Court File No. 01-CV-208141

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE COUNCIL OF CANADIANS, and DALE CLARK, DEBORAH BOURQUE, and GEORGE KUEHNBAUM on their own behalf and on behalf of all members of the CANADIAN UNION OF POSTAL WORKERS

Applicants

- and -

HER MAJESTY IN RIGHT OF CANADA, AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

Respondents

AFFIDAVIT OF JAMES CRAWFORD
(Sworn the 1st day of September, 2004)

I, **JAMES CRAWFORD**, Professor of International Law, of the City of Cambridge, in the County of Cambridgeshire, United Kingdom, make oath and say:

1. In the context of separate proceeding against the Respondent, the Attorney General of Canada, involving a constitutional challenge to Chapter Eleven of the NAFTA (*Democray Watch et. al.* v. *The Attorney General of Canada*, Court File No. 01-CV-211576), Respondent requested that I provide a report on the current rules, understandings and practices concerning confidentiality in international arbitration ("Report on Confidentiality of Proceedings in International Arbitration"). The Respondent has indicated its intention to file the Report on Confidentiality of Proceedings in International Arbitration") in this proceeding and has requested that I execute this affidavit in order to do so.

2. Since 1992, I have been the Whewell Professor of International Law in the University of Cambridge and a Professorial Fellow of Jesus College, Cambridge. I am currently also Chair of the Faculty of Law at the University of Cambridge. From 1996-2003, I was Director of the Lauterpacht Research Centre for International Law, University of Cambridge. From 1992-2001, I was a member of the United Nations International Law Commission, and from 1997-2001 Special Rapporteur on State Responsibility, a subject which touches directly on the relations between the international responsibility of States, including under treaties such as NAFTA, and the internal processes of States under their own internal or domestic law. Attached as **Exhibit "A"** to my affidavit is a copy of my curriculum vitae, setting out in particular experience as arbitrator in international investment disputes, including under Chapter Eleven of NAFTA.

3. Attached as **Exhibit "B"** to my affidavit is a copy of the Report on Confidentiality of Proceedings in International Arbitration.

4. 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 Cambridge)
in the County of Cambridgeshire)
on September 1st, 2004)

JAMES CRAWFORD

Commissioner for Taking Affidavits
Notary Public
and for
Cambridge England
My commission extires at death.

This is Exhibit "A" referred to in the affidavit of James Crawford sworn before me this 1st day of September, 2004

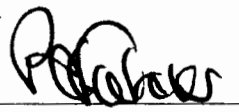

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Exhibit A

CURRICULUM VITAE

(a) CRAWFORD, James Richard

Born, Adelaide, 14 November 1948

Tertiary Education

Adelaide University, 1966-1971; BA (English & History-Politics), 1971; LLB (first class honours), 1971; Stow Scholar. Australian Shell Scholar, 1971. Graduate Student, University College, Oxford, 1972-4; DPhil (Oxon), 1977; LLD (Cantab, 2004).

Professional Qualifications

Barrister and Solicitor of the High Court of Australia (1977).

Barrister of the Supreme Court of New South Wales (called 6/11/1987); Senior Counsel (appointed 7/11/97).

Barrister, Gray's Inn (called March 1999); Member of Matrix Chambers, Gray's Inn, London.

Employment

1. University of Adelaide. Lecturer, August 1974-7; Senior Lecturer, 1977-82; Reader, 1982-3; Professor of Law (personal chair), 1983-6.

2. Australian Law Reform Commission. Commissioner (full-time) 1982-84.

3. University of Sydney. Challis Professor of International Law, 1986-92; Dean, Faculty of Law, 1990-92.

4. University of Cambridge. Whewell Professor of International Law; Professorial Fellow of Jesus College (1992--); Co-Director, Lauterpacht Research Centre for International Law (1995-7), Director (1997-2003); Chair, Faculty Board of Law (2003--).

Governmental and Inter-governmental Bodies

Australian Law Reform Commission. Commissioner (part-time) 1984-90 (reappointed in 1987, 1988 & 1989).

Australian National Commission for UNESCO. Member 1984-8.

Australia, Constitutional Commission. Member, Advisory Committee on the Australian Judicial System 1985-87.

Member, Admiralty Rules Committee (Australia) 1989-92.

Member, United Nations International Law Commission (1992-2001, re-elected 1996).

Committees, Professional Associations

International Law Association: Director of Studies (Australian Branch) (1988-91); Member, International Committee on State Immunity (1979-82; 1987-95); Director of Studies (1991-7).

Australasian Universities Law Schools Association: President (1985).

Institut de Droit International: Associate (elected 1985); Member (1991--).

Maritime Law Association of Australia and New Zealand (Honorary Member)

Hague Academy of International Law, Member of the Curatorium (elected 1999)

British Academy, Fellow (elected 2000)

Legal Professional Practice

Engaged as counsel in the following cases:

Before the International Court of Justice:

1. *Certain Phosphate Lands in Nauru (Nauru v Australia)* ICJ Rep 1992 p240 (counsel for Nauru) (settled in August 1993).
2. *Territorial Dispute (Libya v Chad)* ICJ Rep 1994 p 6 (counsel for Libya).
3. *East Timor Dispute (Portugal v Australia)* ICJ Rep 1995 p 90 (counsel for Australia).
4. *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v United States of America)* (counsel for Iran) (withdrawn pending settlement negotiations; settled 1996: see ICJ Rep 1996 p 9).
5. *Request for an Investigation of the Situation (New Zealand v France)* ICJ Rep 1995 p 288 (counsel for Pacific Island States seeking to intervene: Samoa, Solomon Islands, Federated States of Micronesia, Marshall Islands)
6. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)*, ICJ Rep 1996 p 66 (counsel for Solomon Islands)
7. *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, ICJ Rep 1996 p 226 (counsel for Solomon Islands)
8. *Land and Maritime Dispute (Cameroon v Nigeria)* ICJ Rep 1996 p 13 (Interim Measures) (counsel for Nigeria); ICJ Rep 1998 p 275.
9. *Case concerning the Oil Platforms (Islamic Republic of Iran v United States of America)* (senior counsel for Iran) ICJ Reports 1996 p 803.
10. *Gabcikovo-Nagymaros Barrage System (Hungary v Slovakia)* ICJ Rep 1997 p 7 (senior counsel for Hungary)
11. *Case concerning Sipidan and Ligitan (Malaysia v Indonesia)* (counsel for Malaysia)

12. *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)* (counsel for Rwanda)

13. *Case concerning the Legality of Use of Force (Federal Republic of Yugoslavia v. Canada)* (counsel for Canada)

14. *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Yugoslavia)* (counsel for Croatia)

15. *Case concerning Certain Property (Liechtenstein v. Germany)* (senior counsel for Liechtenstein)

16. *Case concerning Pulau Batu Puteh (Malaysia v Singapore)* (senior counsel for Malaysia)

17. *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (counsel for Palestine)

Before other international tribunals

1. *Islamic Republic of Iran v United States of America, Cases Nos. A15(IV) and A24* Award No. 590-A15(IV)/A24-FT, 28 December 1998) (Iran-United States Claims Tribunal, Full Tribunal) (counsel for Iran).

2. *Prosecutor v. Blaškić (Objection to the Issue of Subpoenae duces tecum)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II) (1997) 110 ILR 606, on appeal, ibid. 668) (counsel for the Prosecutor).

3. *Tradex Hellas SA v Albania* (1996, 1999) 5 ICSID Reports 43 (ICSID Tribunal) (senior counsel for Albania)

4. *Case concerning Southern Blue-fin Tuna (Australia & New Zealand v Japan)* Order for interim measures of protection, International Tribunal for the Law of the Sea, 26 August 1999 38 ILM 1624 (1999), 117 ILR 148; Annex VII arbitration, Washington, May 2000, 119 ILR 508 (Part XV arbitration) (senior counsel for Australia), .

5. *Islamic Republic of Iran v United States of America, Case No. A30* (Iran-United States Claims Tribunal, Full Tribunal, pending) (counsel for Iran).

6. *Eritrea/Ethiopia Boundary Commission* (Boundary Commission under the auspices of the Permanent Court of Arbitration, 2001) (counsel for Eritrea) 41 ILM 1057

7. *Eritrea/Ethiopia Compensation Commission* (Commission under the auspices of the Permanent Court of Arbitration, 2001) 42 ILM 1027, 1056 (counsel for Eritrea) 42 ILM 1056

8. *The Volga (Russia v Australia) (Prompt Release)* (International Tribunal for the Law of the Sea), 42 ILM 159, http://www.itlos.org/start2_en.html

9. *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Request for Provisional Measures)* ((International Tribunal for the Law of the Sea, 2003) (leading counsel for Malaysia)

Plus counsel for applicant or respondent in numerous arbitrations (ICC, UNCITRAL, etc.)

Experience as judge/arbitrator:

Judge, OECD Administrative Tribunal (1993, reappointed 1996, 1999, 2002)

Dabhol Power Company v State of Maharashtra (ad hoc arbitration under UNCITRAL Rules, 1995) (interim award on jurisdiction and arbitrability, 7 February 1996; subsequently settled by consent order) (President of the Tribunal)

Larsen v Hawaiian Kingdom (presiding arbitrator; ad hoc arbitration under the auspices f the Permanent Court of Arbitration, award terminating arbitration, February 2001), 119 ILR 566

Newfoundland/Nova Scotia, Maritime Boundary Arbitration (member of Tribunal, appointed by the Government of Canada) first phase, Fredericton, Award of 17 May 2001; second phase, Award of 26 March 2002: http://www.boundary-dispute.ca/

Compañia de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic (ICSID Case No. ARB/97/3), Decision of 3 July 2002, 41 ILM 1037, 125 ILR 43 (member of *ad hoc* Committee)

Mondev International Ltd v United States of America (ICSID Case No ARB(AF)/99/2), Award of 11 October 2002, 42 ILM 85; 125 ILR 98 (www.state.gov/documents/organization/14442.pdf) (member of Tribunal)

Waste Management, Inc. v. United Mexican States (ICSID Case No. ARB(AF)/00/3) (President), Decision on Preliminary Objection, 24 July 2002; (http://www.worldbank.com/icsid/cases/waste_united_eng.PDF), 41 ILM 1315; Award, 30 April 2004 (President of Tribunal)

Yaung Chi Oo Trading Pte. Ltd. v. Government of Myanmar (ASEAN Case No. ARB 01/1, member of Tribunal), Final Award, 31 March 2003, 42 ILM 540 (member of Tribunal)

Case concerning the MOX Plant, Republic of Ireland v. United Kingdom (Arbitration under UNCLOS Annex VII) 42 ILM 1118 (party-appointed arbitrator for Republic of Ireland)

SGS Société Générale de Surveillance SA v Republic of the Philippines (ICSID Case No. ARB/02/6) decision on jurisdiction and admissibility, 29 January 2004, http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf (member of Tribunal)

JacobsGibb Limited v The Hashemite Kingdom of Jordan (ICSID Case No. ARB/02/12) (party-appointed arbitrator, pending)

EnCana Corporation v Government of the Republic of Ecuador (LCIA-administered Arbitration UN3481) (President of the Tribunal)

Expert witness:

1. *Trade Practices Commission v Australia Meat Holdings Pty Ltd* (1988) 83 Australian Law Reports 299 (Federal Court of Australia, Wilcox J).
2. *Schexnider v McDermott International Inc* (DC, La (WD), 1988, Civil Action No 81-2358) (evidence on oath for plaintiff).
3. *Simoneaux v McDermott International Inc* (SC, La, 1989) (evidence on deposition for plaintiff).
4. *Propend Pty Ltd v Singh & Commissioner for the Australian Federal Police* (UK High Court, Laws J, 1996, CA, 1997, leave to appeal to the House of Lords refused) (evidence on oath for defendant, evidence upheld on appeal), 111 ILR 611.
5. Adviser to and Expert Witness on behalf of the Department of Justice, Government of Canada, *Reference re Secession of Quebec* (Canada, Supreme Court), 115 ILR 536.

