Court File No. 01-CV-211576

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

DEMOCRACY WATCH, and JUDY DARCY on her own behalf and on behalf of and for the benefit of all members of the Canadian UNION of PUBLIC EMPLOYEES

Applicants

- and -

THE ATTORNEY GENERAL OF CANADA

Respondent

AFFIDAVIT OF JAN PAULSSON
(Sworn the 19th day of May, 2003)

I, **JAN PAULSSON**, *avocat à la Cour de Paris* and attorney at law admitted to the bar of Connecticut, of the City of Paris, France, make oath and say:

1. I have been asked by the Respondent, the Attorney General of Canada, to provide a report on issues concerning confidentiality in international arbitration as reflected in international arbitration rules, in particular the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) and the International Centre for the Settlement of Investment Disputes (ICSID).

2. I am a partner in the Paris office of Freshfields Bruckhaus Deringer and am joint head of the firm's Public International Law Group and the International Arbitration Group.

3. I have acted as counsel in over 400 commercial arbitral proceedings, and as arbitrator in over 80 others, conducted in Europe, Asia, the United States and

Africa under the rules of the International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), the Stockholm Institute of Arbitration, UNCITRAL and ICSID. I have also acted in ad hoc arbitrations governed by national laws and before public international law tribunals, including the International Court of Justice. I have been a Vice President of the LCIA since 1985, and a Judge of the World Bank Administrative Tribunal since 1999. I acted as one of the ad hoc arbitrators at the Olympic Games in Atlanta, Nagano and Sydney, and as lead counsel to the International Olympic Committee in arbitrations arising out of the Winter Games of Salt Lake City. Of particular relevance to the present dispute, I have acted as arbitrator in a number of arbitrations under Chapter Eleven of the North American Free Trade Agreement (NAFTA), and presided the Tribunal that rendered the first NAFTA Chapter Eleven award on the merits, applying the ICSID Rules (*Azinian v. United Mexican States*). I am currently presiding another NAFTA Chapter Eleven tribunal, applying the UNCITRAL Rules (*GAMI Investments Inc. v. United Mexican States*).

4. Attached as Exhibit "A" to my affidavit is my full curriculum vitae.

5. Attached as Exhibit "B" to my affidavit is my report.

6. I make this affidavit to assist this Court in these proceedings and for no other or improper purpose.

Sworn before me at the City of Paris,
in France
on 19 May 2003

Commissioner for Taking Affidavits
(Notary Public in Paris, France)

Didier CASAYGUES
Notaire associé à PARIS

JAN PAULSSON

This is Exhibit "A" referred to in the affidavit of Jan Paulsson sworn before me this 19 day of May, 2003

Didier LASAYGUES
Notaire associé à PARIS

Jan Paulsson

CURRICULUM VITAE
(March 2003)

Date and place of birth:	5 November 1949, Nyköping, Sweden
Professional address:	Freshfields Bruckhaus Deringer 69 boulevard Haussmann 75008 Paris, France Telephone: 01 44 56 44 56 Telefax: 01 44 56 44 00
Present Position:	Partner and Head of the Freshfields International Arbitration and Public International Law Groups
Languages:	English, French and Swedish

Education

Harvard University (A.B. 1971)

Yale Law School (J.D. 1975) (Editor, Yale Law Journal)

University of Paris (*Diplôme d'études supérieures spécialisées* 1977)

Professional Associations

Vice-President, London Court of International Arbitration (1985-2003)

Judge, World Bank Administrative Tribunal (Washington) (1999-)

Member, Court of Arbitration for Sport (Lausanne) (1985-)

Member, International Council for Commercial Arbitration (1994-)

Arbitration Experience

Counsel or arbitrator in some 400 arbitral proceedings conducted in all major venues in Europe, as well as in Asia and the United States, mostly under the Rules of the ICC but also notably under those of the LCIA, UNCITRAL, and various *ad hoc* arrangements. Counsel in eleven ICSID arbitrations (on the side of the investor as well as the host State).

Most frequently recurring subject matters: joint ventures, investments, pricing mechanisms in long-term commodity supply agreements, construction projects, intellectual property, sports.

Counsel in the following cases in the public domain (not exhaustive)

State of Qatar v. State of Bahrain; State of Eritrea v. State of Yemen; World Duty Free Inc. v. Republic of Kenya; SGS v. Republic of Pakistan; Soufraki v. The United Arab Emirates; Gruslin v. State of Malaysia; all doping cases arising from the 2002 Olympic Games and heard before various arbitral tribunals (as counsel to the IOC); Ruhrgas v. Marathon Oil; Ken-Ren v. Voest et al; Republic of Cameroon v. Klöckner; SPP v. Republic of Egypt ("Pyramids Oasis" case); Atlantic Triton v. Republic of Guinea; LETCO v. Republic of Liberia; French Nuclear Energy Commission (CEA/EURODIF) v. State of Iran; LIAMCO (Atlantic Richfield) v. State of Libya.

Arbitrator in these cases considered on the merits in 1999 (not exhaustive):

- Azinian *et al.* v. Federal Republic of Mexico, ICSID (AF) Rules, **Washington D.C.**, expropriation claim, first case decided on the merits under NAFTA, award published in 14 ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL 538 (1999); 25 ICCA YEARBOOK 262 (2000) (President).

- Himpurna California Energy Ltd. *et al.* v. PLN (Indonesian State Electricity Company), parallel cases under UNCITRAL Rules, **Jakarta**, contract for sale of electricity, amount in dispute US$ 3.7 billion, awards published in MEALEY'S INTERNATIONAL ARBITRATION REPORT, December 1999 at A1; 25 ICCA YEARBOOK 13 (2000) (President).

- East European trading company v. Mid Eastern State, ICC Rules, **Paris**, contract involving the defence industry, amounts in dispute US$ 660 million claim, US$ 314 million counterclaim (Chairman).

- South American energy company v. Caucasian State (ex-Soviet Union), ICC Rules, **Stockholm**, gas production sharing agreement, amount in dispute US$ 2.2 billion (co-arbitrator).

- Himpurna California Energy Ltd. *et al.* v. Republic of Indonesia, parallel cases under UNCITRAL Rules, **Jakarta**, government undertakings in support of State corporation, amount in dispute US$ 572 million, awards published in MEALEY'S INTERNATIONAL ARBITRATION REPORT, January 2000, at A3, February 2000 at A1; 25 ICCA YEARBOOK 109 (2000) (President).

- Gary Hall Jr. v. FINA (International Amateur Swimming Federation), challenge to suspension for doping infraction, Court of Arbitration for Sport, **Lausanne**, award published in 25 ICCA YEARBOOK 288 (2000) (President).

- French distributor v. French agricultural cooperative, ICC Rules, **Paris**, distribution agreement, amount in dispute FRF 6 million (sole arbitrator).

- Celtic Football Club v. UEFA (Union des associations européennes de football), claim for compensation in connection with the transfer of a player to AS de Monaco, Court of Arbitration for Sport, **Lausanne** (co-arbitrator).

Arbitrator in these cases considered on the merits in 2000 (not exhaustive):

- Indian manufacturer v. Swiss supplier of factory, LCIA Rules, **London**, contract for erection of plant and transfer of technology, amount in dispute Swiss Francs 55 million (Chairman).

- Price dispute concerning electricity supply to African nation, UNCITRAL Rules, **Paris**; named parties: foreign electricity producer and national utility company; indirectly interested parties: three national Governments, amounts in dispute of a macro-economic dimension (President of five-member tribunal).

- Bernardo Segura v. International Athletics Amateur Federation (IAAF), disputed disqualification of Olympic gold medallist race walker, Court of Arbitration for Sport, **Sydney**, award published in CAS AWARDS – SYDNEY 2000, at 131 (President).

- Angel Perez v. International Olympic Committee, eligibility of ex-Cuban athlete to compete in Olympics for the United States, Court of Arbitration for Sport, **Sydney**, award published in CAS AWARDS – SYDNEY 2000, at 53 (co-arbitrator).

- Romanian engineering company v. Zimbabwean investment authority, dispute arising out of the construction of a failed industrial plant, ICC Rules, **Paris**, amount in dispute US$ 56 million (co-arbitrator).

