

Bulletin #2
Transparency in the Dispute Settlement Process:
Country best practices

Nathalie Bernasconi-Osterwalder and Lise Johnson

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Head Office

161 Portage Avenue East, 6th Floor, Winnipeg, Manitoba, Canada R3B 0Y4
Tel: +1 (204) 958-7700 | Fax: +1 (204) 958-7710 | Website: www.iisd.org

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1.0 Introduction

An arbitral dispute between a state and an investor of another state (an investor-state dispute) raises public interest issues not typically present in a commercial arbitration between two or more private parties. For example, investor-state disputes always involve allegations that the respondent government acted wrongly. Investor-state disputes can also involve challenges to important government laws and regulations, such as those protecting the environment and health, addressing social welfare issues, governing the provision of essential services, and regulating the use of natural resources. The disputes can also have significant financial impacts on the public purse and taxpayers. Yet, despite the differences between investor-state arbitrations and arbitrations between two private parties, both commonly use the same sets of procedural rules. Consequently, investor-state arbitrations, drawing from the confidential nature of private commercial arbitration, often lack transparency and provide no opportunity for public participation. This contrasts with the much more open nature of international dispute settlement in other commercial and non-commercial areas where government conduct is at issue, including at the World Trade Organization (WTO), the International Court of Justice (ICJ) and in human rights bodies.

In many instances, it is difficult or impossible even to know that an investor-state dispute has been initiated, what the issues and arguments are and what decisions or awards have been made to resolve the matter. This lack of transparency, in turn, has several negative impacts. For one, it weakens the perceived legitimacy of the investor-state dispute settlement system, and the decisions rendered under it. Moreover, it can facilitate the issuance of decisions that are not well reasoned, an outcome that has especially significant implications given that awards are greatly insulated from recourse or judicial review. Further, it prevents the public, states and investors from being able to assess what the obligations set forth in investment agreements actually mean in practice. Additionally, it creates tension between the investor-state dispute settlement system and the public's rights to information. These rights to information are recognized under the domestic laws of many countries and also under international human rights law as shown, for example, by the decision of the European Court of Human Rights in the Hungarian Civil Liberties Union case (*Társaság a Szabadságjogokért v. Hungary*, Judgment of April 14, 2009), which elaborates upon on the right to receive information of public interest and the scope of governments' obligations not to impede flow of that information.

Concern about the lack of transparency in investor-state arbitration has been mounting over roughly the past decade, tracking the rise of treaty-based investor-state arbitration itself. Indeed, treaty-based investor-state arbitration is a fairly recent phenomenon; the first case was only decided in 1990. It was then with the first cases under the investment chapter (Chapter 11) of the North American Free Trade Agreement (NAFTA) in the mid-to-late 1990s that it became clear that the typically confidential nature of private arbitrations was not appropriate for investor-state disputes of public interest. In 2001, as a step toward increasing the transparency of NAFTA investor-state arbitrations, the parties to that agreement issued an interpretative note specifying that nothing in Chapter 11 itself precluded a NAFTA party from providing public access to documents submitted to or issued by Chapter 11 tribunals. The interpretative note also set forth the NAFTA parties' agreement to make such documents available to the public in a timely manner, subject to certain exceptions, including for the protection of confidential business information and where disclosure would be prohibited under applicable arbitral rules.¹ In bilateral investment treaties (BITs) and free trade agreements (FTAs) concluded by the NAFTA parties subsequently, the countries have gone even further to ensure openness of investor-state dispute settlement by including provisions on transparency directly in the treaties (as opposed to interpretative notes).

¹ NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (July 31, 2001).

The trend to enhance the transparency of investor-state dispute settlement is slowly spreading beyond NAFTA parties, with countries around the world adding into their more recent investment treaties specific provisions enabling the public to have access to information submitted in, generated in connection with, or otherwise related to the investor-state dispute resolution process. However, many investment treaties still remain silent with respect to the transparency of the proceedings. Instead, they simply refer to pre-existing arbitration rules, such as those under the International Centre for Settlement of Investment Disputes (ICSID), the rules developed by the United Nations Commission on International Trade Law (UNCITRAL), and, less frequently, those issued by the International Chamber of Commerce (ICC), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), and other arbitration bodies.

Most of these arbitration rules do not include provisions addressing transparency because they were originally developed primarily for commercial arbitrations between private parties. ICSID arbitration rules are exceptional in this respect because they were specifically developed for disputes between host states and investors. ICSID arbitration rules have therefore historically provided for at least somewhat greater openness than other rules, and increased transparency further in 2006 amendments to those rules. Under the current ICSID arbitration rules, the fact that an ICSID arbitration has been registered by ICSID's secretariat is now automatically disclosed on ICSID's website, as is any award or, at a minimum, the legal reasoning behind the award. By referring to ICSID as one of the applicable sets of arbitration rules, investment treaties have thus indirectly embedded a certain degree of transparency.²

Pursuant to other arbitration rules, such as the UNCITRAL arbitration rules (which, behind the ICSID Rules, are the second most commonly used rules in investor-state arbitrations), the situation is different. Under the UNCITRAL arbitration rules as drafted in 1976 (the 1976 UNCITRAL Rules) and as amended in 2010 (the 2010 UNCITRAL Rules), it is extremely difficult, if not impossible, for the public or non-disputing governments to know even that an arbitration proceeding has been initiated, let alone what is at issue in the dispute. Both the 1976 and 2010 versions of the rules (collectively referred to in this paper as the "UNCITRAL Rules") also restrict publication of the final award. The United Nations body in charge of revising UNCITRAL's arbitration rules, however, is currently addressing the topic of transparency in investor-state arbitrations and may revise the UNCITRAL Rules to ensure greater openness of dispute resolution proceedings conducted under them.

The fact that the different sets of arbitration rules take different approaches to transparency is of significant practical importance because investment treaties often refer to two or more sets of arbitration rules, and allow the investor initiating the dispute against the host state to choose which set of rules will apply. In effect, this means that the investor—and not the host state—can determine the degree of transparency that will be applied to the dispute settlement process by choosing one set of arbitration rules over the other.