6. *Citoma Trading Ltd v Federative Republic of Brazil*, Court of Appeal, 1999, on appeal from *JH Rayner (Mincing Lane) Ltd & ors v Cafenorte SA Importadora & ors* [1999] 1 All ER (Comm) 120.

7. Expert Witness on behalf of the Department of Justice, Government of Canada, *Democracy Watch and another v Attorney-General of Canada* (Ontario Superior Court of Justice, Court file 01-CV-211576)

B. Counsel before national courts

R v Lyons and others, [2002] 4 All ER 1028 (HL) (junior counsel for the Appellants)

Miscellaneous:

Legal Adviser to the Crown Prince of Jordan, Israel Jordan Treaty of Peace, Araba Crossing Point, 26 October 1994: (1995) 34 ILM 43.

Retained by Shipping Conference Services to advise foreign shipping companies on application of Australian legislation to conference trades (1988-93, 1996, 2000).

Books

The Creation of States in International Law (Oxford, Clarendon Press, 1979) i-xxviii, 1-498.

The Rights of Peoples (editor) (Clarendon Press, Oxford, 1988; paperback, 1992) i-x, 1-236.

The Law of the Sea in the Asia Pacific Region (editor, with DR Rothwell) (Nijhoff, Dordrecht, 1995) ix + 282 pp.

(coedited with Philip Alston) *The Future of UN Human Rights Treaty Monitoring* (Cambridge, Cambridge University Press, 2000) i-xxx, 1-530.

The ILC's Articles on State Responsibility: Introduction, Text and Commentaries (Cambridge, Cambridge University Press, 2002) xxviii + 384pp.; also published in French as *Les articles de la C.D.I. sur la responsabilité de l'État. Introduction, texte et commentaires* (Pedone, Paris, 2003), xvi & 461

International Law as an Open System. Selected Essays (Cameron & May, London, 2002) pp. 1-607.

(with Brian Opeskin) *Australian Courts of Law* (4th, Oxford University Press, Melbourne, 2004) xii, 1-308

Editorial

Editor, *Adelaide Law Review*, Vol 3 No 3 (1969); Vol 5 Nos 2-4 (1974-6); Vol 6 Nos 1-3 (1977-8).

Joint Editor,"The Aborigine in Comparative Law", (1987) 2 *Law and Anthropology* (Austria) i-viii, 1-457.

Consultant Editor, Japanese Study Group (Y Onuma & others) on Grotius, *De Iure Belli ac Pacis*: published as Y Onuma, *A Normative Approach to War. Peace, War, and Justice in Hugo Grotius* (Oxford, Clarendon Press, 1993) xvii + 421.

Editor, International Law Association, *Report of the 64th Biennial Conference, Queensland, 19-25 August 1990* (ILA, London, 1991)

Co-Editor, International Law Association, *Report of the 65th Biennial Conference, Cairo, 21-26 April 1992* (ILA, Cairo, 1993)

Co-Editor, International Law Association, *Report of the 67th Biennial Conference, Helsinki, 11-18 August 1996* (ILA, London, 1997)

Co-Editor, Cambridge Studies in International and Comparative Law, Cambridge University Press (1994, continuing)

Editor, *British Yearbook of International Law* (1994-99); Senior Editor (2000--).

Member of Editorial Panel, *World Trade Review* (2002--)

Co-editor, *ICSID Reports* (2002--)

Awards

University of Adelaide, Bonython Prize (1980).

American Society of International Law, Award for Pre-eminent Contribution to Creative Scholarship (1981) (for *The Creation of States in International Law*).

Official Reports

1. ALRC 24, *Foreign State Immunity* (AGPS, Canberra, 1984) i-xxiv, 1-168 (Commissioner in Charge). The Summary of Recommendations and Draft Legislation appended to the Report is reproduced in (1984) 23 *International Legal Materials* 1398-1418. Legislation to implement the Report was enacted: Foreign States Immunities Act 1985 (Cth), reproduced in (1986) 25 *International Legal Materials* 715-24.

2. ALRC 31, *The Recognition of Aboriginal Customary Laws* (AGPS, Canberra, 1986) Summary volume: i-xvii, 1-104; Vol I: i-xxxix, 1-507; Vol 2: i-xvi, 1-415 (Commissioner in Charge).

3. ALRC 33, *Civil Admiralty Jurisdiction* (AGPS, Canberra, 1986) (Commissioner in Charge) i-xxi, 1-393. Legislation to implement the Report was enacted: Admiralty Act 1988 (Cth); Admiralty Rules 1988 (Cth).

4. Constitutional Commission, Australian Judicial System Advisory Committee, *Report* (AGPS, Canberra, 1987) (Member).

5. ALRC 48, *Criminal Admiralty Jurisdiction and Prize* (AGPS, Canberra, 1990) (Commissioner in Charge) i-xvi, 1-210.

Commissioned Reports/Published Opinions:

1. "The Original Status of Aboriginal Peoples in North America" (paper commissioned by the Public Inquiry into the Administration of Justice and Aboriginal People, Manitoba, 1991).
2. (with P Sands), "Legal Aspects of a Nuclear Weapons Convention" in Canberra Commission on the Elimination of Nuclear Weapons, *Background Papers* (Canberra, 1996) 275-302.
3. (with P Sands), "The Availability of Article 11 Agreements in the Context of the Basel Convention's Recyclable Ban Amendment" (paper commissioned by the International Council on Metals and the Environment, Ottawa, July 1997) (pp 1-60)
4. (with A Pellet & G Hafner), "Republic of Cyprus: Eligibility for EU Membership" (A/52/481, S/1997/805, 17 October 1997)
5. "State Practice and International Law in Relation to Unilateral Secession", in AF Bayefsky, *Self-Determination in International Law. Quebec and Lessons Learned* (Kluwer, The Hague, 2000) pp. 31-61;
6. Response to Experts Reports of the Amicus Curiae", ibid. pp. 153-171.
7. "The International Criminal Court and Bilateral Agreements Sought by the United States under Article 98(2) of the Statute" (with P Sands & R Wilde) (http://www.lchr.org/international_justice/Art98_061403.pdf)

Governmental Nominations and Conferences

1. Member of the Australian delegation to UNESCO General Conference, Sofia, October 1985. See *UNESCO General Conference*, Report of the Australian Delegation (AGPS, Canberra, 1986) 36-43.

2. Australian nominee as a conciliator included in the list maintained by the Secretary-General for the purpose of constituting the conciliation commission provided for by the Annex to the Vienna Convention on the Law of Treaties 1969.

3. Adviser, Australian delegation to the United Nations General Assembly, Sixth Committee, 43rd Session, 1988; 44th Session, 1989; 45th Session, 1990; 46th Session, 1991.

4. Member, International Law Commission (1992-2001):
   - Responsible for drafting the Working Group Report (*ILC Yearbook* 1992 vol II pt 2, 58-80) and Draft Statute (1993) on an International Criminal Court. For the text of the latter see (1994) 33 ILM 253. Chair of the Working Group (1994): see Working Group on a Draft Statute for an International Criminal Court, *Report of the Working Group* (A/CN.4/L.491/Rev.2 & Add.1-2, 14, 18, 19 July 1994): see *ILC Ybk 1994/II (2)* 18-74; text also in A Watts, *The International Law Commission 1949-1998. Volume II: The Treaties* (Oxford, Oxford University Press, 2000) 1454-1552.
   - Responsible for drafting Report on Working Methods of the Commission, published in *ILC Report 1996*, Annex 1.
   - Special Rapporteur on State Responsibility (1997-2001):

     First Report on State Responsibility (A/CN.4/490 & Adds. 1-5, 1998)
     Second Report on State Responsibility (A/CN.4/498 & Adds. 1-4, 1999)

Third Report on State Responsibility (A/CN.4/507 & Adds. 1-4, 2000)
Fourth Report on State Responsibility (A/CN.4/517 & Add. 1, 2001)
The Articles on Responsibility of States for Internationally Wrongful Acts were adopted by the ILC on 14 August 2001, and annexed to GA Resolution 56/83, 12 December 2001.

Major Lectures

Hersch Lauterpacht Memorial Lectures, Cambridge, January 1988.
Ebsworth & Ebsworth Maritime Law Lecture, Sydney, August 1996.
Bertha Wilson Distinguished Visiting Professor, Dalhousie Law School, January 1997.
Hague Academy of International Law, "Multilateral Legal Rights and Obligations" (August 1997).
Synder Memorial Lecture, University of Indiana, April 2000
Inaugural James Crawford Lecture, University of Adelaide, November 2003

June 2004

This is Exhibit "B" referred to in the affidavit of James Crawford sworn before me this 1st day of September, 2004

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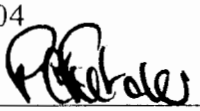
This is Exhibit "B" referred to in the affidavit of James Crawford sworn before me this 1st day of September, 2004



ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

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

CONFIDENTIALITY OF PROCEEDINGS IN INTERNATIONAL ARBITRATION

REPORT

James CRAWFORD, SC, FBA
Whewell Professor of International Law
University of Cambridge

28 March 2003

Table of Contents

REPORT

CONFIDENTIALITY OF PROCEEDINGS IN INTERNATIONAL ARBITRATION

Part I. Introduction

1. I am asked by the Department of Justice of Canada to prepare a report with respect to the international law issues raised by the Notice of Application filed by Democracy Watch and Judy Darcy on her own behalf and on behalf of the Canadian Union of Public Employees against the Attorney-General of Canada. Specifically, I am asked to advise on current rules, understandings and practices concerning confidentiality of proceedings in international arbitration, including arbitration under Chapter 11 of the North American Free Trade Agreement of 17 December 1992 (hereafter "NAFTA"). This affidavit sets out the present position. It is based on a reading of the affidavits and other material deposited by the Applicants, a review of other published sources to which reference is made below, and on my own experience in this field. I believe it to be a fair, full and accurate account of the position. To the extent that this Report refers to issues of Canadian law, the statements are made as part of the general context, and do not purport to be advice on any such issues, which are of course a matter for the Court.