Arbitrator in these cases considered on the merits in 2001 (not exhaustive):

- Canadian oil company v. Liechtenstein holding company, UNCITRAL Rules, **Stockholm**, consulting contract, amount in dispute US$35 million (sole arbitrator).
- Consortium of building companies v. a European capital airport, LCIA Rules, **London**, amount in dispute in excess of €70 million (co-arbitrator).
- Alexander Leipold v. International Wrestling Federation, disputed suspension of an Olympic gold medallist disqualified for doping, Court of Arbitration for Sport, **Lausanne** (co-arbitrator).
- Russian supplier v. Cyprus trading company, fertilizer supply contracts, LCIA Rules, **London**, amount in dispute US$25 million (Chairman).

Arbitrator in these cases considered on the merits in 2002 (not exhaustive):

- Anaconda Operations Pty Ltd. v. Fluor Australia Pty Ltd., ad hoc under the Commercial Arbitration Act 1984 of Victoria, **Melbourne**, design-build-commission contract, amount in dispute in excess of A$ 1.4 billion (President).
- International Association of Athletics Federations (IAAF) v. USA Track & Field, dispute with respect to statutory reporting requirements in doping cases, Court of Arbitration for Sport, **Lausanne**, award published in MEALEY'S INTERNATIONAL ARBITRATION REPORT, January 2003 at C1 (co-arbitrator).

Related Activities

General Editor, Arbitration International (1985-2002)

Chairman, LCIA Rules Revision Committee (1985-2002)

Arbitrator, ad hoc appeals panel at the Olympic Games in Atlanta (1996), Nagano (1998), and Sydney (2000)

Co-Chairman, International Bar Association Sub-Committee on Enforcement of Arbitral Awards (1992-2002)

Member, Drafting Committee for 1994 World Intellectual Property Organization Rules of Arbitration

Senior Special Fellow, United Nations Institute for Training and Research, UNITAR (Geneva) (1995-2000)

Panel of Arbitrators, ICSID (1998-)

Member, Council of the ICC Institute of World Business Law (1988-)

Member, Expert Consultative Group on International Commercial Arbitration, UNCITRAL (Vienna) (1994-95)

Adviser to a number of Governments with regard to legislation or treaties in the area of arbitration

Publications (a partial list)

Books

INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION, Oceana; 1st edition 1983, 2nd edition 1990, 3rd edition 2000 (with W L Craig and W W Park)

THE FRESHFIELDS GUIDE TO ARBITRATION AND ADR CLAUSES, 1st edition 1993 (with J M H Hunter, N K Rawding and D A Redfern), 2nd edition 1999 (with N K Rawding, L Reed, and E A Schwartz)

INTERNATIONAL COMMERCIAL ARBITRATION, FOUNDATION PRESS, 1997 (with W M Reisman, W L Craig and W W Park)

Articles

Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA), 9 ICC COURT BULLETIN 14 (May 1998)

Arbitration without Privity, 10 ICSID REVIEW - FOREIGN INVESTMENT LAW JOURNAL, 1995, at 232

La réforme de l'arbitrage en Inde, REVUE DE L'ARBITRAGE, 1996, at 597

Contrats en Asie: Kuala Lumpur comme lieu d'arbitrage, 1994 DROIT DES AFFAIRES INTERNATIONALES, at 248

1994 Revision of CIETAC Rules Promises Increased Neutrality In Arbitration in China, MEALEY'S INTERNATIONAL ARBITRATION REPORT, June 1994, at 1 (with Alastair Crawford)

Arbitration of International Sports Disputes, THE ENTERTAINMENT AND SPORTS LAWYER, Winter 1994, at 12

The Trouble with Confidentiality, ICC COURT BULLETIN, May 1994, at 48 (with N K Rawding)

Standards of Conduct for Counsel in International Arbitration (Essays in Honor of Hans Smit), THE AMERICAN REVIEW OF INTERNATIONAL ARBITRATION, 1992, at 214

ICSID's Achievements and Prospects, in 6 ICSID REVIEW-FOREIGN INVESTMENT LAW JOURNAL, 1991, at 104

La lex mercatoria *dans l'arbitrage CCI*, in REVUE DE L'ARBITRAGE, 1990, at 55

Arbitrage international et voies de recours: La Cour suprême de Suède dans le sillage des solutions belges et helvétiques, JOURNAL DU DROIT INTERNATIONAL, 1990, at 589

Means of Recourse Against Arbitral Awards Under US Law, JOURNAL OF INTERNATIONAL ARBITRATION, 1989, at 2

Third World Participation in International Investment Arbitration, ICSID REVIEW-FOREIGN INVESTMENT LAW JOURNAL, 1987, at 19

May a State Invoke its Internal Law to Repudiate Consent to International Commercial Arbitration?, ARBITRATION INTERNATIONAL, 1986, at 90

Arbitration Unbound in Belgium, ARBITRATION INTERNATIONAL, 1986, at 68

A Commentary on the 1985 Rules of the London Court of International Arbitration, YEARBOOK COMMERCIAL ARBITRATION, 1985, at 167 (with J M H Hunter)

A Code of Ethics for Arbitrators in International Commercial Arbitration?, INTERNATIONAL BUSINESS LAWYER, 1985, at 153 (with J M H Hunter)

Sovereign Immunity from Execution: French Caselaw Revisited, INTERNATIONAL LAWYER, 1985, at 277

L'arbitre et le contrat: l'adaptation du contrat, REVUE DE L'ARBITRAGE, 1984, at 249

La réforme de la loi de l'arbitrage à Hong Kong, REVUE DE L'ARBITRAGE, 1984, at 325

L'immunité restreinte entérinée par la jurisprudence suédoise dans le cadre de l'exequatur d'une sentence arbitrale étrangère rendue à l'encontre d'un Etat, JOURNAL DU DROIT INTERNATIONAL, 1981, at 544

French Codification of a Legal Framework for International Commercial Arbitration, LAW AND POLICY IN INTERNATIONAL BUSINESS, 1981, at 727 (with W Laurence Craig and W W Park)

The Role of Swedish Courts in Transnational Commercial Arbitration, VIRGINIA JOURNAL OF INTERNATIONAL LAW, 1981, at 211

This is Exhibit "B" referred to in the affidavit of Jan Paulsson sworn before me this 19 day of May, 2003

Didier LASAYGUES
Notaire associé à PARIS

EXPERT REPORT

OF

JAN PAULSSON

19 May 2003

I. INTRODUCTION

A. SCOPE OF THE EXPERT REPORT

1. I have been asked by the Attorney General of Canada to provide an expert report on issues of confidentiality in international arbitration as reflected in international arbitration rules, in particular the arbitration rules of the United Nations Commission on International Trade Law (***UNCITRAL***) and the International Centre for the Settlement of Investment Disputes (***ICSID***).

2. I begin this report by describing the special place occupied by ICSID and UNCITRAL Rules amongst international arbitral rules. I then consider the duty of confidentiality in modern day international arbitration, before focusing specifically on its existence, and extent, under the ICSID[1] and UNCITRAL Rules as they are applied in arbitrations under NAFTA Chapter Eleven.

B. CONCLUSIONS

3. More than any other set of arbitral rules, the ICSID and UNCITRAL Rules represent an international consensus. Indeed, they alone amongst arbitral rules represent a consensus amongst states. Given the participation of states in the formulation of these rules, and their predominance today in disputes involving state parties in a variety of contexts, it was natural for the drafters of the NAFTA to incorporate the ICSID and UNCITRAL Rules in the dispute resolution provisions of Chapter 11 of the NAFTA.

4. Before addressing the issue of confidentiality under the ICSID and UNCITRAL Rules as they are applied in Chapter 11 arbitrations, it should be noted that confidentiality in international arbitration is an evolving area. Privacy in arbitration, i.e. the *in camera* nature of oral hearings, has seldom been questioned. The broader concept of confidentiality that extends to the

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1 The Additional Facility Rules are virtually identical to the ICSID Rules on the matters that are pertinent to the subject matter of this report. For this reason, unless the context requires otherwise, when referring to the ICSID Rules in this report I refer to both the ICSID Arbitration Rules and the ICSID Additional Facility Rules.

proceedings generally, was traditionally assumed to be a natural and implicit corollary of the privacy of proceedings. Notwithstanding this traditional assumption, there exists an unmistakeable modern trend, evidenced by a number of recent judgments around the world, to divorce the privacy of oral proceedings, on the one hand, from the confidentiality of arbitral proceedings as a whole, on the other.

