



## SUMMARY

On May 31 and June 1, 2010, the International Centre for Settlement of Investment Disputes (ICSID), for the first time, webcast its hearing in real-time to the public in the *Pac Rim Cayman LLC v. Republic of El Salvador* case. ICSID's decision is a major step towards increasing transparency in investor-State arbitrations, as the debate over webcasting judicial proceedings in international dispute settlement has moved to international economic dispute settlement bodies.

While international economic dispute bodies have been reluctant to webcast their oral proceedings, domestic and international judicial bodies are increasingly webcasting their oral arguments. Webcasting leads to improved transparency, awareness, accessibility, and accountability. This *Issue Brief* highlights the considerable strides made by domestic and international judicial bodies in webcasting, and analyzes the efforts and possible future increases in webcasting in international dispute settlement.

## INTRODUCTION

The ability of the public and the press to watch judicial proceedings is a significant component of what makes governments transparent, accessible, and accountable. This principle of open justice, has long been formally recognized in constitutional and human rights texts, becoming enshrined domestically, for example, in the Sixth Amendment of the U.S. Bill of Rights and, in international human rights instruments, such as Article 14 of the International Covenant on Civil and

Political Rights (ICCPR) and Article 6 of the European Convention for the Protection of Human Rights. In both the ICCPR and the European Convention, the right entitles everyone to a fair and public hearing by an independent and impartial tribunal established by law.

The advancements of audio-visual technology—photographic equipment, television, and more recently, the Internet—have moved us towards a broadened concept of open justice; they have expanded the audience of judicial proceedings, enabling people around the world to access judicial proceedings, oftentimes from the comfort of their home, office, library or Internet café. In this context, the principle of open justice has often interacted with the principles of freedom of speech and of the press, which have been at the forefront of many judicial decisions and debate. However, as new technology and changed attitudes have begun to tip the scales in a longstanding debate, judiciaries have more recently begun using Internet technology to promote and facilitate public access to their judiciary proceedings by webcasting.

Webcasting is the method of broadcasting live audio and video in real-time to audiences all over the world via the Internet. Webcasting is used extensively in the commercial sector, e.g., for investor presentations and seminars, and for related communications activities. Webcasting should not be confused with web-conferencing or webinars, which are designed for person-to-person interaction.

Although webcasting has been in existence for twenty years, it was initially slow to gain acceptance for several reasons: poor video quality, obtrusive equipment, network bottlenecks, and high cost. But technological and other improvements have led to better quality, lower costs, and increased accessibility, making webcasting an excellent tool for expanding public access to judicial proceedings.

As technology improves, the number of domestic and international judiciaries that provide webcasting of their court proceedings continues to grow. Yet, while various domestic and international judicial proceedings have begun providing webcasting, including the European Court of Human Rights (ECHR), the International Court of Justice, and the Permanent Court of Arbitration (PCA), international economic dispute settlement mechanisms, in particular the World Trade Organization (WTO) and the United Nations Commission on International Trade Law (UNCITRAL), lag behind in this respect.

The international settlement of economic disputes plays an increasingly important role in our globalized and interconnected world. Arbitrations involving States or State entities involve issues of public interest not only in the substantive and financial outcome of the arbitration, but also in the arguments and factual assertions exchanged during the process.<sup>1</sup> The subject matter of many international economic disputes affects the daily life of citizens, and many cases impact the cost and availability of public services such as water, waste management, and electricity.

This *Issue Brief* first discusses the reasons judicial bodies decided to webcast, providing a brief overview of the various

institutions throughout the world that webcast its dispute proceedings. Second, it discusses additional benefits that result from webcasting, as well as concerns associated with webcasting judicial proceedings. Third, it concludes with a discussion on efforts to provide webcasting in international economic dispute settlement bodies.

## **WEBCASTING JUDICIAL PROCEEDINGS: CAUSES, BENEFITS AND CONCERNS**

With the advancement of technology, webcasting judicial proceedings is becoming more common, driven by improvements in the quality, speed and reliability of the Internet to distribute content, as well as an increasing acceptance by court systems of the benefits that webcasting brings. Some proceedings are only available live; others are only offered archived, or by special court permission. Each court differs as how it provides webcasting services. This section discusses: 1) the reasons that judicial bodies decided to webcast its proceedings, highlighting the domestic and international judicial bodies that either currently allow or have, at one time, allowed their judicial hearings to be webcasted; 2) the benefits of webcasting; and 3) the concerns associated with webcasting.

### *1. Causes: Transparency, Awareness and Direct Accessibility*

Local, federal and international judiciaries began webcasting their hearings to increase transparency and accountability, awareness and accessibility. Webcasting humanizes judicial bodies, allows the viewer to witness and associate the individuals in the webcast with the content and the outcome, and improves trust and institutional credibility. Although these

issues overlap, they will be discussed separately in this section.

