

TRANSPARENCY AND PUBLIC PARTICIPATION IN INVESTOR-STATE ARBITRATION

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I. INTRODUCTION

The roles of transparency and public participation have become important issues in investor-state arbitrations. This article addresses certain questions relevant to these issues. Part II of this article explains the context in which investor-state arbitration has developed and the challenges it poses. Particular consideration is given to the challenges to arbitrators in dealing with the subject matter of disputes, the undeniable element of public interest in the underlying transactions and disputes, the evolution of the modern regulatory state that plays an important role in developing environmental laws, and the need for

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coherence in the international arbitration system in addressing environmental and other public concerns. Part III assesses whether there is a democracy deficit in the current investor-state arbitration system. Further, it provides an overview of the advantages and disadvantages of transparency and public participation in investor-state arbitrations and suggests ways in which the disadvantages could be counteracted. Part IV contains a brief conclusion.

II. CONTEXT

To understand the context in which considerations of transparency and public participation in investor-state arbitrations occur, it is helpful to begin by examining the power shifts inherent in the creation of the modern investor-state arbitration system, the presence of public interest in investor-state arbitrations, and the challenges that investor-state arbitrations present to arbitrators and the international legal system.

A. Power Shifts

The advent of investor-state arbitration involved at least two important shifts of power relevant to transparency and public participation.

First, there was a shift in power from states to foreign investors in terms of making states more accountable to investors. Power shifted from states to investors both substantively, because of the codification of strong investor protection laws, and procedurally, because of the provision to investors of the right to institute arbitrations against states and to choose the applicable institutions or rules, including with respect to rules about transparency and opportunities for public participation. The transfer of procedural power was not necessarily permanent: States can decide to try to revise the international investment agreements (IIA) that accomplished these changes, but that would require the agreement of the other State Party to the IIA and, even if the other state agreed, it might not be possible to make such changes immediately effective.

Second, the advent of investor-state arbitration resulted in a shift of power from the public to states in that there was a decrease in holding states accountable to their citizens. Disputes moved from public courts and other public forums to typically non-transparent and non-accountable arbitral tribunals that usually provided no opportunity for public participation. The public could, in theory, hold the state's government accountable after the fact, but it might not even know about the existence of the dispute or of the issues, factual assertions, and arguments included in it, due to the often total lack of transparency about investor-state arbitrations. In practice, however, foreign investors are very distrusting of courts in many countries—particularly in developing countries, due to concerns about inefficiency, having to fight a

“home town advantage,” and corruption. The latter, in fact can itself lead to a lack of transparency and opportunity for public participation. Thus, this shift is not as pronounced in some countries as it is in others.

B. Presence of Public Interest

The public interest in investor-state arbitrations arises from several sources, some of which apply to every case and some of which apply only to some.

Investor-state arbitrations involve the state in a sovereign capacity. The public has a clear interest in such actions. This is self-evident in any democracy. We submit it exists in non-democratic forms of government, as well, though the domestic system might not recognize this.

More pointedly, every investor-state arbitration alleges wrongful behavior by a state. Again, this raises an obvious public interest.

Additionally, investor-state arbitrations often involve either important natural resources, such as oil and gas, hard rock minerals, forests, freshwater resources, and fisheries, or major built infrastructure such as facilities regarding water, sanitation, roads and other transport, power generation, and dams. The latter, in turn, often implicate the delivery of important domestic services, such as drinking water, sanitation, or electricity.

Investor-state arbitrations may also involve challenges to regulatory or other decisions that penetrate deeply into traditionally domestic sovereign prerogatives (e.g., regulations protecting health, safety, or the environment), or activities that similarly have deep roots in domestic institutions (e.g., the operation of a jury system or the response to a fiscal crisis). The public interest in maintaining the integrity and effectiveness of these domestic policies and governmental actions is obvious. Moreover, the empowerment of investor-state arbitration began before the growth of the modern regulatory state, e.g., with respect to health, safety, and the environment. The initial modeling of investor-state arbitration on traditional commercial arbitration thus did not occur with these regulatory systems in mind.

The amount of money at stake in an investor-state arbitration can be very large, as is evidenced by the spate of cases against Argentina. The potential impact on the public raises an obvious public interest.

Finally, and somewhat controversially, the outcomes of investor-state cases are being used as a type of precedent, so that a body of international investment law is evolving from these cases. The public thus has an obvious interest in these cases to the extent they are becoming a *de facto* source of international law.

C. Challenges for Arbitrators and the International System

Reflecting in part the factors just described, investor-state arbitrations create new challenges for arbitrators.

Investor-state arbitrations confront arbitrators with greater complexity. Traditional commercial cases involved more-or-less standard commercial and contract issues, and the primary impacts were limited to the two commercial parties. In contrast, investor-state arbitrations typically involve interpretation and application of sometimes murky treaty provisions, and they typically involve the resolution of important public issues with wide-ranging domestic impacts and to which a broad range of often delicate considerations are relevant. Moreover, because of the age of most arbitrators on investor-state panels, most of them have never studied regulatory subjects such as environmental law that may lie at the heart of an investor-state arbitration.

Correspondingly, cases went from being primarily (if not exclusively) of interest to the disputants and their shareholders, to being of interest, sometimes intense interest, to the public as a whole. That interest sometimes even extends beyond the responding state's borders.

Investor-state arbitration also raises new challenges for the international arbitration system and the international legal system of which international arbitration is a part. As more and more investor-state disputes are resolved using arbitration, the credibility or legitimacy of the system becomes an important issue. At the moment, credibility of the system as a whole, and also of individual awards, is thwarted by non-transparency (which verges on secrecy) and by inconsistent results. Indeed, the coherence of the international legal system itself is even implicated by inconsistencies between awards with respect to specific outcomes, treatment of transparency and public participation, and jurisprudence.

Because there are more than 2500 IIAs, one could argue that the inconsistent cases, or at least those between cases under different IIAs, are irrelevant because each IIA and the cases under it constitute *lex specialis*. That is not convincing, however, because most of the disciplines read the same in different IIAs and because arbitral awards are increasingly used in a precedent-like manner by arbitrations in different IIA regimes. Also, of course, it is difficult to defend that argument because there are such obvious advantages to consistency.