To retain control over this issue, and ensure in advance that investor-state dispute resolution processes will be transparent, states can (and increasingly have) integrated transparency rules directly into their investment treaties. This note provides an overview of those practices. It briefly examines how the UNCITRAL and ICSID arbitration rules impact openness of the various stages of the arbitration process; it then looks at how states are filling in the blanks and avoiding uncertainties left by the rules by addressing the issue of transparency in their treaties. In doing so, this

² ICSID uses two sets of rules: one for disputes when the investor's home state and the host state are both parties to the ICSID Convention (Arbitration Rules), and one for disputes in which only either the state of the investor or the respondent state is a party to the ICSID Convention (Additional Facility Rules). While the discussion in this note focuses on the ICSID Convention and the Arbitration Rules, it should be noted that the Additional Facility Rules are very similar to the Arbitration Rules, and investment treaties typically include both as an option. When this note refers generally to both the ICSID Arbitration Rules and the ICSID Additional Facility Rules, it uses the term "ICSID Rules."

note focuses on individual agreements negotiated by Canada, the United States, Chile, Singapore, Australia and New Zealand, as well as regional arrangements, such as the NAFTA and the investment agreement of the Common Market for Eastern and Southern Africa (COMESA), among others. It also reviews a number of selected model agreements. The aim is to illustrate the various approaches countries have adopted to incorporate transparency into the various stages of the dispute settlement process.

2.0 *Investment Dispute Settlement and the Role of Transparency: Trends*

States have begun integrating provisions into their investment treaties and chapters in FTAs to enhance and ensure transparency in investor-state disputes in the different stages of the arbitration process. These elements are typically introduced to amend, clarify or complete the applicable arbitration rules, such as the ICSID or UNCITRAL arbitration rules. They may also be included in the treaties so as to ensure that the rules on transparency are binding on the disputing parties and may not be derogated from. Relevant provisions, which are examined in more detail below, include those regarding: (1) the commencement of proceedings, (2) access to documents during the proceedings, (3) open hearings, (4) amicus curiae briefs, (5) the final award and (6) exceptions to transparency for protection of confidential business information, state secrets, or other privileged or protected information.

2.1 Public Notice of Commencement of Proceedings

A crucial step for increasing transparency in investment arbitration processes is to ensure that the public is aware of any disputes initiated against a state under a treaty.

Under the ICSID Rules, parties must file a request for proceedings with the ICSID Secretary-General, who then registers the request.³ ICSID's Administrative and Financial Regulations then require the ICSID Secretary-General to publish information about the registration of those requests.⁴ In accordance with that mandate, the ICSID Secretariat maintains a website on which is listed basic information about the initiation of disputes. In contrast, nothing in the UNCITRAL Rules provides that the notice of arbitration or other information about the commencement of a dispute must be made known to the public. Moreover, even if there were a requirement in the UNCITRAL Rules to disclose such information, no register to publish it similar to the register managed by the ICSID Secretariat currently exists.

As noted earlier, investment treaties may refer to ICSID, UNCITRAL, and/or other arbitration rules; and since it is the investor who chooses among the various arbitral rules available under the investment treaty, the investor will also determine the degree of transparency of the process. Consequently, treaty parties do not guarantee the public notification of investment arbitration proceedings simply by incorporating a reference to ICSID procedures as one possible option of applicable arbitration rules.

³Chapter 4, Section 1, Article 36: "(1) Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party. . . . (3) The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre." Source: ICSID Convention, Regulations and Rules. (2006, April); retrieved from: http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

⁴ICSID Administrative and Financial Regulations, Reg. 22(1); see also ICSID, *ICSID Cases at*: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Cases_Home. Regulation 22 of the ICSID Administrative and Financial Regulations apply both to the ICSID Arbitration Rules and the Additional Facility Rules (ICSID Additional Facility Rules, Art. 5).

Recognizing the limitations of referring to pre-existing arbitral rules, and desiring to ensure a consistent approach to the issue, several countries have established their own rules for notifying the public of a dispute. For example, a number of agreements, including model agreements, require the treaty parties to provide the public with information about the commencement of proceedings. One example of such a requirement can be found in the 2004 United States Model Bilateral Investment Treaty (US Model BIT), which explicitly states that “the respondent shall, after receiving the following documents, promptly make them available to the public: (a) the notice of intent; (b) the notice of arbitration.”⁵ In line with that model text, all recent BITs and FTAs with investment chapters negotiated by the United States also include specific provisions requiring the respondent to publish any notice of intent and notice of arbitration it receives.⁶

A similar approach requiring disclosure and placing the burden of publication on the respondent state was adopted in the 2009 agreement between Australia and Chile. This agreement requires the “respondent [to] . . . make [the notices of intent and arbitration] available to the public at their cost.”⁷ A somewhat different approach can be seen in the Investment Agreement for the COMESA Common Investment Area (COMESA Investment Agreement).⁸ It states that “all documents relating to a notice of intention to arbitrate . . . [or] the initiation of an arbitral tribunal . . . shall be available to the public.”⁹

Some texts that seem to aim to increase transparency of proceedings are nevertheless ambiguous on the issue of disclosure of notices of intent and notices of arbitration. Canada’s 2004 Model Foreign Investment Protection Agreement (FIPA) and the agreements Canada has subsequently concluded, for example, state in part that “all documents submitted to, or issued by, the Tribunal shall be publicly available.”¹⁰ The difficulty with such a provision is that, after an investor submits a notice of intent to arbitrate or a notice of arbitration, months can pass before any arbitral tribunal will be constituted to resolve the dispute (if the tribunal is even constituted at all). Unless and until the tribunal is convened, no documents can be submitted to or issued by it; and, consequently, no disclosures regarding the commencement of proceedings apparently need to be made.

⁵ US Model BIT, Art. 29(1).

⁶ See US-CAFTA-DR, Ch. 10, Art. 10.21: “The respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Parties and make them available to the public: (a) the notice of intent; (b) the notice of arbitration”; US-Singapore FTA, Ch. 10, Art. 15.20 (entered into force January 1, 2004) (same); US-Chile FTA, Ch. 10, Art. 10.20 (entered into force January 1, 2004) (same); US-Morocco FTA, Ch. 10, Art. 10.20 (entered into force February 18, 2005) (same); US-Uruguay BIT, Art. 29(1) (entered into force November 1, 2006). These FTAs are all available from the United States’ Trade Compliance Center’s website, available at http://tcc.export.gov/Trade_Agreements/Free_Trade_Agreements/index.asp. The BITs to which the United States is party are also available from the United States’ Trade Compliance Center’s website, at http://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp. As is discussed in the text below, these agreements all make their mandatory disclosures subject to protection of confidential information.

