Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation

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Investor-state arbitration under NAFTA and the other investment treaties to which Canada is a party has been controversial. There are concerns that investor-state arbitration allows investors to challenge laws of general application intended to achieve important public-policy objectives though a process that is lacking in transparency and democratic accountability. This critique of investor-state arbitration is diminishing in potency, however, as arbitral tribunals have recognized the need for greater openness in promoting the legitimacy of the process and have adopted practices intended to achieve that goal. For example, tribunals have ordered open hearings and permitted amicus curiae participation. While all three NAFTA party states have strongly endorsed these practices, they have failed to amend NAFTA to guarantee them. Developments outside of NAFTA indicate that the move toward transparency is part of a larger trend, the strength of which may indicate that the recent changes in practice will be enduring. However, in the absence of comprehensive and predictable rules, concerns about the legitimacy of the NAFTA process are likely to remain.

L'arbitrage investisseur-État dans le cadre de l'ALÉNA et des autres traités d'investissement dont le Canada est signataire a fait l'objet de maintes controverses. Certains craignent que l'arbitrage investisseur-État ne permette aux investisseurs de contester des lois d'application générale, comportant d'importants objectifs de politique publique, par le biais d'un processus qui manque de la transparence démocratique. Cette critique perd cependant de sa force depuis que les tribunaux arbitraux ont reconnu la nécessité d'une plus grande ouverture en vue de promouvoir la légitimité du processus et qu'ils ont, par conséquent, adopté certaines pratiques afin de réaliser cet objectif. Par exemple, les tribunaux ont ordonné la tenue de procès publics et ont permis la participation d'amici curiae. Quoique chacun des trois États signataires de l'ALÉNA ait vivement appuyé ces pratiques, aucun amendement n'a été fait pour en assurer leur permanence. Les développements externes à l'ALÉNA suggèrent que cette ouverture à la transparence s'inscrit dans une tendance plus large, dont l'ampleur pourrait être indicative de l'endurance probable des changements dans les pratiques. Néanmoins, en l'absence continue de règles exhaustives et prévisibles, les préoccupations quant à la légitimité du processus de l'ALÉNA pour le règlement des différends risquent de persister.

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Introduction

When Canada became a party to the North American Free Trade Agreement in 1992, it adopted investor-state arbitration as part of its foreign investment policy.[1] Investor-state arbitration is provided for in Chapter 11 of NAFTA and in nineteen bilateral foreign investment protection agreements entered into by Canada that follow the NAFTA model.[2] Investor-state arbitration provisions in a treaty permit a private

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[1] *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 (entered into force 1 January 1994) [*NAFTA*].

[2] Canada has entered into bilateral foreign investment protection agreements (entitled *Agreement Between the Government of Canada and the Government of [State] for the Promotion and Protection of Investments* unless otherwise indicated) with the following states: Ukraine (24 October 1994, Can. T.S. 1995 No. 23 (entered into force 24 July 1995)); the Republic of Latvia (26 April 1995, Can. T.S. 1995 No. 19 (entered into force 27 July 1995)); the Republic of the Philippines (*Agreement Between the Government of Canada and the Government of the Republic of the Philippines for the Promotion and the Reciprocal Protection of Investments*, 9 November 1995, Can. T.S. 1996 No. 46 (entered into force 13 November 1996)); the Republic of Trinidad and Tobago (*Agreement Between the Government of Canada and the Government of the Republic of Trinidad and Tobago for the Reciprocal Promotion and Protection of Investments*, 11 September 1995, Can. T.S. 1996 No. 22 (entered into force 8 July 1996)); Barbados (29 May 1996, Can. T.S. 1997 No. 4 (entered into force 17 January 1997)); the Republic of Ecuador (*Agreement Between the Government of Canada and the Government of the Republic of Ecuador for the Promotion and Reciprocal Protection of Investments*, 29 April 1996, Can. T.S. 1997 No. 25 (entered into force 6 June 1997)); the Arab Republic of Egypt (13 November 1996, Can. T.S. 1997 No. 31 (entered into force 3 November 1997)); the Republic of Venezuela (1 July 1996, Can. T.S. 1998 No. 20 (entered into force 28 January 1998)); the Kingdom of Thailand (17 January 1997, Can. T.S. 1998 No. 29 (entered into force 24 September 1998)); the Republic of Panama (12 September 1996, Can. T.S. 1998 No. 35 (entered into force 13 February 1998)); the Republic of Armenia (8 May 1997, Can. T.S. 1999 No. 22 (entered into force 29 March 1999)); the Eastern Republic of Uruguay (29 October 1997, Can. T.S. 1999 No. 31 (entered into force 2 June 1999)); the Lebanese Republic (11 April 1997, Can. T.S. 1999 No. 15 (entered into force 19 June 1999)); the Republic of Costa Rica (18 March 1998, Can. T.S. 1999 No. 43 (entered into force 29 September 1999)); the Republic of Croatia (3 February 1997, Can. T.S. 2001 No. 4 (entered into force 30 January 2001)); the Republic of Romania (*Agreement Between the Government of Canada and the Government of the Republic of Romania for the Promotion and Reciprocal Protection of Investments*, 17 April 1996, Can. T.S. 1997 No. 47 (entered into force 11 February 1997)); Peru (14 November 2006 (entered into force 20 June 2007)); El Salvador and South Africa (not yet in force). Negotiations are currently underway with China, India, and Jordan. The *Free Trade Agreement Between the Government of Canada and the Government of the Republic of Chile*, 4 December 1996, Can. T.S. 1997 No. 50 (entered into force 5 July 1997) contains a chapter (Chapter G) that is modelled on NAFTA Chapter 11. Canada is also negotiating free trade agreements with South Korea, Singapore, and four Central American countries (El Salvador, Guatemala, Honduras, and Nicaragua), and is participating in negotiations regarding the Free Trade Agreement of the Americas. Each of these agreements may have an investment chapter. Texts of all these agreements and the status of the negotiations can be found online: Foreign Affairs and International Trade Canada <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/Fipa-apie/Fipa_LIST.aspx?lang=en>.

investor from a state that is a party to the treaty to seek compensation for injuries that the investor suffers as a result of measures of another party state that are not consistent with the substantive obligations in the treaty. While investor-state arbitration procedures are not new, increasingly they are being used to challenge government measures, especially under NAFTA. The burgeoning case law under NAFTA is redefining the standards of protection for investors.[3]

Investor-state arbitration has been controversial,[4] especially in Canada.[5] While concerns about the investor-state process are multiple and varied,[6] one of the most frequently heard complaints is that investor-state arbitration is not transparent.[7] Investor-state arbitration involves challenges to government measures, sometimes measures of general application intended to promote or achieve important public policy goals such as environmental protection. To the extent that issues of public

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[3] See J. Anthony VanDuzer, "NAFTA Chapter 11 to Date: The Progress of a Work in Progress" in Laura R. Dawson & Donald M. McRae, eds., *Whose Rights? The NAFTA Chapter 11 Debate* (Ottawa: Centre for Trade Policy and Law, 2002) 42 at 47.

[4] Mainstream papers in Canada and the United States have been among the critics of the process in this regard. See "NAFTA Cone of Silence", Editorial, *The Globe and Mail* (26 August 1998) A14 (contrasting NAFTA Chapter 11 and the Canadian judicial process in terms of transparency); "Can We Talk?", Editorial, *The Globe and Mail* (1 September 1998) A14; Anthony DePalma, "Nafta's Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say" *The New York Times* (11 March 2001) BU1.

[5] In its December 2002 report, the Standing Committee on Foreign Affairs and International Trade came to the following conclusion regarding investor-state arbitration: "[S]omething is seriously wrong with the status quo and [there is] pressing unfinished business with the NAFTA framework" (*Partners in North America: Advancing Canada's Relations with the United States and Mexico* (Ottawa: Standing Committee on Foreign Affairs and International Trade, 2002) at 146, online: House of Commons Canada <http://cmte.parl.gc.ca/Content/HOC/committee/372/fait/reports/rp1032319/faitrp03/faitrp03-e.pdf>). There was also a constitutional challenge to investor-state arbitration under Chapter 11. See *Council of Canadians v. Canada (A.G.)*, 277 D.L.R. (4th) 527, 149 C.R.R. (2d) 290 (Ont. C.A.), aff'g [2005] O.J. No. 3422 (Sup. Ct.) (QL), leave to appeal to S.C.C. refused, 31842 (26 July 2007). The applicants, unsuccessful at trial and on appeal, argued that investor-state arbitration usurps the "core or inherent jurisdiction" of Canadian superior courts and is incompatible with the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (*Council of Canadians v. Canada (A.G.)*, *ibid.* at para. 33).

[6] For scholarly critiques of the legitimacy of NAFTA Chapter 11, see Chris Tollefson, "Games Without Frontiers: Investor Claims and Citizen Submissions Under the NAFTA Regime" (2002) 27 Yale J. Int'l L. 141 at 163, 184-85; Charles H. Brower, II, "Structure, Legitimacy and NAFTA's Investment Chapter" (2003) 36 Vand. J. Transnat'l L. 37 [Brower, "Structure, Legitimacy"]; Naveen Gurudevan, "An Evaluation of Current Legitimacy-Based Objections to NAFTA's Chapter 11 Investment Dispute Resolution Process", Comment, (2005) 6 San Diego Int'l L.J. 399; Jeffrey Atik, "*Repenser* NAFTA Chapter 11: A Catalogue of Legitimacy Critiques" (2003) 3 Asper Review of International Business & Trade Law 215; Susan D. Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions" (2005) 73 Fordham L. Rev. 1521; Charles N. Brower, "A Crisis of Legitimacy" *National Law Journal* (7 October 2002) B9.

[7] See Tollefson, *ibid.*; Brower, "Structure, Legitimacy", *ibid.* at 56-57, 68, 71-73; Gurudevan, *ibid.* at 425-27; Atik, *ibid.* at 224, 231-33; Franck, *ibid.* at 1544-45.

policy are, in effect, being resolved in investor-state arbitration, it is argued that a high level of public access to the dispute settlement process is necessary to ensure public acceptance of the result and the democratic accountability of the process.[8] NAFTA and other investor-state procedures, however, are based on private commercial-arbitration models, which typically operate free from public scrutiny.

In light of recent events, a critique of investor-state arbitration based on a lack of transparency is becoming harder to sustain. NAFTA Chapter 11 tribunals rendering decisions in individual cases have shown themselves to be responsive to concerns about transparency. Beginning in the late 1990s, tribunals in NAFTA cases have developed a set of procedural practices that significantly contribute to the openness of the investor-state process under Chapter 11. For example, NAFTA tribunals have ordered hearings to be open to the public in three cases.[9] Three NAFTA tribunals have even recognized that it is appropriate to permit the participation of public interest groups as amici curiae in some cases.[10] Amicus participation may contribute to decisions that are more likely to be informed by, and responsive to, a wide range of interests. Non-governmental organizations may provide additional information or perspectives that neither of the parties can bring to the dispute. Both these procedural innovations as well as other transparency practices developed in NAFTA cases have

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[8] Julie A. Soloway describes the problem as follows: "Th[e] lack of transparency seems to run counter to 'the values and views' integral to the post-war trading system and indeed democratic principles, where transparency of legal process is a fundamental norm" ("NAFTA's Chapter 11: The Challenge of Private Party Participation" (1999) 16:2 J. Int'l Arb. 8 at 10).

[9] See *United States Parcel Service of America v. Canada*, Notice of Arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement (19 April 2000), online: Foreign Affairs and International Trade Canada <http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/ups-noa.pdf> [*UPS*, Arbitration Notice]; *Methanex v. United States*, Notice of Arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement (2 December 1999), online: NAFTA Claims <http://naftaclaims.com/Disputes/USA/Methanex/MethanexNoticeOfArbitration.pdf> [*Methanex*, Arbitration Notice]; *Canfor v. United States*, Notice of Arbitration and Statement of Claim (9 July 2002), online: NAFTA Claims <http://www.naftaclaims.com/Disputes/USA/Canfor/Canfor%20Notice%20of%20Arbitration%20and%20Statement%20of%20Claim.pdf> [*Canfor*].

[10] See *Methanex v. United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae" (15 January 2001) (Arbitrators: William Rowley, Warren Christopher, V.V. Veeder), online: U.S. Department of State <http://www.state.gov/documents/organization/6039.pdf> [*Methanex*, Amicus Decision]; *United Parcel Service of America v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae* (17 October 2001) at para. 70 (Arbitrators: Dean Ronald A. Cass, L. Yves Fortier, Justice Kenneth Keith), online: Foreign Affairs and International Trade Canada <http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/IntVent_oct.pdf> [*UPS*, Amicus Decision]; *Glamis Gold, Ltd. v. United States*, Procedural Order No. 1 (3 March 2005) (International Centre for the Settlement of Investment Disputes (Additional Facility)), online: U.S. Department of State <http://www.state.gov/documents/organization/43304.pdf > [*Glamis*, Procedural Order No. 1].

now been endorsed in statements of the three NAFTA party states sitting as the Free Trade Commission.[11]

With respect to enhancing legitimacy, the practices of NAFTA tribunals regarding transparency and amicus participation, and their acceptance by the Free Trade Commission, are encouraging.[12] Unfortunately, the NAFTA regime remains incomplete. Neither NAFTA tribunal decisions nor the statements of the Free Trade Commission create comprehensive obligations that are binding on future tribunals.[13] To date, Canada, the United States, and Mexico have not amended NAFTA to guarantee the ad hoc transparency protections and amicus curiae procedures adopted in NAFTA cases.

Nevertheless, the trend toward improved transparency and openness to amicus participation is clear. There is increasingly compelling evidence in the NAFTA context and in other investor-state forums that transparency and the possibility of amicus participation are accepted by states and arbitrators as essential to the ongoing legitimacy of investor-state dispute settlement. Protections like those adopted on an ad hoc basis in NAFTA Chapter 11 cases have been incorporated as mandatory provisions in the new model bilateral investment treaties ("BITs") that Canada and the United States use as the basis for their negotiations with other countries.[14] Treaties following these models will include these new norms for investor-state procedures.

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[11] See NAFTA Free Trade Commission, "Notes of Interpretation of Certain NAFTA Chapter 11 Provisions" (31 July 2001), online: Foreign Affairs and International Trade Canada <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en> [FTC Interpretive Note on Transparency]; NAFTA Free Trade Commission, "Statement of the Free Trade Commission on Non-disputing Party Participation, 7 October 2003" (2004) 16 W.T.A.M. 167 [FTC Statement].

[12] See Craig Forcese, "Does the Sky Fall?: NAFTA Chapter 11 Dispute Settlement and Democratic Accountability" (2006) 14 MSU-DCL J. Int'l L. 315.