III. THE DEMOCRACY DEFICIT

A. Do Deficits Exist?

There are major deficits in both transparency and public participation in investor-state arbitrations. These deficits, if any, vary according to the

institution in which the arbitration takes place and the rules that apply to the arbitration.¹ These institutions and rules differ dramatically. Although the International Centre for Settlement of Investment Disputes (ICSID)² is clearly the most transparent in general, none of the current institutions or sets of rules have adequate means for the public to be aware of and be engaged in the dispute.³

Investor-state arbitrations are based on the private commercial arbitration model.⁴ Before the advent of institutional forums, parties agreed to ad hoc arbitration, where the seat of the arbitration or venue would typically determine the procedural rules governing the arbitration.⁵ Today, parties have a number of different institutional forums from which to choose. Investment treaties will invariably refer to different institutions or rules that could potentially govern disputes, and the investors are typically free to choose which institutional rules will govern their case.⁶ The choices could include private institutional forums, such as the American Arbitration Association (AAA),⁷ the International Chamber of Commerce (ICC),⁸ the London Court of International Arbitration (LCIA)⁹ and the Stockholm Chamber of Commerce (SCC),¹⁰ or international forums or sets of rules, such as ICSID, the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules¹¹ (which is not a forum per se but provides governing procedural rules), the Permanent Court of

1. See generally Daniel Magraw et al., *Ways and Means of Citizen's Participation in Trade and Investment Dispute Settlement Procedures* (Soc'y of Int'l Econ. Law, Working Paper No. 53/08, 2008), available at http://papers.ssm.com/sol3/papers.cfm?abstract_id=1159770 (last visited Feb. 18, 2009).

2. International Centre for Settlement of Investment Disputes (ICSID), <http://icsid.worldbank.org> (last visited Feb. 10, 2009).

3. Magraw, *supra* note 1, at 9. See also ICSID CONVENTION, REGULATIONS AND RULES, ICSID/15, RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS (2006), available at http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf (last visited Feb. 18, 2009) [hereinafter ICSID ARBITRATION RULES].

4. Magraw, *supra* note 1, at 9.

5. See Gerald Aksen, *Ad hoc Versus Institutional Arbitration*, 2 (No. 1) ICC INT'L CT. ARB. BULL. 9 (1991).

6. Magraw, *supra* note 1, at 9.

7. American Arbitration Association (AAA), <http://www.adr.org/> (last visited Feb. 10, 2009).

8. International Chamber of Commerce (ICC), <http://www.iccwbo.org> (last visited Feb. 10, 2009).

9. London Court of International Arbitration (LCIA), <http://www.lcia-arbitration.com> (last visited Feb. 10, 2009).

10. Stockholm Chamber of Commerce (SCC), <http://www.sccinstitute.com/uk/Home> (last visited Feb. 10, 2009).

11. United Nations Commission on International Trade Law (UNCITRAL), UNCITRAL Arbitration Rules, G.A. Res. 31/98, UN Doc A/Res/31/98 (Apr. 28, 1976), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf> (last visited Feb. 10, 2009) [hereinafter UNCITRAL Arbitration Rules].

Arbitration (PCA),¹² which like ICSID, is a forum and has rules, or a combination of UNCITRAL or other rules and various forums.¹³ Of these, the private institutions tend to be less transparent and open to public participation.¹⁴

This is hardly surprising, since private institutions were created with private commercial disputes in mind.¹⁵ Indeed, one of the major draws of arbitration in the commercial field, was (and still is) the lack of transparency due to the ability of the parties to decide most aspects of the process.¹⁶ Partly because these disputes were perceived as being purely private, public interest did not play a key role in setting procedures in these institutions.¹⁷ Nevertheless, given the permeation of public disputes into a typically private forum, there is a need for identifying democracy deficits within the system, whether on a private institutional level or an international level.

Most investor-state disputes are resolved using ICSID or UNCITRAL rules, although it is impossible to confirm the exact extent to which non-ICSID arbitrations occur.¹⁸ Except for ICSID, the existence of arbitrations is not publicly recorded unless one of the parties chooses to do so.¹⁹ As a starting point, therefore, the focus will be identifying problem areas within these sets of rules.

1. Transparency

There are many deficits in the availability of information regarding investor-state arbitrations. Generally speaking, the public has no way of knowing any of the following:

- 1) That a case or arbitration even exists;
- 2) What the allegations of wrongdoing are;

12. Permanent Court of Arbitration (PCA), http://www.pca-cpa.org/showpage.asp?pag_id=363 (last visited Feb. 10, 2009).

13. Joachim Delaney & Daniel Barstow Magraw, *Procedural Transparency*, in *INTERNATIONAL INVESTMENT LAW 731* (Peter Muchlinski, ET AL, eds., 2008).

14. Compare AAA, COMMERCIAL RULES, available at http://www.adr.org/commercial_arbitration (last visited Feb. 13, 2009) [hereinafter AAA RULES] and LCIA, LCIA ARBITRATION RULES, available at <http://www.lcia-arbitration.com> (follow "Arbitration" hyperlink; then select language) (last visited Feb. 13, 2009) [hereinafter LCIA RULES] and ICC, RULES OF ARBITRATION, available at <http://www.iccwbo.org/court/arbitration/id4199/index.html> (last visited Feb. 13, 2009) [hereinafter ICC RULES] with ICSID ARBITRATION RULES, *supra* note 3.

15. See *Aksen*, *supra* note 5.

16. James Carter, *Dispute Resolution and International Agreements*, 4 (No. 2) INT'L Q. 100, 100 (1992).

17. Magraw, *supra* note 1, at 11.

18. *Id.*

19. *Id.* at 10.

- 3) What the schedule of the arbitration is;
- 4) Who the arbitrators are likely to be, or are;
- 5) What legal issues are at stake;
- 6) What legal arguments and factual assertions are being made;
- 7) What oral presentations are being made;
- 8) What procedural or interim orders are issued; and
- 9) What the final award is.²⁰

As mentioned above, the degree of secretiveness, opacity, and non-transparency varies by arbitration rules and institutions and cases, but overall there exists a serious lack of transparency. Generally speaking, the disputing parties may agree to make any aspect of the arbitral procedure more transparent, subject to those instances in which the arbitral tribunal may require confidentiality, in spite of the parties' wishes. But, this occurs very rarely.

2. Public Participation

With respect to public participation, the main issue has been the ability to submit *amicus curiae* briefs.²¹ These briefs make legal and factual assertions that are relevant to the dispute from a public interest perspective. The UNCITRAL rules and the private institutions' rules are silent on the admissibility of such briefs.²² Until the revisions to ICSID arbitration rules in 2006, the ICSID rules were also silent on the issue.²³ However, under the old ICSID rules, the *Suez* panel unanimously held that the tribunal had the power to accept *amicus curiae* submissions under its residual powers in Article 44.²⁴ The revisions contain a specific provision regarding *amicus curiae* petitions, which is a step towards legally recognizing the validity and importance of such submissions.²⁵ In contrast, investor-state disputes that use UNCITRAL rules

20. For a more detailed discussion, see Magraw, *supra* note 1, at 9; Delaney & Magraw, *supra* note 13, at 731–750.

21. See generally Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 (No. 4) YALE L.J. 694 (1963); Ernest Angell, *The Amicus Curiae American Development of English Institutions*, 16 (No. 4) INT'L & COMP. L.Q. 1017 (1967); Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L. 611, 618–619, (1994).