### **Transparency and Accountability.**

Webcasting can provide immediate access to information with live footage, with which viewers can associate. For example, the Inter-American Commission on Human Rights (IACHR) began webcasting its thematic hearings “to deepen the transparency of its processes and broaden access to the information it generates.”<sup>2</sup> Other international judiciaries, including the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda, the Cambodia War Crimes Tribunal and the Permanent Court of Arbitration (PCA), also webcast their proceedings to increase transparency. ICTY Judges decided that the proceedings should be recorded and made available to the public for the following reasons: “to make sure that justice would be seen to be done, to dispel any misunderstandings that might otherwise arise as to the role and the nature of the Tribunal proceedings and to fulfill the educational task of the Tribunal.”<sup>3</sup>

The PCA, an intergovernmental organization with over one hundred member States, features a webcast of the judicial proceedings in the *Abyei* Case, an arbitration between Sudan and the SPLM/A over the Abyei region. This was the first webcast of arbitration between a State and a non-State actor. The case was webcast because both parties, the SPLM/A and the Sudanese government, committed to the “maximum transparency throughout the proceedings,” including opening the oral proceedings to the public. In a press release, the SPLM/A emphasized that “we believe that unrestricted access to public information is central to good governance and justice as per the provisions of our National

Constitution.”<sup>4</sup> Thus, the SPLM/A and the Sudanese government decided to webcast the proceedings as a way to increase transparency. However, this case illustrates that webcasting judicial proceedings in the PCA is only achieved when both parties in the arbitration consent.

China, a country where the Internet is highly regulated by the government and closed judicial hearings occur quite frequently, launched its first website broadcasting Beijing's court trials in September 2009. In discussing the decision to webcast Beijing's court trials, Zhai Jingmin, Vice President of Higher People's Court of Beijing, noted that: “the establishment of the live broadcast website not only plays an active role in strengthening open trials, promoting justice, improving efficiency and enhancing judges' trial level, but also makes it more convenient for the public to supervise the people's courts,”<sup>5</sup> further noting that: “courts in Beijing will continue to develop a live online broadcast video system, so that the public's wish to watch court trials at home can be satisfied.”

Yet, other domestic judiciaries, such as Australia and the United Kingdom, practice a more restrictive policy of webcasting. Rather than allowing complete live streaming of judicial proceedings, the judiciary of Western Australia embarked on a project with the University of Western Australia to create edited packages of civil and criminal trials to be screened on the university's and the court's websites. For the first time at any court in the United Kingdom, the recently created Supreme Court records its proceedings and makes them available to the media. The Supreme Court's objective is to transform the public's awareness of justice at the highest level, with the aim of being as transparent as

possible in its judgments and proceedings. However, footage of Court proceedings has not been made available to the public on the Internet.

**Awareness.** Domestic and international judicial bodies decide to webcast to improve awareness by directly reaching out to its public and educate them about the operation of the judicial branch. In the United States, a survey conducted by the Florida Supreme Court in 1996, revealed that Floridians were unhappy and lacked public trust and confidence with their judiciary because of a lack of access to the courts and court-related information. The survey also pointed out that most Floridians lacked basic knowledge about the courts, i.e. how the courts worked and the role of judges.<sup>6</sup> Responding to this survey, the Florida Supreme Court pioneered the use of the Internet for increasing its accessibility to the public, becoming the first U.S. judicial site on the Internet 1994, posting some documents online, and in 1997, became the first court to put live audio and video of its oral arguments on the Internet.

Since then, the number of U.S. states that use the Internet to provide live and archived webcasts of their oral arguments and other judicial proceedings continues to grow. Federal U.S. courts have begun experimenting with webcasting as well. In December 2009, the Ninth Circuit Court of Appeals, which includes 15 federal district courts, allowed its courts to experiment with video coverage in civil, non-jury matters. However, in January 2010, the U.S. Supreme Court barred the webcasting of a trial in the Northern District of California on the validity of the California Marriage Protection Act, or Proposition 8. Live proceedings are available on the Internet from at least 24 different U.S. state judiciaries.<sup>7</sup>

In Canada's Ontario Court of Appeal, cameras in the courtroom are generally prohibited under Ontario law; however, they are permitted for educational or instructional purposes, with approval from the presiding judge and consent from the parties and witnesses to the proceeding. Also, the Supreme Court of Canada – the first Supreme Court to webcast its hearings – began webcasting its proceedings in February 2009 to increase awareness and transparency, featuring in its website a list of the webcast of the hearings. However, to use a webcast or obtain a video recording for commercial or educational use, the Court requires interested individuals to fill out and submit an on-line form to the Court.

Brazil's Supreme Federal Court, called Supremo Tribunal Federal (STF) is the country's highest Constitutional Court. It operates a television channel called TV Justica (Justice Television), which can also be watched via the Internet from its website. TV Justica aims to raise awareness among citizens about their constitutional rights, and inform them about the activities and decisions from the Constitutional Court. TV Justica shows the hearings from the Plenary of the Supreme Federal Court, as well as different programs including interviews with scholars, Justices, and citizens. Some of the hearings are archived and available via YouTube. Individuals can also sign-up and receive messages from the STF on Twitter, which is a recently created social networking and blogging service that enables its users to send and read messages known as tweets.<sup>8</sup>

**Accessibility.** Judiciaries have also decided to webcast because of the accessibility advantages it holds over traditional media, particularly in regards to its direct accessibility, potential for in-depth

coverage, and global distribution. Webcasting enables the viewer to see the hearings directly rather than through a third party, such as a reporter or editor. Further, webcasting allows judicial proceedings to be covered in their entirety, which is often not possible for the media because of a lack of media resources, forum and interest in a case. The media's interests in judicial proceedings do not always coincide with the interests of the administration of justice.