5. As a result, it is becoming increasingly difficult to affirm the existence of a duty of confidentiality in international arbitration with any degree of confidence unless such a duty is imposed expressly. While oral proceedings remain *in camera*, absent a broader, explicitly defined duty of confidentiality the significance of the continuing 'privacy' of proceedings is diminishing. Thus, written records of such proceedings (including transcripts of oral hearings) are becoming increasingly accessible to third parties.

6. This modern trend is finding particular expression in arbitrations under NAFTA Chapter Eleven, which by definition involve states with duties of public disclosure under their domestic laws, and sometimes raise issues of public interest and importance. The ICSID and UNCITRAL Rules, the Free Trade Commission's Note of Interpretation of 31 July 2001, as well as the growing weight of modern arbitral jurisprudence around the world, enable arbitral tribunals to be responsive to calls for greater transparency in NAFTA Chapter Eleven arbitrations.

II. THE SPECIAL PLACE OF ICSID AND UNCITRAL RULES AMONGST INTERNATIONAL ARBITRAL RULES

7. The ICSID and UNCITRAL Rules occupy a special place amongst international arbitral rules. While institutional rules such as those of the ICC, LCIA and AAA are often identified with particular categories of states or interest groups, the ICSID and UNCITRAL Rules may reasonably be described as the most multilateral of the major international arbitral rules.

8. This is not simply a matter of perception. More than any other set of arbitral rules, they represent an international consensus. Indeed, they alone amongst arbitral rules represent a consensus amongst states. While no states are members of institutions such as the ICC, LCIA and AAA, *only* states are members of ICSID and UNCITRAL. Their arbitration rules are, thus, particularly well suited to the resolution of disputes involving state parties.

1. Institutional rules such as those of the ICC, LCIA and AAA are often perceived as less universal than the ICSID and UNCITRAL Rules

The rules of arbitration of the International Court of Arbitration of the International Chamber of Commerce[2]

9. The International Chamber of Commerce (***ICC***) describes itself as the "world business organisation". Its members include corporations, chambers of commerce, professional associations and individuals involved in international business. Its governing body is the ICC World Council, the delegates to which are business executives. The ICC declares that its mission is "to serve world business by promoting trade and investment, open markets for goods and services, and the free flow of capital".[3] In 2002, less than 10% of its cases involved a state or parastatal entity. As a result, the ICC's International Court of

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2 I am co-author of what may be the best-known commentary on ICC arbitration, entitled "International Chamber of Commerce Arbitration" (3rd edition, Dobbs Ferry N.Y., Oceana Publications, 2000).

3 *See*, "History of the International Chamber of Commerce; The ICC's origins". Available online at: http://www.iccwbo.org/home/menu_what_is_icc.asp.

Arbitration is often perceived as representing the specific interests of "the business communities of countries with free market economies."[4]

10. Given the nature of its membership, and the predominance on its docket of private commercial disputes, some practitioners have – rightly or wrongly - questioned the use of the ICC for the settlement of investor-state disputes.

> *One of the criticisms lodged against the ICC Court of Arbitration as a forum for the resolution of foreign investment disputes is that, being primarily a centre for the resolution of commercial disputes between private traders, it has relatively little experience in the complexities of long-term investment agreements involving a state as a party.*[5]

11. Moreover, although it is in fact the most international of the major arbitral institutions, the ICC is considered by some observers to have a particularly western European focus. In 2001, France was the seat of 128 ICC arbitrations, constituting more than 25% of all ICC arbitrations. Together, France, Switzerland and the United Kingdom were the seats of close to 60% of all ICC arbitrations in 2001. France was chosen by the ICC as the seat of the arbitration in a third of all cases in which the parties themselves failed to designate a seat.[6]

12. Although there is no legal impediment to using the ICC Rules independently of the institution, it would be abnormal. Moreover, given the important role prescribed in the Rules for the ICC Court at various stages of the arbitration,[7] it is far from clear how this could be workably achieved.

The LCIA's arbitration rules[8]

13. The LCIA has a three-tier structure comprising a company, an arbitration court and a secretariat. The company is incorporated in England, 25% of the LCIA

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4 *See*, Fouchard Gaillard Goldman on *International Commercial Arbitration*, E. Gaillard & J. Savage (eds.), The Hague, Kluwer Law, 1999, p. 174.

5 *See*, P. Muchlinski, *Multinational Enterprises and the Law,* Oxford, Blackwell, 1995, p. 539.

6 *See*, ICC, *2001 Statistical Report*, International Court of Arbitration Bulletin Vol. 13/No. 1 - Spring 2002, pp. 5-16.

7 For example, the ICC Court's scrutiny of awards rendered by Tribunal's pursuant to Article 27 of the ICC Rules.

8 I am a Vice President of LCIA's Court, and served as Acting President in 2002.

court is made up of UK members, and the Secretariat is based in London. Originally known as the London Court of Arbitration, the LCIA has in recent years sought to change its reputation of being an English institution. Its membership (confined to individuals and corporations) is now very cosmopolitan, and its past three Presidents have been non-UK nationals.

14. Its centre of gravity, however, remains firmly fixed in the City of London. Nearly all LCIA arbitrations take place in London. Indeed, Article 16.1 of the LCIA Arbitration Rules provides:

> *The parties may agree in writing the seat (or legal place) of their arbitration. Failing such a choice, the seat of arbitration shall be London, unless and until the LCIA Court determines in view of all the circumstances, and after having given the parties an opportunity to make written comment, that another seat is more appropriate ....*

The American Arbitration Association's arbitration rules

15. The American Arbitration Association, Inc. (***AAA***) is incorporated as a not-for-profit corporation in the State of New York. Its Board of Directors is comprised of individuals drawn predominantly from private legal practice, US corporations and academe.

16. Established as an institution to administer domestic arbitration, the AAA's international scope is recent. It was only in 1991 that the AAA adopted a new set of rules for international arbitration, and only in 1996 that it established an International Centre for Dispute Resolution based in New York.[9] While commentators have correctly recognised its increasing internationalism, the AAA is still seen by many as a predominantly American arbitration institution. As one commentator observed:

> *In most AAA arbitrations, including those subject to the Supplementary Procedures, the parties have chosen the AAA because their dispute bears some American connection. Frequently, the place of performance was in the United States and United States law governs. Even if United States substantive*

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9 Although the AAA's International Centre for Dispute Resolution now has a European office located in Dublin, Ireland.

law does not govern, the mandatory rules of the place of arbitration will apply. In addition, AAA arbitrators often rely to some extent upon American procedures, even though they eschew the strict requirements of American evidentiary rules. For example, American-style cross examination has been permitted in each AAA international arbitration in which this writer has been involved (a practice not uniformly employed in proceedings before other international arbitral institutions).[10]

2. The ICSID and UNCITRAL Rules represent an international consensus

The ICSID rules

17. The International Centre for Settlement of Investment Disputes (***ICSID***) is headquartered in Washington D.C., and was established in 1966 by a multilateral treaty, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (***ICSID Convention***).[11] As the treaty's title suggests, ICSID was created specifically to facilitate the settlement of investment disputes between member States and investors of other member States. As of the beginning of 2003, 154 states have signed the ICSID Convention and 139 states have deposited their instruments of ratification.

18. ICSID is an autonomous international organisation with close links to the World Bank. It is comprised of an Administrative Council and a Secretariat. The Administrative Council is chaired by the World Bank's President and consists of one representative of each State which has ratified the Convention.

19. Arbitrations under the ICSID Convention are conducted pursuant to the ICSID Rules, which were adopted, and have recently been amended, by the Administrative Council.[12] On 27 September 1978, by enacting the Additional Facility Rules, ICSID's Administrative Council authorized the ICSID Secretariat (at the request of the parties concerned) to administer certain

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10 P. Friedland, "Arbitration under the AAA's International Rules", *Arbitration International* Vol. 6 No. 4 (1990) pp. 301-319.

11 The United States of America has ratified the ICSID Convention. Canada and the United Mexican States have not signed the said convention.

12 Amendments to the ICSID Rules came into force on 1 January 2003.

proceedings between States and nationals of other States which fall outside the scope of the ICSID Convention.