22. See UNCITRAL ARBITRATION RULES, *supra* note 11; AAA RULES, *supra* note 14; LCIA RULES, *supra* note 14; ICSID ARBITRATION RULES, *supra* note 3.

23. Magraw, *supra* note 1, at 24; ICSID ARBITRATION RULES, *supra* note 3, at Rule 37(2).

24. Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A (Spain) v. Argentine Republic (Arg.), Order in Response to a Petition for Transparency and Participation as *Amicus curiae*, ICSID Case No. ARB/03/19, ¶¶ 15–16 (2005) [hereinafter *Vivendi, Petition for Transparency*].

25. ICSID ARBITRATION RULES, *supra* note 3, at Rule 37(2).

or any of the private institutional forums are not subject to any provision expressly allowing *amicus curiae* briefs. This uncertainty creates unpredictability and an incentive for investors to choose a forum or set of rules that is more likely to exclude public participation.

Even under ICSID rules, there is no right to file an *amicus curiae* brief; the decision by the tribunal to permit an *amicus curiae* brief is discretionary.²⁶ While objections of the parties do not carry as much weight here as they do with transparency issues, if both parties were to object tribunals may find it harder to justify the benefit of allowing non-party submissions.²⁷ Also, *amicus* status does not automatically give the petitioners any access to documents submitted by either party. In *Biwater Gauff v. Tanzania*, the tribunal rejected the petitioner's request to additional information, including most importantly, documents containing the claims of the parties.²⁸ The primary reason was that Biwater objected to the disclosure of information, which according to the ICSID rules calls for the tribunal to reject the request.²⁹ However, the tribunal also observed that it did not feel the information was necessary for the petitioners to make their submissions on the ground that the dispute was a "very public and widely reported dispute" and that the information that led to the *amici's* "application to intervene" was sufficient to make further submissions.³⁰ The logic of this is troublesome, because the participation of public groups is made considerably more difficult³¹ and is likely to be less effective and helpful to the tribunal if they are not given access to basic documents. Having knowledge of the claims would allow petitioners to make more pertinent arguments and raise more relevant factual points. In fact, in *Biwater*, the tribunal later justified their divergence on one of the petitioner's assertions by noting that the petitioners did not have all the relevant information.³² The tribunal in *Suez Vivendi* also granted permission to file an *amicus curiae* brief but denied access to the parties' submissions.³³

26. There is criteria for *amicus* status, however. *Id.*

27. See *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Procedural Order No. 5, ICSID Case No. ARB/05/22, 12–14 (2007) [hereinafter *Biwater No. 5*].

28. See *id.* ¶ 68.

29. See *id.* ¶¶ 18, 64; ICSID ARBITRATION RULES, *supra* note 3, at Rule 37(2).

30. See *Biwater No. 5*, *supra* note 27, ¶ 65.

31. Discussions by the authors with Nathalie Bernasconi-Osterwalder, (regarding *Biwater*) and Marcos Orellana (regarding *Suez-Vivendi*).

32. See *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Award, ICSID Case No. ARB/05/22, ¶ 514, n.208 (2007) [hereinafter *Biwater Award*].

33. *Vivendi, Petition for Transparency*, *supra* note 24, ¶¶ 23, 28.

B. Advantages and Disadvantages of Transparency and Public Participation

Identifying the ways in which current rules do not provide transparency and opportunities for public participation is the first step. Evaluating and appropriately addressing these gaps requires an appreciation of the advantages and disadvantages associated with making arbitral proceedings more accessible. For present purposes, we will identify them at a general level, noting that they must be applied to transparency and public participation separately at each stage of an arbitral proceeding and may vary from case to case.

1. Advantages of Transparency and Public Participation in Investment Disputes

Transparency and public participation provide a number of advantages, many of which overlap. As such, it is simpler to address them collectively. However, it is important to note that the two go hand-in-hand, in that individually they provide the advantage of bringing about the other. Transparency is a prerequisite for public participation, as it is essential to providing meaningful participation by members of the public. Public participation leads to greater transparency because it facilitates the dissemination of information and causes the dispute to be publicized to some extent.

The advantages of increased transparency and participation fall into several categories:

Higher Quality Decision-Making: Increased transparency will improve the quality of decision-making in investor-state arbitrations. One of the many criticisms of using arbitration to resolve disputes that encompass a variety of legal issues (from commercial practice to environmental standards) is the lack of expertise of the arbitrators. Since the choice of arbitrator is left to the discretion of the parties, there is no guarantee that the arbitrators will be well-acquainted with all the legal issues in an investment dispute. In most court systems, there is no guarantee of this either; however, since opinions are published, less-experienced judges will follow the reasoning set by more experienced judges. It allows judges who are new to a legal issue to make more accurate decisions, ones that are more defensible if challenged. Similarly, transparency in the arbitral system would allow fellow arbitrators to reach more accurate decisions.

Getting an accurate, and therefore defensible, decision is especially important in arbitrations since there is limited ability to appeal. In most cases, notably in the private institutions, there is no appeal at all. Under ICSID, there is an opportunity to challenge the decision on very narrow grounds under the

annulment process.³⁴ Rights of appeal were purposely limited in arbitrations to preserve some of the perceived advantages of arbitration over courts, namely, obtaining a final decision quickly and inexpensively. Nevertheless, it is important to ensure that each decision is legally and factually accurate. Additionally, public disclosure of final awards and other materials discourage improper behavior, to some degree. To the extent that arbitrators, lawyers, and parties know their actions will be scrutinized by the public, the likelihood of corruption in the arbitral process and activities leading up to the arbitration will be lower.³⁵ Greater transparency will improve the quality of decision-making and lead to more consistent results, which in turn contributes to the credibility of the system—as noted below.

Public participation can also assist in higher quality decisions because amicus curiae briefs can often provide factual information and legal argumentation that would not otherwise be provided.³⁶ Many tribunals have noted the importance of amicus submissions in setting the context of a dispute.³⁷ Often times, the parties will not produce an accurate background of the dispute, especially with respect to the wider policy concerns and issues that impact the public. The tribunal in *Biwater* noted the importance of the amicus brief in setting the context of the dispute, which was not otherwise provided.³⁸ Additionally, an amicus brief may have key factual information that would assist tribunals in making more informed decisions.³⁹ Information gathering in an investment context takes years, and it may be public interest groups that have the statistics and background information that is needed.