2. I have been since 1992 Whewell Professor of International Law in the University of Cambridge and a Professorial Fellow of Jesus College, Cambridge. Since September 1995 I have been Director of the Lauterpacht Research Centre for International Law, University of Cambridge. I was formerly Professor of Law at the University of Adelaide (1983-86) and Challis Professor of International Law and subsequently Dean, Faculty of Law, University of Sydney, Australia (1986-92). I was a member of the United Nations International Law Commission (ILC) from 1992-2001, in which capacity I was responsible for the ILC's Draft Statute for an International Criminal Court (1994) and for the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001). I am a member of the New South Wales and English bars (Matrix Chambers, Gray's Inn). I have an extensive practice in international law. I have been counsel in more than 20 interstate cases, before the International Court of Justice, the Law of the Sea Tribunal and other bodies. I have acted as arbitrator, counsel or expert in approximately 20 mixed international arbitrations (between private parties and States), in the context of ICSID, NAFTA, and various bilateral investment treaties, as well as acting in ICC arbitrations. I have

given expert evidence before courts in Australia, New Zealand, the United Kingdom, Canada and the United States.

3. The Applicants object to two aspects of NAFTA Chapter 11 arbitration: first, the requirement of the applicable procedural rules that the hearing of a Chapter 11 claim be held *in camera* unless the parties otherwise agree, and second the absence of any rule that awards in NAFTA proceedings be made public. These aspects of the arbitration rules are said to be inconsistent with the rights of freedom of expression and of the press contained in the Canadian Charter of Rights and Freedoms, in particular s. 2(b). The Applicants further allege that they cannot be justified pursuant to s. 1 of the Charter.

4. It is first necessary to set out precisely what the position is with respect to these two aspects of NAFTA procedure. I do this in **Part II** (paras. 5-43). In **Part III**, I compare the position with other recognized arbitration rules (paras. 45-62, and in terms of a developing international practice qualifying the obligation of confidentiality in arbitrations (paras. 63-76). Specifically I examine the link between disclosure of arbitral pleadings and decisions and freedom of information legislation (paras. 77-84). In **Part IV**, I summarize the conclusions reached. In each of the respects complained of by the Applicants, it will be seen that the position under NAFTA is in advance of the international position, and that remaining elements of confidentiality or privacy are not contrary to any international consensus or to any international principle requiring open hearings in consensual arbitration (paras. 91-98).

Part II. Relevant Provisions of NAFTA and the Applicable Arbitration Rules

5. Chapter 11 of NAFTA is an important instance of a much broader phenomenon in international law, i.e., investor-state arbitration pursuant to the provisions of a bilateral or multilateral treaty. There are now more than 2000 treaties (often referred to as BITs) providing for investor-state arbitration. The aim is to enhance investor protection and security of transactions by providing both a set of substantive minimum standards and a choice of forum for resolving investment disputes (either the courts of the host state, or an independent tribunal under established arrangements for international arbitration). To this end, Chapter 11 of NAFTA draws in particular on arbitral institutions and rules established pursuant to the World Bank Convention for the Settlement of Investment Disputes between States and Nationals of Other States, Washington, 18 March 1965 (the ICSID Convention) and the United Nations Commission on International Trade Law (UNCITRAL).

(a) The Provisions of NAFTA, Chapter 11

6. Part Five of NAFTA deals with investment, services and related matters. Chapter 11 (the first chapter in Part Five) deals with investment. It lays down minimum standards for the treatment of investment – in particular, national treatment, most-favoured nation treatment and a general minimum standard ("fair and equitable treatment and full protection and security"), as well as certain guarantees concerning expropriation or nationalization of investments. It provides for settlement of disputes between NAFTA Parties and investors of another Party. Article 1115 describes this as:

> "a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal."

Investors with a claim under Chapter 11 are not required to exhaust local remedies in the host State before commencing arbitration. They may first seek redress in the local courts, but they also can elect to go direct to Chapter 11 arbitration. At the point at which they do commence Chapter 11 arbitration they are required to waive any (or any further) domestic remedies, subject to certain exceptions.[1] Thereafter (subject to these exceptions), NAFTA arbitration becomes the only remedy in respect of the claim.

7. NAFTA does not provide that arbitrations under Chapter 11 are secret or confidential. Indeed there is no general provision at all on the question of confidentiality. On the contrary, there are a number of specific provisions entitling the States Parties to NAFTA (hereafter "NAFTA Party")to be informed about Chapter 11 claims and to make general submissions about them. Any NAFTA Party which is a respondent to a claim submitted to arbitration under Chapter 11 must give notice of the claim to the other Parties and provide them with copies of all pleadings filed in the arbitration (Article 1127). Thereafter each Party may make submissions to the Tribunal on issues of NAFTA interpretation (Article 1128), a right which has been regularly exercised, notably by Canada. Each NAFTA Party is also entitled to receive from the respondent Party a copy of the evidence tendered to the Tribunal and the written argument of the disputing parties: Article 1129(1). Article 1129(2) provides that:

> "A Party receiving information pursuant to paragraph 1 shall treat the information as if it were a disputing Party."

---

[1] NAFTA, Article 1121(2)(b). The exceptions concern "proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party".

Thus any restriction on a disputing Party publishing information provided by the claimant, or using it for purposes other than the arbitration, would equally apply to the other Parties receiving that information under Article 1129(1).

8. In practice, Article 1128 of NAFTA has been interpreted as allowing NAFTA Parties to attend oral hearings at all stages, although they have normally made any submissions, including post-hearing submissions, in writing.

9. In addition to their express right to participate in Chapter 11 arbitrations (without any showing of special interest), the NAFTA Parties together have supervisory authority over the interpretation of NAFTA and over the implementation of awards. In particular, an interpretation of the Free Trade Commission (consisting of Ministerial representatives of the three Parties) is binding on Chapter 11 tribunals by virtue of Article 1131(2).

10. Chapter 11 also makes express provision for publication of awards (Article 1137(4) and Annex 1137.4). According to Annex 1137.4, separate rules are stated for publication of awards for each of the three Parties, although the rules for Canada and the United States are in identical terms. The position for Canada is as follows:

> "Where Canada is the disputing Party, either Canada or a disputing investor that is a party to the arbitration may make an award public."

Thus under Chapter 11 as originally formulated, the private party to an investment dispute with Canada cannot insist on the award remaining private, although it is true that under NAFTA an award could remain private if *both* Canada and the private party so wished.

(b) The FTC Interpretation of 31 July 2001

11. The matter has however been taken much further. On 31 July 2001, the Free Trade Commission issued an interpretation relating *inter alia* to the confidentiality of Chapter 11 arbitrations. Section A of the Interpretation reads as follows:

> "A. *Access to Documents*
>
> 1. Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter 11 arbitration, and, subject to the application of Article 1137(4), nothing in NAFTA precludes the parties from providing public access to documents submitted to, or issued by, a Chapter 11 tribunal.
>
> 2. In the application of the foregoing:

(a) In accordance with Article 1120(2), the NAFTA Parties agree that nothing in the relevant arbitral rules imposes a general duty of confidentiality or precludes the Parties from providing public access to documents submitted to, or issued by, Chapter 11 tribunals, apart from the limited specific exceptions set forth expressly in those rules.

(b) Each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter 11 tribunal, subject to the redaction of :

(i) confidential business information;

(ii) information which is privileged or otherwise protected from disclosure under the Party's domestic law; and

(iii) information which the Party must withhold pursuant to the relevant arbitral rules, as applied.

(c) The Parties reaffirm that disputing parties may disclose to other persons in connection with the arbitral proceedings such unredacted documents as they consider necessary for the preparation of their cases, but they shall ensure that those persons protect the confidential information in such documents.

(d) The Parties further reaffirm that the Governments of Canada, the United Mexican States and the United States of America may share with officials of their respective federal, state or provincial governments all relevant documents in the course of dispute settlement under Chapter 11 of NAFTA, including confidential information.

3. The Parties confirm that nothing in the interpretation shall be construed to require any Party to furnish or allow access to information which it may withhold under Articles 2102 or 2105."[2]

12. There has been some controversy before NAFTA Chapter 11 tribunals as to whether the FTC Interpretation of 31 July 2001 actually constitutes an "interpretation" within the meaning of Article 1131(2). The dominant view, however, is that the Interpretation of 31 July 2001 does fall within Article 1132(2) and is binding in accordance with its terms.[3]

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[2] 122 ILR 681; also available at http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp.

[3] See *ADF Group Inc. v United States Of America*, Award of 9 January 2003, http://www.state.gov/s/l/c3754.htm, paras. 175-186 with references to earlier cases.

13. Of course the FTC Interpretation contains its own limitations on disclosure. Paragraph (3) refers to information that may be withheld under Articles 2102 or 2105 of NAFTA. Article 2102(1)(a) reserves the right of any NAFTA Party to decline "to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests". Article 2105 provides that:

> "Nothing in this Agreement shall be construed to require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party's law protecting personal privacy or the financial affairs and accounts of individual customers of financial institutions."

In their context these are narrow exceptions which do not appear to create any difficulties in terms of general access to information, and which have not created any difficulties in practice.

14. More relevant are the three exceptions set out in paragraph (2)(b) of the FTC Interpretation. In terms of thee issues raised in the present case, information which is privileged or protected from disclosure under Canadian law presumably presents no difficulties, since the Canadian Charter is itself part of Canadian law. Likewise the reference to "confidential business information", since I understand that the Charter does not itself require disclosure of confidential business information. This leaves the exception for "information which the Party must withhold pursuant to the relevant arbitral rules". As a general matter, it is only if information must be withheld pursuant to the relevant arbitral rules that the pleadings and evidence submitted to and the rulings of a Chapter 11 tribunal (including interlocutory and preliminary rulings as well as awards) would *not* be made available to the public. Thus it is necessary to review the relevant arbitral rules to determine in which circumstances information must be withheld.

(c) The Applicable Arbitration Rules

15. According to Article 1120 of NAFTA, a disputing investor may submit a claim to arbitration under (a) the ICSID Convention, if both the disputing Party (i.e. the respondent State) and the Party of the investor are parties to the ICSID Convention; (b) the Additional Facility Rules, if only one is a party to the Convention, or (c) the UNCITRAL Arbitration Rules. The United States is a party to the ICSID Convention, but Canada and Mexico are not parties. Accordingly in the case of an investment dispute by a United States investor against Canada there are two choices, the Additional Facility Rules or the UNCITRAL Rules, whereas in the case of a dispute between a Mexican investor and Canada there is only one, the UNCITRAL Rules. However for the sake of completeness I will deal with the situation under all three sets of arbitral rules envisaged in Article 1120.

(i) The ICSID Convention and the ICSID Arbitration Rules

16. The ICSID Convention provides for investor-state arbitration before an international tribunal established under the auspices of the International Centre for the Settlement of Investment Disputes, which is an affiliate of the World Bank. Arbitration under the Convention is an autonomous and free-standing form of arbitration, not dependent on the arbitral law of the State where the arbitration takes place. An award rendered under the Convention is to be recognized and (to the extent it imposes pecuniary obligations) enforced in any Member State "as if it were a final judgment of a court in that State".[4] Awards are not subject to "appeal or any other remedy" except as provided in the Convention.[5] The Convention has been widely ratified: on 6 March 2003 there were 153 States Parties.

17. In terms of secrecy and confidentiality, the only provision of the ICSID Convention that is relevant for present purposes is Article 48(5), which provides that "The Centre shall not publish the award without the consent of the parties." This is a limited provision dealing only with publication by the Centre itself.[6] A number of awards have been published as a result of disclosure by one Party without the consent of the other.