[13] *NAFTA* provides that awards "have no binding force except between the disputing parties and in respect of the particular case" (*supra* note 1, art. 1136(1)). Interpretations of NAFTA by the Free Trade Commission are binding (*ibid.*, art. 1131(2)). As discussed in this article, the Free Trade Commission's commitments regarding transparency and amicus curiae participation do not create binding requirements, either because they are not interpretations of NAFTA or because of limitations in the commitments themselves.

[14] See Canada, *Agreement Between Canada and ---------- for the Promotion and Protection of Investments* (Model Foreign Investment Protection Agreement) (2004), online: Foreign Affairs and International Trade Canada <http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/2004-FIPA-model-en.pdf> [*Canadian New Model FIPA*]; U.S., *Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment* (Model Bilateral Investment Treaty) (2004), online: United States Department of State <http://www.state.gov/documents/organization/38710.pdf> [*U.S. New Model BIT*]. These have been called "the new generation of BITs" (United Nations Conference on Trade and Development, *Recent Developments in International Investment Agreements*, UN Doc. UNCTAD/WEB/ITE/IIT/2005/1 (30 August 2005) at 6, online: UNCTAD <http://www.unctad.org/sections/dite_dir/docs/webiteiit20051_en.pdf> [UNCTAD, *Research Note*]).

Some of the practices in NAFTA cases are beginning to be adopted by investor-state tribunals applying other investment treaties. More importantly, in April 2006, the International Centre for the Settlement of Investment Disputes ("ICSID") amended its rules to facilitate greater transparency and to expressly authorize tribunals to allow participation by amici curiae.[15] These rules apply to a large proportion of investor-state disputes worldwide, including some under NAFTA Chapter 11. Consequently, while more could be done to put transparency and amicus curiae participation in investor-state arbitration under NAFTA and other existing treaties on firmer legal ground, the potency of legitimacy critiques of investor-state arbitration based on the lack of transparency and openness to amicus participation is diminishing.[16]

This paper examines the essential nature of concerns about the legitimacy of the NAFTA Chapter 11 process based on a lack of transparency and openness to third-party participation. It then surveys the evolving practices related to transparency and amicus curiae participation in investor-state arbitration under NAFTA Chapter 11 with a view to assessing the progress to date and identifying what remains to be done. In order to provide some context for this analysis, the paper will begin with a brief introduction to the process of investor-state arbitration.

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[15] The ICSID arbitration rules are contained in the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, 575 U.N.T.S. 159, 4 I.L.M. 532 (entered into force 14 October 1966) [*ICSID Convention*] and the rules created by the ICSID Administrative Council pursuant to arts. 6(1)(a) to (c) of the *ICSID Convention*, *ibid.* (*Administrative and Financial Regulations, Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules)*; *Rules of Procedure for Arbitration Proceedings (Arbitration Rules)* [*ICSID Arbitration Rules*]). These rules are published in ICSID, *ICSID Convention, Regulations and Rules*, Doc. ICSID/15 (Washington: ICSID, 2006). The ICSID Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings was created by the ICSID Administrative Council on 27 September 1978 (*ICSID Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings*, Doc. ICSID/11 (Washington: ICSID, 1979) [*ICSID Additional Facility*]). Schedule C of the *ICSID Additional Facility*, *ibid.* sets out the *Arbitration (Additional Facility) Rules* [*Additional Facility Rules*]. On 5 April 2006, the Administrative Council approved amendments to the *ICSID Arbitration Rules* and the *Additional Facility Rules*. These amendments came into effect on 10 April 2006. See ICSID, News Release, "Amendments to the ICSID Rules and Regulations" (5 April 2006), online: ICSID <http://ICSID.worldbank.org/ICSID/ICSID/ViewNewsReleases.jsp> [ICSID News Release].

[16] This is not to say that other legitimacy critiques may not be compelling. See Brower, "Structure, Legitimacy", *supra* note 6; Gurudevan, *supra* note 6; Atik, *supra* note 6; Franck, *supra* note 6.

I. Overview of Investor-State Arbitration

A. A Brief History of Bilateral Investment Treaties

Beginning in the 1990s, foreign direct investment, especially in developing countries, began to increase significantly.[17] Many developing countries were turning away from reliance on the state as the sole engine of development and becoming more interested in attracting private foreign investment.[18] These states became more willing to consider committing to a set of international rules safeguarding foreign investors.[19] At the same time, investors from developed countries were attracted by investment opportunities in developing countries but were concerned about being subject to arbitrary and discriminatory treatment by developing-country governments, including expropriation.[20] This community of interest has been the basis for a proliferation of BITs incorporating standards of behaviour for host states and investor-state dispute settlement. In total, by the end of 2006, over 2,500 BITs had been concluded worldwide, of which more than 1,700 were in force.[21]

Investor-state dispute settlement procedures were first introduced into BITs in the 1960s and had emerged as virtually a standard provision by the 1990s.[22] Both the U.S. and Canadian model investment treaties that each country uses as a template for its negotiations with other countries contain investor-state procedures based on NAFTA's Chapter 11.[23]

While investor-state procedures vary to some extent, they essentially give an investor from a state party to the treaty the right to initiate binding arbitration against another state party when the investor has suffered an injury as a consequence of a measure of the other state party that is inconsistent with the treaty's substantive obligations. A successful claim results in an award of financial compensation to be paid by the state to the investor. Proceedings take place under a set of international arbitration rules chosen by the investor from among several permitted under the

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[17] See United Nations Conference on Trade and Development, *World Development Report 1999: Foreign Direct Investment and the Challenge of Development* (New York: United Nations, 1999) at 10.

[18] See generally Jeswald W. Salacuse & Nicholas P. Sullivan, "Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain" (2005) 46 Harv. Int'l L.J. 67 at 77-79.

[19] See *ibid.*

[20] See *ibid.* at 76-77.

[21] See United Nations Conference on Trade and Development, *The Entry into Force of Bilateral Investment Treaties (BITs)* UN Doc. UNCTAD/WEB/ITE/IIA/2006/9 (2006), online: UNCTAD <http://www.unctad.org/en/docs/webiteiia20069_en.pdf>.

[22] See Luke E. Peterson, "All Roads Lead Out of Rome: Divergent Paths of Dispute Settlement in Bilateral Investment Treaties" in Nautilus Institute for Security and Sustainable Development, *International Sustainable and Ethical Investment Rules Project* (2002) at 5, online: International Institute for Sustainable Development <http://www.iisd.org/pdf/2003/investment_nautilus.pdf>.

[23] See *Canadian New Model FIPA*, *supra* note 14; *U.S. New Model BIT*, *supra* note 14.

treaty, as modified by the provisions of the treaty itself. Under NAFTA and many other investment treaties, an investor may choose one of the following sets of arbitral rules:

(a) the arbitration rules under the *ICSID Convention* ("ICSID Arbitration Rules");[24]

(b) the arbitration rules under the *ICSID Additional Facility* ("Additional Facility Rules");[25] or

(c) the United Nations Commission on International Trade Law Arbitration Rules ("UNCITRAL Rules").[26]

The International Center for the Settlement of Investment Disputes was established in Washington in 1965 under the auspices of the World Bank to provide a process for the resolution of investor-state disputes. ICSID provides facilities as well as the ICSID Arbitration Rules for the resolution of disputes between investors from states party to the *ICSID Convention* and other states party to the convention.[27] The center has jurisdiction over a dispute only where both the investor and the state party complained against consent.[28]

In 1978, the Administrative Council of ICSID created an "Additional Facility" that permitted ICSID to provide its facilities and a set of rules for disputes that were outside its jurisdiction because either the investor's state or the state complained against was not a party to the *ICSID Convention*.[29] Parties consenting to arbitration under the Additional Facility Rules participate in an arbitral process similar to the process under the *ICSID Convention*.

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[24] *ICSID Arbitration Rules*, *supra* note 15.

[25] *Additional Facility Rules*, *supra* note 15. There is a substantial literature describing each of the three sets of arbitral rules referred to in Chapter 11 and other investment treaties. See Thomas L. Brewer, "International Investment Dispute Settlement Procedures: The Evolving Regime for Foreign Direct Investment" (1995) 26 L. & Pol'y Int'l Bus. 633. For an excellent table comparing the three sets of rules and indicating the changes made by Chapter 11, see Cheri D. Eklund, "A Primer on the Arbitration of NAFTA Chapter Eleven Investor-State Disputes" (1994) 11:4 J. Int'l Arb. 135 at 159-71. Under the *Canadian New Model FIPA*, the parties may select any other dispute resolution rules approved by the commission established under the agreement (*supra* note 14, art. 27(1)(d)).

[26] *Arbitration Rules of the United Nations Commission on International Trade Law*, GA Res. 31/98, UN GAOR, 31st Sess., Supp. No. 17, UN Doc. A/31/17 (1976) 46 [*UNCITRAL Rules*].

[27] The mandate of ICSID is set out in *ICSID Convention*, *supra* note 15, art. 1(2) ("The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention").

[28] *Ibid.*, art. 25.

[29] *ICSID Additional Facility*, *supra* note 15.

Until recently, these processes had been used infrequently.[30] No award was made under the *ICSID Additional Facility* until 1999.[31] Now that NAFTA and many BITs provide that state parties give their consent to participate in ICSID or Additional Facility arbitration at the option of investors, the procedures governed by both the ICSID Arbitration Rules and especially the Additional Facility Rules have begun to be used more frequently, as described in the next section. Resort to both ICSID procedures remains limited, however, because some countries, including Mexico, are not parties to the *ICSID Convention*.[32]

The final set of rules that may be chosen by an investor initiating an investor-state claim under NAFTA are the UNCITRAL Rules, a general set of arbitral rules designed to be used for all manner of commercial disputes, not only those relating to investment. Where an investor chooses UNCITRAL arbitration, there is no body responsible for providing institutional support. Unlike ICSID and Additional Facility arbitrations, the parties themselves must make all the administrative arrangements.

B. Statistics on Investor-State Claims

One measure of the growing importance of investor-state dispute settlement procedures is the dramatic increase in the number of investor-state cases being arbitrated. As discussed in more detail below, it is impossible to obtain a reliable estimate of the number of investor-state cases or to find out about the disposition of all cases because there is no complete public record. The United Nations Conference on Trade and Development recently reported that, as of the end of 2005, 219 treaty-based investment arbitration claims had been initiated.[33] While this may seem like a relatively modest total, there has been a significant increase in resort to investor-state procedures in the past few years. Seventy per cent of treaty-based investor-state

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[30] From 1965 to 2000, ICSID had been used for only fifty-six arbitrations and most of the completed cases were settled before an award was rendered. See ICSID, *List of Concluded Cases*, online: ICSID <http://www.worldbank.org/icsid/cases/conclude.htm>.

[31] *Azinian v. Mexico* (1999), ARB(AF)/97/2, 14 ICSID Rev. 538, 39 I.L.M. 537 (International Centre for Settlement of Investment Disputes (Additional Facility)), online: ICSID <http://icsid/worldbank.org/ICSID/> [*Azinian*].

[32] As of 4 November 2007, 155 countries had signed *ICSID Convention*, *supra* note 15, of which 143 had ratified it. See ICSID, "List of Contracting States and Other Signatories of the Convention", Doc. ICSID/3, online: ICSID <http://icsid.worldbank.org/ICSID/>. On 15 December 2006, Canada signed the *ICSID Convention*. Full implementation will be delayed until all of the provinces pass legislation to do so. See Foreign Affairs and International Trade Canada, News Release, "Canada Signs International Convention on Investment Dispute Resolution" (19 December 2006), online: Foreign Affairs and International Trade Canada <http://w01.international.gc.ca/minpub/Publication.aspx?isRedirect=True&publication_id=384696&Language=E&docnumber=160>.

[33] See United Nations Conference on Trade and Development, *International Investment Arrangements: Trends and Emerging Issues* (New York: United Nations, 2006) at 14, online: UNCTAD <http://www.unctad.org/en/docs/iteiit200511_en.pdf> [UNCTAD, *International Investment Arrangements*]. This statistic includes only claims that have actually been submitted to arbitration. It does not include cases in which only a notice of an intention to submit a claim to arbitration has been filed.

claims have been filed since 2000. UNCTAD's data show that more than sixty per cent of claims to date have been filed with ICSID. Prior to 1995, there had only been three treaty-based arbitrations submitted to ICSID.[34]

The first NAFTA claim was filed in 1996.[35] As of 5 February 2008, forty-five notices of intent to submit a claim had been filed with NAFTA party states and made public.[36] At least thirteen of these have led to arbitrations under the Additional Facility Rules. New cases filed annually average about four.[37]

The growth in claims is likely the result of the increasingly dense international network of treaties providing for investor-state arbitration combined with growth in international investment activity.[38] As well, increased awareness regarding the existence and nature of investor-state proceedings resulting, in part, from increased transparency along with a few large high-profile awards may also be responsible. Whatever the cause, increased use of the procedures renders concerns about the transparency and openness of investor-state arbitration an important issue. In the following section, the relationship between legitimacy of investor-state procedures and their transparency is discussed.

II. The Nature of Legitimacy Concerns Regarding NAFTA Chapter 11

Charles Brower suggests that in order for an international legal regime like NAFTA Chapter 11 to be perceived as legitimate it must "operate predictably, conform to historical practice, and incorporate fundamental values shared by the governed community."[39] Based on these criteria, many scholars have expressed doubts regarding the legitimacy of NAFTA Chapter 11.[40] It is beyond the scope of this

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[34] See *ibid.*

[35] *Ethyl v. Canada*, Notice of Arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement (14 April 1997), online: Foreign Affairs and International Trade Canada <http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/ethyl2.pdf>.

[36] This figure treats the 107 identical claims by individual members of the Canadian Cattlemen for Fair Trade as one claim. See Foreign Affairs and International Trade Canada, "Current Arbitrations to Which the United States of America Is a Party", online: Foreign Affairs and International Trade Canada <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/usa.aspx?lang=en>.

[37] This estimate is calculated from the public record of notices of intent to submit a claim to arbitration that is maintained by Foreign Affairs and International Trade Canada (online: Foreign Affairs and International Trade Canada <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/nafta.aspx?lang=en> [Foreign Affairs and International Trade Canada Website]), and the private website NAFTA Claims (online: <http://naftaclaims.com>).

[38] See UNCTAD, *International Investment Arrangements*, *supra* note 33 at 16.

[39] "Structure, Legitimacy", *supra* note 6 at 51. Brower justifies these criteria at 52-58.

[40] See Brower, "Structure, Legitimacy", *ibid.*; Atik, *supra* note 6; Tollefson, *supra* note 6; Gurudevan, *supra* note 6; Franck, *supra* note 6.

article to develop a thorough critique of NAFTA Chapter 11's legitimacy. For present purposes, it is sufficient to identify legitimacy concerns related to the transparency and openness of Chapter 11 proceedings. Leaving aside the issue of predictability of outcome, which turns largely on the application of the substantive standards,[41] one can look at transparency and openness of investor-state arbitration from the standpoint of how the investor-state dispute settlement process under NAFTA Chapter 11 conforms to historical practice, incorporates fundamental values, and operates predictably.