Indeed, tribunals addressing issues in various fields (not limited to investment) have relied on facts provided in amicus briefs because the *amici* have a specialized knowledge or detailed statistical forecasts of key issues in the dispute. For example, in *Brazil Tyres*, the WTO Panel relied on facts and statistical data analysis provided in the amicus brief regarding the use of re-treaded tyres and their effectiveness in reducing waste levels in Brazil.⁴⁰ In the *Schmidt* case, the Inter-American Court of Human Rights noted information

34. ICSID ARBITRATION RULES, *supra* note 3, at Rules 52–54.

35. Consider, for example, the adage, “Sunshine disinfects.” Delaney & Magraw, *supra* note 13, at 761.

36. See Joseph D. Kearney and Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 830 (2000).

37. See, e.g., *Methanex Corp. (Can.) v. United States, Final Award of the Tribunal on Jurisdiction and Merits*, 44 I.L.M. 1345, ¶¶ 26–29 (2005) [hereinafter *Methanex Award*]; *Biwater Award, supra* note 32, ¶¶ 355, 358, 359, 392.

38. *Biwater Award, supra* note 32, ¶¶ 355, 358, 359, 392.

39. Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, 114–40, WT/DS332/R (June 12, 2007).

40. See *id.*

provided in an amicus brief explaining the relationship between Latin American federal constitutional provisions and its application to professional licenses.⁴¹

In the investment context described above, amicus briefs provide tribunals with specialized information that relate to public interest concerns in a dispute. For example, the *Suez/Vivendi* tribunal granted five NGOs amicus status because they had expertise in water distribution and sewage systems that were central to the case:

The factor that gives this case particular public interest is that the investment dispute centers around water distribution and sewage systems of a large metropolitan area . . . [g]iven the public interest in the subject matter of this case, it is possible that appropriate non-parties may be able to afford the Tribunal perspectives, arguments, and expertise that will help it arrive at a correct decision.⁴²

Further, amicus briefs can contain legal arguments that the parties chose not to include in their own claims.⁴³ In *Methanex*, the tribunal pointed out that the briefs addressed “important legal issues that had been developed by the Disputing Parties.”⁴⁴ The briefs were submitted by three environmental NGOs⁴⁵ and presented public interest related concerns, in particular, how international law promotes deference to the government when determining human health and environmental protections. In *Biwater*, the tribunal made specific use of the *amici’s* legal arguments concerning investor responsibility in the context of fair and equitable treatment.⁴⁶ In applying the threshold test, the tribunal took “into account the submissions of the Petitioners . . . which emphasize countervailing factors such as the responsibility of foreign investors, both in terms of prior due diligence as well as subsequent conduct.”⁴⁷ In the *Schmidt* case, the *amici’s* legal arguments were taken into account in the final

41. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights), Advisory Opinion OC-5/85, Inter-Am. Ct. H.R. (ser. A) No. 5, ¶ 60 (Nov. 13, 1985), available at http://www1.umn.edu/humanrts/iachr/b_11_4e.htm (last visited Feb. 19, 2009) (referring to an amicus curiae brief submitted by the Federacion Latinoamericana de Periodistas that said that some Latin American constitutions establish licensing requirements for professions).

42. *Vivendi, Petition for Transparency*, *supra* note 24, ¶¶ 19, 21.

43. *See, e.g.*, Shelton, *supra* note 21, at 614.

44. *Methanex Award*, *supra* note 37, ¶ 29.

45. *Id.* ¶ 28 (noting that amicus briefs were submitted by the International Institute for Sustainable Development and Earthjustice, on behalf of the Bluewater Network, Communities for a Better Environment and the Center for International Environmental Law).

46. *Biwater Award*, *supra* note 32, ¶¶ 370–71, 373–75, 378.

47. *Id.* ¶ 601.

decision, although this was not explicitly stated in the award.⁴⁸ These examples demonstrate that amicus curiae briefs can lead to higher quality decisions.

Democratic Values and Realization of Human Rights: The involvement of the state in investment agreements, hence the investor-state dispute, raises questions of democratic governance and the necessity of adhering to human rights. Access to information or freedom of information is a well-recognized right in democratic systems around the world. In many countries, this has been a hard-fought battle and has led to the realization that citizens are entitled to information regarding government actions that directly affect them. Recently, the Inter-American Court of Human Rights declared that access to information is a human right. It asserted that Article 13 of the American Convention on Human Rights includes the right to “seek, receive and impart” information⁴⁹ and proceeded to state that “access to public information is a requisite for the very exercise of democracy.”⁵⁰

On an international level, states have recognized the importance of access to information in environmental matters and dispute settlements.⁵¹ Principle 10 of the Rio Declaration on Environment and Development asserts that every individual must have access to information, the opportunity to participate in decision-making, and access to redress and remedy.⁵² While the principle relates directly to environmental decision-making on a national level, the action plan under the Declaration emphasizes the need for access to information on an international level to achieve sustainable development. An analogy can be drawn here to investor-state disputes because the investment projects undertaken by private investors and governments are for the purpose of development and invariably have environmental impacts. By their very nature, investment agreements raise the types of environmental and developmental issues that states are beginning to make provisions for, in terms of transparency and public participation.

48. This idea is from a Discussion between Daniel Magraw and Thomas Bergenthall, President of the arbitral tribunal.

49. *Reyes v. Chile*, Case 12.108, Inter-Am. C.H.R., Report No. 60/03, OEA/Ser.L/V/II.118, doc. 70, rev. 2, ¶ 59 (2003), available at <http://www1.umn.edu/humanrts/cases/60-03.html> (last visited Feb. 21, 2009).

50. *Id.* ¶ 61; G.A. Res. 1932, ¶ 1, OAS Doc. AG/Res. 1932 (XXXIII-O/03) (June 10, 2003), available at http://www.oas.org/juridico/english/ga03/agres_1932.htm (last visited Feb. 27, 2009).

51. Rio Declaration on Environment and Development principle 10, June 14, 1992, 31 I.L.M. 874, available at http://www.unesco.org/education/information/nfsunesco/pdf/RIO_E.PDF (last visited Feb. 23, 2009); Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, preamble, art. 3, June 25, 1998, 2161 U.N.T.S. 447, available at <http://www.unece.org/env/pp/documents/cep43e.pdf> (last visited Feb. 23, 2009).