20. The ICSID Rules are distinguishable from the ICC, LCIA and AAA Rules, by reason of their non-private origin. ICSID arbitration is not associated with any specific country, region or private institution. Its rules were adopted by an Administrative Council comprised only of state representatives. They are, thus, particularly acceptable for the settlement of disputes involving sovereign governments. As a leading commentator has noted:

> *No international arbitration centre can lay claim to such distinguished origins as the International Centre for the Settlement of Investment Disputes (ICSID). There are some centres of arbitration, such as those established in London or Paris, which owe their existence primarily to merchants and traders, with a common interest in providing for the speedy and relatively informal resolution of disputes between them. There are other, more recent arbitration centres, such as those now established in Hong Kong or British Columbia, which owe their existence to the initiative of a particular national or state government, prepared to provide a convenient forum for the settlement of international disputes – and to benefit from the prestige and business which such a forum generates. ICSID, by contrast, owes its existence to an international treaty, sponsored by the World Bank and adopted by an impressive number of national governments...*[13]

21. Aimed specifically at investor-state disputes, the ICSID Rules were intended to deal even-handedly with the interests of investors and host states:

> *The Convention's procedures were designed to provide a balance between the interests of investors and of host states. It was thought desirable to establish a dispute settlement mechanism to which both the investor and the State could become irrevocably committed and which either could invoke, and which was detached from the municipal laws of both the investor and the host State.*[14]

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13 D.A. Redfern, "ICSID – Losing its Appeal?" *Arbitration International* Vol. 3 No. 2 (1987) pp. 98-118.

14 Collier and Lowe, "Mixed arbitrations, *The settlement of disputes in international law*", Chapter 4 - Oxford University Press, Oxford, 1999, p. 59.

The UNCITRAL Rules

22. UNCITRAL was established by the United Nations General Assembly in 1966 (Resolution 2205(XXI) of 17 December 1966). UNCITRAL is composed of thirty-six member States elected by the U.N. General Assembly. Membership is structured so as to be representative of the world's various geographic regions and its principal economic and legal systems.

23. Like the ICSID Rules, therefore, the UNCITRAL Arbitration Rules are not of private origin. Unlike the ICSID Rules, however, the UNCITRAL Rules are not associated with a specific arbitral institution. One author has described this autonomy of the UNCITRAL rules as follows:

> *Although institutionalised arbitration is the most common means of settling disputes in the international economy today, a significant place is still reserved for ad hoc arbitration, especially where states are involved. The governments of many states are reluctant to submit themselves to a foreign institution, and this reluctance is even greater in the context of arbitration institutions of a private nature (such as the International Chamber of Commerce and the American Arbitration Association) ... One of the most important developments in the field of international arbitration in recent decades has been the drafting of the Arbitration Rules by the United Nations Committee for International Trade Law (UNCITRAL) in 1976.*[15]

24. In summary, and as perhaps the most experienced of all US arbitrators has commented, the main advantages of the UNCITRAL Rules are as follows:

> *(1) They are acceptable to countries with differing legal, social and economic backgrounds.*
>
> *(2) They provide international uniformity and therefore are not subject to parochial nationalistic labels.*
>
> *(3) They were prepared by arbitral experts from many countries after extensive consultation with professional international arbitral bodies.*
>
> *(4) They are presented by the Untied Nations in several major languages to further ensure their acceptability.*

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15 M. Hirsch, *The Arbitration mechanism of the ICSID Disputes,* London, Martinus Nijhoff, 1993, p. 11.

(5) They are easily referred to in a contract without the need for lengthy negotiations over procedural wrangles – indeed, a model arbitration clause is printed in the Rules.

(6) They assure parties of the best possible procedure for ad hoc arbitration without administering agencies, if this is desired. At the same time they are flexible enough to permit accommodation to institutional aid either as an appointing authority, or for complete administrative services or with minor modifications they may be adapted as institutional Rules (for example as has been done by the Inter-American Commercial Arbitration Commission).[16]

3. The predominance of ICSID and UNCITRAL Rules in disputes involving state parties

25. Representative of an international consensus, the ICSID and UNCITRAL Rules have since their promulgation been used conspicuously often in arbitrations involving state parties.

26. In 1981, the United States and Iran entered into the Algiers Accords that brought an end to the Embassy hostage crisis and created the Iran-US Claims Tribunal to resolve existing disputes between the two countries and their nationals. With some modification, the state parties adopted the UNCITRAL Rules because of their "flexibility, workability and completeness".[17]

27. In December 1995, representatives of Bosnia-Herzegovina, Croatia and the Federal Republic of Yugoslavia signed the Dayton Peace Accords in order to bring an end to war in the former Yugoslavia. Annex 2 of the accords includes an agreement on inter-entity boundary lines, and provides for UNCITRAL arbitration to resolve a disputed portion of one of the inter-entity boundary lines.[18]

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16 Gerald Aksen, "The Iran-Us Claims Tribunal and the UNCITRAL Arbitration Rules - an early comment" *in The Art of Arbitration: Essays on International Arbitration, Liber Amicorum Pieter Sanders,* J.C. Schultz and A.J. Van den Berg, (eds.), The Hague, Martinus Nijhoff, 1982, p. 2.

17 *See*, J. van Hof, *Commentary on the UNCITRAL Arbitration Rules - The Application by the Iran-US. Claims Tribunal*, The Hague, Kluwer Law and Taxation Publishers, 1991, p. 319.

18 Bosnia and Herzegovina-Croatia-Yugoslavia: General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, 35 I.L.M. 75 (1996) at p. 113.

28. References to the ICSID and UNCITRAL Rules predominate in dispute resolution mechanisms contained in bilateral and multilateral investment treaties.

29. The Energy Charter Treaty has been signed by approximately 50 states (including Canada), and gives companies incorporated in contracting states the right to bring claims against other contracting states for a failure to protect investments in the energy sector. Article 26(4) of the Energy Charter Treaty gives investors the choice of four arbitration options, of which three are ICSID, ICSID Additional Facility and UNCITRAL arbitration.

30. Of the more than 2,000 bilateral investment treaties that states have entered into around the world, Dolzer and Stevens note in their wellknown commentary on the subject that the "overwhelming majority" contain a reference to ICSID and/or UNCITRAL arbitration.[19]

31. Finally, in 1992 the Administrative Council of the Permanent Court of Arbitration in The Hague (the ***PCA***) authorized the Secretary-General to establish rules of procedure to be known as the *"Permanent Court of Arbitration optional rules for arbitrating disputes between two States"*, including a model clause on submission of disputes to arbitration. These rules were profoundly influenced by the UNCITRAL Arbitration Rules.

32. Discussing the reasons that led the PCA to base its Rules on the UNCITRAL Arbitration Rules, the then Secretary-General stated that:

> *Experience in arbitrations since 1981 suggests that the UNCITRAL Arbitration Rules provide fair and effective procedures for peaceful resolution of disputes between States concerning the interpretation, application and performance of treaties and other agreements, although they were originally designed for commercial arbitration.*[20]

33. The PCA's Working Group considered fidelity to the UNCITRAL Rules to be critical:

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19 *See,* R. Dolzer & M. Stevens, *Bilateral Investment Treaties*, The Hague, Martinus Nijhoff Publishers, 1995, p. 119.

20 *See*, The Permanent Court of Arbitration, *"Optional Rules for Arbitrating Disputes Between Two States Effective 20 October 1992"*, *ICCA YB*, Vol. XIX, 1994, pp. 313-337.

modifications in those Rules should be kept to a minimum. Fidelity to the language of the UNCITRAL RULES was essential to the success of the new PCA Rules as States and private parties desire assurance that they are adopting a tested and effective set of procedures for arbitrating their disputes.[21]

4. Conclusion

34. Given the nature of ICSID and UNCITRAL, the participation of states in the formulation of their rules, and their predominance today in disputes involving state parties, it was natural for the drafters of the NAFTA to incorporate the ICSID and UNCITRAL Rules in the dispute resolution provisions of Chapter 11.

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21 *See*, P.J.H. Jonkman, "The New Permanent Court of Arbitration Optional Rules - Foreword", ICCA YB Vol. XIX, 1994, pp. 309-312.