In terms of conforming to past practice, it must be acknowledged that investor-state dispute settlement has a long pedigree. As noted above, institutionalized investor-state dispute settlement has been available under ICSID with the consent of both parties since 1965. As well, special tribunals have been established as needed to adjudicate disputes between investors and states arising out of particular situations. For example, the Iran-U.S. Claims Tribunal was established to deal with complaints by American investors arising out of the revolution in Iran and the overthrow of the Shah's regime.[42] The specific provisions in NAFTA Chapter 11 were based on those that had been previously used by the United States in its standard BIT.[43]

Despite this pedigree, however, NAFTA Chapter 11 was a significant departure from past BIT practice in one important sense. It marked the first time that two developed countries with extensive and well-developed regulatory regimes and highly integrated economies had agreed to a comprehensive code governing state behaviour toward foreign investors that was backed up by investor-state dispute settlement. Prior to NAFTA, most investment treaties had been negotiated between a developed and a developing country. While these investment treaties typically dealt with both countries and their investors in the same way, the principal, if not exclusive, beneficiaries of the treaty were expected by both parties to be investors from the developed country. As discussed in the preceding section, developed-country investors feared capricious actions of host governments in developing countries and sought protection in the form of BITs, which provided substantive standards supported by a process for the adjudication, outside local courts, of their claims for compensation when these standards were breached. The possibility of seeking redress in local courts was often unattractive to foreign investors because of a perception that local institutions would be prejudiced against foreigners, were not independent of the government whose actions the investor wanted to challenge, or were otherwise

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[41] For an extensive treatment of this element of legitimacy, see Brower, "Structure, Legitimacy", *ibid.* at 59-63.

[42] See Charles N. Brower, "The Iran-United States Claims Tribunal" (1990) 224 Rec. des Cours 123. See generally Jonathan I. Charney, "Third Party Dispute Settlement and International Law" (1997) 36 Colum. J. Transnat'l L. 65.

[43] U.S., *North American Free Trade Agreement Act Statement of Administrative Action*, 103d Cong. (H.R. Doc. No. 103-159) (1993) at A.2.

unreliable.[44] For their part, developing countries sought to attract foreign investment by offering these guarantees. In most cases, there would be few, if any, investors from the developing-country party that would need the protection of BIT standards from actions of the developed country.[45]

Consistent with this conventional conception of the function of BITs, in negotiating NAFTA's investment rules, Canada and the United States were most concerned about protecting their current and future investors against uncompensated expropriation of their investments or other unfair treatment by the Mexican state, concerns that had some basis in historical precedent.[46] Neither Canada nor the United States could have anticipated substantial increased investment from Mexico on the basis of their own investment commitments. Foreign investors already benefitted from open, transparent, and, with some exceptions, nondiscriminatory treatment in the two countries. Also, there was a relatively small pool of investment capital available for foreign investment in Mexico. Mexico, for its part, was most interested in signalling its commitment not to engage in the kind of behaviour that Canada and the United States were worried about in order to promote Canadian and U.S. investment in Mexico.[47] It is not likely that the Canadian or American governments were relying on NAFTA investment commitments to attract investment from the other country.[48] Cross-border Canada-U.S. investment was already substantial prior to NAFTA's entry into force[49] and already benefited from the admittedly weaker protection that existed under the *Canada-U.S. FTA*.[50]

While the rationale for, and form of, NAFTA Chapter 11 are consistent with past BIT practice, the context in which it operates is very different. The combination of an enormous bilateral investment relationship between Canada and the United States[51]

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[44] See United Nations Conference on Trade and Development, *World Investment Report 2003: FDI Policies for Development: National and International Perspectives* (New York: United Nations, 2003) at 114-18.

[45] See generally Salacuse & Sullivan, *supra* note 18.

[46] See Maureen A. Molot, "NAFTA Chapter 11: An Evolving Regime," in Dawson & McRae, *supra* note 3, 155 at 177-81; Maxwell A. Cameron & Brian W. Tomlin, *The Making of NAFTA: How The Deal Was Done* (Ithaca: Cornell University Press, 2000) at 100.

[47] See Molot, *ibid.*; Cameron & Tomlin, *ibid.*

[48] Cameron and Tomlin suggest that, in fact, Canada was not interested in stronger disciplines on investment in NAFTA than existed in the *Free Trade Agreement Between the Government of Canada and the Government of the United States of America*, 22 December 1987, Can. T.S. 1989 No. 3 (entered into force 1 January 1989) [*Canada-U.S. FTA*], and that Canada continued to have an ambivalent attitude toward U.S. investment in Canada (Cameron & Tomlin, *ibid*. at 101).

[49] In 1992, the year that NAFTA was signed, U.S. investors held over sixty per cent of foreign direct investment in Canada and over sixty per cent of the stock of Canadian direct investment abroad was in the United States. See Statistics Canada, CANSIM Table 376-0051, online: Statistics Canada <http://cansim2.statcan.ca/cgi-win/cnsmcgi.exe?CANSIMFile=CII/CII_1_E.HTM&RootDir=CII/>.

[50] *Supra* note 48.

[51] At the end of 2005, the stock of Canadian investment abroad exceeded C$465 billion compared to a stock of inward foreign direct investment of almost C$415 billion. The total stock of foreign direct

with complex and dense regulation in each country means that investor-state claims against Canada and the United States from investors from the other state are likely to be frequent and more likely to challenge "core activities of host governments."[52] Sophisticated and well-advised investors on both sides of the border have sought to exploit what has been called the "textual indeterminacy"[53] of the substantive provisions in NAFTA Chapter 11 to challenge a very wide range of government action under the agreement,[54] including actions of municipalities,[55] courts,[56] and a number of government agencies.[57] By substantially increasing the likelihood of challenges to state action in Canada and the United States, NAFTA Chapter 11 does not conform to any historical practice of investor-state dispute settlement under other BITs negotiated by Canada and the United States.[58]

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investment in Canada represented over thirty per cent of Canadian GDP. About sixty-four per cent of the total stock of direct investment in Canada is from the United States and forty-six per cent of the stock of Canadian investment abroad is in the United States. See Statistics Canada, *supra* note 49.

[52] Brower, "Structure, Legitimacy", *supra* note 6 at 69. In 2003, Charles N. Brower suggested that, with one possible exception, all the cases that had been initiated by that date raised important public policy concerns ("NAFTA's Investment Chapter: Dynamic Laboratory, Failed Experiments and Lessons for the FTAA" (2003) 97 Proc. Amer. Soc. of Internat. L. 251 at 251-52). See e.g. *Pope & Talbot v. Canada*, Award on the Merits of Phase 2 (10 April 2001), online: Foreign Affairs and International Trade Canada <http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/Award_Merits-e.pdf> (Arbitrators: Hon. Lord Dervaird, Hon. Benjamin J. Greenberg, Murray J. Belman) (challenge to the allocation of the softwood lumber quota).

[53] Brower, "Structure, Legitimacy", *ibid.* at 61.

[54] Indeed, Brower characterizes the textual indeterminacy of NAFTA Chapter 11 as a threat to the legitimacy of the treaty, though, in his view, this threat has been mitigated by the decisions of tribunals in Chapter 11 claims. These judgments have provided greater certainty to Chapter 11 rules (*ibid.* at 63-65).

[55] See *Mondev International Ltd. v. United States* (2002), ARB(AF)/99/2, 42 I.L.M. 85, 6 ICSID Rep. (International Centre for Settlement of Investment Disputes (Additional Facility)), online: U.S. Department of State <http://www.state.gov/documents/organization/14442.pdf> [*Mondev*]; *Metalclad v. Mexico* (2000), ARB(AF)/97/1, 16 ICSID Rev. 168, 40 I.L.M. 36 (International Centre for Settlement of Investment Disputes (Additional Facility)), online: ICSID <http://icsid.worldbank.org/ICSID/> [*Metalclad*, Award].

[56] See *Azinian*, *supra* note 31; *The Loewen Group v. United States* (2001), ARB(AF)/98/3, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, 7 ICSID Rep. 421 (International Centre for Settlement of Investment Disputes), online: U.S. Department of State <http://www.state.gov/documents/organization/3921.pdf> [*Loewen*, Decision on Jurisdiction].

[57] See *Crompton v. Canada*, Notice of Arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement (17 October 2002 and 10 February 2005), online: NAFTA Claims <http://www.naftaclaims.com/disputes_canada_crompton.htm> (Canadian Pest Management Regulatory Agency); *Kenex Ltd. v. United States*, Notice of Arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement (2 August 2002), online: U.S. Department of State <http://www.state.gov/documents/organization/13204.pdf> (Drug Enforcement Agency). See also *supra* note 52.

[58] Brower suggests that various other systemic characteristics of the investor-state process, such as the reliance on ad hoc arbitrators, the absence of stare decisis, as well as the confidentiality of

In light of this deviation from historical practice, a failure of the NAFTA Chapter 11 process to guarantee the kind of transparency and openness that characterizes judicial proceedings in Canada and the United States is argued to imperil the legitimacy of the process.[59] The basic model for NAFTA Chapter 11 and other investor-state procedures is private international commercial arbitration, which can operate in complete secrecy. Indeed, the confidentiality of arbitration is often touted as a benefit that pursuing a claim in court does not offer.[60] Despite the common practice of secrecy, however, there is no consensus on whether there is a general legal duty of confidentiality that binds the parties in a commercial arbitration, prohibiting them from disclosing information regarding either the arbitration itself or the materials produced for the arbitration.[61] Even if there were such a duty in private commercial arbitration, the break with historical practice represented by NAFTA Chapter 11's application to Canada and the United States strongly suggests that it should not apply, at least in some investor-state arbitrations.[62] Moreover, a high degree of transparency is recognized as a "fundamental valu[e]"[63] of the international economic regime and a failure to satisfy such a norm would mean that Chapter 11 would not meet Brower's second criterion for legitimacy.[64]

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proceedings, render it prone to attack on the basis of its likely deviation from historical practice ("Structure Legitimacy", *supra* note 6 at 65).

[59] See Howard Mann & Konrad von Moltke, *NAFTA's Chapter 11 and the Environment: Addressing the Impacts of the Investor-State Process on the Environment* (Winnipeg: International Institute for Sustainable Development, 1999) at 7, 60, online: IISD <http://www.iisd.org/pdf/nafta.pdf> [Mann & von Moltke, *Impact on the Environment*]; International Institute for Sustainable Development & World Wildlife Fund, *Private Rights, Public Problems: A Guide to NAFTA's Controversial Chapter on Investment Rights* (Winnipeg: International Institute for Sustainable Development, 2001) at 37, 44, online: IISD <http://www.iisd.org/publications/pub.aspx?id=270>; Brower, "Structure, Legitimacy", *ibid.* at 56; Soloway, *supra* note 8 at 10; Forcese, *supra* note 12.

[60] See Alain Prujiner, "L'arbitrage unilatéral: Un coucou dans le nid de l'arbitrage conventionnel?" (2005) Rev. Arb. 63 at 83; J.-G. Castel *et al.*, *The Canadian Law and Practice of International Trade with Particular Emphasis on Export and Import of Goods and Services*, 2d ed. (Toronto: Emond Montgomery, 1997) at 724.

[61] Noted Canadian arbitrator L. Yves Fortier has said that there is a "definite lack of consensus" on the existence of general duty of confidentiality ("The Occasionally Unwarranted Assumption of Confidentiality" (1999) 15:2 Arb. Int'l 131 at 132 [emphasis omitted]). The conclusion was confirmed by Fulvio Fracassi based on a survey of case law from around the world ("Confidentiality and NAFTA Chapter 11 Arbitrations" (2001) 2 Chicago J. Int'l L. 213 at 213-17). The absence of consensus was also confirmed in *UNCITRAL Notes on Organizing Arbitral Proceedings* at paras. 31, 32, online: UNCITRAL <http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf>, adopted in *Report of the United Nations Commission on International Trade Law on the Work of its Twenty-Ninth Session*, UN GAOR, 51st Sess., Supp. No. 17, UN Doc. A/51/17 (1996) at paras. 31-32. Eric Loquin has argued that limited confidentiality is an implicit undertaking of the parties in their agreement to arbitrate ("Les obligations de confidentialité dans l'arbitrage" [2006] Rev. Arb. 323).

[62] See Fracassi, *ibid.* at 217-21.

[63] Brower, "Structure, Legitimacy", *supra* note 6 at 51. Prujiner also suggests that transparency is essential (*supra* note 60 at 84-85).

[64] Accord Soloway, *supra* note 8 ("Th[e] lack of transparency seems to run counter to 'the values and views' integral to the post-war trading system and indeed democratic principles, where

The precise degree of transparency required to provide legitimacy is not obvious. It is likely impossible to specify definitively what transparency guarantees would meet legitimacy concerns in practical terms.[65] Since rights are adjudicated and issues of public policy are often implicated in Chapter 11 cases, it could be argued that the appropriate benchmark should be domestic judicial proceedings. Certainly, transparency and openness equivalent to that found in Canadian judicial proceedings would address concerns about legitimacy. In general terms, judicial proceedings are characterized by

- a public record of claims and documents filed by the parties;
- hearings open to the public;[66] and
- published decisions with reasons.[67]

Another element of judicial procedures in both Canada and the United States where public interests are at stake is the participation of intervenors or, as they are more commonly described in the context of investor-state dispute settlement, amici curiae.[68] The rationale for permitting nonparties to participate is that the overall fairness of decisions may be enhanced by the participation of a wide range of intervenors, who may contribute perspectives to the issues under consideration beyond what the parties provide.[69] Well-developed rules for amicus curiae participation in judicial proceedings exist to ensure that participation is permitted in appropriate cases and not abused.[70] An investor-state dispute settlement system that permitted access on similar terms would address legitimacy concerns.

An argument in support of using the relatively high standard of domestic judicial proceedings as a benchmark is that, unlike domestic judicial decisions, investor-state arbitration tribunal awards are subject to judicial review on very narrow grounds, such as a fundamental error in procedure, inappropriate exercise of jurisdiction, and conflict with public policy.[71] In this context, the need for high standards of

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transparency of legal process is a fundamental norm" at 10). Prujiner has written that investor-state arbitration and private commercial arbitration are fundamentally different and that one should not look to private commercial arbitration for guidance regarding the appropriate procedures for investor-state arbitration (*ibid.* at 98-99).

[65] Gurudevan suggests that it is possible to imagine a sliding scale for transparency (*supra* note 6 at 426).

[66] See Gerald A. Gall, *The Canadian Legal System*, 3d ed. (Calgary: Carswell, 1990) at 128-34.