⁷ Australia-Chile, Ch. 10, Art. 10.22(1)(a)-(b) (Transparency of Arbitral Proceedings).

⁸ The Common Market for Eastern and Southern Africa (COMESA) includes Angola, Burundi, Comoros, Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Tanzania, Uganda, Zambia, and Zimbabwe. The COMESA Investment Agreement was adopted May 2007 at the Twelfth Summit of COMESA Authority of Heads of State and Government).

⁹ Art. 28(5).

¹⁰ See, for example, Canada-Peru FTA, Ch. 8, Art. 835(3) (entered into force August 1, 2009).

2.2 Access to Documents During the Proceedings

For the dispute settlement process to be genuinely transparent, it is important for the public to have access to information throughout the various stages of the proceeding. Both ICSID and UNCITRAL rules, however, are silent on disclosure of such information. They neither impose any general obligation of confidentiality, nor mandate publication. Nothing in either body of rules, therefore, prevents parties from unilaterally publishing documents submitted to the tribunal, and the tribunal's decisions and orders.¹¹

To rein in the tribunal's discretion here and ensure transparency in investor-state arbitrations, investment agreements are increasingly explicitly prescribing that certain documents must be made public. For example, the US Model BIT requires the respondent to make the following available to the public: (a) pleadings, memorials and briefs submitted to the tribunal by a disputing party; (b) written submissions by non-disputing parties to the treaty or non-parties, such as *amicus curiae*; (c) minutes or transcripts of hearings of the tribunal, where available; and (d) orders, awards and decisions of the tribunal (awards are discussed *infra*).¹² Recent United States agreements¹³ have followed the US Model BIT's approach. This level of transparency has also been adopted in other recent agreements, including the FTA negotiated between Australia and Chile¹⁴ and the COMESA Investment Agreement.¹⁵

Canada's Model FIPA also contains provisions on transparency, though they are narrower than the ones discussed above. Canada's text provides that "all documents submitted to, or issued by, the Tribunal shall be publicly available, unless the disputing parties otherwise agree, subject to the deletion of confidential information."¹⁶ Thus, that model agreement makes transparency the default rule, and prevents one disputing party from vetoing the other's wish to make documents available to the public, but allows both parties to agree to deviate from the rule of mandatory disclosure. (That possible exception to otherwise mandatory disclosure, however, does not apply to awards, as all awards must be publicly available, subject only to the deletion of confidential information.) Investment agreements Canada has concluded subsequent to its development of the 2004 Model FIPA contain identical or substantially similar provisions on the availability of documents submitted to and issued by tribunals in investor-state dispute settlement.¹⁷

¹¹ Awards are different, and are dealt with in a separate section below. As used in this note, awards, which may be interim, interlocutory, partial or final, resolve all or some of the disputing parties' claims or counterclaims. Decisions and orders, in contrast, do not. Rather, decisions and orders address procedural or other matters relating to the conduct of proceedings. When a tribunal dismisses a case due to lack of jurisdiction, that is an award. When it finds that it has jurisdiction, that is a decision.

¹² US Model BIT, Art. 29(1).

¹³ US-Singapore FTA, Art. 15.20; US-Chile FTA, Art. 10.20; US-CAFTA-DR, Art. 10.21; US-Morocco FTA, Art. 10.20; US-Uruguay BIT, Art. 29(1).

¹⁴ Ch. 10, Art. 10.22(1)(c)-(d) (entered into force March 6, 2009) states that "the respondent shall" make various documents available to the public, including notices of intent and arbitration; pleadings; memorials; briefs, minutes or transcripts of hearings; orders, awards, and decisions of the tribunal.

¹⁵ Art. 28(5) states: "All documents relating to a notice of intention to arbitrate, the settlement of any dispute pursuant to Article 28, the initiation of an arbitral tribunal, or the pleadings, evidence and decisions in them, shall be available to the public."

¹⁶ Canada's Model FIPA, Section C (Settlement of Disputes between an Investor and the Host Party), Art. 38(3)

¹⁷ See, for example, Canada-Peru BIT (entered into force June 20, 2007) (including in Art. 38(3)-(4) the same provisions on transparency as are contained Section C, Art. 38(3)-(4) of the Model FIPA); Canada-Jordan BIT (entered into force December 14, 2009) (same); Canada-Columbia FTA (signed November 21, 2008, not yet entered into force) (including in its chapter on investment [Ch. 8] provisions that are substantively the same as those in Section C, Art. 38(3)-(4) of the Model FIPA); Canada-Peru FTA (entered into force August 1, 2009) (including in its chapter on investment [Ch. 8] the same provisions as those in Section C, Art. 38(3)-(4) of the Model FIPA); Canada-Latvia BIT (signed May 5, 2009) (including in an annex to the agreement the same provisions on transparency as are contained Section C, Art. 38(3)-(4) of the Model FIPA); Canada-Romania BIT (signed May 8, 2009) (same); Canada-Czech Republic BIT (signed May 6, 2009) (including in an annex to the agreement provisions that are substantively the same as those in Section C, Art. 38(3)-(4) of the Model FIPA).

As compared to those agreements noted above, some other agreements addressing the issue of transparency have taken different, less open, approaches to the disclosure of documents during the proceedings. Rather than requiring publication of the documents, for instance, some of these agreements merely ensure that parties have discretion to make certain documents public. The FTA between Mexico and Japan is an example of such an agreement, providing that “either disputing party may make available to the public in a timely manner all documents, including an award, submitted to, or issued by, a Tribunal.”¹⁸ Other agreements, such as the China-New Zealand BIT and the ASEAN-Australia-New Zealand FTA, are a bit narrower in that they specify which party has authority to disclose information. These agreements state that it is the “state party”¹⁹ or the “disputing Party”²⁰ that may make information publicly available. While such provisions ensure that publication cannot be blocked against the wish of a respondent state, they fall short of guaranteeing that the public will have access to documents filed or issued in relation to a dispute settlement proceeding. In addition, some agreements seem to constrain transparency by narrowly identifying which documents may be made public. For example, in contrast to texts such as the US Model BIT, the Canadian Model FIPA, the Australia-Chile FTA and the COMESA Investment Agreement, the ASEAN-Australia-New Zealand-FTA (AANZFTA) states merely that it allows the respondent state to make public “all awards, and decisions produced by the tribunal.”²¹

The various provisions on document disclosure noted above highlight several practical issues—for example, who is responsible for ensuring that the documents are available to the public, who will bear the costs (if any) associated with dissemination of the information, when the disclosures must be made, and how the information should be made available. The texts examined in this note, however, are largely silent on these issues.