18. The ICSID website maintains a complete register of pending and completed cases with reference to the texts of awards and decisions where these have been published and summary information about the state of the proceedings.[7]

19. Under Rule 32 of the ICSID Rules, the hearing may be attended by the tribunal members and officers, the parties, their agents, counsel and advocates, witnesses and experts. In addition, the tribunal may decide, with the consent of the parties, which other persons may attend. Thus actual hearings are private unless the parties and the tribunal otherwise agree.

20. There is no provision in the ICSID Rules for the confidentiality of information provided by the parties for the purposes of the arbitration. The official annotations accompanying the original version of the ICSID Arbitration Rules (which do not form part of the Rules and are not binding) state that the parties are not prohibited from publishing their pleadings, but note that they may agree not to do so "if they feel that publication may exacerbate the dispute" (Rule 30, Note F). This is a prudential limitation, not a confidentiality requirement.[8]

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[4] ICSID Convention, Art. 54(1).

[5] Ibid., Art. 53 (1). The Convention provides for interpretation (Art. 50), revision (Art. 51) and annulment (Art. 52).

[6] See C Schreuer, *The ICSID Convention. A Commentary* (Cambridge, CUP, 2002) 819-828, esp 822.

[7] See http://www.worldbank.org/icsid/cases/cases.htm.

[8] See 1 ICSID Reports 93. See also "Confidentiality Revisited", paper delivered by Margrete Stevens, Senior Counsel, ICSID, at the Sixteenth ICSID/American Arbitration

21. The position stated in Note F is confirmed by ICSID jurisprudence. In *Amco Asia Corp & others v The Republic of Indonesia*, an ICSID Tribunal was asked to recommend a provisional measure to prevent the parties from promoting newspaper publication of details of the case. The Tribunal rejected this request on the ground that neither the ICSID Convention nor the Rules nor any accepted principle of confidentiality in arbitration prevented a party from revealing information about an arbitration case to the newspapers.[9] However, the tribunal stated that both parties "should refrain, in their own interest, to do anything that could aggravate or exacerbate" the dispute.[10] The Tribunal's use of the word "should" here confirms that there is no legal obligation under the ICSID Convention and Rules not to disclose information about a pending or completed arbitration. Rather the *Amco Asia* Tribunal called on the parties not to aggravate or exacerbate the dispute, a general caution which is common in provisional measures decisions at the international level.

(ii) The ICSID (Additional Facility) Arbitration Rules

22. Arbitration under the ICSID Convention is limited to disputes between investors with the nationality of a State Party and another State Party. However, the Governing Council of ICSID (comprising the Member States) have also provided a facility for arbitration between parties one of whom is not a Member State or a national of a Member State. In accordance with the Additional Facility, arbitration occurs under the auspices of ICSID but it is not covered by the Convention itself. In consequence the provisions of the Convention precluding national courts from reviewing ICSID arbitrations and requiring unconditional enforcement of awards (subject only to ICSID's own provisions for revision and annulment) do not apply to Additional Facility arbitrations – a situation expressly recognized in Article 1136 of NAFTA. For example, in the *Metalclad* case, a NAFTA award made under the Additional Facility Rules was subject to judicial review in the British Columbia Supreme Court.[11]

23. In accordance with Article 39 of the Additional Facility Arbitration Rules,[12] the persons present at the hearing are limited to tribunal members and officers, the parties, their agents, counsel and advocates and witnesses and experts. The tribunal

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Association/ICC Court Colloquium on International Arbitration, 29 October 1999 (http://www.worldbank.org/icsid/news/n-17-1-2.htm).

9 (1983) 1 ICSID Reports 410, 412.

10 Ibid.

11 *United Mexican States v Metalclad Corporation*, 2001 BCSC 664, 5 ICSID Reports 236; 2001 BCSC 1529. In that case Tysoe J held that the Tribunal erred in taking into account requirements of transparency contained in other Chapters of NAFTA in the interpretation of Chapter 11.

12 Text in 1 ICSID Reports 249.

can decide with the consent of the parties which other persons may attend the hearings: Article 39(2). Minutes of all hearings are to be kept by the Secretary-General of the Centre and cannot be published without the consent of the parties: Article 44.

24. The extent of confidentiality obligations under the Additional Facility Rules has been discussed in a number of cases.

25. In *Metalclad v United Mexican States* (ICSID Case ARB(AF)/97/1), following a July 1997 procedural meeting convened by the Tribunal in Washington D.C., Metalclad's CEO discussed in a conference call with certain shareholders and brokers some of what had transpired at that meeting. Confidentiality had been discussed at the procedural meeting briefly and only regarding the deliberations of the tribunal. Mexico sought an order prohibiting disclosure of any information regarding the case on the grounds that all matters before the tribunal were *sub judice* and confidential. Metalclad contested the existence of any implied obligation of confidentiality, noted the absence of any formal agreement on the subject, and doubted to what extent a confidentiality order could be enforceable having regard to existing legal regimes such as U.S. securities legislation and the requirements of the NAFTA Articles 1127 and 1129, in combination with the United States' Freedom of Information Act (FOIA). The Tribunal declined to issue the order sought by Mexico. It said:

> "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 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 the United States security laws, the Claimant, as a public company traded on a 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 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 of disclosure by which either of them may be legally bound."[13]

The Tribunal did find that disclosure by the claimant of specific time limits discussed in the hearing was a technical violation of the Additional Facility Rules, but held it was not serious enough to warrant any protective order.

26. In *Loewen Group Inc & Raymond L Loewen v United States* (ICSID Case No. ARB(AF)98/3), the Respondent requested that all filings, including the minutes of proceedings, be treated as open and available to the public. The Claimants agreed that the minutes and other filings should be made publicly available, but only after the matter was concluded. In its decision of 5 January 2001, the Tribunal summarized this aspect of the proceedings as follows.[14] By a decision of 28 September 1999,[15] the Tribunal noted that Article 44(2) of the ICSID Additional Facility 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 went on to deny the Respondent's request "to the extent that it sought to bring about a situation in which the Tribunal or Secretariat makes available to the public all filings in this case". The Tribunal continued:

> "In its Decision the Tribunal rejected the Claimant's 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 [of 29 September] 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."

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13 (2000) 5 ICSID Reports 212, 215-216 (para. 13) (emphasis added).

14 Decision on hearing of the Respondent's Objection to Competence and Jurisdiction, 5 January 2001, available at http://www.state.gov/documents/organization/3921.pdf.

15 Ibid., paras. 24-28.

27. In a later ruling of 2 June 2000, the Tribunal stated that neither decision "was intended to affect or qualify, or could affect or qualify, any statute-imposed obligation of disclosure by which any party to the arbitration might be bound."[16]

28. The issue also arose before a NAFTA Tribunal (of which the author was a member) in *Mondev International Ltd. v United States* (ICSID No. ARB(AF)/99/2), although it was overshadowed by the question of disclosure of pleadings and rulings under the United States Freedom of Information Act (FOIA), which is discussed below. In an Order of 13 November 2000, the Tribunal said:

> "The Tribunal's Order and Interim Decision of 25 September, 2000 is not a public document. It represents the outcome of a hearing before the Tribunal, followed by subsequent written submissions by the parties, which hearing was itself not open to the public and the minutes of which are by Article 44(2) of the Arbitration (Additional Facility) Rules not to be published without the consent of the parties. Accordingly such Order and Interim Decision should not be published by the Respondent whether by posting on its Internet site or otherwise during the pendency of this arbitration."

29. Following the Tribunal's order of 25 January 2001, refusing to prohibit disclosure by the United States in accordance with its statutory obligations under the FOIA, the parties jointly sought clarification of whether, in the absence of such a statutory obligation, the parties were free to publish documents and pleadings. On 27 February 2001, the Tribunal ordered that...

> "unless otherwise ordered by the Tribunal and subject always to any applicable statutory obligation of disclosure, neither party to this arbitration shall before the making by the Tribunal of its award publish the documents the subject of the Order of January 25, 2001 or any other documents filed in these proceedings not being documents already appearing in a public register maintained by the Secretariat."

At the time of its final award dismissing the claim, the Tribunal lifted all restrictions on publication.[17]

30. In *Mondev* it was the Claimant which sought non-disclosure and the United States which resisted it, relying *inter alia* on the FOIA. Arbitrators usually seek to maintain some level of balance as between the parties: having on the one hand denied the Claimant's request to prevent the United States from disclosing material

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[16] Ibid.

[17] *Mondev International Ltd. v United States of America*, Award of 11 October 2002, www.state.gov/documents/organization/14442.pdf, in press in 6 ICSID Reports.

under the FOIA, the Tribunal evidently felt that it was appropriate to restrain temporarily any other form of publication. This decision was of course given prior to the FTC's Interpretation, and it represented an exercise of procedural discretion uninfluenced by that Interpretation. I discuss below how the issue should now be dealt with.[18]

(iii) The UNCITRAL Arbitration Rules

31. The United Nations Commission on International Trade Law (UNCITRAL) was established by General Assembly Resolution 2205(XXI) of 17 December 1966. Its concern is to further "the progressive harmonization and unification of the law of international trade". In 1976 UNCITRAL adopted arbitration rules which have come to be quite widely used in international arbitration, including investor-state arbitration. Under Article 1120 of NAFTA, the UNCITRAL Rules are available to Chapter 11 claimants in claims against Canada.

32. Under Article 25(4) of the UNCITRAL Rules, hearings are to be held *in camera* unless the parties agree otherwise. There is no provision requiring confidentiality of documents prepared for or disclosed in arbitrations, or addressing publication of the award.[19]

33. In *Methanex v United States*, certain third parties petitioned the Tribunal to be permitted to intervene as *amicus curiae*. As part of this claim they sought copies of all documents filed in the arbitration. In a decision of 15 January 2001, the Tribunal held that as *amici* have no rights under Chapter 11 of NAFTA, they were to be treated as any other members of the public. Accordingly, these materials could only be disclosed as allowed in the consent order of 7 September 2000, under the terms of which "either party is at liberty to disclose the major pleadings, orders and awards of the Tribunal into the public domain (subject to redaction of Trade Secret Information)".[20] Further, "such materials may however be derived from the public domain within the terms of the Consent Order ... , or otherwise lawfully, but that is quite a separate matter outwith the scope of this decision".[21]

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[18] See below, paragraphs 42-43.

[19] The UNCITRAL Notes on Organising Arbitral Proceedings (1996), published in 5 *Tul. J. Int'l & Comp. L.* 411, para. 31 note that "...parties that have agreed on arbitration rules or other provisions that do not expressly address the issue of confidentiality cannot assume that all jurisdictions would recognize an implied commitment to confidentiality. Furthermore, the participants in an arbitration might not have the same understanding as regards the extent of the confidentiality that is expected."

[20] Decision of 15 January 2001, available at http://www.state.gov/documents/organization/6039.pdf, para. 46.

[21] Ibid., para. 47.