[67] See Peter McCormick, *Canada's Courts: A Social Scientist's Ground-Breaking Account of the Canadian Judicial System* (Toronto: James Lorimer, 1994) at 136.

[68] See Ian Brodie, *Friends of the Court: The Privileging of Interest Group Litigation in Canada* (Albany: Albany SUNY Press, 2002) at 20-28.

[69] See Ian Brodie, "Intervenors and the Charter" in Frederick L. Morton, ed., *Law, Politics and the Judicial Power*, 3d ed. (Calgary: University of Calgary Press, 2002) 295; Frederick L. Morton, "Access to Judicial Power" in Morton, *ibid.*, 255 at 264-65.

[70] See e.g. B.A. Crane & H.S. Brown, *Supreme Court of Canada Practice 2005* (Toronto: Thomson, 2005) at 274-97. See especially *ibid.* at 276-78, 284-85.

[71] Review of NAFTA Chapter 11 decisions is discussed in Eklund, *supra* note 25.

transparency and amicus curiae participation in the arbitral process is more compelling.

The next sections review NAFTA's rules and the practices developed by NAFTA tribunals. Tribunals now typically provide transparency and an openness to amicus participation to a degree that is comparable with that of domestic judicial proceedings. Indeed, there is mounting evidence of a strong trend toward improved transparency in investor-state arbitration. This trend suggests that, despite the remaining gaps in the NAFTA regime, NAFTA states and tribunals are unlikely to revert readily to lower levels of transparency and openness in practice. Nevertheless, in the continuing absence of detailed and specific rules in NAFTA or the applicable arbitral rules guaranteeing transparency and openness, a degree of uncertainty remains regarding how transparent and open the process will be in any particular case. As a consequence, Brower's third criterion for legitimacy of an international regime, that it operate predictably, is not fully achieved in NAFTA investor-state arbitration.

III. Rules on Transparency in Investor-State Arbitrations

A. The NAFTA Rules

1. Introduction

There are some minimal transparency provisions in NAFTA Chapter 11. NAFTA article 1126(13) requires that a public register of arbitration claims be maintained by the NAFTA Secretariat, a trinational organization established under the agreement primarily to provide support for the trade-remedies dispute-settlement process under Chapter 19 and the general dispute-settlement process under Chapter 20.[72] NAFTA also provides for disclosure of arbitral awards. Under the three sets of arbitral rules contemplated under NAFTA, publication of an arbitration award may only take place with the consent of both parties.[73] This publication rule is maintained for awards against Mexico, but Canada and the United States are permitted to disclose awards against them without the consent of the investor and investors may similarly make awards public.[74] There are no other transparency requirements in NAFTA's investment chapter.

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[72] *NAFTA*, *supra* note 1, art. 2002.

[73] *ICSID Arbitration Rules*, *supra* note 15, r. 48(4); *UNCITRAL Rules*, *supra* note 26, art. 32(5). The *Additional Facility Rules*, *supra* note 15 do not address publication but it has been suggested that agreement of the parties would be required. See e.g. Eklund, *supra* note 25 at 157.

[74] *NAFTA*, *supra* note 1, ann. 1137.4.

2. FTC Interpretive Note on Transparency

In 1998, the Canadian government presented an issues paper to the other NAFTA parties advocating an agreed-upon interpretation of Chapter 11 that would permit disclosure of the existence and basic nature of each Chapter 11 claim.[75] There was no consensus at the time, but in July 2001, the Free Trade Commission adopted the FTC Interpretive Note on Transparency, which provides in part:

> 1. Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and, subject to the application of Article 1137(4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal.
>
> 2. In the application of the foregoing:
>
> a) In accordance with Article 1120(2), the NAFTA Parties agree that nothing in the relevant arbitral rules imposes a general duty of confidentiality or precludes the Parties from providing public access to documents submitted to, or issued by, Chapter Eleven tribunals, apart from the limited specific exceptions set forth expressly in those rules.
>
> b) Each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of:
>
> i. confidential business information;
>
> ii. information which is privileged or otherwise protected from disclosure under the Party's domestic law; and
>
> iii. information which the Party must withhold pursuant to the relevant arbitral rules, as applied.[76]

The effect of this note on the practice before NAFTA tribunals is discussed below.

3. NAFTA Practice

Several NAFTA Chapter 11 tribunals have recognized that greater openness of investor-state proceedings would contribute significantly to improved public perceptions regarding the legitimacy of the Chapter 11 process.[77] In this sense, the FTC Interpretive Note on Transparency confirmed prior tribunal practice. In *Metalclad*, for example, the tribunal had determined that nothing in NAFTA, the Additional Facility Rules, or the UNCITRAL Rules prevented parties from making

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[75] The Canadian Government issues paper has not been officially made public, but was reproduced in "Canadian Memo Identifies Options for Changing NAFTA Investment Rules" *Inside U.S. Trade* 17:6 (12 February 1999) 1 at 21-23 [Canadian Paper on Transparency].

[76] *Supra* note 11.

[77] See *Methanex*, Amicus Decision, *supra* note 10; *UPS*, Amicus Decision, *supra* note 10.

information regarding the arbitration publicly available.[78] In *Loewen*, the tribunal determined that, in the absence of an express provision precluding disclosure to the public by a party, no such duty should be implied, because it would deprive "the public of knowledge and information concerning government and public affairs."[79]

Despite their confirmation that there is no general obligation in NAFTA or the applicable arbitral rules to ensure that all matters related to the proceedings remain in confidence, tribunals have been somewhat cautious about allowing transparency, reflecting commercial arbitral practice. The *Metalclad* tribunal, for example, offered the following observation:

> [I]t still appears to the [Arbitral Tribunal] that it would be of advantage to the orderly unfolding of the arbitral process and conducive to the maintenance of working relations between the Parties if during the proceedings they were both to limit public discussion of the case to a minimum, subject only to any externally imposed obligation of disclosure by which either of them may be legally bound.[80]

Tribunals have also cautioned that openness must be balanced against the legitimate concerns of investors about disclosure of their confidential information and the burden it could place on them.[81]

The practice regarding disclosure in NAFTA Chapter 11 cases to date has been for tribunals to issue an order near the beginning of the arbitration, typically based on the consent of the parties, regarding what information and documents relating to the proceedings may be publicly disclosed.[82] In early cases like *Ethyl*, disclosure was

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[78] *Metalclad v. Mexico*, Decision on a Request by the Respondent for an Order Prohibiting the Claimant from Revealing Information Regarding ICSID Case ARB/(AF)197/1 (27 October 1997) at para. 10, online: NAFTA Claims <http://www.naftaclaims.com/Disputes/Mexico/Metalclad/MetalcladProceduralOrder1.pdf> [*Metalclad*, Order]. See also *S.D. Myers v. Canada*, Procedural Order No. 16 (Concerning Confidentiality in Materials Produced in the Arbitration) (13 May 2000) at paras. 8-9, online: Foreign Affairs and International Trade Canada <http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/SD_Myers.pdf> [*S.D. Myers*, Procedural Order No. 16].

[79] *Loewen*, Decision on Jurisdiction, *supra* note 56 at para. 26. In *S.D. Myers*, the tribunal noted that in the few private commercial arbitration cases that had found a duty of confidentiality binding on parties, the courts had relied on there being an implied term in the arbitration agreement between the parties. The tribunal found that there is no such implied term in treaty-based arbitration as state consent is given in advance in the treaty itself. See *S.D. Myers*, Procedural Order No. 16, *ibid.*

[80] *Metalclad*, Order, *supra* note 78 at para. 10.

[81] See *The Loewen Group v. United States* (2003), ARB(AF)/98/3, 42 I.L.M. 811 at paras. 231-33, 7 ICSID Rep. 442 (International Centre for Settlement of Investment Disputes), online: U.S. Department of State <http://www.state.gov/documents/organization/22094.pdf>; *S.D. Myers*, Procedural Order No. 16, *supra* note 78 (emphasizing the relationship between limited disclosure of written arguments and evidence to be presented at a hearing and the efficient organization of proceedings). Fracassi is critical of this conclusion (*supra* note 61 at 219).

[82] In practice, Canada has sought the investor's consent to disclosure and a tribunal order on disclosure. See *Ethyl v. Canada*, Procedural Order (2 July 1998), online: Foreign Affairs and

limited to the notice of intent to file a claim to arbitration, the investor's statement of claim, the respondent state's statement of defence, as well as any orders of the tribunal. Transcripts of hearings, evidence, and any other submissions of the parties to the tribunal were kept confidential.[83] In later cases, such as *Pope & Talbot v. Canada*,[84] disclosure has tended to be more extensive, including, in addition to the documents made available in *Ethyl*, all the parties' written submissions, transcripts of oral submissions, correspondence from the tribunal, evidence, formal responses of the parties to tribunal questions, and all submissions from non-disputing state parties. Following the issuance of the FTC Interpretive Note on Transparency, hearings have been open via closed-circuit television in at least three cases,[85] and in other cases transcripts of hearings have been made public.[86] Typically the tribunal order will establish a process to deal with the protection of information that is sensitive for commercial or other reasons. Disclosure of such information is only permitted to certain people, such as counsel and witnesses. Each person receiving the information is subject to the restrictions on disclosure in the order and must sign a confidentiality agreement.[87]

Based on recent cases, it seems the overall result of the note has been that the public has had substantial access to information and documents related to Chapter 11 cases. This includes the parties' submissions, evidence, communications between the tribunal and the parties, orders of the tribunal on procedural and other matters, transcripts of oral proceedings, and awards. The websites of Department of Foreign Affairs and International Trade Canada, the U.S. State Department, and Mexico's Secretaria de Economia[88] contain many of the documents related to the cases to date,

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International Trade Canada <http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/ethyl5.pdf>; *S.D. Meyers v. Canada*, Procedural Order No. 3 (10 June 1999), online: Foreign Affairs and International Trade Canada <http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/myers5.pdf>).

[83] *Ethyl v. Canada*, Procedural Order (28 November 1997), online: Foreign Affairs and International Trade Canada <http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/ethyl5.pdf>.

[84] Amended Procedural Order on Confidentiality No. 5 (17 September 2002), online: Foreign Affairs and International Trade Canada <http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/Amended%20ProceduralOrder5.pdf> [*Pope & Talbot*, Amended Procedural Order]. Participation by non-disputing NAFTA party states is permitted by *NAFTA*, *supra* note 1, art. 1128.

[85] See *UPS*, Arbitration Notice, *supra* note 9; *Methanex*, Arbitration Notice, *supra* note 9; *Canfor*, *supra* note 9. In *Glamis*, the tribunal issued a procedural order providing for open hearings, though in that case, both parties had consented (Procedural Order No. 1, *supra* note 10).

[86] See e.g. *ADF Group v. United States* (2003), ARB(AF)/00/1, 18 ICSID Rev. 195 (International Centre for Settlement of Investment Disputes), online: ICSID <http://icsid.worldbank.org/ICSID/> [*ADF*].

[87] See e.g. *Pope & Talbot*, Amended Procedural Order, *supra* note 84.

[88] Foreign Affairs and International Trade Canada Website, *supra* note 37; U.S., Department of State, "NAFTA Investor-State Arbitrations", online: U.S. Department of State <http://www.state.gov/s/l/index.cfm?id=3439> [U.S. Department of State Website]; International Centre for the Settlement of

though there is sometimes a time lag between the date of the documents and the date on which they are posted. As well, a wealth of information is available on various private websites maintained by investors' counsel[89] and others.[90] In practice, access to pleadings, communications between the tribunal and the parties, and interim procedural orders is often better than in domestic court proceedings. Nevertheless, despite this level of disclosure, the legitimacy of the investor-state process based on Brower's criteria has not been fully attained because such disclosure is not guaranteed through predictable rules binding on investors and states. The gaps in both the rules and tribunal practice are discussed below.

4. Gaps in NAFTA Transparency Rules

There are few legal guarantees regarding public access to information about Chapter 11 proceedings. In particular cases, a state party or the investor may seek a tribunal order to limit disclosure and they may be successful. In this sense, the current transparency practices in NAFTA cases lack the more robust character of the rules governing judicial procedures. In the remainder of this section, the gaps in the legal framework for transparency are discussed.

a. Disclosure Prior to Commencement of the Arbitration

The FTC Interpretive Note on Transparency does not address disclosure in relation to the early stages of a Chapter 11 case. It speaks only to disclosure after the arbitration has been commenced and the tribunal appointed. Several steps in an investor-state arbitration occur prior to this point in the process.

The first step in a Chapter 11 arbitration is the delivery by an investor from one state party of a "Notice of Intent to Submit a Claim to Arbitration" to another state party that the investor claims has breached its treaty obligations causing a loss to the investor.[91] The investor and the state party may then engage in consultations. Consultations are not mandatory and may occur before or after a notice of intent is delivered. Because the notice of intent to submit a claim to arbitration is filed and any consultations occur before the arbitral process is formally begun, the arbitration rules that will be applied once the process has begun have no effect on whether the state party complained against may disclose the notice on the nature of any consultations, nor is there any restriction in NAFTA.[92] Undoubtedly, disclosure of the substance of

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Investment Disputes, online: ICSID <http://icsid.worldbank.org/ICSID/>; Mexico, Secretaria de Economia, online: Secretaria de Economia <http://www.economia-snci.gob.mx/>.

[89] See e.g. "NAFTA Investor-State Arbitrations", online: Appleton & Associates <http://www.appletonlaw.com/cases.htm>.

[90] See e.g. NAFTA Claims, *supra* note 37; Investment Treaty Arbitration, online: University of Victoria Faculty of Law <http://ita.law.uvic.ca>.

[91] *NAFTA*, *supra* note 1, art. 1119.

[92] In the past, Canada has expressed some concern that disclosure would be contrary to Canadian domestic law. See Canadian Paper on Transparency, *supra* note 75 at 22.

consultations would reduce the prospect of a settlement of the dispute at this early stage. For this reason, such disclosure may be impractical and there is no practice of disclosure of information regarding consultations.[93] Notices of intent in cases against Canada and Mexico have been made available on government websites, though not always on a timely basis. For U.S. cases, notices of intent are not published by the NAFTA party states though in most cases they can be found on private sites.[94] In some early cases, the existence of the case was not made public until long after it had begun.[95] While this somewhat inconsistent practice regarding disclosure of notices of intent to arbitration goes some way toward promoting the legitimacy of the process, a binding and specific requirement to promptly disclose all notices of intent received would enhance the predictability and certainty under which the Chapter 11 process operates. Just as with judicial proceedings, a publicly available record should be created once the first step in an investor-state arbitration is taken.

b. Disclosure of Arbitration Claim

Under NAFTA article 1120, the arbitration is commenced by the investor submitting a claim to arbitration in accordance with the requirements of the arbitration rules chosen by the investor, subject to certain conditions established in NAFTA.[96] There is no requirement to maintain confidentiality in relation to a claim to arbitration. Indeed, as noted above, article 1126(13) contemplates that arbitration claims will be made available in a publicly accessible register maintained by the NAFTA Secretariat. No interpretation or further provision in the agreement is required to create a disclosure obligation.[97] Currently, the NAFTA Secretariat does maintain such a register in compliance with this obligation, though it can be accessed only by visiting the Secretariat office in the state complained against. In practice, more effective disclosure of arbitration cases is achieved by publication of arbitration claims on a government website, though there is often a lag between the filing of the claim and publication. Delays may occur because NAFTA party states are reluctant to

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[93] The websites of Foreign Affairs and International Trade Canada (*supra* note 37) and the United States Department of State (*supra* note 88) provide brief descriptions of the claims in each case. The U.S. Department of State also typically adds that it plans to defend the claim vigorously.