52. Rio Declaration, *supra* note 51.

The most important application of the Rio Principle is the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), adopted on June 25, 1998, in Aarhus, Denmark, and entering into force on October 30, 2001.⁵³ This is the first internationally binding mechanism for access to information and public participation in environmental matters. It was negotiated between countries of the United Nations Economic Commission for Europe (UNECE), but is open to all countries to adopt. To date, forty-one countries and the European Community (EC) have adopted the convention.⁵⁴

It is clear that access to information and public participation in decision-making is key to democratic governance, and that this is recognized on both domestic and international levels. Allowing greater transparency and public participation in investor-state arbitrations would facilitate the sentiment demonstrated by the efforts to democratize environmental decision-making and dispute settlement. Further, it assists individuals to realize the rights in which they are entitled. Indeed, access to justice is not valuable unless there is awareness of such access. While public participation provides access to disputes that concern the public, transparency promotes the awareness of the disputes, which is vital to realizing the right to information and participation. Additionally, the developments in public disclosure and access to information contribute to a general trend of “good governance.”⁵⁵ This trend is one that incorporates core democratic values, specifically the idea that governments must take into account wider interests and be accountable for their actions. Since investor-state arbitrations render decisions that critically affect the public with respect to a transaction that involves the state, transparency and participation are essential to good governance. Furthering good governance standards also provides other advantages, such as the protection of interests and accountability, which are discussed below.

Protection of Interests: One of the main problems with investment and/or development projects in developing countries is that individuals who are affected by them often are not aware of their interests or how to protect them.⁵⁶ While there may be consultations with such individuals at the planning stage of projects, affected communities rarely participate in dispute resolution. The

53. United Nations Economic Commission for Europe (UNECE), Aarhus Convention, Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (2008), <http://www.unece.org/env/pp/> (last visited Feb. 23, 2008).

54. UNECE, Status of Ratifications, <http://www.unece.org/env/pp/ratification.htm> (last visited Feb. 10, 2009).

55. Magraw, *supra* note 1, at 10.

56. This idea is from comments made during a discussion with members of the World Bank Inspection Panel, CIEL Event, Oct. 10, 2008.

problem there is twofold: a lack of awareness on a general level as to the existence of a dispute and an inability to obtain meaningful information other than what the parties choose to provide. Transparency in arbitrations would alleviate some of these problems, because at the very least, the existence of a dispute would be public knowledge. Additionally, allowing some access to the details of the dispute—those within the bounds of confidentiality interests—would make any participation more meaningful, thereby providing higher quality decisions as mentioned above.

Public participation, through the submission of *amicus curiae* briefs, provides an opportunity for the public to protect interests that they may have. Not only does it enable them to voice their perspectives on the matter, it also allows them to raise legal arguments or facts that were not raised by the parties. There may be arguments that the parties will not make within the confines of each other's claims that are especially pertinent arguments to be made in light of the public interest. Additionally, the public can make an *amicus* petition without having to rise to the level of an intervener to the case. This is beneficial because public interests can be very broad and do not necessarily fit within the traditional third party intervener's level of interest. It also means that the parties can maintain the level of confidentiality dictated by the proceeding with respect to non-parties. Of course, this can be problematic as maintaining strict confidentiality with respect to *amicus* petitioners leads to lower quality contributions and may not serve to protect the public interest. However, that is not to say that a balance cannot be reached between disclosing essential information and protecting confidential information. Until this balance is reached and there is greater international recognition for public interest rights, public participation through *amicus* status in arbitral proceedings will serve to ensure that, at the very least, these interests are heard.

Consistency: Transparency of process and of decisions brings more consistency to investment arbitrations. Although, in practice, there is no system of precedent in arbitration, if there is an arbitral decision on point, arbitrators are likely to look to it for guidance.⁵⁷ Therefore, there is already a developing sense of consistency within the system, one that greater transparency would develop further. Note, however, that arbitrators can only make the procedural and analytical links if the cases are published and more publicized than they currently are. In investor-state arbitrations, consistency is all the more important due to the greater public interest that is at stake in many of the outcomes and the fact that there is no possibility of appeal. As many people are affected by tribunal decisions, consistency is necessary to achieve certainty and a meaningful opportunity to participate. Consistency is also desirable to the parties and the larger international community.

57. If not for guidance, then to distinguish themselves from the previous decision.

First, it creates certainty within the system. This is good for the investors and states directly involved in the process because it allows them to anticipate outcomes better and thereby plan their actions more productively. On a procedural level, it allows for more efficient discovery and confidentiality discussions. It also benefits the system generally as it provides legitimacy, which is discussed below. Further, from a public participation perspective, consistency in procedures and procedural decision-making assists public interest groups to organize their submissions and requests more effectively. It not only provides a clear structure for participation, but it also informs public participants as to the types of requests that are likely to succeed, thereby allowing them to place emphasis on more important and relevant requests/issues. Second, it would develop similarity of treatment on an international level, in other words, a more coherent body of law dealing with investment disputes. By relying on previous decisions, a system of precedent will develop and lead to coherent rules dealing with investment disputes. This is in the interests of the parties, the public, and the international community as a whole. Dispute settlement is more efficient when there is a coherent body of law, and it allows international actors to interact with each other more effectively and confidently. Further, coherence leads to higher quality in decision-making (addressed above), and it creates opportunities for systemic reform (discussed below).

Thus, transparency is key to both certainty and coherence in investment disputes.

Legitimacy: As noted above, legitimacy and credibility are important in the context of the international arbitration system, due, for example, to the high number of investor-state disputes, and the use of arbitral decisions as precedent. Transparency helps to legitimize systems as a whole as it increases awareness of the process and creates opportunities to improve problem areas. Particularly in the investment arbitration context, transparency reduces the secrecy, and therefore distrust, of the proceedings and reassures the public as to the process. Public participation also reduces the secretiveness of the process and makes it more like courts, which is more familiar and accepted by the public.

Accountability: As noted above, there has been a decrease in holding states accountable to the public in the investment context. This was achieved by moving dispute settlement proceedings to a private context to which the public would not have access. However, with increasing calls for democratic governance, holding individuals and governments accountable for their decisions and actions has become more important. Transparency helps facilitate this accountability with respect to those participating in dispute settlement, and it includes actions taken in the lead up to the arbitration as well.

Implementation: Implementing decisions of the arbitral tribunal can be difficult if there is public opposition to it. Governments that have cooperative

members of the public tend to implement decisions, laws, and treaty provisions with greater effect than governments that do not. The public are less likely to disapprove of a decision or process in which they participated or even had a right to participate. As such, public participation may lead to more effective implementation because public acceptance of outcomes of a process they participated in is more likely. On a more practical level, public participation would benefit implementation because members of the public are more likely to become involved in implementation if they participated in the decision-making process.⁵⁸

Systemic Reform: Transparency is particularly important in ensuring systemic improvements in the areas of law that are covered in investment arbitrations. It allows governments, persons, and institutions to observe the wider implications of the laws in existence and identify what works and what does not. This leads to the creation of better laws and institutions and also improves the credibility of investment arbitration as a valuable forum for all interested actors.

Demonstration: Both transparency and public participation in investment arbitration would provide a model of an accessible system for domestic legal systems. Along with increasing coherence in the system, demonstration helps promote the rule of law.