34. In *S.D. Myers Inc v Canada*, a NAFTA Tribunal issued three orders regarding confidentiality.[22] The parties to the case had agreed that the pleadings could be disclosed to the public subject to a confidentiality agreement. In its Procedural Order No. 3 of 10 June 1999, the Tribunal ordered that certain pleadings (including the Notice of Arbitration and the Statement of Claim and Defence) could be released into the public domain under Article 18 of the UNCITRAL Rules. However, it ordered that "As a further temporary measure the parties shall not release into the public domain any other documents prepared in connection with the proceedings before 30 June 1999 or the date on which the parties enter into a confidentiality agreement, whichever is the earlier." In its Procedural Order No. 11 of 11 November 1999, the Tribunal further ordered that all transcripts and other records of the hearings were to be kept confidential and could only be disclosed according to the conditions required for "Protected Documents". Protected documents were defined as those in respect of which, under NAFTA Article 1129, a claim of business confidentiality had been made. No protected document could be published without the consent of the party claiming confidentiality. Specifically, Procedural Order No. 11 (para. 7) required that:

> "If any person in possession of a Protected Document receives a request pursuant to law to disclose a Protected Document or information contained therein, that person shall give prompt written notice to the party that claimed confidentiality over the document so that party may take such steps as it considers appropriate..."

Paragraphs 8 and 9 of the same Order required Protected Documents to be clearly marked and to identify the persons to whom protected documents may be disclosed (e.g., counsel, witnesses). Appended to the Order was a draft confidentiality agreement for signature by third persons involved in the arbitration, under which they would agree to keep the information confidential. It allowed any party to apply to have documents treated differently than as required by the Order. The Order confirms that under Article 1137 of NAFTA all awards (interlocutory or final) may be published, as well as all other decisions and orders, unless they contain information that is to be treated as confidential (paras. 4 and 5).

35. In a further Procedural Order No. 16 of 13 May 2000, the Tribunal distinguished NAFTA arbitrations from private commercial arbitrations and denied the existence in NAFTA arbitrations of any general principle of confidentiality:

> "The Tribunal considers that, whatever may be the position in private consensual arbitrations between commercial parties, it has not been established that any *general principle* of confidentiality exists in an arbitration such as that currently before this tribunal.

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[22] Two of these are available at http://www.naftaclaims.com. The partial award (13 November 2000) is at 121 ILR 73.

> The main argument in favour of confidentiality is founded on a supposed implied term in the arbitration agreement. The present arbitration is taking place pursuant to a provision in an international treaty, not pursuant to an arbitration agreement between disputing parties."[23]

On the other hand the Tribunal went on to say that:

> "It would be artificial and might adversely affect the efficient organization of Chapter 11 arbitrations proceedings if such materials were deemed to be less private merely because they were to be delivered in advance of an oral hearing, or even after to it in the form of post-hearing briefs. Such written materials effectively form part of the hearing. The same level of confidentiality that is conferred on the transcripts of the opening and closing submissions and witness testimony must logically be applied to the equivalent written submissions."[24]

Thus the Tribunal, as in the *Mondev* case, was prepared to infer from the requirement of the confidentiality of oral hearings a requirement of confidentiality of written submissions or pleadings prepared for presentation in such hearings. This was, however, based on inference, not on the express language of the UNCITRAL Rules. Those Rules deal expressly with oral hearings and are silent as to the confidentiality of written pleadings and documentary evidence. Like the *Mondev* Tribunal, the *S.D. Myers* Tribunal was of course not in a position to take into account the FTC's Interpretation.

36. By contrast the Tribunal in *Pope & Talbot, Inc. v. Government of Canada* was called on to consider issues of confidentiality subsequent to the FTC's Interpretation, to which it indicated a degree of hostility. This was another NAFTA arbitration under the UNCITRAL Rules. At issue was a request for disclosure under the Access to Information Act (Canada) (ATIA), and the decision is discussed in more detail below in that context.[25]

37. In 1999 the Tribunal made a procedural order dealing with confidentiality. After the adoption of the FTC Interpretation of 31 July 2001, the issue arose again and the Tribunal declined to vary the earlier Order in light of the Interpretation – or indeed, on the face of things, to show any flexibility in its application of its earlier Order. The Tribunal said:

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[23] Procedural Order No. 16, 13 May 2000), para. 8 (emphasis in original).

[24] Ibid., para. 12. See the discussion by Fracassi, "Confidentiality and NAFTA Chapter 11 Arbitrations", (2001) 2 *Chicago J. Int'l L.* 213, 218.

[25] See below, paragraphs 80-84.

> "Canada makes reference to the Interpretation of the NAFTA Free Trade Commission... arguing that nothing in Chapter 11 imposes a general duty of confidentiality. This is true, but the remainder of the Interpretation shows that the NAFTA Parties fully recognized that there may well be specific requirements of confidentiality that inure in the Chapter 11 process. Of course, Order No. 5 is such a specific requirement. It was not a product of a general requirement of confidentiality but of an agreement between the parties, adopted by the Tribunal, regarding appropriate treatment of submissions and other documents."[26]

The Tribunal went on to stress that under its procedural order, decisions on disclosure were for the Tribunal, not for a party. It noted that the Interpretation did not apply to transcripts of hearings, which are not documents "submitted to, or issued by, a Chapter 11 Tribunal".[27] It noted that if hearings are to be *in camera*, transcripts of those hearings must likewise be covered.[28]

(d) Summary

38. It will be evident that the situation under Chapter 11 has been developing, and that the decisions so far are not entirely consistent. However I would summarize the position in the following terms.

39. NAFTA provides that, unless otherwise agreed by the tribunal and the parties, actual hearings of Chapter 11 cases are to be heard *in camera*, and only the disputing parties and representatives of the NAFTA Parties are entitled to attend. However each NAFTA Party obtains, as of right, access to pleadings, written arguments and evidence submitted in Chapter 11 arbitrations.

40. The FTC Interpretation of 31 July 2001 does not change this situation. But Section A of the Interpretation does include an undertaking by each NAFTA Party to make available to the public in a timely manner such pleadings, arguments and evidence, subject to the redaction of confidential business information, information which is privileged or otherwise protected from disclosure under the Party's domestic law, and information which the Party must withhold pursuant to the relevant arbitral rules.

41. In my opinion, Section A of the FTC Interpretation was an entirely proper exercise of the power conferred by Article 1131(2) of NAFTA. It does not affect requirements of confidentiality expressly laid down by NAFTA: as we have seen there are no such requirements. Nor does it affect the limited express provisions

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26 Discussion and Order by the Arbitral Tribunal, 11 March 2002, para. 14.

27 Ibid., para. 15.

28 Ibid.

for confidentiality of oral pleadings (and minutes of oral argument) arising under the relevant arbitration rules. Beyond that, it does not affect the power of a Tribunal to impose *specific* requirements for the protection of confidential information where this is necessary for the purposes of the proceedings or for the protection of a party disclosing that information. On the other hand, it is not now open to a NAFTA Tribunal to use its general power to regulate the conduct of proceedings (conferred by the relevant arbitral rules) to impose what amounts to a blanket requirement of confidentiality of pleadings or evidence.

42. By virtue of the FTC's Interpretation, the NAFTA Parties are under an obligation to disclose the information in question unless otherwise prevented from doing so in terms of that Interpretation. Moreover the Interpretation also provides authoritative guidance to NAFTA Tribunals as to how to apply their procedural powers and discretions. It draws a distinction between, on the one hand, "a general duty of confidentiality" (which does not exist under NAFTA) and, on the other hand, "limited specific exceptions set forth expressly" in the arbitral rules. Faced with this interpretation, a NAFTA Tribunal should not interpret the arbitral rules as by implication imposing any general obligation of confidentiality. Nor should it exercise general powers (such as the power to regulate the arbitral proceedings) in such a way as to impose such an obligation.

43. In several cases, NAFTA Tribunals have inferred from express requirements of confidentiality of oral argument a parallel requirement of confidentiality of written pleadings and evidence. Whatever the cogency of this inference before the FTC's Interpretation, in my view it is incumbent on tribunals now to apply the distinction between "general" and "specific" limitations and not to use their general procedural powers to undermine that distinction. There is no textual prohibition in NAFTA on disclosure of written pleadings or other material submitted under Chapter 11, and any investor who now commences a Chapter 11 arbitration will be aware of the States Parties' commitment to prompt publication of pleadings and other documents, unless they fall within one of the protected classes. There is thus no basis for inferences about confidentiality, extending beyond the actual language of the applicable arbitral rules or the actual needs of a given case. On the other hand, it is a matter for each Tribunal to assess whether specific protection should be given, for example to commercial confidentiality. The power to give such protection is conferred by the arbitral rules. A State Party to a Chapter 11 arbitration will be bound by a specific confidentiality order, and other States Parties acquiring access to pleadings and documents under Article 1129 will likewise be required to respect such an order.

Part III. Confidentiality in International Arbitration: Current Practice

44. Although it has special features, investor-state arbitration has been much influenced by general trends in international arbitration, including on questions of

procedure.[29] The UNCITRAL Arbitration Rules are themselves applied in a wide range of arbitrations, including both investor-state arbitration and interstate arbitration. Thus it is useful to ask whether there is any existing or emerging consensus on questions of confidentiality and privacy of hearings, pleadings and awards. In this Part I first review other relevant rules widely used in international arbitration. I then discuss whether – in the absence of express provision in the applicable arbitration rules – there is an implied obligation of confidentiality or non-disclosure in international arbitration, such as could affect a claim of public access to hearings or to information. As will be seen, the position is a developing one: a catalyst in this respect was the decision of the High Court of Australia in *Esso Australia Resources Ltd. v Plowman*,[30] refusing to imply an obligation of arbitral confidentiality into a state contract. Finally, I examine the specific issue of the relationship between confidentiality in arbitration and requirements under freedom of information legislation.

(a) Requirements of Confidentiality or Privacy under Major Arbitration Rules

45. The arbitration rules surveyed here are those of the International Chamber of Commerce (ICC), the American Arbitration Association (AAA), the Stockholm Chamber of Commerce (SCC), the Iran-US Claims Tribunal (I-USCT), the Permanent Court of Arbitration (PCA), the World Intellectual Property Organisation (WIPO), the London Court of International Arbitration (LCIA) and the Centre for Public Resources Rules for Non-Administered Arbitration of International Disputes 2000 (CPR International Rules).[31] All of these provide for *in camera* hearings, with access controlled by the parties and/or the tribunal. By contrast, the only rules which require confidentiality of pleadings are the WIPO Rules, the LCIA Rules and the CPR International Rules.

(i) ICC Arbitration

46. The International Chamber of Commerce (ICC) is the most important institution conducting international commercial arbitrations. Under Article 21(3) of the current Arbitration Rules (effective 1 January 1998), hearings are

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29 For example see K-H Böckstiegel, *Arbitration and State Enterprises* (Deventer, Kluwer, 1984).

30 (1995) 183 CLR 10.