[94] See e.g. NAFTA Claims, *supra* note 37.

[95] See Howard Mann & Konrad von Moltke, "Protecting Investor Rights and the Public Good: Assessing NAFTA's Chapter 11" (Background Paper to the International Institute for Sustainable Development Tri-National Policy Workshops, Mexico City (March 13 2002), Ottawa (March 18, 2002), Washington (April 11 2002)), online: IISD <http://www.iisd.org/pdf/2003/investment_ilsd_background_en.pdf>.

[96] Six months must have passed since the events giving rise to the claim (*NAFTA*, *supra* note 1, art. 1120) and the investor must file a consent to arbitration in accordance with the requirements of art. 1121. The submission of a claim is referred to as a notice of arbitration under the *UNCITRAL Rules* (*supra* note 26, art. 3) and the *Additional Facility Rules* (*supra* note 15, art. 2), and as a request for arbitration under the *ICSID Convention* (*supra* note 15, art. 36(1)).

[97] In the Canadian Paper on Transparency, it was suggested that an agreed interpretation should be adopted on this point (*supra* note 75 at 22).

widely disseminate investors' claims to arbitration until the proceedings have moved considerably along and the respondent state has had an opportunity to make its defence to a claim in a public way. Publication of the investor's claim to arbitration unaccompanied by the state's response allows the investor to define both the issues related to the claim and how the claim is perceived by the public.[98] One problem resulting from delays in disclosure is that delays impair the ability of public-interest NGOs to participate in a case. Without prompt public disclosure of the existence of a case and some information regarding its nature, such organizations may miss an opportunity to apply to the tribunal for permission to participate as amici curiae.[99] Enshrining a more effective requirement in NAFTA to disclose filed claims on a timely basis would contribute to the legitimacy of the Chapter 11 process.

c. Disclosure After Commencement of Arbitration

Once the arbitration has commenced, the FTC Interpretative Note on Transparency commits the NAFTA party states to disclosing all documents submitted to or issued by an arbitral tribunal. However, it acknowledges "limited specific exceptions" in the applicable arbitral rules.[100] In fact, these exceptions may be significant in relation to proceedings subsequent to the initiation of the arbitration but prior to the issuance of the final award. The UNCITRAL Rules, the Additional Facility Rules, and the ICSID Arbitration Rules all provide that procedural matters are to be dealt with by the tribunal.[101] Under the Additional Facility Rules and the ICSID Arbitration Rules, the views of the parties are to be considered and any agreement between them applied, but otherwise the procedure is left to the tribunal. Tribunals have even more flexibility under the UNCITRAL Rules.[102] Thus, notwithstanding the commitment of the NAFTA party states in the FTC Interpretative Note on Transparency, tribunals retain discretion to limit disclosure. Orders

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[98] This concern is raised in the Canadian Paper on Transparency, *ibid.*

[99] In *Glamis v. United States*, the tribunal issued Procedural Order No. 1, *supra* note 10 on 3 March 2005. It provided that non-disputing parties would have until March 2006 to apply to file an amicus submission. On 26 August 2005, the tribunal moved the deadline up to 30 September 2005 (Procedural Order No. 4, online: U.S. Department of State <http://www.state.gov/documents/organization/54151.pdf>). The order was only posted on the U.S. Department of State website on 25 September 2005. In response to complaints from a number of NGOs, the tribunal agreed, in a letter written to the NGOs on 30 September 2005, to extend the deadline to 26 October 2005. In *UPS*, Arbitration Notice, *supra* note 9, counsel for some prospective intervenors succeeded in getting put on the service list so that his clients would not miss their opportunity to apply for leave to file an amicus submission.

[100] *Supra* note 11 at para. 1.b.i.

[101] *UNCITRAL Rules*, *supra* note 26, art. 15; *Additional Facility Rules*, *supra* note 15, arts. 27-35; *ICSID Arbitration Rules*, *supra* note 15, r. 20.

[102] The *UNCITRAL Rules* provide that "[s]ubject 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" (*ibid.*, art. 15(1)).

prohibiting disclosure of documents filed with or issued by arbitral tribunals may be made where requested by the investor or the state complained against.

NAFTA cases disclose examples of both. In *Karpa*, prior to the FTC Interpretive Note on Transparency, Mexico sought a tribunal order barring the investor from publicly discussing the case and prohibiting the disclosure of all evidence, testimony, and documents. The investor opposed the issuance of the order. The tribunal ruled that there was nothing in NAFTA, or in international commercial arbitration practice generally, that prohibited a party from discussing an ongoing case. In support of its conclusion, the tribunal noted that the investor was a public company that had a legal obligation to provide a certain level of public disclosure of its affairs under U.S. securities laws.[103] The tribunal also ordered, however, that all evidence, testimony, and documents be kept confidential.[104] In other cases, the investor has sought to limit disclosure.[105] As noted, in most of the cases to date, tribunals have issued an order on the consent of the parties permitting disclosure of pleadings, other communications between the parties and the tribunal, orders, and awards.[106] Nevertheless, the commitment of the NAFTA party states to disclosure of all documents submitted to or issued by a tribunal may be better understood as a commitment to seek the consent of the investor to disclosure and to seek an order from the tribunal permitting disclosure.

The FTC Interpretive Note on Transparency is limited in one other important way. It only addresses disclosure of documents, not the openness of oral hearings. This may be because, in relation to oral hearings, article 25(4) of the UNCITRAL Rules provides that all hearings must be in camera unless the parties consent to a more open process. Rule 32 of the ICSID Arbitration Rules and article 39 of the Additional Facility Rules are similar in effect. The tribunal must decide, with the consent of the parties, who, in addition to the parties, may attend oral hearings. These rules give either party a veto over the attendance of the public, the press, or public-

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[103] *Karpa v. Mexico*, ARB(AF)/99/1, Procedural Order No. 5 Concerning Questions Raised in Connection with Procedural Order No. 4 (6 December 2000) at para. 10 (International Centre for Settlement of Investment Disputes), online: NAFTA Claims <http://naftaclaims.com/Disputes/Mexico/Feldman/FeldmanProceduralOrder5.pdf> [*Karpa*, Procedural Order No. 5]. Mexico made a similar application in the form of a request for an interim measure of protection in *Metalclad*, Order, *supra* note 78. The request was rejected.

[104] *Karpa*, Procedural Order No. 5, *ibid.* at para. 11.

[105] See e.g. *Waste Management v. Mexico* (2004), ARB(AF)/00/3, 43 I.L.M. 967 (International Centre for the Settlement of Investment Disputes (Additional Facility)), online: NAFTA Claims <http://naftaclaims.com/Disputes/Mexico/Waste/WasteFinalAwardMerits.pdf>.

[106] See e.g. *Methanex v. United States*, Minutes of Order of the First Procedural Meeting Held by Telephone Conference on Thursday, 29 June 2000 at item 15:2, online: U.S. Department of State <http://www.state.gov/s/l/c3757.htm> [*Methanex*, Disclosure Order] (parties agreed to the disclosure of orders, awards, and pleadings).

interest representatives at oral hearings.[107] The most that a NAFTA party state can do is seek agreement from the investor to open the oral hearings.[108]

In 2003, Canada affirmed that in Chapter 11 disputes to which it is a party, it will consent to hearings being open to the public and will request the consent of disputing investors. However, the hearings would be subject to the protection of confidential information, including confidential business information. Both Mexico and the United States joined Canada in this commitment in 2004.[109] Hearings that were open to the public by closed-circuit television have been held in *UPS*,[110] *Methanex*,[111] and *Canfor*,[112] and hearing transcripts have been made public in a number of more recent cases.[113]

Despite this substantial transparency in practice, in order to establish a transparency regime that provides durable support for the legitimacy of NAFTA Chapter 11, the investor-state process must be reformed. NAFTA should guarantee prompt, systematic disclosure of all preliminary proceedings, submissions of all parties including non-disputing states and amici curiae, evidence, hearings, communications between the parties and the tribunal, and all tribunal orders and awards. All of the above would be subject to the protection of confidential information. An unwillingness among Canada, the United States, and Mexico to tinker with the NAFTA rules seems likely to prevent the occurrence of such reforms through an amendment to NAFTA itself. The next section describes how slight progress has been made through changes to the arbitration rules that govern Chapter

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[107] This interpretation of the *Additional Facility Rules*, *supra* note 15 was recently confirmed in *Aguas Provinciales de Santa Fe v. Argentina*, ARB/03/17, Order in Response to a Petition for Participation as *Amicus Curiae* (17 March 2006) (International Centre for Settlement of Investment Disputes), online: ICSID <http://icsid.worldbank.org/ICSID/> [*Aguas Provinciales*, Amicus Order].

[108] See also *ICSID Arbitration Rules*, *supra* note 15, r. 32. Amendments to these rules that contemplate but do not require open hearings are discussed in more detail below. See text accompanying note 123.

[109] See NAFTA Free Trade Commission, "Joint Statement" (16 July 2004), online: Foreign Affairs and International Trade Canada <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/js-sanantonio.aspx?lang=en>.

[110] Arbitration Notice, *supra* note 9.

[111] Arbitration Notice, *supra* note 9.

[112] *Supra* note 9.

[113] See *GAMI Investments v. Mexico* (2004) (Arbitrators: W. Michael Reisman, Julio Lacarte Muró, Jan Paulsson), online: NAFTA Claims <http://naftaclaims.com/Disputes/Mexico/GAMI/GAMIfinal Award.pdf>; *Fireman's Fund v. Mexico*, Notice of Arbitration under the Rules Governing the Additional Facility for the Administration of Proceedings by the International Centre for Settlement of Investment Disputes and the North American Free Trade Agreement (30 October 2001), online: Mexican Ministry of the Economy <http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos_Mexico/Fireman/documentos_basicos/Notice_of_Arbitration.pdf>; *International Thunderbird Gaming v. Mexico*, Notice of Arbitration and Statement of Claim (1 August 2002), online: Mexican Ministry of the Economy <http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos_Mexico/Thunderbird/documentos_basicos/aviso_de_reclamacion.pdf>; *ADF*, *supra* note 86; *Mondev*, *supra* note 55.

11 arbitrations when the investor chooses the ICSID Additional Facility Rules.[114] It also outlines how some of the identified defects in the NAFTA process have been remedied in the new model investment treaties adopted by Canada and the United States.

B. Recent Improvements in Transparency Rules

There has been increasing recognition of the need for greater transparency in investor-state arbitration.[115] This view is reflected in certain amendments in 2006 to the ICSID Arbitration Rules and the Additional Facility Rules designed to expedite publication of excerpts from the legal holdings in awards and to give tribunals the express power to permit additional categories of people and even the general public to attend or observe hearings.[116] The amendments condition the tribunal's power to open up hearings on the absence of an objection from either of the parties.[117] The ICSID Secretariat's 2005 proposals regarding these amendments did not contain this limitation. Only consultation with the parties was required.[118] Nevertheless, even the watered-down amendments may improve the prospects for greater transparency. Previously, article 32 of the ICSID Arbitration Rules and article 39 of the Additional Facility Rules provided that a tribunal could only act with the consent of the parties. The 2006 amendments require an objection from the parties to prevent access to hearings as opposed to a positive consent to access. This requirement represents a subtle shift in emphasis intended to make clear that tribunals have the power to admit

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[114] The same changes were made to the *ICSID Arbitration Rules*, *supra* note 15.

[115] In June 2005, the OECD Investment Committee issued a statement endorsing enhanced transparency and specifically linking improved transparency to the legitimacy of investor-state procedures. See Organisation for Economic Co-operation and Development, *Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures: Statement by the OECD Investment Committee* (June 2005), online: OECD <http://www.oecd.org/dataoecd/25/3/34786913.pdf> [*OECD Statement*].

[116] Proposals for reform were made initially by the ICSID Secretariat in *Possible Improvements of the Framework for ICSID Arbitration: ICSID Secretariat Discussion Paper* (22 October 2004), online: ICSID <http://www.worldbank.org/icsid/highlights/improve-arb.pdf>. The proposals were amended in March 2005 following comments from various constituencies and a revised working paper was issued by the ICSID Secretariat (*Suggested Changes to the ICSID Rules and Regulations: Working Paper of the ICSID Secretariat* (12 May 2005), online: ICSID <http://www.worldbank.org/icsid/highlights/052405-sgmanual.pdf> [*ICSID Secretariat Proposals*]). Revised proposals were submitted to the ICSID Administrative Council in the fall of 2005. On 5 April 2006, the Administrative Council approved amendments of the *ICSID Arbitration Rules*, *supra* note 15 and the *Additional Facility Rules*, *supra* note 15 [*ICSID Amendments*]. These amendments to arts. 32 and 48 of the *ICSID Arbitration Rules* and arts. 39 and 53(3) (formerly 54(3)) of the *Additional Facility Rules* came into effect on 10 April 2006. See ICSID News Release, *supra* note 15. Pursuant to art. 44 of the *ICSID Convention*, *supra* note 15, unless otherwise agreed upon by the parties, an ICSID arbitration proceeding is conducted in accordance with the arbitration rules in effect on the date on which the parties consented to arbitration.

[117] *ICSID Arbitration Rules*, *ibid.*, r. 32; *Additional Facility Rules*, *ibid.*, art. 39(2).

[118] *ICSID Secretariat Proposals*, *supra* note 116 at 10.

members of the public and other interested third parties and that it may be "useful" to do so in certain cases.[119] The new provisions also provide that rules should be put in place to ensure the protection of confidential information of the parties.