In cases where ICSID Rules apply, ICSID’s Administrative and Financial Regulations respond to the first issue to a certain extent by stating that “if both parties to a proceeding consent to the publication of the minutes and other records of proceedings, the Secretary-General shall arrange for the publication thereof, in an appropriate form with a view to furthering the development of international law in relation to investments.”²² The US Model BIT states the requirement differently, specifying that the respondent must make the documents available to the public.²³ The Canadian Model FIPA and other Canadian investment agreements represent yet another approach: these texts do not specify whether the respondent, claimant or tribunal bears the burden, but instead state simply that the information “shall be publicly available.”²⁴ And as noted above, some of the agreements that Australia or New Zealand has signed do not impose a burden of public disclosure on either disputing party, but provide that the respondent may make non-confidential information available if it so chooses.

¹⁸ Art. 94. This agreement entered into force April 1, 2005.

¹⁹ New Zealand-China FTA, Ch. 11, Art. 157(1) (entered into force October 1, 2008).

²⁰ Association of Southeast Asian Nations (ASEAN)-Australia-New Zealand Free Trade Area (AANZFTA), Ch. 11, Art. 26(1), Art. 18(4) (b) defines a “disputing Party” as a “Party against whom a claim is made.” The phrases “state party” and “disputing Party” both refer to the respondent state, and not the investor, in a dispute. The capitalized term “Party” refers to a state that is party to the treaty.

²¹ Art. 26(1): Transparency of Arbitral Proceedings. As noted earlier, by specifying which documents “may” be disclosed to the public, the agreement arguably prevents disclosure of those documents not so specified. This approach may therefore restrict disclosure to a greater extent than treaties that are silent on the issue.

²² Reg. 22(2).

²³ Art. 29(1).

²⁴ Art. 38(3).

With respect to the issue of costs for disseminating information to the public, most agreements are silent.²⁵ The investment chapter of the Australia-Chile FTA, however, is apparently anomalous in that it states that the respondent (i.e., the host state) must make the various documents subject to disclosure “available to the public at their cost.”²⁶ Not a model of clarity, this provision leaves unclear to whom “their” refers, thus opening the possibility that the parties will impose the costs on the public.

With respect to the third issue, the issue of timing, the texts are again often silent. Yet there are exceptions. The US Model BIT and agreements the United States has recently entered into, such as the US-Central America-Dominican Republic FTA (US-CAFTA-DR), for example, require the respondent to “promptly” make documents available to the public.²⁷ Although “promptly” is not defined in any section of those texts, the practical effect of using that term in the provision is to ensure that documents are made public almost immediately after they have been filed.

Agreements, likewise, generally do not dictate how to resolve the fourth issue—the issue of how information submitted to and issued by the tribunal will be disclosed. States have, however, developed practices that serve as useful models. The United States, for example, posts information regarding the initiation of proceedings; submissions to tribunals; decisions, orders and awards by tribunals; and transcripts of hearings on a government-run website. ICSID also uses the Internet to publish certain information about investment disputes.

2.3 Open Hearings

Another fundamental aspect of increasing transparency in the dispute settlement process is providing the public with access to hearings held in connection with the arbitration. In the past, arbitration hearings were almost always held behind closed doors, in application of UNCITRAL or ICSID rules. However, over the past few years, tribunals have, in agreement with the parties, opened up hearings, in each instance without reports of disruption to, or delay of, the proceedings.²⁸ Logistical problems regarding space and public access have proven to be easily surmountable.

The need for open hearings became clear when several disputes under NAFTA involved matters of clear public interest, though the public had no access to the hearings (except where both parties agreed to open them up). Under both the ICSID and UNCITRAL arbitration rules, each disputing party possessed a veto power with which they could prevent

²⁵ In contrast to their silence on this point, however, some agreements state that a respondent state party shall make information available to the non-disputing state party *at the non-disputing state party's cost*. See, for example, AANZFTA, Ch. 11, Art. 26(6): “The non-disputing Party shall be entitled, at its cost, to receive from the disputing Party a copy of the notice of arbitration” and Canada-Columbia FTA, Art. G-30: “A Party shall be entitled to receive from the disputing Party, at the cost of the requesting Party a copy of: (a) the evidence that has been tendered to the Tribunal; and (b) the written argument of the disputing parties.”

²⁶ Art. 10.22(1).

²⁷ Art. 10.21(1). Some texts mandate that documents be disclosed to the non-disputing state party within a certain time frame, but do not similarly impose time limits about when disclosure to the public must occur. See, for example, Australia-Chile FTA, Ch. 10, Art. 10.22(1)-(2).

²⁸ See, for example, *Methanex Corp. v. United States*, UNCITRAL (NAFTA) (see Final Award, August 3, 2005, para. 8), where it was decided, with the consent of both parties, to open June 2004 hearings to the public by broadcasting them live via a closed circuit television system) and *Glamis Gold, Ltd. v. United States*, UNCITRAL (NAFTA) (see Procedural Order No. 11, July 9, 2007), wherein the public was permitted to view non-confidential aspects of the hearing via live closed circuit television broadcast at the World Bank.

open hearings.²⁹ Recognizing this as a problem, the United States and Canada took action to promote open hearings. In an October 7, 2003 Statement of Canada on Open Hearings in NAFTA Chapter Eleven Arbitration, Canada declared that it “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.”³⁰ That same day, the United States made an essentially identical declaration of its advance consent to open NAFTA hearings.³¹ One year later, in 2004, Mexico decided to join Canada and the United States in supporting open hearings for NAFTA investor-state disputes.³²

Learning from experiences under NAFTA, and aiming to prevent investors from overruling respondent states’ positions on transparency, states have begun requiring open hearings in their model agreements and investment treaties. The US Model BIT, for instance, states that “the tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements.”³³ The United States has committed to open hearings in all of its recently negotiated BITs and investment chapters in FTAs (with Chile, Singapore, Uruguay, Peru, Colombia, the Central American countries and the Dominican Republic). Similarly, Canada’s Model FIPA provides that all hearings in investor-state arbitrations “shall be open to the public.”³⁴ In accordance with that model, Canada has also provided for open hearings in agreements it has negotiated with Colombia,³⁵ Peru³⁶ and Jordan.³⁷