31 Other arbitral bodies include the Singapore International Arbitration Centre (rules based on the UNCITRAL Rules), the Hong Kong International Arbitration Centre (rules based on the UNCITRAL Rules), the German Institute of Arbitration (s. 43.1 of the rules require the parties, arbitrators and the secretariat to maintain confidentiality with respect to the conduct of the arbitration and in particular regarding the parties involved, the witnesses, the experts and other evidentiary materials). The German Supreme Court has held that any arbitration agreement carries with it an implied duty of confidentiality by the parties: see Berger, "The Arbitration Agreement Under the Swedish Arbitration Act 1999 and the German Arbitration Act 1998" (2001) *Arbitration International* 389, 398.

confidential, and except with the approval of the tribunal and the parties, persons not involved in the proceedings may not be admitted. By adopting the ICC Rules to govern the resolution of their dispute, the parties agree that the proceedings shall be private. The ICC makes copies of the award available only to the parties (Article 28(2)).

47. There is no provision requiring the parties to an ICC arbitration to keep arbitration information, including awards, confidential. In preparing the 1998 Rules, the ICC considered but rejected a proposed general provision requiring the parties to respect the confidentiality of the arbitration proceedings.[32] The explanation was that the number of legitimate possible exceptions to any such rule and the fact that requirements of national law concerning confidentiality of arbitral proceedings were in a state of development and conflict made it difficult to articulate a general principle capable of generating a consensus.[33] Craig, Park and Paulsson, the authors of the leading text on ICC arbitration, conclude from a survey of the national jurisprudence that...

> "[t]hese conflicting cases support the ICC's conclusion, during the revision of the Rules in 1998, that there is insufficient consensus on the existence and extent of an implied agreement of confidentiality between the parties and also to what extent such an agreement can bind the other participants in the arbitral process (witnesses, experts, counsel, etc.)."[34]

In practice, arbitrators often propose that a confidentiality clause be included in the terms of reference to be agreed and signed by the parties.[35] In the absence of such a clause, however, their powers are more limited. Article 20(7) authorizes the tribunal to take measures to protect trade secrets and confidential information.[36] It has been suggested that the reference to "confidential information" is "nevertheless sufficiently broad that an order of the Arbitral Tribunal could also extend to documents produced for the purpose of the arbitration itself, such as pleadings, witness statements and the Award, or other information relating to the arbitration or even its existence, to the extent appropriate."[37] But unless the applicable curial law (i.e., the *lex arbitri*) of the ICC tribunal imposes a requirement of confidentiality, it

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32 For earlier practice see, e.g., ICC Case No. 6932, *Austrian Party v French Party* (1994) 121 *Journal du Droit International* 1065.

33 Y Derains & EA Schwartz, *A Guide to the New ICC Rules of Arbitration* (The Hague, Kluwer Law International, 1998), 12-13; WL Craig, WW Park & J Paulsson, *International Chamber of Commerce Arbitration* (3rd edn., Dobbs Ferry NY, Oceana, 2000) 313-14; E Schwartz, "International Chamber of Commerce: International Arbitration Rules", *INTALR* (1997), N1-5, N4.

34 Ibid., 317.

35 Craig, Park & Paulsson, 312; H Bagner, "Confidentiality – A Fundamental Principle in International Commercial Arbitration?" (2001) 18(2) *Journal of International Arbitration* 243.

36 Craig, Park & Paulsson, 314.

37 Derains & Schwartz, 264.

is doubtful that the tribunal can go beyond the scope of Article 20(7) in prohibiting disclosure.

48. In *Andersen Consulting v Arthur Andersen and Andersen Worldwide* (28 July 2000), the respondents claimed that the claimants had acted improperly by publicly disclosing the initiation of the arbitration and the circumstances that prompted it. According to a published commentary:

> "The arbitrator ruled that the Claimants had a legitimate interest in informing their clients of developments and paid scant attention to the widely proclaimed confidentiality of arbitration. It bears noting in this regard that the ICC Arbitration Rules do not expressly impose any general duty of confidentiality on the parties to an ICC Arbitration... The view that arbitral awards should be freely exposed to public scrutiny is steadily gaining ground... Andersen Consulting had to inform its numerous customers, who knew that the arbitration had been pending, of the outcome. It judged that this could best be done by publishing the entire award. This appears to have been a reasonable judgment."[38]

(ii) The London Court of International Arbitration

49. The London Court of International Arbitration (LCIA) is a significant private arbitration association. Article 19.4 of the LCIA Rules[39] provides "All meetings and hearings shall be in private unless the parties agree otherwise in writing or the Arbitral Tribunal directs otherwise." In contrast with the ICC Rules, Article 30.1 of the LCIA Rules contains a comprehensive confidentiality provision. It provides that unless the parties otherwise agree in writing, they...

> "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 the other party 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." (emphasis added).

This provision was added in 1998 by amendment to the rules, following the 1995 decision of the Australian High Court in the *Esso* case.[40]

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38 "The Andersen Arbitration" (2000) 10 *Am Rev. Int'l Arb.* 437, 439.

39 Available at http://www.lcia-arbitration.com/arb/uk.htm.

40 (1995) 183 CLR 10.

50. In addition, the LCIA will not publish any award or part of an award without the prior written consent of all the parties and the tribunal (Article 30.3).

(iii) The American Arbitration Association

51. Under Article 20(4) of the AAA Rules (effective 1 November 1998), hearings are private unless the parties agree otherwise or the law provides to the contrary.[41] An award may be made public only with the consent of all parties or as required by law: Article 27(4). Confidential information disclosed during the arbitration must not be divulged by the tribunal or the AAA Administration: Article 34. There is no provision requiring the parties to keep information relating to or disclosed in the arbitration confidential and so in the absence of a specific confidentiality agreement between the parties, the existence of an obligation of confidentiality will depend on whether it is implied under the *lex arbitri*.

(iv) The Stockholm Chamber of Commerce

52. The Rules of the Arbitration Institute of the Stockholm Chamber of Commerce[42] provide that the Institute and the arbitral tribunal respectively must maintain the confidentiality of the arbitration (Articles 9, 20(3)). These provisions are directed at the Institute and the tribunal rather than the parties.

(v) The CPR International Rules

53. The only major alternative to the UNCITRAL Arbitration rules for *ad hoc* arbitration currently available are the CPR Rules for Non-Administered Arbitration of International Disputes 2000. They are published by the Center for Public Resources Institute for Dispute Resolution, a major alternative dispute resolution organizations in the United States. The CPR International Rules provide for a broader scope of confidentiality than do many of the other leading sets of arbitration rules, including the UNCITRAL Rules. Rule 17 states:

> "Unless the parties agree otherwise, the parties, the arbitrators and the Neutral Organization shall treat the proceedings, any related disclosure and the decisions of the Tribunal, as confidential, except in connection with judicial proceedings ancillary to the arbitration, such as a judicial challenge to, or enforcement of, an award, and unless otherwise required by law or to protect a legal right of a

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41 Text in A Redfern & M Hunter, *Law and Practice of International Commercial Arbitration* (3rd edn, London, Sweet & Maxwell, 1999) 509.

42 Available at http://www.chamber.se/arbitration/english.

party. To the extent possible, any specific issues of confidentiality should be raised with and resolved by the Tribunal."[43]

(vi) The Permanent Court of Arbitration

54. The Permanent Court of Arbitration (PCA) was established in 1899 as the forerunner of modern dispute settlement arrangements. Its focus was initially on the confidential settlement of disputes between States by mediation, inquiry or arbitration.[44] The PCA itself is a secretariat, not a judicial body. As such, it has extended its scope more recently to cover, as well as interstate arbitration, mixed arbitration and even private arbitration.[45]

55. The PCA Optional Rules for Arbitrating Disputes Between Two States (1992) are based on the UNCITRAL Arbitration Rules with modifications to reflect the public international law character of interstate disputes. Hearings are held *in camera*, unless the parties agree otherwise: Article 25(4). The award may only be made public with the consent of the parties: Article 32(5). So far as the parties are concerned, there are no express confidentiality provisions in the PCA Rules.

56. The same provisions are contained in the PCA Optional Rules for Arbitrating a Dispute between Two Parties of Which Only One Is a State,[46] and for disputes where an international organization is a party.[47]

57. The PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment, which provide for mixed arbitration, were approved 19 June 2001 by the Administrative Council. They set out more elaborate rules to preserve confidentiality between the parties. Article 15(4) provides that a party may apply to the arbitral tribunal to have any information it wishes or is required to submit in the arbitration classified as confidential, setting out the reasons for its application. The arbitral tribunal shall determine "whether the information is to be classified as confidential and of such a nature that the absence of specific measures of protection in the proceedings would be likely to cause serious harm to the party or parties invoking its confidentiality. If the

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43 See RH Smit, "The Newly Revised CPR Rules for Non-Administered Arbitration of International Disputes" (2001) 18(1) *Journal of International Arbitration* 59.

44 Under the Hague Convention for the Pacific Settlement of International Disputes, 29 July 1899, arbitral proceedings were "only public if it be so decided by the Tribunal, with the assent of the parties" (Article 41), although the Award was to be read in public (Article 53). The equivalent provisions of the further Convention of 18 October 1907 are Articles 66 and 80.

45 See Permanent Court of Arbitration, *Basic Documents* (The Hague, 1998) for the various texts, which are also available at http://www.pca-cpa.org.

46 PCA Optional Rules for Arbitrating Disputes between Two Parties only one of which is a State (1993), Articles 25(4), 32(5).

47 PCA Optional Rules for Arbitration Involving International Organizations and States (1996), Articles 25(4), 32(5); PCA Optional Rules for Arbitration between International Organizations and Private Parties (1996), Articles 25(4), 32(5).

tribunal so determines, it shall decide and communicate in writing to the parties and the Registry under what conditions and to whom the confidential information may in part or in whole be disclosed and shall require any person to whom the confidential information is to be disclosed to sign an appropriate confidentiality undertaking".

(vii) The Iran-US Claims Tribunal

58. The Iran-US Claims Tribunal was established pursuant to the Algiers Accords in order to settle the hostages crisis, as well as to resolve pending disputes between nationals of one State and the other. The Tribunal also has jurisdiction in disputes between Iran and the United States concerning the interpretation and application of the Algiers Accords. Since its establishment in 1981 it has had a significant caseload.[48]

59. The Tribunal's Rules are based on the UNCITRAL Rules with amendments. Article 25(4) provides that hearings shall be *in camera*. On the other hand, once issued, all awards and decisions are to be made available to the public: Article 32(5).[49] The parties can request the Tribunal to decide that it will not make public the entire award or other decision, but will instead publish a redacted version removing the names of the parties, other identifying facts and trade or military secrets. There are no provisions specifically addressing the confidentiality of information pertaining to or disclosed in proceedings before the Tribunal. Moreover, according to one commentator, there has been no particular pattern in Iran-US tribunal decisions granting confidentiality under Article 32(5), so they are of little use in developing guiding principles in this area.[50]

(viii) Arbitration under the WIPO Rules

60. The World Intellectual Property Organization (WIPO) is a UN specialized agency concerned with the harmonization and implementation of intellectual property standards and rules. Because of the context in which highly sensitive trade secrets and proprietary information is involved, the WIPO Rules[51] contain comprehensive and detailed confidentiality provisions. Under Article 52 a party may apply for a determination by the tribunal that certain information be classified as confidential, provided the information is in the possession of the party, not accessible to the public, of commercial, financial or industrial significance, and is treated as confidential by the party possessing it. Hearings will be held in private,

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48 See CN Brower & JD Brueschke, *The Iran-United States Claims Tribunal* (Kluwer, The Hague, 1998).