By changing the arbitration rules that will apply in some NAFTA Chapter 11 arbitrations, the 2006 amendments help to consolidate the developing practice in NAFTA cases regarding hearings. As well, they may herald increased openness for investor-state arbitration hearings taking place under other investment treaties that are subject to the ICSID Arbitration Rules or the Additional Facility Rules.[120]

Much more comprehensive and explicit guarantees of transparency have been included in the *Canadian New Model FIPA*[121] and in the *U.S. New Model BIT*.[122] All hearings must be open to the public and documents must be made available in accordance with requirements that track the commitments undertaken by the NAFTA states in the FTC Interpretive Note on Transparency. All of the following must be made public:

- notice of intent;
- notice of arbitration;
- pleadings, memorials, and briefs submitted to the tribunal by a disputing party, and any written submissions by a non-disputing party state or by an amicus curiae;
- minutes or transcripts of hearings, where available; and
- orders, awards and decisions of the tribunal.[123]

Significantly, the new model treaty obligations overcome the main deficiency with the NAFTA tribunal practices and the FTC Interpretive Note on Transparency by providing that the contemplated level of transparency is mandatory. Transparency is also not subject to any limitations imposed by the applicable arbitral rules, which, as noted above, give significant discretion regarding disclosure to arbitral tribunals.

Critiques of investor-state procedures based on an absence of transparency are hard to sustain in relation to this new generation of investment treaties. These new

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[119] *Ibid.*

[120] It is conceivable that investors adverse to transparency may be encouraged to choose arbitration under the *UNCITRAL Rules*, *supra* note 26 instead of under the *Additional Facility Rules*, *supra* note 15. There is no evidence to suggest that the *UNCITRAL Rules* will be amended to provide for greater transparency. Following UNCITRAL's July 2006 meetings, the UNCITRAL Secretariat identified possible future amendments to the *UNCITRAL Rules*. Stronger transparency was not listed. In fact, consideration was being given to a proposal to tighten restrictions on disclosure. The list of possible amendments did not purport to be exhaustive. See UNCITRAL, *Settlement of Commercial Disputes: Possible Future Work in the Field of Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules: Note by the Secretariat*, UN GAOR, 39th Sess., UN Doc. A/CN.9/610/Add.1 at para. 6.

[121] *Supra* note 14.

[122] *Supra* note 14.

[123] *Ibid.*, art. 29(1); *Canadian New Model FIPA*, *supra* note 14, art. 38.

model treaties evidence the recognition of the important role played by transparency in contributing to the legitimacy of investor-state arbitration that is shared by Canada and the United States. This is consistent with the position that they had earlier staked out in the FTC Interpretive Note on Transparency and in both countries' public commitments to open hearings. The limited 2006 amendments to the ICSID Arbitration Rules and the Additional Facility Rules suggest that this recognition of the legitimacy-enhancing role of transparency is increasingly broad based and that there is a definite movement away from the private commercial arbitration model with its traditions of secrecy. In this environment, it is difficult to imagine that NAFTA tribunals will readily change direction to move away from the level of transparency adopted in recent cases. Without further changes to the applicable arbitral rules or to NAFTA itself, however, there are no guarantees in this regard and the resulting lack of predictability means that some legitimacy concerns remain.

As described in the next section, parallel developments to those described above with respect to transparency have occurred in relation to the participation by amici curiae in investor-state arbitration.

IV. Rules on the Participation of Amici Curiae in Investor-State Arbitrations

A. Introduction

None of the three sets of arbitral rules contemplated in NAFTA Chapter 11, nor Chapter 11 itself, creates a right for third parties to participate in arbitrations.[124] Participation by non-disputing third parties is completely absent from private arbitration proceedings.[125] There is, however, some precedent for non-disputing parties to participate in international forums in which the international responsibility of states is adjudicated, such as the WTO[126] and the Iran-U.S. Claims Tribunal (a body charged with ruling on claims by U.S. investors against Iran under the

[124] NAFTA party states other than the one complained against are entitled as of right to make submissions regarding issues related to the interpretation of NAFTA (*NAFTA*, *supra* note 1, art. 1128). This right has been widely used. See Martin Hunter & Alexei Barbuk, "Procedural Aspects of Non-disputing Party Interventions in Chapter 11 Arbitrations" (2003) 3 Asper Review of International Business and Trade Law 151.

[125] See Patrick Dumberry, "The Admissibility of *Amicus Curiae* Briefs in NAFTA Chapter 11 Proceedings: Some Remarks on the *Methanex* Case, A Precedent Likely to be Followed by Other NAFTA Arbitral Tribunals", Case Comment, (2001) Bulletin of the Swiss Arbitration Association 74 at 75.

[126] In 1998, the WTO Appellate Body held that panels could receive amicus briefs from non-governmental organizations (*United States—Import Prohibition on Shrimp and Shrimp Products* (1998), WTO Doc. WT/DS58/AB/R (Appellate Body Report), online: WTO <http://docsonline.wto.org>).

UNCITRAL Rules).[127] NAFTA Chapter 11 tribunals have held that they have the power to permit participation by non-disputing third parties in several cases, beginning in 2001 with rulings in *Methanex*[128] and *UPS*.[129] In both cases, the tribunals determined that they could allow participation of third parties as amici curiae, or friends of the court.[130] Subsequently, in 2003, the Free Trade Commission issued a statement on non-disputing party participation ("FTC Statement"), which recommended a process for NAFTA Chapter 11 tribunals to follow when considering applications for amicus participation and setting out criteria to be taken into account in deciding whether to permit such participation.[131] The procedures contemplated in the FTC Statement are similar to those found in Canadian domestic judicial proceedings.[132] While these tribunal decisions and the FTC Statement are not binding,[133] the consistent practice of tribunals to date suggests that applications for leave to participate as amicus curiae will be dealt with in a manner consistent with the FTC Statement. This was confirmed in 2006, when ICSID amended the ICSID Arbitration Rules and the Additional Facility Rules to expressly provide that tribunals have the power to permit participation by amici curiae, setting out procedures that are similar to, though not as comprehensive as, those in the FTC Statement.

There is also some evidence of a trend toward permitting the participation of amici in investor-state cases under other treaties.[134] Provisions in the new Canadian

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[127] See Stewart Baker & Mark Davis, *UNCITRAL Arbitration Rules in Practice: The Experience of the Iran-US Claims Tribunal* (The Hague: Kluwer Law International, 1992) at 98; Charles N. Brower & Jason D. Brueschke, *The Iran-United States Claims Tribunal* (The Hague: Kluwer Law International, 1998).

[128] Amicus Decision, *supra* note 10. More recently, in *Glamis*, the tribunal confirmed that it had power to accept amicus curiae submissions (Procedural Order No. 1, *supra* note 10).

[129] Amicus Decision, *supra* note 10.

[130] This expression comes from American usage. Amicus participation is expressly provided for in Fed. R. App. P. 29. The U.S. Federal Rules of Appellate Procedure can be accessed online: House of Representatives, Judiciary Committee <http://judiciary.house.gov/media/pdfs/printers/109th/appel 2005.pdf>.

[131] FTC Statement, *supra* note 11.

[132] See Forcese, *supra* note 12 at 327. In order to obtain standing as an intervenor in Canada, a party must show that (1) it has a direct legal interest in the outcome of the decision, (2) its rights will be directly affected by the outcome, and (3) it will bring to the court a point of view different from those of the parties. See *Canadian Council of Professional Engineers v. Memorial University of Newfoundland* (1997), 135 F.T.R. 211 at para. 4, 75 C.P.R (3d) 291 (T.D.). Rouleau J. cited these criteria in dismissing a motion for leave to intervene in the judicial review of the arbitral award in *S.D. Myers v. Canada (A.G.)*, 2001 FCT 317, [2001] F.C.J. No. 567 (QL) at para. 18 [*Myers Decision on Intervenors*]. See also *Canadian Taxpayers Federation v. Benoit*, 2001 FCA 71, 55 D.T.C. 5242 at para. 51.

[133] See *supra* note 13 and accompanying text.

[134] See e.g. *Aguas Argentinas v. Argentina*, ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae* (19 May 2005), online: ICSID <http://icsid. worldbank.org/ICSID/> [*Aguas Argentinas*, Amicus Order]. An identical decision was recently issued by the same panel in a related case *Aguas Provinciales*, Amicus Order, *supra* note 107.

and U.S. model investment treaties expressly empower investor-state tribunals to permit participation by amici curiae.

Thus, even though the NAFTA party states have not amended NAFTA to provide rules to govern amicus participation, the 2006 amendments to the ICSID Arbitration Rules and the Additional Facility Rules entrench the power of tribunals to accept amicus submissions. In addition, the positions of the NAFTA states as expressed in the FTC Statement and the apparent trend favouring the possibility of amicus participation strongly suggest that amicus participation is becoming a fixture in investor-state arbitration under Chapter 11 and other investment treaties. Nevertheless, the absence of binding and predictable rules to govern amicus involvement means there are residual concerns regarding the legitimacy of the NAFTA Chapter 11 process.

In the next section, the practices of NAFTA tribunals regarding amicus participation are surveyed. This is followed by a discussion of recent events that demonstrate the broadening acceptance of amicus participation in investor-state arbitration.

B. NAFTA Practice

The first two cases in which NAFTA tribunals recognized their power to admit and consider amicus submissions were *Methanex*[135] and *UPS*.[136] Both decisions were issued in 2001.

In *Methanex*, Methanex Corporation challenged an executive order by the Governor of the State of California requiring the removal of MTBE, a gasoline additive, from gasoline by no later than the end of 2002. The ostensible purpose of the order was to protect health and the environment. Methanex Corporation is a Canadian producer of methanol, an ingredient of MTBE, and claimed that the order was tantamount to expropriation of its business in breach of NAFTA article 1110 and that the manner in which the order was enacted and implemented was a violation of the minimum standard of treatment guaranteed by NAFTA article 1105. The International Institute for Sustainable Development, Communities for a Better Environment, the Blue Water Network, and the Center for International Environmental Law sought to participate in the arbitration, arguing that they could provide an important and distinctive perspective on the environmental issues in the case and that their participation would be important to the public acceptance of the Chapter 11 process. It was strongly argued by the International Institute for Sustainable Development that the case would have significant implications for the NAFTA states' ability to enact environmental protection legislation.

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[135] Amicus Decision, *supra* note 10.
[136] Amicus Decision, *supra* note 10.

In *UPS*, United Parcel Service of America, a U.S. courier business, alleged that Canada Post uses its monopoly in letter mail to compete unfairly against private-sector courier and parcel services in breach of NAFTA articles 1502 and 1503.[137] The Canadian Union of Postal Workers and the Council of Canadians sought standing as parties to the arbitration and, in the alternative, to participate as amici curiae on the basis that (1) they had a direct interest in the proceeding that could be adversely affected by the outcome, (2) they could offer a distinct perspective, and (3) their participation would promote the openness of the process.

In both cases, the tribunals held that they had no power to add parties to the arbitration. Recognizing that consent of the parties is the essence of the arbitral process, the tribunals determined that neither the claimant investor nor the state had consented to arbitrating with anyone except each other. Adding parties was not within the tribunal's power to control the arbitration's procedure under the UNCITRAL Rules that governed both arbitrations.[138]

Nevertheless, both tribunals agreed that they could permit third parties to participate as amici curiae. The tribunals stated that receiving written submissions from third parties was within the powers of the tribunal to manage the procedure of the arbitration with a view to facilitating "the Tribunal's process of inquiry into, understanding of, and resolving, that very dispute which has been submitted to it in accordance with the consent of the disputing parties."[139] In both cases, the tribunals acknowledged the importance of the public interest in relation to the issues before them and the contribution that amicus participation would make to the legitimacy of NAFTA investor-state arbitration.[140] In *Methanex*, the need for the Chapter 11 process to be perceived as open and transparent was also taken into account by the tribunal.[141] In both *Methanex* and *UPS*, the tribunal determined that it would make a final decision regarding whether to accept particular amicus briefs at the merits stage of the proceedings in consultation with the parties.

The *Methanex* and *UPS* tribunals reached the conclusion that they could accept amicus submissions despite objections from Mexico based, in part, on the ground that such third-party participation was not permitted in domestic legal proceedings under

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[137] UPS is also alleging breaches of arts. 1102 (national treatment) and 1105 (minimum standard of treatment required by international law). See *UPS*, Arbitration Notice, *supra* note 9.

[138] *Supra* note 26, art. 15.

[139] *UPS*, Amicus Decision, *supra* note 10 at para. 60. In *UPS*, Amicus Decision, neither the claimant investor nor Canada argued that the tribunal was without power to allow amicus curiae participation. Canada argued that the amicus participation should not extend to issues of jurisdiction, the place of arbitration, or procedure. The United States supported the Canadian position. In *Methanex*, Amicus Decision, *supra* note 10, the United States, with the support of Canada, did not argue against a finding that the tribunal had power to allow amici curiae. The claimant investor, however, did. In both cases, Mexico opposed amicus curiae participation.

[140] *Methanex*, Amicus Decision, *ibid.* at para. 49; *UPS*, Amicus Decision, *ibid.* at para. 70. This position was taken by the United States with the support of Canada in *Methanex*.

[141] Amicus Decision, *ibid.*

Mexican law.[142] On this point, the tribunals noted that disputes under Chapter 11 are to be resolved in accordance with international law, not domestic law. The tribunals cited the practice before the Iran-U.S. Claims Tribunal and in the WTO dispute-settlement process as supporting a power to receive third-party submissions.[143] The tribunals also noted, however, the need to minimize the burden on the parties, especially the investor, indicating that page limits and other procedural protections might be imposed in relation to third-party participation.

The tribunals also held that third-party participation must be limited to submitting written arguments on the issues raised by the parties unless the parties agree otherwise. As noted above, article 25(4) of the UNCITRAL Rules provides that all hearings must be in camera unless the parties consent to a more open process. Unless the investor agrees, amici curiae cannot attend or otherwise participate in oral hearings.[144]

Neither the *Methanex* nor *UPS* tribunal provided much guidance as to how the tribunal's power to permit third-party participation should be exercised. In *UPS*, the tribunal said that "[o]ne governing consideration will be whether the [third parties] are likely to be able to provide assistance beyond that provided by the disputing parties."[145] The tribunal went on to say that questions regarding jurisdiction, the place of arbitration, and any procedural matters could all be resolved without the assistance of third parties.[146]

In 2003, following the *UPS* and *Methanex* orders on amicus participation, the Free Trade Commission issued its statement recommending that NAFTA Chapter 11 tribunals adopt procedures specified in the statement to deal with participation by "non-disputing parties".[147] Essentially, the FTC Statement says that nothing in NAFTA limits a tribunal's discretion to decide to accept written submissions from a person who is a not a disputing party. It makes detailed specific recommendations

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[142] See *Methanex v. United States*, Submission by Mexico Pursuant to NAFTA Article 1128 (10 November 2000), online: U.S. Department of State <http://www.state.gov/documents/organization/3936.pdf>; *United Parcel Services of America v. Canada*, First Submission by Mexico Pursuant to NAFTA Article 1128 (11 June 2001), online: Foreign Affairs and International Trade Canada <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/parcel_archive.aspx?lang=en.pdf>.