²⁹ Article 25(4) of the 1976 UNCITRAL Rules and Article 28(3) of the 2010 UNCITRAL Rules set closed hearings as the default rule, stipulating that: “Hearings shall be held in camera unless the parties agree otherwise.” Arbitration Rule 32(2) of the 2006 ICSID Arbitration Rules reads: “Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.” Article 39(2) of the Additional Facility Rules contains an identical provision. While the 2006 revision of both sets of ICSID rules continues to enable a disputing party to veto open hearings, the new language indicates a slight trend towards openness as it seems to require one party to affirmatively object to opening the hearing in order to keep it closed. By comparison, Rule 32 in both the 1984 and 2003 versions of the ICSID Arbitration Rules required affirmative *consent* of the parties. It read: “The Tribunal shall decide, with the consent of the parties, which other persons besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal may attend the hearings.” See also International Chamber of Commerce Rules of Arbitration (January 1, 1998), Art. 21(3): (“Save with the approval of the Arbitral Tribunal and the parties, persons not involved in the proceedings shall not be admitted.”).

³⁰ Canadian Department of Foreign Affairs and International Trade (October 4, 2008). Statement of Canada on Open Hearings in NAFTA Chapter Eleven Arbitrations. Retrieved from: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/open-hearing.aspx?lang=en&view=d>

³¹ See Executive Office of the President of the United States (2003, October). NAFTA Commission Announces New Transparency Measures. Retrieved from: <http://www.ustr.gov/about-us/press-office/press-releases/archives/2003/october/nafta-commission-announces-new-transparen>

³² Executive Office of the President of the United States (2004, July). NAFTA Free Trade Commission Joint Statement: Decade of Achievement. Retrieved from: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/js-sanantonio.aspx?lang=en&view=d>

³³ Art. 29(2).

³⁴ Art. 38(1): “Hearings held under this Section shall be open to the public. To the extent necessary to ensure the protection of confidential information, including business confidential information, the Tribunal may hold portions of hearings *in camera*.” Article 38(2) adds, “The Tribunal shall establish procedures for the protection of confidential information and appropriate logistical arrangements for open hearings, in consultation with the disputing parties.”

³⁵ Canada-Columbia FTA, Ch. 8, Art. 830(2): states, in relevant part, that “hearings held under this Section shall be open to the public” and that the tribunal “may hold portions of hearings *in camera* to the extent necessary to ensure the protection of confidential information.”

³⁶ Canada-Peru FIPA, Art. 38(1)-(2); Canada-Peru FTA, Ch. 8, Art. 835(1)-(2): “Hearings . . . shall be open to the public. To the extent necessary to ensure the protection of confidential information, the Tribunal may hold portions of hearings *in camera*.” Art. 835(1). Article 835(2) obliges the tribunal to establish procedures for the open hearings and to protect against disclosure of confidential information.

³⁷ Canada-Jordan FIPA, Art. 38(1)-(2).

Governments in other regions have also provided for open hearings in their BITs and FTAs. One example is the recent FTA between Australia and Chile, which requires the tribunal to “conduct hearings open to the public.”³⁸ Similarly, the COMESA Investment Agreement states clearly that “procedural and substantive oral hearings shall be open to the public.”³⁹

2.4 Amicus Curiae Briefs

In addition to increasing the transparency of arbitrations by providing the public with information about the cases, countries have also increased the openness of the proceedings by specifically allowing non-parties to act as “amicus curiae” and submit information relevant to the dispute to the tribunal.

The UNCITRAL Rules are silent on whether tribunals can accept and consider amicus curiae briefs. Tribunals have nevertheless held that Article 15(1), which grants arbitral tribunals broad powers to conduct arbitrations as they deem appropriate,⁴⁰ confers power on the tribunal to accept or reject amicus curiae briefs. The first tribunal to reach this conclusion was the *Methanex* tribunal in 2001.⁴¹

Until the 2006 revision of the ICSID Rules, those rules, too, were silent with respect to the amicus curiae question. As happened with application of the UNCITRAL Rules, the pre-2006 ICSID Rules’ silence on the issue did not prevent tribunals from accepting amicus curiae briefs. 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—“grant[ed] it the power to admit amicus curiae submissions from suitable non-parties in appropriate cases.”⁴²

The revised ICSID Rules integrate that practice in an explicit provision allowing tribunals to accept amicus briefs. The rules require the tribunal to consult with the parties before deciding whether to allow the non-party submissions, but do not allow either or both parties together to veto the tribunal’s decision on the matter. 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 relevant ICSID Rules (Rule 37(2) of the 2006 ICSID Arbitration Rules and Article 41(3) of the 2006 Additional Facility Rules) provide, inter alia, “After consulting both parties, the tribunal may allow a person or entity that is not a party to the dispute . . . to file a written submission with the Tribunal regarding a matter within the scope of the dispute.”

The 2006 ICSID Rules go on to provide that, when deciding whether to accept an amicus curiae submission, a tribunal must consider a non-exclusive list of three factors: (a) whether the submission will assist the tribunal determine a factual or legal issue by providing a perspective that differs from the parties to the dispute; (b) whether the submission is within the scope of the dispute; and (c) whether the non-party has a significant interest in the proceeding.

³⁸ Art. 10.22(2). This provision also states that the tribunal has the power and duty to address procedural and logistical issues, and to guard against disclosure of confidential information.

³⁹ Art. 28(6).

⁴⁰ The full text of Article 15(1) of the UNCITRAL rules states, “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.”

⁴¹ *Methanex Corp. v. United States* (Jan. 15, 2001) found that amicus briefs could be submitted under Chapter 11 arbitrations pursuant to Rule 15 of UNCITRAL (para. 31).

⁴² *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A., v. Argentina*, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, ICSID Case No. ARB/03/19 (May 19, 2005), para. 16.

In line with practice and recent developments in ICSID, a number of model agreements and recently concluded BITs and FTAs explicitly refer to and allow acceptance of amicus briefs. Since most BITs and FTAs refer to UNCITRAL and ICSID, the additional rules in those treaties are particularly relevant where the investor chooses to bring its claim under the UNCITRAL rules, which are silent with respect to amicus curiae. Even though, as explained above, UNCITRAL rules can and have been interpreted to allow tribunals to accept amicus briefs, there is no certainty as to how future tribunals will interpret the UNCITRAL Rules since there is no precedent in investment arbitration and tribunals are in no way bound to earlier decisions.

