the public. The tribunal shall establish appropriate logistical arrangements, including procedures for the protection of confidential business information or information which is privileged or otherwise protected from disclosure under a party's domestic law.

32(5) **32(5) bis**	The award may be made public only with the consent of both parties.	**32(5)** Except in a dispute arising directly out of an investment, between a State and a national of another State, the award may be made public only with the consent of both parties. **32(5) bis** In a dispute arising directly out of an investment, between a State and a national of another State, any award or other decision of the arbitral tribunal may be disclosed or made public by either of the parties without the consent of the other party; and the president of the tribunal is directed to dispatch a copy of all awards and other decisions to the UNCITRAL secretariat as they are issued, which shall without delay post them on the UNCITRAL website.	**32(5)** Except in a dispute arising directly out of an investment, between a State and a national of another State, the award may be made public only with the consent of both parties. **32(5) bis** In a dispute arising directly out of an investment, between a State and a national of another State, any award or other decision of the arbitral tribunal may be disclosed or made public by either of the parties without the consent of the other party; and the president of the tribunal is directed to dispatch a copy of all awards and other decisions to the UNCITRAL secretariat as they are issued, which shall without delay post them on the UNCITRAL website.

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