For example, in British Columbia Canada, the first judicial proceeding to allow webcasting occurred in 2001 in *United Mexican States v. Metalclad Corporation* (2001 BCSC 664), when the Supreme Court of British Columbia allowed a petition by the Independent Media Center to webcast live the entire proceeding. In the British Columbia Supreme Court hearing, the presiding judge ruled that Independent Media could record the proceedings and streamline it on the Internet on condition that the hearings were covered in their entirety. As a result, ten days of hearings were recorded and some 40 hours of video together with background documents and interviews were made publicly available on Independent Media's webpage.

Webcasting has no geographic boundaries, while traditional media, including television stations, is centralized within a limited geographical area. Through the use of webcasting, citizens are able to access content wherever and whenever they want, depending on whether the hearings are available via 'live' or archived format. For example, in February 2004, the International Court of Justice (ICJ) first allowed its public hearing to be webcast live and in full in the case concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (request for advisory opinion), commonly referred to as the

*Israeli Wall* case. This decision was made in response to the interest shown by the general public, civil society and the media worldwide, and to better accommodate the public and the media due to very limited seating space at the Peace Palace in The Hague.<sup>9</sup> The ICJ intends to provide such webcasting in the future for cases of a similar nature.

In launching its webcasting project, the European Court of Human Rights President Jean-Paul Costa described it as "a significant step forward in making the Court's activities more visible and accessible."<sup>10</sup> He further described some of the benefits of webcasting: "Lawyers, academics, journalists and ordinary citizens, many of whom would never have been able to come to Strasbourg to attend a hearing, will be able to follow the proceedings from their homes and offices. They will be able to see and hear for themselves the arguments advanced for and against a finding of a human rights violation in respect of some of the most sensitive issues of the day. This will bring the Convention closer to the ordinary citizens whom it is intended to serve and protect."<sup>11</sup>

In its 2004 budget report requesting funding for webcasting, the ECHR discussed three main advantages and reasons for webcasting: first, the public nature of court hearings is a fundamental component of the fair trial guarantee; second, the increased visibility of the Convention system and the court; and third, as an educational tool in increasing human rights awareness and preventing human rights abuse.<sup>12</sup>

2. *Benefits: Time and Cost Savings, More Accurate Reporting, Performance Reviews and Partnerships with Universities*

In addition to creating a judiciary that is both more transparent and accessible to the public, as well as a public that is more aware of judicial proceedings, the use of webcast technology leads to important benefits including: more accurate reporting; time and cost savings associated with increased accessibility; content review, self-evaluation and insights; and partnerships with universities.

**More Accurate Reporting.** Webcasting has led not only to increased media coverage of the courts, but also to more positive and more accurate reporting. For example, the ECHR noted in its 2004 budget report requesting funding for webcasting that “it is undeniable that webcasting the Court’s most important hearings would facilitate media coverage of the proceedings thereby raising the overall visibility of the Court, of the Convention system and therefore of the Council of Europe in general. In this connection and in terms of potential audience, it is worth recalling that the Court’s Internet site received some 27 million visits in 2002.”<sup>13</sup> News media—especially reporters from smaller organizations that cannot afford to travel—no longer have to rely on secondhand reports of court cases, as they can now watch them on the Internet. Also, reporters who are able to attend the proceedings are able to use the archived webcasts to check the accuracy of their quotations.

**Time and Cost Savings.** Due to increased accessibility, webcasting allows the potential for time and cost savings by the media, lawyers and government officials. For instance, individuals do not always have to attend hearings, and they can continue to work at their desks during a meeting, rather than waiting for a hearing to be called. In addition, individuals can view proceedings via webcast and clarify decisions made and

issues raised. If they do not need to attend the hearing, they do not need to travel, thus saving on travel costs. For example, in October 2002, a newspaper reporter in Gary, Indiana saved himself a 240-mile roundtrip drive by accessing an oral argument via webcasting provided by the Indiana Supreme Court website.<sup>14</sup> In addition, there can be a reduction in the need to brief members of staff on what went on in a meeting, as staff would have the opportunity to watch for themselves. Finally, people inquiring about particular points in a hearing, or certain decisions can be directed to the webcast.

**Content Review: Self-evaluation and Insights into Judicial Thinking.** Groups other than the media are also benefiting from webcasting. According to a staffer at Maryland’s Court of Information Office, many lawyers use the archived videos of the webcast in order to see how they performed in court that day.<sup>15</sup>

Lawyers and even clients can watch a webcast of an oral argument on a similar topic to provide significant insights into the judiciary’s thinking to prepare for an argument.