2. Disadvantages of Transparency and Public Participation in Investment Disputes

Several disadvantages may be associated with providing greater transparency and opportunities for public participation in trade and investment dispute settlement procedures. In some cases, tribunals and institutions have developed methods of reducing the disadvantages. These methods are presented in this section to provide a more complete understanding of the actual extent of the disadvantages. The disadvantages posed by increased transparency and public participation fall into several categories:

Increased costs: The process of making information public necessarily entails administrative costs to tribunals, thus increased transparency will increase tribunal costs to some extent. Public participation increases costs on the part of the parties, insofar as they respond to any *amicus curiae* briefs or to other requests by the *amici*, and the tribunal to the extent that it spends time ruling on *amici* status, ruling on other requests by *amici*, considering the briefs, and using the briefs in its final award. The *Methanex* tribunal noted that “the acceptance of *amicus* submissions might add significantly to the overall cost of

58. This follows from the political adage, “If you want people to be on board at landing, they should be on board at take-off.”

the arbitration” and that there is a risk of “imposing an extra burden on one or both the Disputing Parties.”⁵⁹ Since arbitrations are intended to be less expensive than other binding dispute resolution techniques, excess costs can be very problematic and potentially discourage the use of arbitration.

Some institutions and tribunals have introduced mechanisms to curb these costs. One method is the introduction of page limits. This is achieved on an institutional level by setting clear limits in the provision for public participation, like the NAFTA Free Trade Commission that set limits of five and twenty pages for the application of amicus status and the brief, respectively.⁶⁰ In other situations, the tribunal may set limits to reduce the material that it and the parties would have to consider.⁶¹ Another method is the use of strategic collaborations. For example, in *Biwater*, five NGOs collaborated on one amicus brief, which was submitted to the tribunal.⁶² In *Bechtel v. Cochabamba*, a petition to open the case to the public was supported by over three hundred citizen groups from forty-one countries.⁶³ Further, a number of non-governmental organizations were represented by eight parties to make a formal request for amicus status in the arbitration.⁶⁴ This type of collaboration reduces costs for the tribunal and the parties as well as the public participants, and it makes the decision-making process more efficient.

Delay: Making information available and allowing public participation can cause delays in the resolution of disputes. Transparency can entail allowing time for information to be posted publicly (on the Internet or through the media)

59. Methanex Corp. (Can.) v. United States, Decision of the Tribunal on Petitions from Third Persons to Intervene as “Amici Curiae,” ¶ 50 (2001), available at <http://www.state.gov/documents/organization/6039.pdf> (last visited Mar. 1, 2009) [hereinafter *Methanex Amici Curiae*].

60. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, STATEMENT OF THE FREE TRADE COMMISSION ON NON-DISPUTING PARTY PARTICIPATION (2003) § B2(b), B3(b), available at http://www.ustr.gov/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file660_6893.pdf (last visited Feb. 21, 2009) [hereinafter *Statement Non-Disputing Party Participation*].

61. *Biwater No. 5*, supra note 27, ¶ 60a (setting a limit of fifty pages on an amicus curiae submission). See also Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. (Spain) v. Argentine Republic, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an Amicus Curiae Submission, ICSID Case No. ARB/03/19, ¶ 27 (2007) [hereinafter *Vivendi, Petition by Five NGOs*] (providing a thirty page limit for the amicus curiae brief).

62. See *Biwater No. 5*, supra note 27, ¶ 60a.

63. CIEL, *Three Hundred Citizen Groups Call on Secret World Bank to Open up Bechtel Case Against Bolivia*, Aug. 29, 2002, CIEL, http://www.ciel.org/Tae/Bechtel_Bolivia_Aug02.html (last visited Feb. 19, 2009); Aguas Del Tunari v. Bolivia, Petition of La Coordinadora Para la Defensa Del Agua y Vida, La Federacion Departamental Cochabambina de Organizaciones Regantes, Semapa Sur, Friends of the Earth-Netherlands, Oscar Olivera, Omar Fernandez, Father Luis Sanchez and Congressman Jorge Alvarado to the Arbitral Tribunal, ICSID Case No. ARB/02/3 (2002) [hereinafter *Bolivia*].

64. *Bolivia*, supra note 63.

and/or for information to be translated. Public participation can cause delays due to the time spent deciding whether to accept amicus briefs, awaiting responses from the parties, and then considering the briefs. Some of these delays have been curtailed by imposing page limits (discussed above) and strict time limits for submission. It is possible for tribunals to create a tight schedule for addressing public concerns. Additionally, the tribunals are not required to use or even read the briefs; it is left to the discretion of the tribunal to use the brief if they find it helpful.

Impaired Confidentiality and Weakened Secrecy: As noted above, less transparency is one of the factors that may draw private parties to arbitration, as it maintains confidentiality in ways that court systems do not. Increased transparency, by definition, results in less confidentiality, and is therefore a disadvantage for the investors and perhaps for the governments, too. There is also a risk that secret information will be inadvertently disclosed during more transparent proceedings. Public participation also leads to impaired confidentiality to the extent that transparency takes place to allow for the preparation of amicus briefs. This is a tension that may be hard to resolve. On the one hand, parties need confidentiality, but on the other, public participants need information to make more informed submissions. So far, tribunals seem to favor confidentiality and have refused access to parties' claims and other evidence that would be helpful to public participants.⁶⁵

Compromise of Procedural Integrity and Interference with Proceedings: Transparency and full public disclosure can breach obligations to observe the procedural integrity of the dispute and not to aggravate the dispute. The fear is that by disclosing arbitration proceedings, the dispute becomes politicized and subject to pressure by the media and the general public. In the *Biwater* case, Biwater argued that campaigns by NGOs, the public, and the media were threats to the procedural integrity of the dispute, and also that there were risks of aggravation and exacerbation of the dispute.⁶⁶ The tribunal issued an order of confidentiality, noting that it has the right to direct parties not to take actions that would exacerbate the dispute and that this includes protecting the tribunal's mandate to determine the dispute without external pressure or trial by the media and ensuring a level playing field.⁶⁷

Amicus briefs raise numerous concerns with respect to inference of proceedings and procedural fairness. Critics point out that some persons who request amicus status are against the objectives of investment projects and thus

65. See, e.g., *Vivendi, Petition for Transparency*, *supra* note 24; *Biwater No. 5*, *supra* note 27.

66. See *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Procedural Order No. 3, ICSID Case No. ARB/05/22, ¶¶ 12, 15–17 (2006) [hereinafter *Biwater No. 3*].