[143] See *supra* notes 126-27 and accompanying text. It has been suggested that third-party participation could also occur under *NAFTA*, *supra* note 1, since art. 1133 permits tribunals to seek out experts. See Canadian Paper on Transparency, *supra* note 75 at 23; Mann & von Moltke, *Impact on the Environment*, *supra* note 59 at 56.

[144] As noted above, the investor ultimately consented to open hearings and such hearings were held. See *Methanex v. United States*, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005) at para. 8, online: U.S. Department of State <http://www.state.gov/documents/organization/51052.pdf> [*Methanex*, Final Award on Jurisdiction and Merits].

[145] *UPS*, Amicus Decision, *supra* note 10 at para. 70.

[146] *Ibid.* at 71.

[147] FTC Statement, *supra* note 11 at para. A.3.

regarding the form and content of an application for leave to submit a non-disputing party submission and of the submission itself, which must be attached to the application for leave. The FTC Statement also sets out certain nonexclusive criteria to be applied by tribunals in deciding whether leave should be granted. The tribunal should consider the extent to which

- the non-disputing party submission would assist the tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge, or insight that is different from that of the disputing parties;
- the non-disputing party submission would address matters within the scope of the dispute;
- the non-disputing party has a significant interest in the arbitration; and
- there is a public interest in the subject matter of the arbitration.[148]

The FTC Statement also recommends that tribunals should ensure that "any non-disputing party submission avoids disrupting the proceedings" and that "neither disputing party is unduly burdened or unfairly prejudiced by such submissions."[149] In accordance with the FTC Statement, granting leave to make a submission does not entail permission to make subsequent submissions, nor is the tribunal obliged to take the submission into account.

In 2004, the tribunal in *Methanex* adopted the procedures for the handling of amicus submissions in the FTC Statement on the recommendation of both parties[150] and accepted written submissions from two non-disputing parties. Submissions by the International Institute for Sustainable Development and by Earth Justice (on behalf of itself, Blue Water Network, Communities for a Better Environment, and the Center for International Environmental Law) were accepted by the tribunal with the agreement of both the United States and the investor.[151] In light of the parties' consent, the tribunal did not provide reasons for accepting the amicus submissions. The investor and the United States had an opportunity to respond to the submissions. The investor's response was fifty-two pages long.[152] In the final award, the tribunal referred to the amicus submission of the International Institute for Sustainable Development, describing it as "carefully reasoned".[153]

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[148] *Ibid.* at para. B.6.

[149] *Ibid.* at para. B.7.

[150] See *Methanex v. United States*, Disputing Parties' Agreement on *Amicus* Participation (31 October 2003), online: NAFTA Claims <http://www.naftaclaims.com/Disputes/USA/Methanex/MethanexAgreementReScope.pdf>.

[151] See *Methanex v. United States*, Letter from V.V. Veeder, Chair (6 April 2004), online: U.S. Department of State <http://www.state.gov/documents/organization/31277.pdf>.

[152] See *Methanex v. United States*, Claimant Methanex Corporation's Reply to the *Amicus Curiae* Submissions of Earthjustice and the International Institute for Sustainable Development (23 April 2004), online: U.S. Department of State <http://www.state.gov/documents/organization/31979.pdf>.

[153] *Methanex*, Final Award on Jurisdiction and Merits, *supra* note 144 at para. 27.

In *UPS*, an application for leave to file an amicus brief was filed by the same parties who asked the tribunal to decide if it had power to accept amicus filings: the Canadian Union of Postal Workers and the Council of Canadians.[154] The investor filed a response to the application asking that the leave application be dismissed.[155] This was followed by a rejoinder by the applicants[156] and then a response by the investor to the arguments raised in the amicus brief itself, which had been filed along with the application for leave.[157] In October 2005, the U.S. Chamber of Commerce ("Chamber") filed an application for leave to file an amicus brief.[158] This marked the first attempt to participate in a Chapter 11 case by a probusiness group. The Chamber's submission was restricted to arguments regarding the interpretation of the NAFTA national treatment obligation and of certain provisions in NAFTA Chapter 15 relating to state responsibility. In late 2005, Canada filed a response to the Chamber's national treatment argument but indicated that it did not object to the Chamber's leave application being granted.[159] In its decision on the merits, the *UPS* tribunal referred to these amicus applications in its overview of the proceedings but did not further discuss them in its reasons.[160]

Recently, in *Glamis*, a case involving mining claims and raising environmental and aboriginal-rights issues, the tribunal accepted a submission from the Quechan

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[154] See *United Parcel Services of America v. Canada*, Application for *Amicus Curiae* Status by the Canadian Union of Postal Workers and Council of Canadians (20 October 2005), online: Foreign Affairs and International Trade Canada <http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/UPSdoc2.pdf>.

[155] See *United Parcel Services of America v. Canada*, Investor's Observations on the Application of the Council of Canadians and the Canadian Union of Postal Workers for Leave to File *Amicus Curiae* Submissions (1 November 2005), online: Foreign Affairs and International Trade Canada <http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/UPSdoc-1.pdf>.

[156] See *United Parcel Services of America v. Canada*, Letter from Steven Shrybman, counsel for the Canadian Union of Postal Workers and the Council of Canadians (3 November 2005), online: Foreign Affairs and International Trade Canada <http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/UPSDOCUMENT.pdf>.

[157] See *United Parcel Services of America v. Canada*, Investor's Reply to the Canadian Union of Postal Workers and the Council of Canadians *Amicus Curiae* Submissions (10 November 2005), online: Foreign Affairs and International Trade Canada <http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/UPSdoc3.pdf>.

[158] See *United Parcel Services of America v. Canada*, Application for *Amicus Curiae* Status by Chamber of Commerce of the United States (20 October 2005), online: Foreign Affairs and International Trade Canada <http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/UPSdoc1.pdf>.

[159] See *United Parcel Services of America v. Canada*, Response of the Government of Canada to the *Amicus Curiae* Submission By the Chamber of Commerce of the United States of America (10 November 2005), online: Foreign Affairs and International Trade Canada <http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/CanadaResponseUSChamberSubmission.pdf>.

[160] *United Parcel Services of America v. Canada*, Award on the Merits (24 May 2007) at para. 3, online: Foreign Affairs and International Trade Canada <http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/MeritsAward24May2007.pdf>.

Indian Nation, applying the process set out in the FTC Statement.[161] The Quechan Indian Nation is actively opposed to the development of the mining claims held by Glamis and argued that it could bring a unique perspective to the Chapter 11 proceedings by providing expertise regarding the cultural, social, and religious value of the area of the mine to the Quechan Indian Nation and regarding the severity of the mine's impact on the area and the nation. The tribunal's order accepting the submission did not provide reasons. The investor did not oppose or support the application for leave but filed only a response seeking to challenge certain factual assertions in the application.[162] Four environmental groups—Friends of the Earth, together with Friends of the Earth Canada, and Sierra Club, together with Earthworks—have filed applications for leave to file an amicus brief with their brief attached.[163] The National Mining Association has also made a filing.[164] There has been no response from the tribunal to these applications.

If third parties are able to participate as amici curiae, the documents they will be given access to for the purpose of making their submissions will have a substantial impact on how effective their submissions will be. Third parties' participation will not be meaningful if they are denied all access to the parties' claims and submissions. In *Methanex*, the tribunal had previously issued a consent order on the disclosure of information.[165] The order reflected the parties' interim agreement that orders, awards (including interim awards), and pleadings could be made public by either party.[166] The tribunal determined that if third parties were permitted to participate, they could respond to any information properly in the public domain as well as to anything disclosed under the order. The FTC Statement suggests that disclosure to non-disputing parties should be made in accordance with the FTC Interpretive Note on

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[161] *Glamis v. United States*, Decision on Application and Submission by Quechan Indian Nation (16 September 2005), online: U.S. Department of State <http://www.state.gov/documents/organization/53592.pdf>. A subsequent application for leave to file a non-party submission was made by the Quechan Indian Nation. See *Glamis v. United States*, Application to File a Supplemental Non-Party Submission (16 October 2006), online: U.S. Department of State <http://www.state.gov/documents/organization/75015.pdf>.

[162] *Glamis v. United States*, Response of Glamis Gold Ltd. to Application by the Quechan Indian Nation for Leave to File a Non-Party Submission (15 September 2005), online: Department of State <http://www.state.gov/documents/organization/54090.pdf>.

[163] *Glamis v. United States*, *Amicus Curiae* Application of Friends of the Earth Canada and Friends of the Earth United States (30 September 2005), online: Department of State <http://www.state.gov/documents/organization/54364.pdf>; *Glamis v. United States*, Application of Non-Disputing Parties [Sierra Club and Earthworks] for Leave to File a Written Submission (16 October 2006), online: Department of State <http://www.state.gov/documents/organization/74831.pdf>.

[164] *Glamis v. United States*, Application for Leave to File a Non-Disputing Party Submission by the National Mining Association (13 October 2006), online: Department of State <http://www.state.gov/documents/organization/75178.pdf>.

[165] *Methanex*, Disclosure Order, *supra* note 106 at item 15:2. The tribunal in *UPS*, Amicus Decision, *supra* note 10 took the same approach, though in that case the parties had not yet reached an agreement on disclosure.

[166] All these documents are available on the U.S. Department of State Website, *supra* note 88.

Transparency. As discussed above, what will actually be available to prospective amici curiae may vary from case to case depending on what disclosure is ordered by the tribunal.[167]

The issue of amicus curiae participation has also been raised in the Canadian judicial review proceedings relating to the investor-state arbitration tribunal awards in *S.D. Myers* and *Metalclad*. In both review proceedings, based on the applicable Canadian law, the courts refused to allow public-interest NGOs to participate. The courts concluded that the NGOs would be unlikely to assist the court with the specific issues relating to the review in ways that the parties could not. These issues included various claims that the decision of the arbitral tribunal exceeded its jurisdiction and was contrary to Canadian public policy. Costs of $2000 were awarded against the applicants in the *S. D. Myers* case. The courts did not reject the possibility of third-party intervention in a judicial review of a Chapter 11 arbitral award in an appropriate case.[168] However, given the narrow scope of judicial review for arbitral awards in Canada and elsewhere, there may be few cases in which amici curiae will be successful in obtaining leave to participate.[169]

The courts have been much more welcoming to applications from governments in other NAFTA states to participate as amici curiae. In *S.D. Myers*, the court permitted the government of Mexico to participate as an amicus curiae with the consent of the parties.[170] In *Metalclad*, the governments of Canada and Quebec were permitted to participate as amici.[171] In support of its conclusion, the court in *Metalclad* noted that NAFTA states other than the one complained against have a right to participate in investor-state arbitration under NAFTA article 1128.[172]

In short, notwithstanding the absence of any reference to amicus participation in NAFTA Chapter 11 or any of the possibly applicable arbitral rules, investor-state tribunals established under NAFTA Chapter 11 have demonstrated that they are open to the possibility that submissions from NGOs of varying political orientations may be of assistance in resolving the issues before them and have applied a process and

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[167] See Part III.A.4, above.

[168] In the *Myers Decision on Intervenors*, *supra* note 132, the court denied the applications of the Council of Canadians, the Sierra Club of Canada, and Greenpeace, while Mexico was granted intervenor status with the consent of the parties. In the judicial review of *Metalclad*, Award, *supra* note 55, the governments of Canada and Quebec were granted intervenor status, but some NGOs were not (*Mexico v. Metalclad*, 2001 BCSC 1529, 89 B.C.L.R. (3d) 359, 14 B.L.R. (3d) 285 [*Metalclad*, Judicial Review]).

[169] The scope of judicial review of arbitral awards was discussed extensively in *Canada v. S.D. Myers*, 2004 FC 38, [2004] 3 F.C.R. 368 (T.D.).

[170] *Myers Decision on Intervenors*, *supra* note 132. Under Canadian law, non-disputing parties are referred to as intervenors. See Forcese, *supra* note 12 at 327.

[171] *Metalclad*, Judicial Review, *supra* note 168.

[172] *Ibid.* (Transcript of 19 February 2001), online: The National Security Archive <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB65>. Participation as an amicus curiae by an investor that was making a claim against Canada in another case was rejected.

criteria for the acceptance of amici curiae submissions that follows the FTC Statement. Undoubtedly, this openness to amicus participation, which is similar to that in Canadian judicial proceedings, contributes to the legitimacy of NAFTA investor-state arbitration. Nevertheless, neither the FTC Statement nor previous NAFTA cases create a set of binding rules regarding the possible involvement of amici.[173] In order to provide security and predictability in relation to amicus participation, either NAFTA or the arbitration rules applicable to investor-state procedures would have to be amended to incorporate detailed rules such as those in the FTC Statement. As discussed in the next section, recent amendments to the ICSID Arbitration Rules and the Additional Facility Rules go some way in this direction.

C. Recent Improvements in Amicus Curiae Rules

In 2005, the ICSID Secretariat proposed that tribunals established under the ICSID Arbitration Rules and the Additional Facility Rules be given the express authority to accept and consider submissions of non-disputing parties.[174] The ICSID Administrative Council adopted the amendments and they came into force effective 10 April 2006.[175] The amendments establish criteria to be applied by tribunals considering whether to accept a non-disputing party's submission that are virtually identical to those enumerated in the FTC Statement.[176]

As in the FTC Statement, the tribunal is also mandated to ensure that non-disputing party submissions do not disrupt the proceedings or unduly burden either party.[177] Both parties must have an opportunity to respond to the non-disputing party

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[173] The FTC's statement that "[n]o provision of the North American Free Trade Agreement ("NAFTA") limits a Tribunal's discretion to accept written submissions from a person or entity that is not a disputing party" may be regarded as a binding interpretation of the agreement that tribunals have the authority to accept and consider amicus submissions (FTC Statement, *supra* note 11 at para. A.1).

[174] *ICSID Secretariat Proposals*, *supra* note 116 at 11.

[175] See ICSID News Release, *supra* note 15; text accompanying note 15; *supra* note 116 and accompanying text.

[176] The amendments to r. 37 of the *ICSID Arbitration Rules*, *supra* note 15 and art. 41 of the *Additional Facility Rules*, *supra* note 15 provide in part as follows:

> (2) ... In determining whether to allow [a submission by a non-disputing party], the Tribunal shall consider, among other things, the extent to which:
>
> (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
>
> (b) the non-disputing party submission would address a matter within the scope of the dispute;
>
> (c) the non-disputing party has a significant interest in the proceeding.

It is curious that, unlike the FTC Statement, *supra* note 11, there is no reference to there having to be a public interest in the dispute.

[177] *ICSID Amendments*, *supra* note 116.

submission. The detailed specific requirements of the FTC Statement regarding the form of amicus submissions are not reproduced in the amendments. All new NAFTA arbitrations in which the investor chooses the ICSID Arbitration Rules or the Additional Facility Rules will be subject to these requirements.