**Partnerships with Universities.** Webcasting presents an opportunity for judiciaries to form partnerships with universities to help defray the cost of webcasting proceedings. For example, in the United States, the Supreme Court of Texas partnered with St. Mary’s University in 2007 to webcast its oral arguments live and archived, with the university providing the design, construction, and equipment costs for the webcasting project.<sup>16</sup> To ensure the court’s right to the material, the Texas Office of Court Administration, in its contract with the university, required that any intellectual property produced as part of

an oral argument webcast is the property of the state, including any value added provided by the law school, such as titling on the video. The Supreme Court of Texas formed the partnership with the university, beginning in 2005, after the Texas Legislature rejected the Court's request for legislative funding to provide webcasting services of its court proceedings. The Court was interested in creating the webcasting project to raise awareness of the judiciary, while the law school was interested in the joint project because it would, among other reasons, provide an educational opportunity for its students and the general public. Similar situations exist with Suffolk University Law School, in cooperation with the Supreme Judicial Court of Massachusetts, and the University of Kentucky School of Law, working with the Kentucky Supreme Court.<sup>17</sup>

Universities abroad have followed suit. For example, the courts of Western Australia embarked on a project with the University of Western Australia to create edited packages of civil and criminal trials to be screened on the university's and the court's websites.

### 3. *Concerns: Financial Cost, Quality, and Content Manipulation*

Although our research indicates that most judiciaries that webcast their arguments have had positive experiences, several concerns remain. Concerns associated with webcasting involve financial costs, quality concerns, and content manipulation.

**Financial Cost.** Like any system, webcasting technology comes at a financial cost. These costs vary depending on how the courts and governments concerned want to use the system. In addition, operating the

system also comes with the cost of staff time, in terms of running a proceeding. For most courts providing webcasting, they have the choice of whether they want to webcast live, archived or both, and the equipment they need to do this (in terms of cameras, decoders, etc.). In addition, courts need to take into account the amount of staff and other resources needed to operate the system effectively.

Regarding the cost of webcasting, there is an incremental cost per viewer—i.e. bandwidth costs money, and each additional viewer adds to this cost. In terms of its initial outlay, for example, the ECHR, in its 2004 budget request for webcasting, asked for a sum of 600,000 Euros as a one-off investment and 120,000 Euros for annual costs to webcast its public hearings -- 30 to 40 public hearings a year. The ECHR noted in its request that “although the costs involved may be regarded as high, it should be recalled that 600,000 is a one-off investment.”<sup>18</sup>

Compared to most judicial proceedings, webcasting international economic dispute settlement cases are usually less expensive as many international institutions that house international disputes, such as the World Bank, the United Nations, and the WTO, already have the equipment and capability to webcast, and use that capability to webcast other types of activities. In the *Pac Rim* case, ICSID used equipment and staff at the World Bank to webcast the hearing. As discussed above, judiciaries have also partnered with universities to defray the costs.

**Quality Concerns.** There are also quality concerns that need to be considered in webcasting. This refers to the quality of the image and audio transferred from the servers of the distributor to the home screen

on a user, also referred to as stream quality. Higher quality video requires higher bandwidth and faster connection speeds. If there are too many viewers attempting to access the webcast for the available bandwidths, the result can be server overloads. For example, in December 2007, the ICTY's provider experienced technical difficulties, which caused serious disruption to broadcasts of all on-going ICTY trials.<sup>19</sup> Both the ICTY Registry and the outside provider looked for ways to ensure that the system become operational again and worked on a transitional project to solve the malfunction and subsequently to transfer the responsibility for the operation of the Internet broadcast to the ICTY technical services.

To ensure that the webcast hearings reached the widest possible audience, the ICJ decided to provide for two streaming options that would be suitable for different types of Internet connection: audio and video streaming for fast broadband connections; and audio and video streaming for slower ordinary telephone connections.<sup>20</sup> Although there still may be temporary pauses in the live video coverage due to high traffic on the ICJ's website, the same footage is made available via the archive link. Thus, if someone misses the live hearings because of website congestion or of the time difference in someone's country, the hearings are available on the "Video Archive," which is where the webcast hearings will be archived after every half-day session.

**Content Manipulation.** As previously mentioned, not all judiciaries support webcasting. For example, in *R. v.*

*Pilarinos and Clark*, heard in the Supreme Court of British Columbia in 2002, the media requested to bring one camera into the courtroom, pooling to other media outlets and to webcast the trial, showing the trial on a Court television station. In her judgment, Madam Justice Bennett upheld the trial court's ruling, affirming that although webcasting would present more thorough coverage than television, "if the trial were webcast on the Internet, it would provide millions of people with uncontrolled access to the proceedings. The ability to manipulate images on the Internet is well-known and would seriously affect not only the privacy of all those whose images are captured and broadcast, but also the dignity and decorum of the courtroom." Despite the concern for content manipulation, many judiciaries, such as Canada, Australia and the United Kingdom, have created mechanisms, enabling the judiciary to control who sees the content and how they see it.

#### **EFFORTS TO WEBCAST INTERNATIONAL ECONOMIC DISPUTE SETTLEMENT**

In a landmark decision, the International Centre for Settlement of Investment Disputes (ICSID) made its hearing on preliminary objections in the *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12) available to the public via webcast in real-time. ICSID based its decision on Article 10.21.2 of the Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA), which requires hearings to be open to the public.

ICSID's decision was a major step towards increasing transparency in economic dispute settlement, as it meant that the public around the world had the opportunity to access the hearings. Noteworthy is that the hearing was webcast in both English and Spanish, which allowed citizens in El Salvador the opportunity to be informed of the efforts to halt harmful metals mining in their country and the private sector's response to those efforts in their language. ICSID reported that, on the first day of the hearing, there were 150 hits during the live webcast. Out of the 150 hits, 120 of them viewed the hearings in English, and 30 in Spanish. The hearings have since been archived on ICSID's website for further viewing.