Examples of agreements that incorporate provisions on amicus curiae briefs are the United States and Canada model agreements, which explicitly provide the tribunal with the authority to accept amicus curiae briefs from non-parties. Canada's Model FIPA is similar to the ICSID Rules in that it states that the tribunal may accept an amicus submission, but that, when determining whether to do so, it must consider a non-exclusive list of factors. Those factors include the ones listed in the ICSID Rules (and noted above), and also the extent to which "there is a public interest in the subject-matter of the arbitration."⁴³ The Canada-Peru FIPA⁴⁴ and Canada-Jordan FIPA⁴⁵ use the language contained in the Model FIPA. The investment chapter of the Canada-Columbia FTA, however, follows a different approach. Instead of listing considerations a tribunal must take into account when determining whether to accept submissions, it provides that the "Tribunal shall have the authority to consider and accept written submissions from" non-parties that have "a significant interest in the arbitration."⁴⁶

In comparison to the ICSID Rules and approach taken in Canada's Model FIPA and several of Canada's investment agreements, the US Model BIT does not direct the tribunal to consider any particular list of factors when deciding whether to allow non-party participation. Article 28 of the US Model BIT states simply that "the tribunal shall have the authority to accept and consider amicus curiae submissions from a person or entity that is not a disputing party." All FTAs and BITs recently negotiated by the United States follow this approach and provide tribunals with wide discretion to accept and consider amicus curiae briefs.⁴⁷

Agreements from other regions and between other parties likewise provide tribunals with explicit authority to accept amicus curiae briefs. The investment chapter in the Australia-Chile FTA, for example, states that "the tribunal shall have the authority to accept and consider amicus curiae written submissions that may assist the tribunal in evaluating the submissions and arguments of the disputing parties from a person or entity that is not a disputing party (the 'submitter')."⁴⁸ Similarly, the COMESA Investment Agreement states that the "arbitral tribunal shall be open to the

⁴³ Art. 39(4).

⁴⁴ Canada-Peru FIPA, Art. 39; see also Canada-Peru FTA, Ch. 8, Art. 836 & Annex 836.1.

⁴⁵ Canada-Jordan FIPA, Art. 39 & Annex C.39.

⁴⁶ Canada-Columbia FTA, Ch. 8, Art. 831; see also Annex 831, which describes what an application for leave to file a non-disputing party submission must contain.

⁴⁷ The US-CAFTA-DR, for example, exactly tracks the US Model BIT, stating succinctly that the "tribunal shall have the authority to accept and consider amicus curiae submissions from a person or entity that is not a disputing party." (Ch. 10, Art. 10.20). For similar provisions, see also US-Singapore, Art. 15.19 (Conduct of the Arbitration); US-Chile, Art. 10.19 (Conduct of the Arbitration); CAFTA, Art. 10.20 (Conduct of the Arbitration); US-Morocco, Art. 10.19 (Conduct of the Arbitration); US-Uruguay, Art. 29(1)(e) (Transparency of Arbitral Proceedings). Some agreements, however, contain slight variations on this approach. The agreement between Singapore and the United States, for example, states that "the tribunal shall have the authority to accept and consider amicus curiae submissions from any persons and entities in the territories of the Parties and from interested persons and entities outside the territories of the Parties." US-Singapore, Art. 15.19. This wording imposes a geographical restriction on those who may be amicus curiae unless the amicus curiae are "interested persons."

⁴⁸ Art. 10.20(2) (Conduct of the Arbitration). The article then sets forth procedural requirements the "submitter" and tribunal must comply with. It states, "Submissions shall be provided in both Spanish and English, and shall identify the submitter and any Party, other government, person, or organisation, other than the submitter, that has provided, or will provide, any financial or other assistance in preparing the submission. Where such submissions are admitted by the tribunal, the tribunal shall provide to the parties an opportunity to respond to such written submissions."

receipt of amicus curiae submissions in accordance with” certain requirements set forth in a separate annex.⁴⁹ That annex, in turn, merely: (a) confirms the tribunal’s authority to accept and consider the submissions, (b) sets forth requirements for amicus curiae applicants to make their submissions in certain languages and disclose their identities and the identities of those who provided assistance in making the submission (financial or otherwise), and (c) adds that “submissions may relate to any matter covered by [the COMESA Investment Agreement] that is relevant to the claim before the tribunal.”⁵⁰

2.5 Final Award/Result

One of the most important elements of any international arbitration is the final award. Yet, to date, many international investment awards remain secret or are published only a long time after their issuance.

The ICSID Rules do not require one disputing party to obtain the other’s consent before publishing awards. Consent of the parties is only required when the ICSID Secretariat, not one of the disputing parties, seeks to make the award public. Additionally, following the 2006 revisions to the ICSID Rules, the ICSID Secretariat must “promptly include in its publications excerpts of the legal reasoning” supporting the award even when parties do not agree to ICISD’s publication of the award itself.⁵¹

In contrast to the ICSID Rules, Article 32(5) of the 1976 UNCITRAL Rules, which deals with awards, provides that “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 investor to publish an award, and vice-versa. The 2010 UNCITRAL Rules are slightly different. They state in Article 34(5):

An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.

The UNCITRAL Rules contain no provision or mechanism for excerpts or summaries of awards to be made available when publication of the actual document is blocked.

In this context, as in those discussed above, countries have taken steps to establish their own consistent rules and practices regarding transparency. For instance, Annex 1137.4 of NAFTA, which refers 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. Where Mexico is the disputing state party, the applicable arbitration rules apply to the publication of an award.⁵² Similarly, a number of agreements to which Australia and/or New Zealand are party, including the AANZFTA⁵³ and New Zealand-China FTA,⁵⁴ specifically allow respondent states to make public the awards issued by tribunals.

⁴⁹ Art. 28(8); see also Annex A, Art. 8.

⁵⁰ Annex A, Art. 8.

⁵¹ ICSID Arbitration Rules, Rule 48(4); Additional Facility Rules, Art. 53(3).

⁵² The website (<http://www.state.gov/s/l/c3439.htm>) provides access to all documents that have been made available to the public for any NAFTA dispute, and is not limited to publication of final awards.

⁵³ Ch. 11, Art. 26(1): “The disputing Party may make publicly available all awards and decisions produced by the tribunal.”

⁵⁴ Ch. 11, Art. 157: “The state party may, as it considers appropriate, ensure public availability of all tribunal documents.”