III. CONFIDENTIALITY IN INTERNATIONAL ARBITRATION

35. Close to a decade ago, in an article entitled "The Trouble with Confidentiality", my co-author and I expressed the following opinion:

> *It has long been standard practice to include the word 'confidentiality' in any list of supposed benefits of arbitration. Parties agreeing to an arbitration clause therefore expect any dispute to be resolved out of the site of jealous competitors and inquisitive media, not to mention over-curious authorities.*
>
> *But is this more than an act of faith? It is certainly true that third parties are excluded from most types of international arbitration. But does it follow that parties are obliged not to disclose to strangers what has transpired in the arbitration? Can one really point to a positive duty on the part of participants in arbitral proceedings to maintain confidentiality? If such a duty exists, what are its limits and its practical effects?*
>
> *The truth is that while the emperor of arbitration may have clothes, his raiments of secrecy can be torn off with surprising ease. Parties may be astonished to find, when they actually test the matter, that the rule of confidentiality is not reliable.*[22]

36. At that time, our conclusion was that:

> *a general obligation of confidentiality cannot be said to exist de lege lata in international arbitration. At best, it is a duty in statu nascendi. Most national jurisdictions have not addressed the issue at all.*[23]

37. Since then, many national jurisdictions have come to address the duty of confidentiality in arbitration, and found it to be problematic. In many significant jurisdictions around the world, one can now conclude that there exists no implied duty of confidentiality.

38. In this section of the report, I begin by describing the traditional assumption that confidentiality was a necessary corollary of the privacy of arbitral proceedings. I then describe the modern trend evidenced by recent judgements around the world, which is to divorce the privacy of oral proceedings, on the one hand,

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22 Jan Paulsson and Nigel Rawding, "The Trouble with Confidentiality", *Arbitration International*, Vol. 11, No. 3, 1995, at page 303 *et seq.*

23 *Ibid*, at p. 303.

from the confidentiality of arbitral proceedings as a whole, on the other. Finally, I describe recent revisions of some of the major arbitration rules to address the question of confidentiality expressly in the light of growing doubts as to the existence of an implied duty.

1. Confidentiality in international arbitration: the traditional assumption

39. By choosing international arbitration, parties have traditionally assumed that they were choosing a 'private' or 'confidential' dispute resolution mechanism allowing them to resolve disputes away from the glare of publicity.

40. Although the terms 'privacy' and 'confidentiality' are sometimes used interchangeably, they represent quite different concepts in international arbitration. The concept of 'privacy' is narrow, and specifically denotes the *in camera* nature of oral proceedings. It ensures only that the parties, their representatives and their witnesses are alone entitled to attend arbitral hearings. The concept of 'confidentiality' is far broader and extends to the confidential nature of documents created for, or submitted in, an arbitration – indeed, ultimately to the confidential nature of the very existence of an arbitration.

41. The *in camera* nature of oral hearings has seldom been questioned, and is assured by express provisions in every major set of international arbitral rules. As to the broader concept of confidentiality, although until recently this was rarely the subject of express provision in arbitral rules, traditionally it was often assumed to be a natural and implicit corollary of the privacy of arbitral proceedings.

42. The decisions of the English courts in *Hassneh Insurance* and *Ali Shipping* provide useful statements of what might be referred to as the traditional assumption of the confidentiality in international arbitral proceedings.

43. In *Hassneh Insurance Co. of Israel v Mew*,[24] the English High Court recognised the existence of an implied duty of confidentiality in international arbitration and commented as follows:

> *If it be correct that there is at least an implied term in every agreement to arbitrate that the hearing shall be held in private, the requirement of privacy must in principle extend to documents which are created for the purpose of that hearing. The most obvious example is a note or transcript of the evidence. The disclosure to a third party of such documents would be almost equivalent to opening the door of the arbitration room to that third party. Similarly witness statements, being so closely related to the hearing, must be within the obligation of confidentiality. So also must outline submissions tendered to the arbitrator. If outline submissions, then so must pleadings be included.*[25]

44. In *Ali Shipping Corporation v. 'Shipyard Trogir'*, the English Court of Appeal reaffirmed this classical position, although on a somewhat different basis. While it did not accept that the notion of confidentiality was dependent on the privacy of arbitral proceedings, the court held that the duty of confidentiality was nonetheless:

> *[a term] which arises as the nature of the contract itself implicitly requires [and] which the law will necessarily imply as a necessary incident of a definable category of contractual relationship.*[26]

45. The court acknowledged, however, that:

> *the boundaries of the obligations of confidence which thereby arise have yet to be delineated.*[27]

46. In this way, it echoed a long running theme in English decisions on the implied duty of confidentiality: *sure that it is there, but not sure how far it goes.* In their most recent opportunity to reaffirm the existence of an implied duty of

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24 *Hassneh Insurance Co. of Israel v Mew*, 22 December 1992, High Court, Queen's Bench Division (Commercial Court) 1993, 2 *Lloyd's Rep.* 243.

25 *Ibid*, at page 247.

26 [1998] 1 Lloyd's Rep. 643 at 651.

27 *Ibid.*

confidentiality the English courts declined to do so, relying instead and exclusively on the existence of an express confidentiality undertaking.[28]

47. Recent judgments in various important arbitral jurisdictions around the world render the English position increasingly singular.[29]

2. Confidentiality in international arbitration: the modern trend

48. There exists an unmistakeable trend in international arbitration to divorce the unquestioned privacy of oral proceedings, on the one hand, from the confidentiality of arbitral proceedings as a whole, on the other.

49. Various forces lie behind this development.

50. First, there has been a realisation amongst participants in the arbitral process that a party may have a legal duty, for example to shareholders, insurers or regulators, to disclose information relating to an arbitration. In addition, when making applications to national courts in relation to arbitral proceedings – for example to enforce an arbitral award – parties to an arbitration have no choice but to disclose to third parties information relating to the arbitration agreement, such as the award itself.

51. Secondly, and more practically, parties and tribunals alike have recognised that it is difficult to sanction a breach of confidentiality in a way that is effective while not obstructing unnecessarily the arbitral process itself. The Stockholm

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28 *See* the decision of the Privy Council in *Aegis v. European* the Privy Council Appeal No. 93 of 2001, 29 January 2003 (unreported).

29 *See*, however, the now rather dated decision of the *Cour d'appel de Paris* in *Aita v. Ojjeh*, Judgement of 18 February 1986, 1986 *Revue de l'arbitrage* 583, in which it ruled that the mere bringing of court proceedings in France to annul an arbitration award rendered in England violated the principle of confidentiality by causing a "public debate of facts which should remain confidential". In so finding, the court held that it is in *"the very nature of arbitral proceedings that they ensure the highest degree of discretion in the resolution of private disputes, as the two parties had agreed."* However, the relatively extreme position advanced by the court has been considered by many commentators to be unsatisfactory in failing to explain why the nature of arbitration calls for a duty of confidentiality, or what the limits of that duty should be. In my view, the *Cour d'appel*'s decision must be understood in the context of the Court's determination to censure what it considered to be an entirely hopeless attempt to set aside an English award in the French courts for the sole purpose of embarrassing the winning party by publicity (the contract concerned the sale of military material).

City Court's first instance decision in the *Bulbank* case discussed below provides an extreme example of this dilemma.[30]

52. In this case, one of the parties to the arbitration arranged for the publication of the arbitral tribunal's interim award on jurisdiction in a major arbitration journal prior to the rendering of a final award on the merits. Following publication, the respondent argued that this constituted a fundamental breach of an implied term of the arbitration agreement ensuring confidentiality (there was no express duty of confidentiality under the applicable arbitral rules) and that, as a result, the arbitration agreement had been discharged. Although the arbitral tribunal itself rejected this argument, the Stockholm City Court accepted it and annulled the arbitral tribunal's final award on this basis.

53. In response to the imposition of such an extreme sanction, the Swedish Supreme Court reversed the Stockholm City Court's annulment and, in a decision that is referred to below, rejected the very existence of an implied duty of confidentiality in international arbitration.[31]

54. Thirdly, the growing numbers of investor/state arbitrations arising under bilateral or multilateral investment treaties have more recently caused further erosion of the duty of confidentiality in international arbitration. As further discussed in Section IV below, investor/state arbitrations sometimes raise issues of public interest that do not typically arise in arbitrations between private parties. In these types of disputes, the outcome of the arbitral process may have significant consequences for third parties to the proceedings; such that there exists a justifiable public interest in a certain level of transparency.