ICSID's decision to webcast the hearings occurred after many years of advocacy. Civil society organizations, including the Center for International Environmental Law (CIEL), have long advocated for more transparent mechanisms for dispute settlement generally, including access to information and public participation in proceedings at ICSID, UNCITRAL, the North American Free Trade Agreement (NAFTA), and the WTO. International economic dispute settlement plays an increasingly important role, yet lack transparency, opportunities for public participation, and accountability. Given the clear presence of important public interest in these cases, it is essential that these institutions and their respective processes be as transparent and accessible as possible, rather than being far-removed from the people they ultimately affect. Furthermore, webcasting enables individuals to provide input into the process as friends of the court, i.e., *amicus curiae*. Webcasting allows individuals to access information produced in the arbitration, which would be necessary to prepare more useful and accurate input.

Webcasting the *Pac Rim* case at ICSID is of particular relevance to the operation of arbitral rules used in investment arbitrations. UNCITRAL arbitration rules, which are used around the world, were developed thirty years ago primarily for

#### **Textbox 1**

##### **CIEL urges UNCITRAL to amend their arbitration rules to make disputes transparent, recommending webcasting.**

CIEL is engaged in the revision process of the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) – rules that are the most widely used in private commercial disputes and which are thought to be most widely used just before ICSID rules in disputes between investors and States. Revising UNCITRAL's arbitration rules is a unique opportunity to create a template for more transparent and participatory investment dispute settlement.

Since 2007, CIEL has been urging members of UNCITRAL's Working Group II (the group mandated for revising the arbitration rules) to get the issues of transparency onto the agenda, recommending that hearings are open and webcast to the public. At UNCITRAL's Commission meeting in June 2008, in which CIEL participated, UNCITRAL's main body reached consensus that the UNCITRAL arbitration rules should provide for transparency in arbitrations brought by investors against States. It mandated Working Group II to begin discussions on transparency immediately after it finishes its work revising the generic arbitration rules.

This decision is a direct result of efforts by CIEL and its partner, the International Institute for Sustainable Development (IISD). Both CIEL and IISD received official status as Observers to Working Group II in February 2007; obtaining observer status required substantial work, including contacting various UN agencies.

traditional commercial arbitrations, i.e., arbitrations between private commercial entities regarding business disputes; but they are now used in arbitrations to which one or more States are a party and that raise important public policy issues. Investment arbitrations conducted under the existing UNCITRAL Arbitration Rules typically occur in secret, lacking fundamental elements that characterize modern democracies and are essential to sound and credible dispute settlement. Often, it is impossible to even know whether a procedure has been initiated or what the outcome is. In 2006, UNCITRAL embarked on a process of revising its arbitration rules. CIEL has taken an active role in ensuring that UNCITRAL's new arbitration rules include provisions relating to transparency and public participation, including webcasting its hearings (see box 1).

Additionally, CIEL has advocated for hearings to be available to the public via webcast in disputes involving NAFTA, particularly in the *Cases Regarding the Border Closure due to BSE Concerns* (see box 2). Although NAFTA, which came into force on January 1, 1994, creating a free trade area between Canada, Mexico, and the United States, is silent on the issue of public access to arbitration hearings, hearings have been open to the public only with the consent of both disputing parties. Three NAFTA tribunals have allowed open hearings: *UPS*, *Methanex*, and *Canfor*. The experiences in these cases proved that allowing public access to investment arbitral hearings was possible at low cost and without interfering with the hearing or causing any other problems.

With respect to the WTO, civil society organizations, including CIEL,<sup>21</sup> experts, and some countries, such as the United States and Canada, have called for

## Textbox 2

### CIEL urges open hearings and webcasting in NAFTA case

In October 2007, CIEL requested that the United States petition the North American Free Trade Agreement (NAFTA) Chapter 11/United Nations Commission on International Trade Law (UNCITRAL) Arbitral Tribunal hearing the *Cases Regarding the Border Closure due to BSE Concerns* to open all hearings to public viewing. The Tribunal in the *BSE case* had only allowed a one-way transmission to the University of Calgary in Canada, which is where a lawyer representing the claimants teaches. CIEL suggested the hearing be open to physical public presence, video transmitted, and webcast.

The *BSE case* raised a number of highly relevant environment and health issues. Generally, the U.S. border was closed to the import of live Canadian cattle after an outbreak of "mad cow" disease was detected in Canada. Canadian cattle-ranchers affected by this measure brought a claim under the investment chapter of the NAFTA. It is important for both the Canadian and the U.S. public to know and understand what exactly is at stake in this dispute. The one-way video transmission of the hearing to a room at the University of Calgary in Canada is insufficient to fulfill the U.S. public's interest in this case. It is essential that the public be not only fully informed, but also given every opportunity to follow and understand the mechanisms of NAFTA arbitrations.