67. *Id.* ¶ 163.

frustrate the goals of arbitration by participating in the proceedings.⁶⁸ However, it should be possible for tribunals to recognize such a situation and limit the discussion to issues in dispute. Another concern is the nature of support the amicus brief provides. The *Methanex* tribunal recognized that amicus briefs can undermine equal procedural protections for each party in light of what it perceived to a greater likelihood of arguments presented by the *amici* being more likely to favor respondent countries.⁶⁹ As such, the tribunal was concerned that the Claimant would require whatever protections may be necessary.⁷⁰

Permitting amicus submissions directly to the tribunal also creates problems with regard to the disputing parties' interest in controlling the information that the tribunal considers.⁷¹ Of course, this creates a burden on parties if they have to rebut facts or legal argumentation presented in the brief.⁷²

This is especially problematic because the *amici* are not required (or even allowed, in a practical sense, because of page limits) to prove facts that they present to the tribunal.⁷³ The lack of quality control in this regard may threaten the integrity of the proceedings. Finally, there is a general loss of control over the arbitration as the introduction of new facts and arguments could affect a party's tactics. However, this is no different from anticipating the opposing party's submissions or questions from the tribunal.

Unequal Access to Amicus Submission Process: Since the submission of amicus briefs requires resources, it may disadvantage NGOs or third parties in developing countries. As such, it is possible that they may be under-represented in the public participation process. In practice, NGOs from developing countries have tended to collaborate with those in developed countries to the extent that those NGOs reflect public interests in developing nations. This is enhanced by the requirement of submitting a single brief as mandated by certain institutions and tribunals. Nevertheless, there is no mechanism to ensure that persons submitting briefs actually represent the public interest and do not use the submission process to forward their own agendas. A related concern is that NGOs are more likely to support respondent countries or governments and prejudice the private investors.

68. *Id.* ¶¶ 32, 34.

69. *Methanex Amici Curiae*, *supra* note 59, ¶ 50.

70. *Id.*

71. *Id.*

72. Brigitte Stern, *The Intervention of Private Entities and State as "Friends of the Court" in WTO Dispute Settlement Proceedings*, in PATRICK F.J. MACRORY ET AL., *THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS* 1427, 1456 (2005).

73. *See id.* at 1438.

Potential Conflicts of Interest: There is a risk that the arbitrators that constitute the tribunal may have relationships with persons submitting amicus curiae brief in a way that creates a conflict of interest.⁷⁴ The pool of arbitrators consists of experts that could have connections to NGOs or individuals within NGOs, and this can be hard to detect on a superficial level. Unlike the safeguards in place for detecting conflicts of interest between arbitrators and parties, there is no specific mechanism to address conflicts between non-parties and arbitrators. NAFTA requires that persons seeking amicus status provide certain information, for example, information regarding those who financed the brief.⁷⁵ However, it does not specify that the purpose of providing this information is to determine whether there is a conflict of interest.⁷⁶ So far, in investor-state disputes, there is no specificity either,⁷⁷ although the *Suez-Vivendi* tribunal did set similar requirements to NAFTA for the NGOs that submitted an amicus brief.⁷⁸

C. Means of Minimizing Disadvantages

While there are a number of possible disadvantages posed by increasing transparency and public participation in the arbitral system, there are many ways in which they can be curbed. The following describes some existing methods and means of improving them as well as additional methods that could effectively limit disadvantages. They are:

Page and subject matter limits on amicus briefs: Limiting pages and subject matter can help to reduce the costs and delays associated with handling amicus briefs. Setting page limits reduces the amount of material that disputing parties have to respond to and that tribunals have to assess.⁷⁹ Subject-matter limits can help reduce delay and costs by limiting the amicus briefs to important issues within the scope of the dispute.⁸⁰ As noted above, some institutions set an overall limit applicable to all cases, and some tribunals set their own limits depending on the case. While having an institutional limit reduces the time tribunals would have to spend determining page limits, it may not give optimal results because there may be cases where the subject matter requires greater

74. Ruth MacKenzie, *The Amicus Curiae in International Courts: Towards Common Procedural Approaches?*, in CIVIL SOCIETY, INTERNATIONAL COURTS AND COMPLIANCE BODIES 295, 300–01, n.22 (2005).

75. *Statement Non-Disputing Party Participation*, *supra* note 60 ¶ B2(c)–(f).

76. *See id.* ¶ B6.

77. *Vivendi, Petition for Transparency*, *supra* note 24, ¶ 27.

78. *Id.* ¶ 25.

79. *See supra* Part III.B.2.

80. *See, e.g.*, ICSID ARBITRATION RULES, *supra* note 3, at Rule 37(2)(b) (providing that amicus curiae briefs shall “address a matter within the scope of the dispute”).

depth. Therefore, some discretion should be given to the tribunal to determine what limits to place or to extend institutional limits if necessary (even if there is a set limit).

Using the Internet and other electronic sources to reduce costs and delay:

One of the best ways to reduce costs and delays with respect to public disclosure of information is to use the Internet. Compared to publishing the information in print, the Internet is low-cost system of making proceedings more transparent. For example, ICSID maintains a register and publishes all relevant information on its website. As such, the financial costs of dissemination are lessened, and there is no delay in the dispute settlement proceedings. Of course, the information is confined to matters pertaining to the existence of the dispute and the issues involved. There is no necessity to include confidential information, and what is confidential can be determined in the course of proceedings, before dissemination.

A related issue is the developing trend in investment arbitration to open hearings to the public. Today, the United States, Canada, and Mexico promote open hearings in NAFTA investment arbitrations.⁸¹ The revised ICSID rules now give tribunals the authority to allow open hearings if the parties do not object.⁸² Current examples of open hearings show that they can be held successfully without disrupting or delaying the proceedings. Additionally, there are low-cost ways of allowing access to the public. The first examples, that of *UPS* and *Methanex*, show that live closed-circuit broadcasts can be used to great effect.⁸³ ICSID has also broadcast live hearings via closed-circuit television in the *Canfor* case.⁸⁴ These cases show that open hearings are possible at a low cost and without causing delay or other problems. Costs could be lowered further by web casting public hearings, as has been done by the International Court of Justice.⁸⁵ Web casts reach a wider audience than closed-circuit hearings, which increase transparency while reducing costs. Note that as with disclosure generally, steps should be taken to protect confidential,

81. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, STATEMENT ON OPEN HEARINGS IN NAFTA CHAPTER ELEVEN ARBITRATIONS (2003), available at http://www.ustr.gov/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file143_3602.pdf (last visited Feb. 23, 2009) [hereinafter *U.S. Statement*]; OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, NAFTA FREE TRADE COMMISSION JOINT STATEMENT—"A DECADE OF ACHIEVEMENT" (2004), available at http://www.ustr.gov/Document_Library/Press_Releases/2004/July/NAFTA_Free_Trade_Commission_Joint_Statement_-_A_Decade_of_Achievement.html?ht=, (last visited Feb. 19, 2009) [hereinafter *Decade of Achievement*].