49 Tribunal decisions and awards have been widely published: see, e.g., *Iran-U.S. Claims Tribunal Reports* (vols. 1-33).

50 JJ Van Hof in *Commentary on the UNCITRAL Rules – Their Application by the Iran-U.S. Claims Tribunal* (Nijhoff. The Hague, 1991), 224-5.

51 See Redfern & Hunter (3rd edn) 586.

unless the parties agree otherwise (Article 53). In accordance with Articles 73 and 75, the parties (who are usually commercial competitors) are required to maintain confidentiality even as to the existence of the arbitration: they may not unilaterally disclose the existence of the arbitration to any third party except to the extent necessary in connection with a court challenge to the arbitration or an action for enforcement of an award, or unless required to do so by law or by a competent regulatory body. Disclosure is allowed only to the extent legally required and details of the disclosure must be provided to the other party and the tribunal. Notwithstanding these requirements, a party may disclose to a third party the names of the parties to the arbitration and the relief requested for the purpose of satisfying any obligation of good faith or candor owed to that third party.

61. In addition, under Article 74 any documentary or other evidence given by a party or a witness in the arbitration must be treated as confidential and, to the extent that it describes information not in the public domain, it must not be used or disclosed to any third party by a party whose access to that information arises exclusively as a result of its participation in the arbitration for any purpose, without the consent of the parties or order of a competent court.

62. The WIPO Center and the arbitrator must maintain the confidentiality of the arbitration, the award and, to the extent that they describe information that is not in the public domain, any documentary or other evidence disclosed during the arbitration, except to the extent necessary in connection with a court action relating to the award, or as otherwise required by law, except that the Center may include information concerning the arbitration in any aggregate statistical data that it publishes concerning its activities, provided that such information does not enable the parties or the particular circumstances of the dispute to be identified.[52]

(b) The Existence of an Implied Obligation of Confidentiality

63. In the absence of express provisions in the arbitration rules (such as those of WIPO, the CPR International Rules or, since 1998, the LCIA), the question is whether the parties to a consensual arbitration are under an implied obligation of confidentiality as to the pleadings or proceedings. This has been much discussed in the case-law and literature, as the following summary review demonstrates.

64. In *U.S. v Panhandle Eastern Corp*,[53] the United States sought production of documents from Panhandle which related to an ICC arbitration to which the Algerian national oil company was a party. The discovery request was comprehensive, seeking all documents including briefs, correspondence and other papers filed with or submitted to the arbitrators, or their delegates, communications

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[52] See WIPO Rules, Article 76. See further H Smit, "Confidentiality: Articles 73 to 76" (1998) 9 *Am. Rev. Int'l Arb.* 233.

[53] (1988) 118 FRD 346 (DC, Delaware).

between the defendants, depositions or other witness statements, transcripts of the hearings, proposals to settle and inter-company documents. Panhandle refused to produce the arbitration documents unless the U.S. agreed to a protective confidentiality order, agreeing not to copy or take notes from the documents. Another defendant, PEPL, also sought a protective order for the confidentiality of documents submitted in the arbitration.

65. The Court noted that under the Federal Rules of Civil Procedure, a party may be granted a protective order only if it can show a good cause by demonstrating, through specific examples rather than broad-sweeping allegations, a particular need for protection.[54] The Court found that PEPL did not meet its burden of showing good cause, as it relied only on the argument that the ICC Rules required the documents to be kept confidential and that disclosure would cause economic injury. The Court found that the ICC Rules did not lay down any general obligation of confidentiality for the parties, nor was there a confidentiality agreement between them.

66. In *Esso Australia Resources Ltd v Plowman*,[55] a majority of the High Court of Australia held that there was in the circumstances no implied obligation of confidentiality in respect of a consensual commercial arbitration. Esso had entered into an arbitration with two public utilities, GFC and SEC, concerning proposed increases in prices of gas under their supply contract. Before the arbitration was completed, the Victorian Minister for Energy and Minerals brought an action against all the parties seeking a declaration that the information disclosed in the arbitration was not subject to any obligation of confidence. Mason CJ, giving the majority judgment, noted that the arbitration was "private in the sense that it is not open to the public". He preferred to see "the private character of the hearing as something that inheres in the subject matter of the agreement to submit the disputes to arbitration rather than attribute that character to an implied term".[56] However, he denied the existence of any broader obligation of confidentiality, pointing out that no confidentiality obligation attached to witnesses, that the award could become public in court proceedings relating to the arbitration and that disclosure may be required, for example, by an insurance policy or by legislation. For all these reasons, he held that, in Australia, confidentiality is not an essential attribute of private arbitration "imposing an obligation on each party not to disclose the proceedings or documents and information provided in and for the purposes of the arbitration".[57] Further, no term of confidentiality needed to be implied into the arbitration agreement to give business efficacy to the contract.[58] On the other hand he accepted that an obligation of confidentiality is owed in respect of documents

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54 Ibid., 349.
55 (1995) 183 CLR 10.
56 Ibid., 26.
57 Ibid., 29-30.
58 Ibid., 30-31.

produced compulsorily under a discovery order by the tribunal (by analogy with the same rule applying in litigation before a court): again, however, that obligation is subject to the public's legitimate interest in obtaining information about the affairs of public authorities.[59]

67. Toohey J, dissenting, upheld an implied term of confidentiality in commercial arbitration agreements, on the basis that "no sharp distinction can be drawn between privacy and confidentiality in this context. They are, to a considerable extent, two sides of the same coin. ...surely [privacy] exists only in order to maintain the confidentiality of the dispute..."[60] However, even he denied the existence of any general obligation of confidentiality: it was "necessary to focus on particular categories of documents and information",[61] and there could be a public interest exception to the principle of confidentiality.

68. *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* was heard by the Court of Appeal of New South Wales soon after judgment in *Esso* was delivered.[62] It concerned the scope of the court to review procedural orders given by an arbitrator concerning confidentiality. The claimant sought a review of the order, in order to inform the public of matters covered by the arbitration which were potentially relevant to public safety. The Court declared that the arbitrator did not have the power to give the directions ordered. Kirby P. observed:

> "[w]ere the law otherwise, a question would be raised as to how the Commonwealth, with its large constitutional and legal rights and duties could ever submit to a private arbitration the result of doing which might be to surrender its governmental rights and duties completely to procedural orders of an arbitrator which were effectively if not entirely unreviewable."[63]

The Court of Appeal was also prepared to limit the ambit of confidentiality with respect to a party's own documents, even in normal situations when the public interest is not invoked: it was not prepared...

> "to cast the net of confidentiality protection so wide that it embraces a party's own documents perhaps prepared for the purposes of the arbitration but having a wider interest and utility."[64]

69. Unlike *Esso* and *Cockatoo Dockyard*, the leading English case, *Ali Shipping Corporation v Shipyard Trogir*,[65] concerned an arbitration between private

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59 Ibid., 32-33. See also Brennan J (concurring), ibid., 36.
60 Ibid., 42.
61 Ibid., 46.
62 (1995) 36 NSWLR 662.
63 (1995) 36 NSWLR 662, 680.
64 Ibid.

commercial parties. In an earlier arbitration Ali had secured an award against the shipyard for failing to build a ship in accordance with the contract. The shipyard did not pay but reactivated arbitration proceedings against three of Ali's sister companies (all one-ship companies), which also had shipbuilding contracts with the shipyard, for failing to meet the first installment payments of their respective contracts. The shipyard intended to rely on certain documents (the written opening submissions of Ali, the award and reasons, and transcripts of oral evidence) and the reasoning of the award of the arbitrator to rebut contentions put forward by the three companies and to support a plea of issue estoppel. Ali sought and obtained an injunction to prevent disclosure of the materials, arguing that use of the material would amount to a breach of the shipyard's implied obligation of confidentiality. The shipyard appealed.

70. At first instance, Clarke J held that the injunction would be discharged in so far as there was no need to imply a term requiring confidentiality into the contract between Ali and the shipyard in respect of the sister companies because the companies were so closely related, and so there was no reason as a matter of business efficacy why the shipyard could not pass on information relating to Ali to the arbitrators in a dispute with those companies. However, a term should be implied requiring confidentiality vis-à-vis unrelated third parties.

71. The Court of Appeal overturned Clarke J's decision, holding that a term of confidentiality in an arbitration clause was implied by law as a necessary incident of a definable category of contractual relationship, i.e. private commercial arbitration.[66] Potter LJ (delivering the judgment of the Court) continued:

> "While acknowledging that the boundaries of the obligation of confidence which thereby arise have yet to be delineated... the manner in which that may best be achieved is by formulating exceptions of broad application to be applied in individual cases...
>
> As to those exceptions, it seems to me that, on the basis of present decisions, English law has recognized the following exceptions to the broad rule of confidentiality: (i) consent i.e. where disclosure is made with the express or implied consent of the party who originally produced the material; (ii) order of the Court, an obvious example of which is an order for disclosure of documents generated by an arbitration for the purposes of a later Court action; (iii) leave of the Court. It is the practical scope of this exception i.e. the grounds on which such leave will be granted, which gives rise to difficulty. However, on the analogy of the implied obligation of secrecy between banker and customer, leave will be given in respect

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65 [1998] 2 All ER 136 (CA). See also *Dolling-baker v Menett* [1990] 1 WLR 1205 (CA).

66 Ibid., 146-147. It is worth noting that counsel for the shipyard conceded the existence of an implied term of confidentiality.

> of (iv) disclosure when, and to the extent to which, it is reasonably necessary for the protection of the legitimate interests of an arbitrating party. In this context, that means reasonably necessary for the establishment or protection of an arbitrating party's legal rights vis-à-vis a third party in order to found a cause of action against that third party or to defend a claim (or counterclaim) brought by the third party...
>
> ...Although to date this exception has been held applicable only to disclosure of an award, it is clear ... that the principle also covers pleadings, written submissions, and the proofs of witnesses as well as transcripts and notes of the evidence given in the arbitration..."[67]

Potter LJ also recognized an exception for cases where disclosure was in the "interests of justice", citing an earlier case[68] where it was held that a party to court proceedings was entitled to call upon expert evidence from an earlier arbitration where the views of the expert were inconsistent with those from the earlier arbitration. He expressly distinguished this public interest exception from the "wider issues of public interest" contested in the *Esso* case.[69] It was not necessary to address the *Esso* public interest exception in the case before him.

72. In the event the Court rejected the claim that disclosure of the documents was "reasonably necessary" as there was no prospect of success of a plea of issue estoppel on the basis of the materials before the Court.[70]

73. It should be noted that in 1996, England introduced a new Arbitration Act, after careful consideration and consultation. It is significant that, despite the *Esso* decision and its divergence from previous English case-law, it was decided not to incorporate any rules or principles relating to privacy and confidentiality in arbitrations. Lord Justice Saville explains the reasoning (which reflects the reasoning of Mason CJ's majority judgment in *Esso*) as follows:

> "The reason was that this is a developing topic and it is simply not possible to frame more than the most general principles. It would have been possible to say that arbitrations and arbitration proceedings are private and confidential; but between whom? The

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67 Ibid., 651-652.