WTO Members to formalize open proceedings, including webcasting. The WTO has the equipment and capability to webcast. In recent years, there have been proposals to make the disputes open to the public, arguing that that open hearings, including webcasting would increase transparency, accessibility and confidence (including that of WTO Members). Both the

United States and Canada<sup>22</sup> submitted proposals, calling for all substantive meetings of the panels, Appellate Body and all arbitration to be open to the public; for all submissions to panels, the Appellate Body and arbitrators to be public, except those portions dealing with confidential information. However, the proposals remain controversial among many government delegations. In particular, there was much opposition to the U.S. proposal, as many developing country Members, such as Brazil, Chile, India, Indonesia, Mexico, Malaysia, the Philippines and Uruguay, rejected the proposal, which they said would undermine the inter-governmental character of the WTO.<sup>23</sup>

Despite the controversy of its previous proposal, the United States, submitted another proposal in July 2005 on improving transparency in the WTO dispute settlement rules.<sup>24</sup> This proposal suggested that the WTO broadcast its proceedings, recommending: the WTO Secretariat control any electronic broadcast; the WTO explore various options to ensure that the broadcast be as unobtrusive as possible, including a voice-activated camera to focus on and track only those who are speaking; and the WTO discuss the possibility of allowing the hearings to be broadcasted, as that would provide greater flexibility concerning viewing times, although it would raise questions about who would have rights to re-broadcast. As the proposals to increase transparency, including webcasting, remain controversial, they have not, as of yet, been included in the *Proposed Amendments to the WTO's Dispute Settlement of Understanding*. Only time will tell whether webcasting becomes an amendment to the DSU, however, there has been support and progress in improving transparency in the WTO's Dispute Settlement.<sup>25</sup>

### **Textbox 3.**

#### **CIEL urges the WTO and its Member States to webcast its proceedings.**

CIEL and partners have written letters to the European Commission, the office of the U.S. Trade Representative, and Canada's Minister of International Trade requesting their governments to make open hearings and webcasting their official policy in all WTO disputes. Since open processes have not been formalized in the WTO, CIEL has intervened by requesting that hearings be open and that webcast is available in specific cases: it submitted a request to the WTO Dispute Panel, asking it to webcast its hearing in the *Brazil-Retreaded Tyres* case (WT/DS332) in 2006. In 2007, CIEL, along with partners, including the Agency for Cooperation and Research in Development (Kenya), Both ENDS (Netherlands) and Jagrata Juba Shanga (Bangladesh), petitioned the WTO Compliance Panel in *EC - Bananas III* case (WT/DS 27) to provide webcasting of the proceedings.

CIEL believes that opening hearings to the public is an important and necessary step in increasing transparency in dispute proceedings. While transparency does not solve the problems relating to the disciplines themselves, it can improve the quality of the WTO's Dispute Settlement Body's decisions and enhance public understanding of both the problems and the benefits inherent in the multilateral trading system.

Despite the failure to allow open hearings in the WTO's dispute settlement rules, certain WTO Member States, as consenting disputing parties, have taken measures to provide open hearings in its dispute settlement process.<sup>26</sup> In 2005, the three disputing parties in the *US-Hormones (Continued Suspension)* case<sup>27</sup>—the European Commission, the United States and Canada—had requested that the proceedings with the parties and scientific

experts be open to the public, which enabled the WTO panel to allow closed-circuit television cameras into the courtroom. The *Beef Hormones* case set a precedent in cases where all parties agreed to make hearings accessible to the public.

Soon after, other hearings were open to the public,<sup>28</sup> and in July 2008, the first ever public viewing of the WTO's Appellate Body procedures occurred, as the three disputing parties in the *Beef Hormones* case continued the call for open hearings by requesting the WTO's Appellate Body proceedings in the *Beef Hormones* case be open to the public, again via closed-circuit broadcasting in Geneva. Although the parties hailed the Appellate Body hearing as an "improved evolution" for increasing transparency in WTO's dispute settlement, some Members participating in the case as third parties, particularly China and Brazil, were opposed to open hearings.<sup>29</sup> Hence, to reflect the dissension among Members, the broadcast of the public hearing was cut whenever China and Brazil intervened, as they had not given their permission for an open hearing. As open processes have not been formalized in the WTO, there has been

## CONCLUSION

Webcasting offers an opening into the dispute settlement process that allows the public to see the individuals involved in this forum at work. Webcasting is perhaps the only means through which many will have an opportunity to see dispute proceedings. Local, federal and international judiciaries began webcasting their hearings to increase transparency and accountability, awareness and accessibility. The benefits of webcasting dispute proceedings include: more accurate reporting; time and cost savings associated

inconsistency in supporting open hearings and in the method to which hearings are open (i.e., hearings have been open only where all parties in the dispute, as well as the dispute settlement panel agree, and only certain cases have been opened).<sup>30</sup>

Civil society organizations have called for WTO Members to formalize open proceedings, including webcasting. For example, civil society organizations, including CIEL, have written letters to the European Commission, the office of the U.S. Trade Representative, and Canada's Minister of International Trade requesting their governments make open hearings and webcasting their official policy in all WTO disputes (see text box 3). Moreover, since open processes have not been formalized in the WTO, civil society has also intervened by requesting that hearings are open and webcast is available in specific cases. Perhaps the WTO's open hearings will contribute to a more informed discussion of possible institutional changes to the system, including webcasting of its dispute proceedings.

with increased accessibility; content review, self-evaluation and insights; and partnerships with universities.

Although there are initial financial costs and quality concerns brought by webcasting technology, the benefits far outweigh any initial costs. Experience has shown a greater interest and understanding in the workings of proceedings since webcasting started.

