JOINT STUDY PANEL ON TRANSPARENCY IN INTERNATIONAL COMMERCIAL ARBITRATION

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REMARKS

Thanks to Professor Louise Ellen Teitz, and to the ILA and ASIL for initiating this joint study panel.

Our topic brings to mind the tale of the blind men and the elephant. The most reliable of all sources, Wikipedia, attributes the tale variously to Sufis, Jainists, Buddhists, or Hindus. Whoever created the tale, we all know it. A group of blind men, or men in the dark, encounter an elephant. It is not a presidential election year, so the elephant is in a mellow mood. It stands by while the blind men examine it to ascertain its true character. Each man examines one different part—the leg, the tail, the trunk, the ear, and so on. They then compare notes. Each insists on a different vision of the elephant—as a tree, a rope, a hose, and so on.

My task today is to try to describe the parts of the elephant. What are the elements involved in thinking clearly about transparency in international commercial arbitration?

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I. ARBITRATION

Let's begin with "arbitration." As you know, the essential concept is that parties agree to authorize an independent, impartial third party to render a legally binding decision in a dispute. The legal systems of many countries sanction, indeed encourage this, and they have adopted supportive laws and policies. They do this in various ways, both positive and negative. In a positive way, their courts will enforce agreements to arbitrate and the awards resulting from a properly conducted arbitration, following some limited review aimed at maintaining the integrity of the process. In a negative way, courts will not otherwise intrude deeply into the process or review the merits of arbitrators' decisions.

There is great controversy in this country about the widespread use of boilerplate arbitration clauses in some types of domestic relationships, such as employment contracts, consumer credit, nursing homes, and securities transactions. The controversy reflects concerns that these clauses do not reflect informed agreement, involve parties of unequal bargaining power and that the mechanisms for arbitrating such claims are defective. These domestic transactions are not what we are discussing here. We are concerned with agreements to arbitrate growing out of international transactions, typically involving sophisticated businesses, investors and governments.

II. INTERNATIONAL

We are also concerned only with arbitration involving international transactions. Given this audience, I think I can safely assume that everyone has a general idea of what "international" means, although you should be warned that the concept sometimes causes difficulties.

III. COMMERCIAL

Next, what do we mean by "commercial?" Here things begin to get complicated. We risk serious muddle if we don't keep some distinctions in mind.

A few decades ago, international arbitration mostly involved disputes between private parties growing out of commercial relationships. It involved disputes concerning the sale of goods, construction projects, ship charters, franchises and the like. The rules applied were drawn from national law or the laws and customs of merchants engaged in a particular line of commerce. Most international commercial arbitration is still between private parties and grows out of these sorts of transactions.

But now, a new type of arbitration has developed in parallel with older forms of commercial arbitration. Over the last two or three decades, there has

been dramatic growth in international arbitrations involving disputes between investors and foreign governments, where claimants assert rights based upon public international law—often a bilateral investment treaty (BIT) or other similar public law instrument.

These investment arbitrations clash with the notion of arbitration as the fruit of agreements between private actors. One of the parties is a State. It has important responsibilities and legal obligations to its citizens. These cases often involve attacks on important policies and practices of the host governments and claims for a great deal of money. This has led some arbitral tribunals to call for much greater transparency in these proceedings, to much critical discussion, and to significant changes in some settings, notably North American Free Trade Agreement (NAFTA), aimed at encouraging transparency in investment cases.

IV. TRANSPARENCY

Now comes the biggest piece of the elephant. What do we mean by transparency? There is no single definition for these purposes, and people often mean very different things when they talk about transparency. You need to listen carefully, to be sure what is being talked about. There are many relevant questions.

1) Who should be able to know whether there is even a dispute being arbitrated?
2) Should parties be able to provide information about cases under arbitration to their stockholders? Should they discuss them in the press or before governmental bodies?
3) Should outside persons be able to see the pleadings, the evidence and the arguments? If so, which outside persons?
4) Should outside persons be able to attend or view the hearings? What about presenting arguments in them? In this regard, some writers see an important distinction between "privacy" of arbitral proceedings, and "confidentiality." Is this a clear distinction? Is it useful?
5) Should outside persons be able to file materials to be considered by the arbitrators? Which outside persons? Who decides? What standards should guide the decision?
6) And, if outside persons are allowed to make filings, what can they file? Who should bear the parties' additional costs of responding? An extra round of briefing in a big investment case can be very expensive.
7) Who should be able to see the eventual award? All of it? Or just some? If only part, how much? Just the result? The reasoning? What about the identities of the parties and arbitrators?