82. ICSID ARBITRATION RULES, *supra* note 3, at Rule 32(2).

83. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), TRANSPARENCY AND THIRD PARTY PARTICIPATION IN INVESTOR-STATE DISPUTE SETTLEMENT PROCEDURES ¶¶ 29, 34 (2005).

84. *Id.* ¶ 35.

85. Magraw, *supra* note 1, at 21.

privileged, or sensitive information, so as to minimize any disadvantages in holding live public hearings.

Tight schedules for amicus curiae submissions and timely disclosure of briefs, transcripts, final awards, and any other submission made to a tribunal: Reasonably tight deadlines for amicus curiae submissions can help in a number of ways: it reduces delay in arbitration proceedings, it limits the time and resources that NGOs and/or third parties spend preparing the briefs, and it indirectly limits the amount of material in the briefs, thereby limiting what the disputing parties respond to and the tribunal considers.⁸⁶

Further, timely disclosure of key documents such as briefs, final awards, and transcripts will assist persons submitting amicus briefs to be more efficient in making their own submissions. Without access to basic information like the pleadings or preliminary orders, the *amici* would have to depend on less reliable sources in framing their petitions and submissions. This delays amicus preparation as well as the parties' and tribunals' time in responding to the material presented. However, it is important that the information be disclosed in a timely fashion; if they are released only after the outcome of the arbitration, then interests will not be realized, and there will be no effect on minimizing the disadvantages of the participation that does take place. With the use of the Internet, any costs incurred in doing so would be minimal. Indeed, there is evidence of institutions and states moving towards disclosure of arbitral documents, even timely disclosure in the more recent cases. The NAFTA Free Trade Commission statement of July 31, 2001, stated that parties must make arbitration documents available to the public.⁸⁷ Following this, the United States, Canada, and Mexico have posted most documents related to arbitrations on their respective websites.⁸⁸ ICSID awards and orders are published in the ICSID review or are available on the ICSID website.⁸⁹ Even awards given under some bilateral investment treaties are available on investment arbitration

86. The *Biwater* and *Vivendi* tribunals both placed deadlines on amicus curiae submissions. See *Biwater No. 5*, *supra* note 27, ¶ 60a (setting the deadline for the amicus curiae submission less than two months after the tribunal granted the petition for participation). See also *Vivendi, Petition by Five NGOs*, *supra* note 61, ¶ 27 (setting the amicus curiae submission deadline approximately two months after the tribunal's decision to permit participation).

87. NAFTA FREE TRADE COMMISSION, NORTH AMERICAN FREE TRADE AGREEMENT NOTES OF INTERPRETATION OF CERTAIN CHAPTER 11 PROVISIONS §§ A1–A2a (2001).

88. FOREIGN AFFAIRS AND INTERNATIONAL TRADE CANADA, STATEMENT OF CANADA ON OPEN HEARINGS IN NAFTA CHAPTER ELEVEN ARBITRATIONS, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/open-hearing.aspx?lang=en> (last visited Feb. 21, 2009); *U.S. Statement*, *supra* note 81; *Decade of Achievement*, *supra* note 81.

89. ICSID, *supra* note 2.

websites.⁹⁰ Timely disclosure of information is vital to better participation, and the disadvantages are minimal.

Requirement that third parties jointly submit a single amicus curiae brief: Requiring a single amicus curiae brief from all third parties can minimize preparation costs and help NGOs or third parties from developing countries to participate, because they can collaborate with NGOs in developed countries that have more human and financial resources. Additionally, a single brief will limit costs and delays associated with responding to and assessing amicus submissions by the parties and the tribunal, respectively. It helps to streamline the submissions process and to ensure that points are raised by the *amici* without excess repetition. However, this can reduce the diversity of viewpoints that are relevant to a dispute. Further, forcing several NGOs or third parties with various perspectives to produce one brief often entails a time-consuming process of collaboration to reach a final product. In situations where NGOs from developed countries collaborate with NGOs from developing countries, transnational communication adds to expenses and delays in preparing an amicus brief.⁹¹

Requirement that information be provided about the third parties: Individual tribunals or institutional rules should require the submission of information regarding organizations or persons seeking amicus status to determine whether there are potential conflicts of interest with the arbitrators. Although this does take place to some extent (noted above), it needs to be done for the purpose of identifying conflicts of interest. Even though *amici* are not parties to the dispute, they should be treated as such in this respect so that the disputing parties' entitlement to procedural fairness is not undermined.

Provide for the protection of confidential business information and state secrets: A major concern associated with transparency and public participation, as noted above, is the loss of confidentiality. Confidential business information and/or state secrets can be inadvertently disclosed by increasing mechanisms for transparency and public participation. However, much of this is alleviated by the process of issuing confidentiality orders. Under ICSID, this determination is essentially up to the parties, because if one party objects, information cannot be disclosed to third parties and this includes party claims, evidence, witnesses, etc.⁹² While this is problematic in other respects

90. See, e.g., Investment Claims, <http://www.investmentclaims.com> (last visited Feb. 18, 2009) and Investment Treaty Arbitration, <http://ita.law.uvic.ca> (last visited Feb. 18, 2009).

91. Both the *Biwater* and *Vivendi* tribunals required groups of NGOs to submit a single amicus curiae brief. See *Biwater No. 5*, *supra* note 27, ¶ 60a (providing that the five NGOs, from Tanzania and the U.S., submit a single amicus curiae submission). See also *Vivendi, Petition by Five NGOs*, *supra* note 61, ¶ 27 (requiring the five NGOs, from Argentina and the U.S., to file a single amicus curiae brief).

92. ICSID ARBITRATION RULES, *supra* note 3, at Rule 37(2).

(addressed above), it does ensure that information the parties consider confidential is not released to any party outside of the dispute. Another way to provide protection would be to hold closed proceedings for sensitive information and preclude that from being discussed in open proceedings, similar to an *in camera* proceeding in domestic courts. This would permit more access to third parties while protecting information that is confidential, instead of ruling out all evidentiary information or claims simply because one part of it is confidential. Given the flexibility that tribunals have in determining procedure, it is more than possible to balance access to information and confidentiality.

D. Assessment of Advantages and Disadvantages

These advantages and disadvantages need to be analyzed with respect to possible specific avenues for transparency and public participation, because they play out differently for different avenues. For example confidentiality plays a different role in settlement discussions than it does with respect to final awards.

IV. CONCLUSION

Investor-state arbitration is increasingly important and increasingly involves significant public interests, yet it is characterized by a serious democracy deficit in terms of lack of transparency and opportunities for public participation. This deficit, which varies according to the rules and institutions, if any involved in a particular arbitration, should be remedied through careful analysis of the advantages and disadvantages of transparency and public participation at each stage of the arbitral proceeding. Such an analysis reveals many instances where transparency and public participation rules need to be revised, utilizing available techniques for limiting or eliminating the possible disadvantages.