ICSID's precedent-making decision to webcast the *Pac Rim* case occurred after many years of advocacy, and carries profound implications for the conduct of international economic dispute settlement. Civil society organizations, including the Center for International Environmental Law (CIEL), have long advocated for more transparent mechanisms for dispute settlement generally, including access to information and public participation in

proceedings at ICSID, UNCITRAL, NAFTA, and the WTO. Webcasting international economic dispute settlement hearings will allow many interested citizens and government officials, especially from developing countries, to watch the proceedings. It will also enable civil society in developing countries to participate in the proceedings by having the proper access to information necessary to submit an *amicus curiae* brief.

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<sup>1</sup> Daniel Magraw, Sofia Plagakis and Jessica Schifano, *Ways and Means of Citizens' Participation in Trade and Investment Dispute Settlement Procedures*, Social Science Research Network (July 2008), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1159770](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1159770); and Nathalie Bernasconi-Osterwalder, *Democratizing international dispute settlement: The case of trade and investment disputes*, 6th International Conference of New or Restored Democracies, Doha (Oct. 29, 2006), [http://www.ciel.org/Publications/ICNRD6\\_300ct06.pdf](http://www.ciel.org/Publications/ICNRD6_300ct06.pdf).

<sup>2</sup> IACHR Announces Webcast of Public Hearings of The 127th Regular Period of Sessions, <http://www.cidh.org/Comunicados/English/2007/8.07eng.htm>.

<sup>3</sup> A Report on the Audiovisual Coverage of the ICTY's Proceedings finds that Cameras contribute to a proper Administration of Justice. Dr. Paul Mason, A Report on the Audiovisual Coverage of the ICTY's Proceedings, The Hague (Apr 19 2000), <http://www.icty.org/sid/7869>.

<sup>4</sup> See [http://www.gossmission.org/goss/index.php?option=com\\_content&task=view&id=835&Itemid=193](http://www.gossmission.org/goss/index.php?option=com_content&task=view&id=835&Itemid=193).

<sup>5</sup> China's first website broadcasting live court trials launched in Beijing (September 18, 2009), <http://www.cctv.com/english/special/news/20090918/104130.shtml>.

<sup>6</sup> Robert Craig Waters, *Using the New Technology*, CTC7, (2001).

<sup>7</sup> U.S. Appellate Courts include: Alaska Supreme Court; Arkansas Supreme Court; Florida Supreme Court; Indiana Supreme Court; Kentucky Supreme Court; Massachusetts Supreme Judicial Court; Maryland Court of Appeals; Mississippi Court of Appeals; Mississippi Supreme Court; Missouri Supreme Court; Nebraska Court of Appeals; Nebraska Supreme Court; Nevada Supreme Court; New Hampshire Supreme Court; New Jersey Supreme Court; New York Court of Appeals; North Dakota Supreme Court; Ohio Supreme Court; South Dakota Supreme Court; Texas Supreme Court; Vermont Supreme Court; Washington Supreme Court; West Virginia Supreme Court; Wisconsin Supreme Court. Trial Courts include: Ninth Judicial Circuit of Florida; Delaware County Ohio Municipal Court; and Wise County, Virginia.

<sup>8</sup> The website for TV Justica is <http://www.tvjustica.jus.br/>. The YouTube page for the STF is <http://www.youtube.com/stf>; and the Twitter page for the STF is [http://twitter.com/stf\\_official](http://twitter.com/stf_official).

<sup>9</sup> Press Release 2004/26: Live Internet video coverage of the reading of the Court's Advisory Opinion on Friday 9 July 2004, from 3 p.m. (June 25, 2004), <http://www.icj-cij.org/docket/index.php?pr=5&p1=3&p2=1&case=131&p3=6&search=%22webcast%22>.

<sup>10</sup> Press release, Registrar, Launch of webcasting and new information about pending Court cases (June 25, 2007), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=819328&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

<sup>11</sup> Id.

<sup>12</sup> European Court of Human Rights - Budget requests for 2004, Rapporteur Group on Administrative and Budgetary Questions (November 10, 2003), <https://wcd.coe.int/ViewDoc.jsp?id=84745&BackColorInternet=9999CC&BackColorIntranet=&BackColorLogged=FDC864>.

<sup>13</sup> Id.

<sup>14</sup> Dr. Elizabeth R. Osborn, *Webcasting: It's not just about oral arguments anymore*, Future Trends in State Courts (2005), <http://www.ncsconline.org/WC/Publications/Trends/2005/AppCtsWebcastTrends2005.pdf>

<sup>15</sup> Interview, Staffer at Maryland's Court of Information Office, January 10, 2008.

<sup>16</sup> Bruce Hermes, *Webcasting in the Supreme Court of Texas*, Technology Experience Bulletin TEB: 2007-03, Court Information Technology Officers Consortium (June 2007).