55. These forces have yet to impact the narrower principle of privacy. Arbitral hearings generally remain *in camera* unless parties expressly agree otherwise. The reason for this lies perhaps in the consensual nature of the arbitration process. Arbitration remains a private dispute resolution mechanism that is chosen by parties as an alternative to national courts. In the view of many, it

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30 *A.I. Trade Finance Inc. v. Bulgarian Foreign Trade Bank Ltd.*, Stockholm City Court, 10 September 1998, *Mealy's International Arbitration Report*, Vol. 13, Issue 11 at p. A-1.

31 *See* para. 61 below.

follows from this that only the parties to those private proceedings have a right to attend and participate in oral hearings. This position remains ensured by express provisions in all of the major arbitral rules, although the simultaneous erosion of the duty of confidentiality has sometimes led to the result that third parties continue to be excluded from oral hearings while having access to the transcript of those oral proceedings.

Esso

56. In *Esso Australia Resources Ltd. and Others v. The Honourable Sidney James Plowman and Others*, the Australian High Court held that there was a distinction between the privacy of oral hearings and the secrecy of proceedings in general, and concluded that confidentiality is not an essential attribute of a private arbitration. Specifically, the High Court found that a requirement to conduct proceedings *in camera* did not translate into an obligation prohibiting disclosure of documents and information provided in and for the purposes of the arbitration. The High Court then concluded that even though a certain degree of confidentiality might arise in certain situations, it was not absolute and that a public interest exception applied.

57. In respect of this final point, Mason C.J. discussed the standards for disclosure in respect of information that is of legitimate interest to the public, and held:

> *The courts have consistently viewed governmental secrets differently from personal and commercial secrets. As I stated in The Commonwealth of Australia v. John Fairfax and Sons Ltd., the judiciary must view the disclosure of governmental information "through different spectacles". This involves a reversal of the onus of proof: the government must prove that the public interest demands non-disclosure.*[32]

58. Courts in the US and Sweden have been more emphatic in their rejection of the existence of an implied duty of confidentiality.

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32 *Esso Australia Resources Ltd and Others* v. *The Honourable Sidney James Plowman and Others* F.C. No. 95/014 (1995) 128 ALR 391 at para. 39.

Panhandle

59. In *United States v. Panhandle Eastern Corp et al.*,[33] Panhandle brought a motion before a US federal district court for a protective order, preventing the disclosure of documents relating to arbitration proceedings, between it and Sonatrach, the Algerian National Oil and Gas Company. In support of its motion, Panhandle argued that disclosure to third parties of documents related to the arbitration would severely prejudice defendants' ongoing business relationship with both Sonatrach and the Algerian Government.

60. While the Court denied the motion on the grounds that Panhandle failed to satisfy the "good cause" requirement of Rule 26(c) of the Federal Rules of Civil Procedure, and that the filing was untimely, it proceeded to address the question of confidentiality. The Court rejected the existence of an express confidentiality agreement between the parties and did not even entertain the possibility of the existence of an implied duty of confidentiality.

Bulbank

61. As already referred to above,[34] in its decision in *A.I. Trade Finance Inc. v. Bulgarian Foreign Trade Bank Ltd.*[35] the Supreme Court of Sweden also rejected the existence of an implied duty of confidentiality. Accepting that arbitral proceedings are fundamentally private, and that such privacy constitutes one of the perceived advantages of arbitration, the Supreme Court nevertheless distinguished between privacy and confidentiality and held that while arbitral proceedings are not public, the parties are entitled to disclose information to third parties. The Swedish Supreme Court held that:

> *a party to arbitration proceedings cannot be deemed to be bound by a duty of confidentiality, unless the parties have concluded an agreement concerning this.*[36]

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33 118 FRD 346 (D Del 1988).

34 *See* para. 53 above.

35 Supreme Court of Sweden, 27 October 2000, *Mealy's International Arbitration Report*, Vol. 15, Issue 12 at p. A-1.

36 *Ibid*, at page A-3.

62. Reflecting this modern trend, and in the light of the particular importance of transparency in investor state disputes that raise issues of public importance, on 31 July 2001 the NAFTA Free Trade Commission issued a Note of Interpretation of certain of the provisions of Chapter 11, in which it clarified that with regard to arbitration conducted thereunder:

> *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....*[37]

3. Recent revisions of arbitration rules

63. As a result of growing international doubts as to the existence of an implied duty of confidentiality, recent revisions of arbitral rules have addressed the issue expressly. Such express provisions must, in turn, fuel further doubts as to the existence of an *implied* duty of confidentiality. As parties now have the option to designate arbitral rules that expressly impose a duty of confidentiality, a reference to rules that do not might be interpreted as a positive choice by the parties (to the extent that this particular element appears to have been given significance) not to subject themselves to such a restriction.

LCIA Rules (of January 1998)

64. Article 30 of the LCIA Rules, introduced in January 1998, now imposes an express duty of confidentiality on the parties to the arbitration as follows:

> *30.1 Unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards in their arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain – save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority.*

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37 NAFTA Free Trade Commission "Note of Interpretation of Certain Chapter Eleven Provisions" dated 31 July 2001.

> *30.2 The deliberations of the Arbitral Tribunal are likewise confidential to its members, save and to the extent that disclosure of an arbitrator's refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal under Articles 10, 12 and 26.*
>
> *30.3 The LCIA Court does not publish any award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal.*

The AAA Rules (as amended and effective 1 November 2001)

65. In contrast, Article 34 of the AAA International Arbitration Rules, effective on 1 November 2001, only imposes an express duty of confidentiality on the arbitrators and the institution itself:

> *Confidential information disclosed during the proceedings by the parties or by witnesses shall not be divulged by an arbitrator or by the administrator. Unless otherwise agreed by the parties, or required by applicable law, the members of the tribunal and the administrator shall keep confidential all matters relating to the arbitration or the award.*

The ICSID and UNCITRAL Arbitration Rules have not been the subject of recent amendment that expressly address the issue of confidentiality

66. Whilst the Administrative Council of ICSID approved new amendments of the ICSID Rules and Additional Facility Rules on 29 September 2002, the amendments do not address the question of confidentiality expressly.[38]

67. As for the UNCITRAL Arbitration Rules, the UNCITRAL Secretariat made the following comments at its Thirty-second session in 1999:

> *On the basis that current protection may not be adequate, opinion is divided on how the confidentiality of arbitral proceedings can be ensured. One approach suggests that the difficulty of defining the scope of a general duty of confidentiality makes it difficult to address the issue at all. Others, including the High Court of Australia in Esso v Plowman, suggest that parties to an arbitration can expressly provide in their arbitration agreement for absolute or specific levels of confidentiality to apply. Yet another approach is to suggest that arbitral rules*

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38 The Administrative Council did exclude what used to be Article 44, entitled "minutes", which provided, *inter alia*, that minutes of hearings "shall not be published without the consent of the parties" (Article 44(2)). The effect, if any, of this change has yet to be determined.

> *should include provisions on confidentiality, while a further approach suggests that what might be needed is a model legislative provision. In all of these cases, the emphasis has been placed upon the importance for international commercial arbitration of uniformity of treatment and widespread coverage.*
>
> *The Commission may wish to consider whether the issue of confidentiality needs to be further examined and, in particular, whether further protection may be needed in the form of a model legislative provision. If so, the Secretariat might be requested to explore the options for protecting confidentiality and, in particular, the scope of the protection that may need to be afforded in terms, for example, of the material or information that is to be kept confidential, the persons to whom the duty of confidentiality is to extend and how it is to be applied, and permissible exceptions to prohibitions on disclosure and communication.*[39]

68. UNCITRAL has not, however, amended its arbitration rules to address the question of confidentiality.

69. As a result, and as I shall now explore, the ICSID and UNCITRAL Rules accommodate greater flexibility on this issue than other familiar contemporary arbitration rules.

4. Conclusion

70. For the reasons discussed above,[40] it is becoming increasingly difficult to affirm the existence of a duty of confidentiality in international arbitration with any degree of confidence unless such a duty is imposed expressly. While oral proceedings remain *in camera*, absent a broader duty of confidentiality the significance of the continuing 'privacy' of proceedings is diminishing; written records of such proceedings (including transcripts of oral hearings) are becoming increasingly accessible to third parties.

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39 *See*, UNCITRAL, *"Possible future work in the area of international commercial arbitration, Note by the Secretariat"*, Thirty-second session, Vienna, 17 May - 4 June 1999.