While the amendments are only effective with respect to arbitrations commenced after the date they came into force, it seems likely that ICSID tribunals will apply these rules in ongoing cases. Even before these amendments, NAFTA practices regarding amicus participation were beginning to find their way into other investor-state proceedings.

The tribunal in *Aguas Argentinas*, a dispute under BITs signed by Argentina with Spain, France, and the United Kingdom, said it had the power to accept submissions by non-disputing parties.[178] This case marked the first time that an ICSID tribunal had decided that it had such a power. The dispute involves claims by Spanish, French, and English shareholders in a concession to operate water and sewage facilities in Buenos Aires. Some Argentine and U.S. NGOs sent a letter to the tribunal stating that the case was likely to raise public-interest concerns, including issues related to consumer protection and human rights. The tribunal agreed that the case was an appropriate one for non-disputing party submissions because it could involve matters of public interest. The tribunal noted that virtually all ICSID treaty-based arbitrations could be said to involve some public-interest considerations because they deal with the international responsibility of states. In this case, however, the tribunal concluded that there was a significant, distinct public interest because the outcome could affect the operation of basic public services delivered to millions of people.[179] Like the tribunals in *Methanex* and *UPS*, the *Aguas Argentinas* tribunal also considered that permitting non-disputing party participation "would have the additional desirable consequence of increasing the transparency of investor-state arbitration" in the interests of promoting greater public acceptance and understanding of investor-state arbitration, contributing to "[p]ublic acceptance of the legitimacy of international arbitral processes."[180] The tribunal determined that it had power to accept amicus filings under its authority to deal with any question of procedure not covered by the rules.[181]

After referring to NAFTA and WTO practice, the tribunal in *Aguas Argentinas* established a procedure to govern amicus participation that is similar to that under the FTC Statement, including a requirement to apply for leave to make a submission.[182] The tribunal determined that it should

> consider all information contained in the petition; the views of [investors and the state complained against]; the extra burden which the acceptance of *amicus curiae* briefs may place on the parties, the Tribunal, and the proceedings; and

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[178] Amicus Order, *supra* note 134.
[179] *Ibid.* at paras. 19-20.
[180] *Ibid.* at para. 22.
[181] *Ibid.* at paras. 10-16 (referring to the *ICSID Convention*, *supra* note 15, art. 44).
[182] *Aguas Argentinas*, Amicus Order, *ibid.* at para. 25.

> the degree to which the proposed *amicus curiae* brief is likely to assist the Tribunal in arriving at its decision.[183]

The tribunal decided that there would be no need for amicus submissions on the issue of jurisdiction in that case.[184]

Not all transparency concerns expressed by the NGOs were endorsed by the *Aguas Argentinas* tribunal, however. In light of objections from the investor, the tribunal refused to order that hearings be open to the public and deferred a request for public disclosure of all documents.[185] This ruling illustrates the continuing fragility of transparency-enhancing measures under the arbitration rules that govern investor-state arbitrations in the absence of binding treaty provisions or reforms to the arbitration rules themselves.

In March 2006, in a related case, the same tribunal once again addressed the issue of amicus participation. In *Aguas Provinciales de Santa Fe v. Argentina*,[186] the tribunal applied the same approach as it had in *Aguas Argentinas*. The tribunal went on to dispose of an application for leave to participate as amici curiae on behalf of three individuals claiming expertise in law, human rights, and development and on behalf of one NGO, Fundación para el Desarrollo Sustentable. The application for leave was rejected on the basis that the applicants had failed to provide sufficient information to establish that they had the expertise, experience, and independence to be of assistance to the tribunal.[187]

While one must be extremely cautious about making generalizations based on two cases decided by one tribunal, the *Aguas Argentinas* and *Aguas Provinciales* cases do suggest that the developing practice under NAFTA with respect to amicus participation is spilling over into investor-state arbitrations under BITs involving other states. The FTC Statement was the inspiration for the procedure adopted by the tribunal in these cases for the participation of amici curiae.[188] With the added impetus of the 2006 amendments to the Additional Facility Rules and the ICSID Arbitration Rules, ICSID tribunals are more likely to appreciate and value amicus participation, even in cases proceeding under the rules as they were before the amendments came into force. These cases make clear as well that NGOs have been emboldened by their success under NAFTA and are likely to seek permission to participate in investor-

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[183] *Ibid.* at para. 27.

[184] *Ibid.* at para. 28. In a subsequent order, the tribunal permitted five NGOs to file an amicus submission. See *Aguas Argentinas v. Argentina*, ARB/03/19, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an Amicus Curiae Submission (12 February 2007), online: ICSID <http://icsid.worldbank.org/ICSID>.

[185] *Ibid.* at paras. 5-6, 30-31. This ruling is based on an interpretation of *Additional Facility Rules*, *supra* note 15, art. 32(2). The tribunal's interpretation confirms the argument made above. See *supra* notes 107-14 and accompanying text.

[186] Amicus Order, *supra* note 107.

[187] *Ibid.* at paras. 30-34.

[188] See *ibid.* at para. 24; *Aguas Argentinas*, Amicus Order, *supra* note 134 at para. 25.

state disputes under other BITs. Undoubtedly, this is a trend that will continue to strengthen.

The importance of amicus participation to the legitimacy of investor-state arbitration has been recognized in other contexts as well.[189] The commitment of Canada and the United States to amicus participation is clear in their new model investment treaties. The *Canadian New Model FIPA* contains express provisions dealing with nondisputing-party participation that mirror the recommendations in the FTC Statement, though they are somewhat less detailed.[190] A key difference is that while the FTC Statement is a recommendation only, the new model treaty provisions require tribunals to follow the rules prescribed. The *U.S. New Model BIT*, as well as the recent free trade agreements entered into by the United States with Chile, Singapore, Central America, the Dominican Republic, and Morocco all provide that arbitral tribunals have the power to accept and consider submissions from a non-disputing party.[191] The process to be followed and the criteria to be applied are not spelled out.

This broad trend in favour of the possibility of amicus participation in appropriate circumstances suggests that amicus participation is becoming an entrenched feature in investor-state cases in which questions of public policy are at issue. Nonetheless, concerns regarding the legitimacy of the investor-state process may continue to linger in the absence of a well-developed, predictable set of rules binding on arbitral tribunals that govern amicus participation in NAFTA Chapter 11 and other investor-state procedures. The 2006 amendments to the ICSID Arbitration Rules and the Additional Facility Rules are only a first step in this direction.

Conclusions

To be considered legitimate, investor-state dispute settlement under NAFTA needs to satisfy high standards of transparency and openness to non-disputing party participants. Such transparency and openness are fundamental values of the

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[189] Amicus participation in investor-state cases has been given a qualified endorsement by the OECD Investment Committee: "Members of the Investment Committee generally share the view that, especially insofar as proceedings raise important issues of public interest, it may also be desirable to allow third party participation, subject however to clear and specific guidelines" (*OECD Statement*, *supra* note 115 at 1).

[190] *Canadian New Model FIPA*, *supra* note 14, art. 39.

[191] *U.S. New Model BIT*, *supra* note 14, art. 28(3); *United States-Singapore Free Trade Agreement*, 15 January 2003, Hein's No. KAV 6376, art. 15.19(3) (entered into force 1 January 2004); *United States-Central America-Dominican Republic Free Trade Agreement*, 5 August 2004, Hein's No. KAV 7157, art. 10.20(3); *United States-Morocco Free Trade Agreement*, 15 June 2004, Hein's No. KAV 7206, art. 10.19(3) (entered into force 1 January 2006). The *United States-Chile Free Trade Agreement*, 6 June 2003, Hein's No. KAV 6375, art. 10.19(3) (entered into force 1 January 2004) goes on to require any non-disputing party to provide information regarding anyone providing financial support. All of the treaties are available online: Office of the United States Trade Representative <http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html>.

international economic order. As well, the significant exposure to challenge by investors that U.S. and Canadian governments face as a result of NAFTA Chapter 11 represents a substantial change from the historical experience of both countries. Concerns about transparency and openness in NAFTA are more compelling than in investor-state procedures in other investment agreements with developing countries where the likelihood of cases being brought to challenge important elements of public policy in Canada and the United States is remote. While it is impossible to specify definitively what procedures would be required to render the process legitimate in this sense, one necessary characteristic is that requirements for transparency and openness be governed by clear and predictable rules. NAFTA and most existing investor-state procedures do not contain such rules.

With few exceptions, the level of transparency in practice, however, is comparable to that in domestic legal proceedings. Almost from the initiation of the first investor-state case under NAFTA Chapter 11 in 1996, arbitration tribunals have been developing practices providing for transparency in response to pressures from NGOs and the NAFTA party states themselves. NAFTA tribunals now typically order the disclosure of pleadings and other submissions of the parties, communications between the parties and the tribunal, evidence, submissions of non-disputing states and amici curiae, and interim orders and awards by tribunals. Open hearings are also increasingly being ordered. This trend toward increased transparency has been encouraged and consolidated by statements issued by the NAFTA Free Trade Commission, expressing the commitment of the NAFTA party states to an open process. In practice, NAFTA states provide direct and easy access to documents on their websites, including most documents that relate to disputes before the arbitral process has formally commenced.

Notwithstanding these developments, however, the NAFTA Chapter 11 procedures regarding transparency remain incomplete and uncertain. The procedures to be followed in a Chapter 11 investor-state arbitration are largely determined in accordance with a set of arbitration rules contemplated in the chapter and selected by the investor. These rules are based on a model of international commercial arbitration that contemplates very little disclosure to the public of information regarding the process. NAFTA itself only requires a public record of claims and allows Canada and the United States to decide whether they will disclose arbitral awards once made.[192] Under the three sets of arbitral rules contemplated in NAFTA Chapter 11, as under most arbitral rules, detailed procedural requirements are left to the tribunal and, in practice, are established by the tribunal with the consent of the parties. While the NAFTA party states have shown a strong commitment to transparency, they have a limited ability to impose greater transparency requirements on tribunals. They cannot prescribe detailed specific requirements. Most NAFTA tribunals have shown their sensitivity to the need for transparency, but tribunal decisions are not binding. The

[192] For Mexico, disclosure may only be made with the consent of the investor. See *supra* notes 73-74 and accompanying text.

2006 amendments to the ICSID Arbitration Rules and the Additional Facility Rules make only marginal improvements in this regard, expediting publication of awards and giving tribunals a power to permit additional categories of people and even the general public to attend hearings conditional on the absence of an objection from one of the parties. While the important role of openness is recognized, no guarantees are provided. As a result, transparency required under NAFTA does not approach the certainty and predictability achieved in domestic legal systems. Investors, states, and prospective amici curiae cannot be sure about what procedures will be followed in a particular case or what documents will be made public. The transparency of NAFTA investor-state arbitration will continue to depend on the initiative taken by the state complained against and the cooperation of the investor, as well as the attitude of the tribunal. Thus, while transparency practices in recent cases should reduce attacks on the legitimacy of the process, concerns will remain until transparency is put on a firmer legal footing.

Unfortunately, the prospects for amending NAFTA accordingly seem remote. The 2006 ICSID amendments demonstrate that, for arbitrations under the Additional Facility Rules, the amendment of the ICSID rules is an alternative way to fix rules on transparency. However, the modesty of the changes effected by the amendments as a result of the failure by the ICSID Administrative Council to accept the recommendations of the ICSID Secretariat suggests that amending the Additional Facility Rules and the ICSID Arbitration Rules is unlikely to lead to strong mandatory rules like those in the Canadian and American model investment treaties in the near future.[193]

Outside the NAFTA context, there has been increasing recognition of the importance of transparency for public acceptance of investor-state arbitration. The ICSID amendments and the new Canadian and U.S. model investment treaties are both evidence of the strength of this trend toward enhanced transparency standards. The reach of this trend will spread as Canada and the United States enter into new BITs and free trade agreements that deal with investment and renegotiate existing commitments to conform to their new models. With respect to this new generation of investment treaties, a legitimacy critique based on a lack of transparency has little potency. In the absence of a robust set of rules, some transparency concerns will continue with regard to NAFTA Chapter 11. Nevertheless, one may be cautiously optimistic that transparency will not be curtailed in practice given the broad-based trend toward transparency and the recognition by the NAFTA states and tribunals of the important role played by transparency in promoting public acceptance of investor-state dispute resolution.

With respect to amicus participation, neither NAFTA practice nor rules in the FTC Statement are binding on future tribunals, but the ICSID amendments setting out a procedure and criteria for amicus participation apply to new cases under the

[193] For a discussion of the improbability of greater transparency being achieved through amendments to the *UNCITRAL Rules*, *supra* note 26, see *supra* note 120 and accompanying text.

Additional Facility Rules, including NAFTA cases in which the investor has chosen these rules. While an investor might seek to avoid amicus involvement by choosing to arbitrate under the UNCITRAL Rules, such a strategy is unlikely to be successful. The decisions regarding amici in *Methanex*, *UPS*, and *Glamis* were all in arbitrations governed by the UNCITRAL Rules. Practically, it is difficult to imagine that a tribunal would categorically deny that it had a power to allow amici to apply for leave to make submissions.[194]

Indeed, the trend in favour of amicus participation seems to be strengthening. The two recent *Aguas* cases show a sensitivity to the legitimacy-enhancing role of amicus participation and point to the approach likely to be taken in cases under other investment treaties governed by the ICSID Arbitration Rules and Additional Facility Rules in force prior to the date the ICSID amendments came into effect—10 April 2006.[195] The new generation of model investment treaties adopted recently in Canada and the United States specifically empower tribunals to accept amicus submissions. In the case of the Canadian model, it imposes requirements for tribunals that track the template set out in the FTC Statement.

All these developments suggest that amicus curiae participation is becoming a fixture in investor-state arbitration in cases implicating important public policy considerations. Nevertheless, while the basic possibility of amicus participation is becoming entrenched, many second-level issues remain. Some relate to what process should be followed by tribunals. What are the requirements for the form of amicus applications? When should they be filed? Is there a right to respond to responses from other parties to an amicus application? The criteria determining when an amicus submission will be accepted and considered by a tribunal are also unclear. The small number of cases to date provides some minimal guidance regarding the type of case in which amicus participation will be permitted and what an aspiring amicus will have to show to have its submissions accepted. The FTC Statement provides answers to some of these questions and there appears to be a consensus building around use of the procedures in the Statement. But even the FTC Statement is not a complete code. Also, transparency and amicus participation are closely linked. More certain rules regarding transparency are needed if amicus participation is to be informed and effective. In sum, more clarity and predictability regarding the information to which amici will have access and the other modalities of amicus participation are needed to fully address the legitimacy concerns related to the involvement of amicus curiae in investor-state arbitration.

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[194] See *supra* note 173 and accompanying text.

[195] See *supra* note 116 and accompanying text. This is practically important since there are over one hundred cases pending under the old rules and cases typically take a number of years to be finally resolved. See ICSID, "List of Pending Cases", online: ICSID <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListPending>.