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- <sup>17</sup>Richard Day, *Webcast to air Kentucky Supreme Court's oral arguments*, (Oct 25, 2007), <http://theprincipal.blogspot.com/2007/10/webcast-to-air-kentucky-supreme-courts.html>.
- <sup>18</sup>European Court of Human Rights - Budget requests for 2004, Rapporteur Group on Administrative and Budgetary Questions (Nov 10, 2003), <https://wcd.coe.int/ViewDoc.jsp?id=84745&BackColorInternet=9999CC&BackColorIntranet=&BackColorLogged=FDC864>.
- <sup>19</sup>See, <http://www.un.org/icty/>.
- <sup>20</sup>See <http://www.icj-cij.org/docket/index.php?pr=157&code=mwp&p1=3&p2=1&p3=6&case=131&k=5a>.
- <sup>21</sup>See [http://www.ciel.org/Tae/WTO\\_DisputeSettlement\\_11Oct06.html](http://www.ciel.org/Tae/WTO_DisputeSettlement_11Oct06.html); *Open dispute settlement hearings in the WTO, Letter to European Commissioner* (Oct. 4, 2006), [http://www.ciel.org/Publications/WTO\\_Dispute\\_EC\\_Oct06.pdf](http://www.ciel.org/Publications/WTO_Dispute_EC_Oct06.pdf); *Letter to Ambassador Schwab at USTR* (Oct. 10, 2006), [http://www.ciel.org/Publications/WTO\\_Dispute\\_USTR\\_Oct06.pdf](http://www.ciel.org/Publications/WTO_Dispute_USTR_Oct06.pdf); *Letter to Canada's Minister of International Trade* (Oct. 10, 2006), [http://www.ciel.org/Publications/WTO\\_Dispute\\_Canada\\_Oct06.pdf](http://www.ciel.org/Publications/WTO_Dispute_Canada_Oct06.pdf); *See Brazil-Measures Affecting Imports of Retreaded Tyres, Request for Public Hearing* (June 20, 2006), [http://www.ciel.org/Publications/BrazilTires\\_HearingLetter\\_20Jun06.pdf](http://www.ciel.org/Publications/BrazilTires_HearingLetter_20Jun06.pdf). See [http://www.ciel.org/Tae/Bananas\\_Webcasting\\_2Nov07.html](http://www.ciel.org/Tae/Bananas_Webcasting_2Nov07.html). *Request for web-casting of upcoming public hearing* (Nov. 2, 2007), [http://www.ciel.org/Publications/Bananas\\_Webcast\\_Nov07.pdf](http://www.ciel.org/Publications/Bananas_Webcast_Nov07.pdf).
- <sup>22</sup>See Dispute Settlement Body, *Contribution of the United States to the Improvement of the Dispute Settlement of Understanding of the WTO related to Transparency*, Communication of the United States, TN/DS/W/13 (Aug 22, 2002); Special Session of the Dispute Settlement Body, *Further Contribution of the United States to the Improvement of the Dispute Settlement Body*, Communication from the United States, TN/DS/W/46 (Feb 11, 2003); Dispute Settlement Body, *Transparency and Derestriction—Communication by Canada*, WT/GC/W/98 (September 22, 1998); and Dispute Settlement Body, *Transparency in WTO Work – Procedures for the Circulation and Derestriction of WTO Documents – Revised Proposals by the United States and Canada*, WT/GC/W/106 (October 13, 1998).
- <sup>23</sup>ICTSD, *DSU Review: Developing Countries Reject US Proposal on Transparency, Suggest Other Options*, Bridges Weekly Main Page, V. 6, No. 31 (Sept 18, 2002), <http://www.ictsd.org/weekly/02-09-18/story2.htm>.
- <sup>24</sup>See Special Session of the Dispute Settlement Body, *Contribution of the United States on some practical considerations in improving the dispute settlement understanding of the WTO related to Transparency and open meeting*, TN/DS/W/79 (July 13, 2005).
- <sup>25</sup>*The Future of the WTO: Addressing Institutional Challenges in the New Millennium*, Report by the Consultative Board to the Director-General Supachai Panitchpakdi (2005).
- <sup>26</sup>Marcos Orellana, *WTO and Civil Society*, in *The Oxford Handbook of International Trade Law* (Daniel Bethlehem et al. eds., 2009).
- <sup>27</sup>*US - Continued suspension of obligations in the EC - Hormones dispute*, DS320; and *Canada - Continued suspension of obligations in the EC - Hormones dispute*, DS321.
- <sup>28</sup>In November 2007, at the request of the parties, the WTO dispute panel opened to the public the hearings of the meeting on compliance in the *EC - Bananas III* case; *See European Communities - Regime for the Importation, Sale, and Distribution of Bananas: Recourse to Article 21.5 of the DSB by the United States*, WT/DS27 (2007).
- <sup>29</sup>CIEL attends first open WTO Appellate Body hearing in the famous *Hormones* dispute, [http://www.ciel.org/Tae/WTO\\_Hormones\\_30Jul08.html](http://www.ciel.org/Tae/WTO_Hormones_30Jul08.html).
- <sup>30</sup>Marcos Orellana, *WTO and Civil Society*, in *The Oxford Handbook of International Trade Law* (Daniel Bethlehem et al. eds., 2009); and Christiane Ahlborn and James Headen Pfitzer, *Transparency and Public Participation in WTO Dispute Settlement* (2009): [http://www.ciel.org/Publications/Transparency\\_WTO\\_Dec09.pdf](http://www.ciel.org/Publications/Transparency_WTO_Dec09.pdf).

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**CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW**

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