40 *See* paras. 48-55 above.

IV. CONFIDENTIALITY UNDER THE ICSID AND UNCITRAL RULES AS THEY ARE APPLIED IN NAFTA CHAPTER ELEVEN ARBITRATIONS

71. Neutrality is the single attribute that has, more than any other, made international arbitration the preferred mechanism for resolving private international commercial disputes. It also commends itself in the context of disputes between states and their foreign investors. States and investors chose international arbitration primarily because it allows them to avoid each other's national courts. However, in adopting the arbitral mechanism in bilateral and multilateral treaties, states adopt not only its neutrality, they adopt all of its attributes.

72. With respect to the attribute of confidentiality discussed in Section III above, both the traditional assumption that arbitration was confidential, as well as the growing realisation that it need not be, have found expression in the investor/state arbitral experience. However, it is the realisation that there is no implied duty of confidentiality – referred to above as the modern trend - that is clearly beginning to prevail in treaty arbitration.

73. This is hardly surprising. As already noted,[41] treaty arbitrations between investors and states sometimes raise issues of public interest that do not arise in international commercial arbitrations between private parties. In such cases, the value of the confidentiality of proceedings to one or both of the parties to the arbitration must be weighed against the duties of disclosure to which governments are often subject and, moreover, the public interest in the transparency of proceedings that determine issues of public importance.

74. As I shall now demonstrate, by reference both to the rules themselves and some examples of how they have been applied, the ICSID and UNCITRAL Rules that govern NAFTA Chapter 11 disputes to which Canada is a party retain sufficient flexibility on the issue of confidentiality to allow a tribunal to balance these competing imperatives in the light of the particular circumstances of the pending dispute.

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41 *See* paras. 6 and 54 above.

75. Indeed, the NAFTA Free Trade Commission's Note of Interpretation of 31 July 2001 (referred to at para. 62 above) has confirmed, *inter alia*, that:

> *Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration ...*
>
> *[and] [i]n the application of the foregoing ...*
>
> *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 ...*[42]

1. The ICSID Additional Facility Rules

76. Under the ICSID Additional Facility Rules, the *privacy* of oral proceedings is ensured by Article 39(2) of the Additional Facility Rules and Regulation 22(2) of the ICSID Administrative and Financial Regulations that also now apply to Additional Facility arbitrations. Thus, Article 39(2) provides that "the tribunal shall decide *with the consent of the parties*, which other persons (other than the parties, their representatives and witnesses) may attend the hearings" (emphasis added); and Regulation 22 provides that all parties must consent to the publication of "minutes and other records of proceedings".

77. A duty of *confidentiality* is not, however, expressly imposed. Although Article 53(3) of the Additional Facility Rules and Regulation 22(2) of the Administrative and Financial Regulations ensure that an award cannot be published without the consent of the parties,[43] no blanket duty of confidentiality is imposed on the proceedings.

78. While arbitrators are required, pursuant to Article 13(2) of the Additional Facility Rules, to sign a declaration in which they undertake to:

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42 NAFTA Free Trade Commission "Note of Interpretation of Certain Chapter Eleven Provisions" dated 31 July 2001.

43 In respect of NAFTA proceedings to which Canada is party, see however annex 1137.4 of Chapter 11, which provides that: "where Canada is a disputing Party, either Canada or a disputing investor that is a party to the arbitration may make an award public."

> *keep confidential all information coming to [their] knowledge as a result of my participation in this proceeding,*

no equivalent undertaking is required of the parties.

2. How the Additional Facility Rules of ICSID have been applied by international tribunals

79. In the early 1980s, well before the NAFTA was conceived, an international arbitral tribunal applying the ICSID Rules in *Amco v. the Republic of Indonesia* was asked by the Republic of Indonesia to recommend as a provisional measure (Article 47 of the ICSID Convention authorises arbitrators to *recommend* rather than *order* provisional measures) that the claimant stop recounting to the business press a one-sided version of the dispute "in tones designed to be detrimental to international perceptions of the climate for foreign investment in Indonesia". Indonesia argued that such public statements were:

> *incompatible with the spirit of confidentiality which imbues these international proceedings.*[44]

80. The *Amco* tribunal declined to make the recommendation requested by the Republic of Indonesia, holding that:

> *as to the 'spirit of confidentiality' of the arbitral procedure, it is right to say that the Convention and the Rules do not prevent the parties from revealing their case....*

81. Balanced against this finding, the tribunal nonetheless referred to a general duty existing under international law not to exacerbate disputes, and relied on the existence of this duty to recommend to the parties that they kept their public statements about cases (1) accurate, and (2) to a minimum.

82. In the years since *Amco v. The Republic of Indonesia*, tribunals applying the ICSID Rules, including NAFTA Chapter Eleven tribunals, have striven to achieve the same balance between the non-existence of a duty of confidentiality and the duty not to exacerbate disputes through the misuse of publicity.

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44 *Amco Corporation and Others v. The Republic of Indonesia*, Decision on Request for Provisional Measures, 9 December 1983, (1983) 1 ICSID Reports 410,412.

Metalclad

83. In *Metalclad Corporation v. United Mexican States*, the Mexican government made an application for a confidentiality order, pursuant to Article 1134 of the NAFTA ("interim measures of protection") and Article 28 of the (then) ICSID Additional Facility Rules ("Procedural Orders"). On 9 October 1997, the tribunal dismissed the Request, finding as follows:

> *There remains nonetheless a question as to whether there exists any general principle of confidentiality that would operate to prohibit public discussion of the arbitration proceedings by either party. Neither the NAFTA nor the ICSID (Additional Facility) Rules contain any express restriction on the freedom of the parties in this respect. Though it is frequently said that one of the reasons for recourse to arbitration is to avoid publicity, unless the agreement between the parties incorporates such a limitation, each of them is still free to speak publicly of the arbitration. It may be observed that no such limitation is written into such major arbitral texts as the UNCITRAL Rules or the draft Articles on Arbitration adopted by the International Law Commission. Indeed, as has been pointed out by the Claimant in its comments, under United States security laws, the Claimant, as a public company traded on a public stock exchange in the United States, is under a positive duty to provide certain information about its activities to its shareholders, especially regarding its involvement in a process the outcome of which could perhaps significantly affect its share value.*
>
> *The above having been said, it 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 by which either of them may be legally bound.*[45] (Emphasis added.)

Loewen

84. In *R. Loewen and Loewen Corporation v. United States of America*, the U.S. government requested that all filings, as well as the minutes of oral proceedings, be treated open and available to the public. While the Claimant did not oppose

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45 *Metalclad Corporation v. United Mexican States*, Final Award, 2 September 2000 at para. 13).

public disclosure, they requested that the disclosure take place only after the conclusion of the arbitration.

85. In its award on jurisdiction, the tribunal described its decision on disclosure as follows:

> *(...) Article 44(2) of the ICSID Additional Facility Arbitration Rules provides that the minutes kept of all hearings pursuant to Article 44(1) 'shall not be published without the consent of the parties'. The Tribunal pointed out that this prohibition is primarily directed to the Tribunal but was understood in the Metalclad Arbitration (ICSID Case ARB(AF)/97/1) Decision as being directed to the parties as well. The Tribunal went on to deny the Respondent's request to the extent that it sought to bring about a situation in which the Tribunal or the Secretariat makes available to the public all filings in this case.*[46]

86. Even though the tribunal did not allow the Respondent's request, it nevertheless did not recognise any general duty of confidentiality. Rather, it rejected the Claimant's submission that each party is under an obligation of confidentiality in relation to the proceedings. The tribunal summarised its conclusions as follows:

> *In its Decision the Tribunal rejected the Claimants' submission that each party is under a general obligation of confidentiality in relation to the proceedings. The Tribunal stated that in an arbitration under NAFTA, it is not to be supposed that, in the absence of express provision, the Convention or the Rules and Regulations impose a general obligation on the parties, the effect of which would be to preclude a Government (or the other party) from discussing the case in public, thereby depriving the public of knowledge and information concerning government and public affairs. The Decision concluded by repeating the comment made by the* Metalclad *Tribunal, namely that it would be of advantage to the orderly unfolding of the arbitral process if during the proceedings the parties were to limit public discussion to what is considered necessary.*[47]

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46 *R. Loewen and Loewen Corp. v. United States of America,* Award on Jurisdiction, 5 January 2001 at para. 25. Although Article 44 has since been excluded from the Additional Facility Rules, as I have already remarked at note 38 above, the effect, if any, of this deletion has yet to be determined.