As compared to those texts, some go a step further to increase transparency and require that final decisions and awards be made public. The US Model BIT does this as part of the general obligation it imposes on respondents to make a host of documents submitted to and issued by the tribunal publicly available, including “orders, awards, and decisions of the tribunal.”⁵⁵ In contrast, Canada’s Model FIPA treats disclosure of awards differently than disclosure of other information relating to the proceedings: the model agreement requires disclosure of awards; disclosure of other documents, however, may be blocked if both parties so agree.⁵⁶ In their recent BITs and FTAs, Canada and the United States have each generally followed the approaches taken in their respective model agreements and have required disclosure of all awards.⁵⁷ And like these agreements, the FTA between Australia and Chile mandates that the respondent state make awards available to the public.⁵⁸

2.6 Privileged and Confidential Information

For investors and states to fully embrace a transparent process, both must be comfortable that any privileged, confidential or other protected information (generally referred to in this note as “confidential information”) can still be shielded from disclosure—even in a process that allows non-parties to the dispute to participate in and have access to documents filed and decisions issued in connection with an ongoing dispute. To alleviate concerns that an increase in transparency will result in the release of confidential information, all investment chapters and investment agreements considered in this paper include provisions to protect such information from becoming publicly available. In fact, protections for confidential information are some of the best-developed sections within the dispute settlement provisions of the model texts and the investment agreements.

Confidentiality provisions in investment agreements addressing and allowing for transparency in investor-state dispute settlement share many common features. As a general matter, they subject parties’ and tribunals’ transparency obligations to the obligation to protect confidential information, which may be confidential business information or other privileged or protected information shielded from disclosure under the applicable law.⁵⁹ The US Model BIT establishes the contours of what information it excepts from transparency requirements by including a definition of “protected information,” stating in Article 1 that “‘protected information’ means confidential business information or information that is privileged or otherwise protected from disclosure under a Party’s law.” Similarly, the Canada Model FIPA defines “confidential information” in its Article 1 as “business confidential information and information that is privileged or otherwise protected from disclosure.”

⁵⁵ Art. 29(1)(e).

⁵⁶ Canada Model FIPA, Art. 38.

⁵⁷ See, for example, Canada-Peru FTA, Ch. 8, Art. 835(3) & (4); Canada-Columbia, Ch. 8, Art. 830; US-Uruguay BIT, Art. 29(1)(e); US-Singapore FTA, Ch. 15, Art. 15.20; US-Chile FTA, Ch. 10, Art. 10.20; US-CAFTA-DR, Ch. 10, Art. 10.21; US-Morocco FTA, Ch. 10, Art. 10.20. Some agreements concluded prior to the United States’ and Canada’s developments of their model investment agreements may not provide for the same degree of transparency. The Canada-Chile FTA, for example, which entered into force July 7, 1997, states that the respondent state or the investor claimant may make an award public. There are no provisions requiring publication of awards (or other documents) (Art. G-38 & Annex G-38.4).

⁵⁸ Australia-Chile FTA, Ch. 10, Art. 10.22: “The respondent shall, after receiving the following documents, make them available to the public at their cost: . . . orders, awards, and decisions of the tribunal.”

⁵⁹ See, for example, AAANZFTA, Ch. 11, Art. 26: “Subject to Paragraphs 2 and 3 [regarding protection of confidential information] the disputing Party may make publicly available all awards and decisions produced by the tribunal.”; Mexico-Japan FTA, Ch. 7, Art. 94: “Either disputing party may make available to the public in a timely manner all documents, including an award, submitted to, or issued by, a Tribunal established under this Section, subject to redaction of” confidential, privileged, or otherwise protected information; New Zealand-China FTA, Art. 157: “Subject to paragraph 2 [regarding protection of confidential information], the state party may, as it considers appropriate, ensure public availability of all tribunal documents.”; US-CAFTA-DR, Ch. 10, Art. 10.21(1): “Subject to paragraphs 2 and 4 [regarding protection of confidential information], the respondent shall” make various documents available to the public.

The COMESA Investment Agreement does not specifically define “confidential” or “protected” information, but likewise states that information need not be disclosed if it is “confidential business information or information that is privileged or otherwise protected from disclosure under a Member State’s law.”⁶⁰

The Australia-Chile FTA also excepts “confidential business information or information that is privileged or otherwise protected from disclosure under a Party’s law” from transparency requirements.⁶¹ Yet it differs from the United States and Canadian models and the COMESA Investment Agreement in that it also defines “confidential information” as “any sensitive factual information that is not available in the public domain.”⁶²

Another common feature of investment agreements’ confidentiality provisions is that they make clear that parties are not required to provide access to information when such access would impede law enforcement or protection of essential security interests, or be contrary to domestic law or public policy.⁶³

Agreements additionally specify when and to whom parties may disclose confidential information. They clarify, for example, that: (a) a disputing party may share confidential information with other persons (e.g., experts) when necessary for the preparation of its case;⁶⁴ (b) state parties may share confidential information with national and subnational government entities and officials;⁶⁵ and (c) none of the agreement’s confidentiality provisions permit a party to withhold information that is required by law to be disclosed to the public.⁶⁶

With respect to procedural issues, agreements addressing these matters often require parties to classify confidential information as such at the time it is submitted to the tribunal, and charge the tribunal with developing appropriate procedures to ensure that the information is shielded from disclosure. One specific example of this is from the ASEAN Comprehensive Investment Agreement, which states that “any of the disputing parties that intend to use information designated as confidential information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.”⁶⁷ As this text illustrates, provisions can be tailored to address protection of confidential information at specific phases of the proceedings given that procedures and/or standards for shielding such information from disclosure may differ depending, for instance, on whether the information is contained in documents or is being presented at hearings.

Many of the agreements (particularly those to which the United States is a party) further specify processes under which the tribunal can review the classification to ensure that information a party designates as “confidential” should indeed be protected.

⁶⁰ Annex A, Art. 9.

⁶¹ Art. 10.22.

⁶² Art. 10.22(4).

⁶³ See, for example, US-CAFTA-DR, Ch. 10, Art. 10.21(3); US-Morocco FTA, Ch. 10, Art. 10.20(3); Mexico-Japan FTA, Ch. 7, Art. 94(4)(b); Canada-Peru FTA, Ch. 8, Art. 835(7); Canada-Columbia FTA, Ch. 8, Art. 830(5); Australia-Chile FTA, Ch. 10, Art. 10.22(3); ASEAN-Australia-New Zealand FTA, Ch. 11, Art. 26(5); COMESA Investment Agreement, Art. 9(3) & (4).