8) Are things different if the parties have included provisions explicitly regulating any of these matters?

For a long time, many people thinking about these sorts of issues tended to do so in light of the fundamental character of international commercial arbitration as a private system for settling disputes. States allowed private parties to settle their disputes through mechanisms they selected or created. They did not regulate parties' choices regarding matters like confidentiality.

Indeed, for a long time, it was widely assumed that confidentiality was an inherent aspect of arbitration—that every agreement to arbitrate included an implicit confidentiality provision. The rules of international arbitral institutions tended to assume that proceedings were private, although the eventual award might become public in enforcement proceedings under the New York Convention or otherwise.[1]

In recent years, courts in some important countries have rejected the notion that confidentiality is an implicit element of agreements to arbitrate. The highest courts in Australia and Sweden have said that it is not, as have some U.S. courts.[2] Other courts—in the United Kingdom, France and other jurisdictions—continue to see confidentiality as inherent.[3] And, as I noted a minute ago, there have been significant developments aimed at increasing transparency in investment arbitration.

In considering these questions today, we should ask, "Who are the relevant stakeholders?"

The parties to the arbitration have a stake. Parties may have very sound reasons for desiring confidentiality. Confidentiality is not necessarily a dirty word. Parties may want to protect business practices, industrial processes, trade secrets, to shield a valued ongoing relationship, or to prevent public posturing that may worsen matters. Particularly in arbitrations involving states, confidentiality may relieve pressures for States to take and maintain extreme positions. Writers sometimes imply that parties seek confidentiality primarily because someone has fouled up and wants to avoid embarrassment. That sometimes may occur, but it is not a fair or sufficient description.

How important is confidentiality to arbitrating parties? The few studies that have sought to collect hard data give inconsistent answers. A 2006 survey of numerous arbitration practitioners by PricewaterhouseCoopers and the School of International Arbitration at Queen Mary College of London found that privacy was quite important to those surveyed, ranking a close second

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1. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S 38.

2. Cindy G. Buys, *The Tensions Between Confidentiality and Transparency in International Arbitration*, 14 AM. REV. INT'L ARB. 121, 129–30 (2003).

3. *Id.* at 130.

(surpassed only the by the enforceability of arbitral awards) as a key value.[4] However, in another study of international cases administered by the American Arbitration Association (AAA), fewer than ten percent of participants identified privacy as one of the most important attributes of arbitration.[5] Other studies reflect similarly varying perspectives.

The public at large? Or "civil society," to use the more politically current term? Here, I expect Dan Magraw will have some views, particularly with reference to investment arbitrations or other cases involving issues of potentially large public significance.

The College of International Lawyers? Many of you know of Oscar Schacter's wonderful notion of "the Invisible College of International Lawyers."[6] There's a good case that the "Invisible College" is also a stakeholder. Important commentators remind us that international arbitration has become an important generator of public and private international law. Given this, they argue, there is a broad community interest in open access to arbitral awards, to permit analysis, criticism, and growth of the law. Commentators also have noted that publication will enhance predictability and reduce erratic or unpredictable outcomes. They also suggest that greater visibility will contribute to the continued acceptance, credibility, and legitimacy of arbitration.

As we proceed with our inquiry, I suspect that we will find that there is no one-size-fits-all answer to any of these questions. Answers may be shaped by variables such as the subject matter, the characteristics of the parties, the types of information involved, and the legal basis of the claims.

And so, we return to the blind men and the elephant.

Like the elephant, our subject has many related parts, all playing an important and legitimate role. It will be our challenge to try to assemble them into a coherent whole.

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4. PricewaterhouseCoopers & Queen Mary College of London, International Arbitration: Corporate Attitudes and Practices 2006 2 (2006), *available at* http://www.pwcadvisory.co.jp/common/media/International_Arbitration.pdf (last visited Feb. 22, 2009).

5. Richard W. Naimark & Stephanie E. Keer, *What Do Parties Really Want From International Commercial Arbitration*, AAA DISP. RESOL. J. 78, 80 (Nov. 2002/Jan. 2003). *See also* Richard W. Naimark & Stephanie E. Keer, *Expectations and Perceptions of Attorneys and Business People: A Forced-Rank Analysis*, 30 INT'L BUS. L. 203, 204 (2002).

6. *See* Oscar Schachter, *The Invisible College of International Lawyers*, 72 NW. U. L. REV. 217 (1977).