47 *Ibid, Loewen* at para. 26.

3. The UNCITRAL Rules

87. Like the ICSID Rules, the UNCITRAL Rules do no more than ensure the privacy of oral proceedings.

88. Thus, Article 25(4) provides that:

> *Hearings shall be held in camera unless the parties agree otherwise...*

89. A general duty of confidentiality is not, however, provided for. Rather, in exercising the broad procedural discretion provided under Article 15 to "conduct the arbitration in such manner as it considers appropriate", arbitral tribunals have reached differing views as to the appropriateness of implying a duty of confidentiality on the parties.

4. How the UNCITRAL Rules have been applied by international tribunals

Myers

90. In *S.D. Myers Inc. v. Government of Canada*, a NAFTA tribunal applying the UNCITRAL Rules embraced the traditional assumption that, notwithstanding the absence of an express duty of confidentiality, such a duty existed as a natural extension of the privacy of the proceedings. Thus, it held that:

> *The rationale for the relevant confidentiality order was to ensure that Article 25.4 of the applicable UNCITRAL Arbitration Rules was respected. That Article states:*
>
> > *"Hearings shall be held in camera unless the parties agree otherwise..."*
>
> *The Disputing Parties did not agree, and the Tribunal took the view that the written evidence and argument, as well as the transcripts of the testimony and argument presented at the hearing, properly fell within the scope of Article 25.4, given that the context of the procedure adopted was that hearing time should be minimised by having as much as possible of the argument and testimony delivered to the Tribunal in writing in advance of the hearing.*

> *The Tribunal also takes the view that it has no power to override the mandatory effect of Article 25.4 of the Rules, in the absence of agreement between the parties.*[48]

91. However, the Tribunal reached this view prior to the Free Trade Commission's issuance of the Note of Interpretation discussed above.[49]

Pope & Talbot

92. In *Pope & Talbot, Inc. v. Government of Canada*, another NAFTA Chapter Eleven arbitration applying the UNCITRAL Rules held in a procedural order dated 17 December 1999 that a number of categories of documents submitted by the parties in the arbitration were to be kept confidential. Once again, however, this order was rendered prior to the Federal Trade Commission's Note of Interpretation and, moreover, pursuant to an express request by the parties that the arbitral tribunal issue an order on confidentiality.[50]

93. In a subsequent procedural order dated 11 March 2002,[51] rendered following the Free Trade Commission's issuance of the Note of Interpretation, the *Pope & Talbot* tribunal held that the parties were still subject to a duty of confidentiality. However, in so finding, it accepted the proposition set out in the Note of Interpretation that "[n]othing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter 11 arbitration" as "true", but observed that the Note proceeded to refer, inter alia, to "information which the [parties] must withhold pursuant to the relevant arbitral rules, as applied".

94. In identifying the "relevant arbitral rules" that in its view obliged non-disclosure in the case before it, the *Pope & Talbot* tribunal purported to rely principally on the express agreement on confidentiality that the parties had reached prior to the Note of Interpretation (although the scope of the agreement was disputed by the

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48 *See,* the Tribunal's letter to the parties dated 26 February 2001, in which it explains its various confidentiality orders including, in particular, Procedural Order No. 11 (concerning confidentiality in materials produced in the arbitration) dated 11 November 1999.

49 *See* paras. 62 and 75 above.

50 *Pope & Talbot, Inc. v. Canada*, Procedural Order on Confidentiality No. 5 of 17 December 1999. As for the express request by the parties: *see*, Decision and Order on Confidentiality of 11 March 2002 at para. 7.

51 *Pope & Talbot, Inc. v. Canada*, Decision and Order on Confidentiality of 11 March 2002.

parties). As to the UNCITRAL Rules themselves, the *Pope & Talbot* tribunal held only that, in containing a provision requiring *in camera* oral hearings, the UNCITRAL Rules precluded disclosure of transcripts of oral hearings.

Methanex

95. In *Methanex Corporation and United States of America*, a NAFTA tribunal considering whether it had the power to accept submissions by *amici curiae*, reached a conclusion consistent with the modern trend identified in Section III above. It held that privacy did not necessarily imply confidentiality. While Article 25(4) of the UNCITRAL Rules obliges that hearings be held in camera, it observed as follows:

> *As to confidentiality, the Tribunal notes the conflicting legal materials as to whether Article 25(4) of the UNCITRAL Arbitration Rules imposes upon the Disputing Parties a further duty of confidentiality (beyond privacy) in regard to materials generated by the parties within the arbitration. The most recent decision of the Swedish Supreme Court in Bulgarian Foreign Trade Bank Ltd. v. A.I. Trade Finance Inc. (27.x.2000) suggests that a privacy rule in an arbitration agreement does not give rise under Swedish law to a separate duty of confidentiality, at least as regards the award. That approach is strongly supported by the decision of the High Court of Australia in Esso/BHP v Plowman (1993) 183 CLR 10 distinguishing between confidentiality and privacy, particularly as subsequently applied by the New South Wales Court in Commonwealth of Australia v Cockatoo Dockyard Pty Ltd (1995) 36 NSWLR 662 involving a public corporation (per Kirby J: "Can it be seriously suggested that [the] parties' private agreement can, endorsed by a procedural direction of an arbitrator, exclude from the public domain matters of legitimate concern...".*[52]

96. Ultimately, this NAFTA Tribunal went on to describe the question of confidentiality as "a difficult area",[53] and one on which it did not need to decide given the parties express agreement in this regard in a "Consent Order regarding Disclosure and Confidentiality". Yet it gave every indication that had it been required to determine the issue, it would have found that there was no separate

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52 *See, Methanex Corporation v. United States of America*, Decision on Authority to Accept Amicus Submissions, 15 January 2001 at para. 43.

53 *Ibid*, at para. 46.

duty of confidentiality for the same reasons that it found that it did have the power to accept *amicus* submissions, namely:

> *There is an undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties. This is not merely because one of the Disputing Parties is a State: there are of course disputes involving States which are of no greater general public importance than a dispute between private persons. The public interest in this arbitration arises from its subject-matter, as powerfully suggested in the Petitions. There is also a broader argument, as suggested by the Respondent and Canada: the Chapter 11 arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive.*[54]

5. Conclusion

97. The ICSID and UNCITRAL Rules, the Free Trade Commission's Note of Interpretation, as well as the growing weight of modern jurisprudence around the world, enable arbitral tribunals to be responsive to calls for greater transparency in NAFTA arbitrations. International arbitrations remain private unless the parties agree otherwise;[55] but they need not necessarily be confidential. While the privacy of arbitral hearings have in the past allowed for the possibility of confidential proceedings, it does not oblige such confidentiality.

Signed

Jan Paulsson

Maître Didier LASAYGUES,
Notaire Associé soussigné, certifie
exacte la signature de : Jan PAULSSON
apposée ci-dessus.
Fait à PARIS, le 19 MAI 2003

Paris, 19 May 2003.

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54 *Ibid*, at para. 49.

55 In this regard, I refer to a NAFTA Chapter Eleven tribunal's recent Procedural Directions and Confidentiality Order dated 4 April 2003 in *United Parcel Service of America Inc. v. Government of Canada*, which records the parties' agreement to various proceedings that oral hearings shall not be held *in camera* and that the parties be free to disclose to the public: "Pleadings, and submissions of any disputing party or NAFTA Party, (...) including any notice of intent, notice of arbitration, amended statement of claim, statement of defence and exhibits, affidavits, responses to tribunal questions, transcripts of public hearings, correspondence to or from the Tribunal, and any awards, including procedural orders, rulings, preliminary and final awards."

In *GAMI Investments Inc. v Government of The United Mexican States* a NAFTA Chapter Eleven arbitration governed by the UNCITRAL Rules; the arbitral tribunal (on which I sit), made the following order on confidentiality in its Procedural Order No 1 issued on 31 January 2003: "The Notes of Interpretation issued by the NAFTA Free Trade Commission on Free Trade shall apply to the confidentiality of documentary evidence and submissions. The Arbitral Tribunal's sessions with the Parties and the hearings will be closed to the public."