⁶⁴ See, for example, Mexico-Japan FTA, Ch. 7, Art. 94(4); Canada-Peru FTA, Ch. 8, Art. 835(5); Canada-Columbia FTA, Ch. 8, Art. 830(3); Australia-Chile FTA, Ch. 10, Art. 10.22(6); ASEAN Comprehensive Investment Agreement, Art. 39(4); ASEAN-Australia-New Zealand FTA, Ch. 11, Art. 26(4).

⁶⁵ See, for example, Canada-Peru FTA, Ch. 8, Art. 835(6); Canada-Chile FTA, Ch. 8, Art. 830(4); Mexico-Japan, Ch. 7, Art. 94(4).

⁶⁶ See, for example, Canada-Peru FTA, Ch. 8, Art. 835(8); Canada-Chile FTA, Ch. 8, Art. 830(5); Australia-Chile FTA, Ch. 10, Art. 10.22(7); US-Singapore FTA, Ch. 15, Art. 15.20(5); US-Chile FTA, Art. 10.20(5); US-CAFTA-DR, Ch. 10, Art. 10.21(5); COMESA Investment Agreement, Art. 9(5); US Model BIT, Art. 29(5); Canada Model FIPA, Art. 38(8).

⁶⁷ Art. 39 (signed 26 Feb. 2009). See also, US-Singapore FTA, Ch. 15, Art. 15.19(2) &(4)(b); US-CAFTA-DR, Ch. 10, Art. 10.21(2) &(4)(b); Australia-Chile FTA, Ch. 10, Art. 10.22(2); Canada-Columbia FTA, Ch. 8, Art. 830(1)-(2); ASEAN-Australia-New Zealand FTA, Ch. 11, Art. 26(2) & (3); US-Morocco FTA, Ch. 10, Art. 10.20(5); US Model BIT, Art. 29(2) & 4(b); COMESA Investment Agreement, Art. 9(2) & (4)(b).

Article 29 of the US Model BIT illustrates several of the features noted above. It states, in part:

4. Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:

(a) Subject to subparagraph (d), neither the disputing parties nor the tribunal shall disclose to the non-disputing Party or to the public any protected information where the disputing party that provided the information clearly designates it in accordance with subparagraph (b);

(b) Any disputing party claiming that certain information constitutes protected information shall clearly designate the information at the time it is submitted to the tribunal;

(c) A disputing party shall, at the time it submits a document containing information claimed to be protected information, submit a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the non-disputing Party and made public in accordance with paragraph 1; and

(d) The tribunal shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may (i) withdraw all or part of its submission containing such information, or (ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph (c). In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under (i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under (ii) of the disputing party that first submitted the information.

5. Nothing in this Section requires a respondent to withhold from the public information required to be disclosed by its laws.

The precise language in the US Model BIT has been adopted in several investment chapters of United States FTAs and BITs, including US-Singapore⁶⁸; US-Chile⁶⁹; CAFTA⁷⁰; US-Morocco⁷¹; and US-Uruguay.⁷²

3.0 Concluding Remarks

International arbitration allows parties to resolve disputes outside traditional domestic court systems and has long been used by private entities as a mechanism to ensure confidentiality of proceedings and achieve efficient outcomes. Over roughly the past decade and a half, however, investors have increasingly used international arbitration to bring suits against states under international law. A consequence of this development is the threat that issues of public importance and interest have been and are currently being resolved in a system that was not designed to recognize, much less facilitate, public awareness and participation.

In order to ensure that the system of international arbitration is consistent with states' rights and obligations to act transparently, and citizens' corresponding rights to access information and have a voice in issues that are of interest to and affect them, states and arbitral institutions have begun to revise the rules that govern investor-state arbitrations.

⁶⁸ Art. 15.20(4)(d).

⁶⁹ Art. 10.20(4)(d).

⁷⁰ Art. 10.21(4)(d).

⁷¹ Art. 10.20(4)(d).

⁷² Art. 29(4)(d).

These efforts also reduce uncertainty regarding how calls for transparency will be resolved in any particular case. The ICSID Rules were revised in 2006 to, for instance, require the disclosure of information regarding the legal reasoning behind awards and make clear that arbitral tribunals have authority to accept submissions from *amicus curiae*. Similarly, the UNCITRAL Commission has recognized the importance of transparency in investor-state dispute settlement, and efforts are currently underway to examine and revise the UNCITRAL rules to ensure that they provide for appropriate levels of transparency in this context.

In order to take control of and standardize resolution of these matters, ensure that investor-state dispute settlement is sufficiently open, and prevent investors from vetoing states' attempts to allow public awareness of, access to and participation in arbitrations, states have increasingly been incorporating rules on transparency in their investment agreements. This note highlights those developments in order to illustrate both that general trend, as well as some of the particular approaches taken in the various agreements. The model texts, agreements and corresponding states' practices illustrate that developed and developing countries alike have adopted approaches requiring (or at least explicitly allowing) the public to have access to information submitted to and issued by tribunals, to view or read transcripts of hearings, and to participate in disputes as *amicus curiae*.

Notably, many of the texts requiring the greatest openness are those to which the United States and Canada are party—two countries that have each been respondents in a relatively high number of disputes and are therefore familiar with having to confront and address these issues of public interest and transparency in investor-state dispute settlement. Their continued commitments to transparency through the various stages of dispute settlement proceedings are evidence that parties and tribunals are able to provide for such transparency (1) without imposing a burden on or unduly delaying the proceedings, or exacerbating the disputes and (2) while ensuring the protection of claimants' and respondents' confidential and privileged information. That other countries are likewise incorporating provisions on transparency in their investment agreements further shows that states increasingly view the benefits of including such provisions as outweighing any potential costs. Indeed, this trend toward greater transparency and formalization of procedural rules on the issue can be expected to and should continue, in light of: (1) the public interest in investor-state arbitrations, (2) governments' corresponding interests in ensuring investor-state dispute settlement is consistent with their rights and obligations to provide information to the public, (3) the desirability of reducing uncertainty regarding how issues of transparency will be addressed in a particular case and (4) growing awareness and lessening apprehension about what increased transparency will mean in practice.

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Head Office

161 Portage Avenue East, 6th Floor, Winnipeg, Manitoba, Canada R3B 0Y4

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