68 *London & Leeds Estates Ltd* v *Paribas Ltd (No.2)*, [1995] 2 E.G. 134.

69 [1998] 2 All ER 136, 147.

70 For a comparative discussion of the *Ali Shipping* and *Esso* cases, see P Sheridan, "Privacy and Confidentiality – Recent Developments: the Divergence Between English and Australian Law Confirmed" (1998) 1 *Int. A.L.R.* 171. More recently the Privy Council has implied into a strict confidentiality agreement an exception allowing the successful party to disclose the award as necessary in a subsequent arbitration in order to enforce or defend its rights: *Associated Electric & Gas Insurance Services Ltd v European Reinsurance Co of Zurich*, Privy Council, 30 January 2003.

> present English law appears to rest the proposition that arbitration is private and confidential on the basis of an implied term of the arbitration agreement, but if this is so, those who are not bound by that agreement can hardly be subject to the obligation. Again, who is to be treated as a party? In the context of much commercial arbitration, the contest is in truth between insurers, but they are not parties. Are they, the people who are paying, not to be kept informed about the arbitration? What about a company that is party to an arbitration agreement? Must it keep what is going on confidential and thus (in certain cases at least) keep from its shareholders information which would be needed in order to give a fair and true picture of the financial position of the company, which they are required to do by law? What about government bodies who are arbitrating? Does not the public have a legitimate interest in what is going on? ... the best we could have done would be to have stated some general rule about privacy and confidentiality and made it subject to 'all just exceptions'. That, of course, would have told the reader nothing at all."[71]

74. In 2000, the Swedish Supreme Court adopted a similar position to that taken by the Australian High Court in the *Esso* case. In *Bulgarian Foreign Trade Bank Ltd v AI Trade Finance Inc*,[72] the claimant procured the publication of a tribunal's award confirming jurisdiction. The Bank, the unsuccessful respondent to that award, sought to have it set aside by the tribunal on grounds of alleged breach of confidentiality; the tribunal refused and issued a final award. The Supreme Court upheld the award, denying the existence of any implied obligation of confidentiality. The Supreme Court noted that the recent Swedish Arbitration Act of 1999 did not incorporate any rule on confidentiality, that no opinion in the Swedish legal literature could be found on the subject, and that a comparative review of other jurisdictions produced no international consensus that could assist the Court.[73]

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71 (1997) 13 *Const. L.J.* 410-17, 410-11.

72 Stockholm City Court decision of 10 September 1998 reproduced (1998) 13(1) *Mealey's International Arbitration Report* A-1; Svea Court of Appeal decision of 30 March 1999 reproduced in (1999) 14(4) *Mealey's International Arbitration Report* A-1.

73 Fracassi, 214. See also C Romander, "Confidentiality in Swedish Arbitration Proceedings", para. 3.4., http://www.chamber.se/arbitration/shared_files/articles/arkiv/confidentiality_sve.html; MJ Goldstein & AK Bjorklund, "International Commercial Dispute Resolution", (2002) 36 *Int'l Lawyer* 401, 415.

75. A recent review of domestic arbitration legislation[74] showed that only the New Zealand legislation – the Arbitration Act 1996 – has an express provision requiring confidentiality of the arbitration.[75]

76. Following this trend, the preponderant view in the literature is that it cannot be assumed that there is any general implied obligation of confidentiality in arbitration,[76] although some writers continue to favour the older approach.[77]

(c) Confidentiality and Freedom of Information Legislation

77. In contractual arbitration it is recognised that a party to arbitration may be subject to legal obligations of disclosure (e.g. an insured person under an insurance contract, a company in relation to a corporate regulator). Evidently no contractual obligation of non-disclosure, express or implied, can prevail against an obligation imposed by statute, and this would be true for government agencies which are parties to arbitration in respect of their obligations under freedom of information legislation.[78] The position in international arbitration is not necessarily the same.

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[74] A Brown, "Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration", (2001) 16 *Am. U. Int'l L. Rev* 969, 991-992.

[75] The Arbitration Act 1996 (NZ), s. 14 provides:

"(1) Subject to subsection (2), an arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that the parties shall not publish, disclose, or communicate any information relating to arbitral proceedings under the agreement or to an award made in those proceedings.

(2) Nothing in subsection (1) prevents the publication, disclosure, or communication of information referred to in that subsection---

(a) If the publication, disclosure, or communication is contemplated by this Act; or

(b) To a professional or other adviser of any of the parties."

[76] F Fracassi, (2001) 2 *Chicago J. Int'l L.* 213; GB Born, p. 9; J Reed Haynes, "International Arbitration may not be as confidential as you think or want", in SN Frommel & BAK Rider eds., *Conflicting Legal Cultures in Commercial Arbitration – Old Issues and New Trends* (1999), p. 99; JJ Coe Jr., *International Commercial Arbitration: American Principles and Practice in a Global Context* (1997), pp. 179, 261; J Paulsson & N Rawding, "The Trouble With Confidentiality", (1995) 11 *Arbitration International* 303; C Pearce & J Coe Jr. "Arbitration under NAFTA Chapter 11: Some pragmatic reflections upon the first case filed against Mexico", (2000) 23 *Hastings Int'l & Comp L. Rev.* 311; J Epstein, "The Use of Comparative Law in Commercial International Arbitration and Commercial Mediation" (2001) 75 *Tul. L. Rev.* 913; L Yves Fortier, "The Occasionally Unwarranted Assumption of Confidentiality", (1999) 15 *Arbitration International* 131, and the expert reports of Julian Lew and Hans Smit in the *Esso* case, excerpted in (1995) 11 *Arbitration International*, 283, 297. See also, H Smit, "Note", (1995) 11 *Arbitration International* 299, 300.

[77] See, e.g., Redfern & Hunter (3rd edn) 27-30; M Odams de Zylva & R Harrison eds., *International Commercial Arbitration – Developing Rules for the New Millenium* (2000), pp. 57 (T Allen), 191 (V Smith); Stewart Boyd, Expert Report (for the applicant) in the *Esso* case, reported in *Arbitration International* 11 (1995) 265, 267, 270; P Sanders, *Quo Vadis Arbitration? Sixty Years of Arbitration Practice* (1999), p. 4-6.

[78] For a discussion of freedom of information regimes around the world see RS Baxter, "Public Access to Information Held by Government" [1997] *Journal of Business Law* 199. Since Baxter's article, England has passed its Freedom of Information Act 2000.

For example the procedural obligations of the parties to an ICSID arbitration arise under the ICSID Convention and Rules, and in principle a State may not a rely on its own domestic law as a ground for refusal to comply with its international obligations.[79] On the other hand, the existence of domestic law requirements on a party to disclose information is a relevant factor for an international tribunal – whether the party is a company required to disclose information to shareholders or auditors, or a government agency bound by freedom of information legislation.

78. The latter issue arose in the *Mondev* case. The applicant objected to the release by the United States under its Freedom of Information Act (FOIA) of the United States' written submissions to the Tribunal, as well as of correspondence with the claimant's counsel and the Tribunal. The position is described as follows in the Tribunal's final award of 11 October 2002:

> "29. On 13 December 2000, the Respondent informed the Tribunal that it had received and intended to comply with a request under the FOIA for the release of certain of the Respondent's written submissions to the Tribunal and of certain letters that it had addressed to the Claimant and the Tribunal. By letter of 28 December 2000, the Claimant informed the Tribunal that it objected to such release and stated its grounds for that objection. Each party subsequently made written submissions in support of its contentions regarding such proposed release. On 25 January 2001, the Tribunal issued an order and interim decision in which it expressed the view that in general terms the ICSID (Additional Facility) Rules did not purport to qualify statutory obligations of disclosure which might exist for either party. *Since it appeared that the FOIA created a statutory obligation of disclosure for the Respondent*, the Tribunal rejected the Claimant's request for the Tribunal to prohibit the Respondent from releasing its submissions and correspondence in the case pursuant to the FOIA."[80]

79. As a member of the *Mondev* Tribunal, the author should be cautious in commenting on the decision. Two points may, however, be made. First (as already noted), the decision predates the FTC Interpretation of 31 July 2001, which is now the governing document in terms of information submitted to or issued by a Tribunal under Chapter 11. Secondly, the Tribunal did not purport to determine the scope of FOIA obligations, hence the use of the term "appeared" in the above passage. Evidently it is a matter for the United States authorities responsible for

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[79] See ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001), annexed to GA Resolution 56/83, 12 December 2001, Article 3 & commentary, in J Crawford, *The International Law Commission's Articles on State Responsibility* (CUP, Cambridge, 2002), 86-90.

[80] *Mondev International Ltd. v United States of America*, Award of 11 October 2002, www.state.gov/documents/organization/14442.pdf, in press in 6 ICSID Reports (emphasis added).

the FOIA to determine the scope of its provisions and of the various exceptions. Nonetheless, the Tribunal was evidently sensitive to the requirements of the United States under FOIA, which pre-existed NAFTA and which were themselves sought to strike a balance between citizens' access to information and issues of commercial confidentiality.

80. A somewhat different approach was taken by an UNCITRAL Tribunal in *Pope & Talbot, Inc v Canada.* There the applicant sought a declaration that Canada not release documents, including transcripts of hearings, which it had stated it would release under the Access to Information Act (ATIA).[81] The applicant claimed that the publication would violate an earlier procedural order (Order No. 5) on confidentiality, as well as the UNCITRAL Rules themselves. In an Interim Order dated 5 March 2002, the Tribunal requested Canada to delay releasing the documents so as to allow the Tribunal to consider the issue in light of further Canadian documents not yet received by all members of the Tribunal. Canada responded by pointing out that it had no authority under the Act to grant this request. The Tribunal then ruled (on an interim basis, until it could make a final decision pending receipt of the Canadian documents) that certain identified documents were confidential within the meaning of its previous confidentiality order and that release, in some cases, would also breach Canada's obligations under NAFTA. The Tribunal expressed the view that "simple fairness necessitate[s] an interim ruling on the Investor's request so as to permit it to have at least some opportunity to seek relief from the Canadian courts, if it so desires".[82]

81. In further proceedings, Canada denied that the documents came under any exceptions to disclosure under the ATIA, asserted that Order No. 5 allowed their release under Canadian domestic law provided 30 days prior notice was given to the other party, and argued that the UNCITRAL Rules did not prevent disclosure. In any event, in its view, neither Order No. 5 nor the UNCITRAL Rules "could purport to affect or modify statutorily mandated disclosure requirements." Canada relied *inter alia* on the FTC's Interpretation of 31 July 2001.

82. In its subsequent Decision and Order, given on 11 March 2002, the *Pope & Talbot* Tribunal ruled that the documents in question were confidential in terms of Order No. 5 and that both parties were obliged to keep them confidential. In particular it relied on the general power of a Tribunal under Article 15 of the UNCITRAL Rules to "conduct the arbitration in such a manner as it considers appropriate". It stressed that Order No. 5 had allowed publication of the pleadings, but with confidential business information to be redacted. To the extent that Canada claimed Order No. 5 implicitly recognized disclosure pursuant to domestic law, the Tribunal held that the Order contemplated that disputes over release of documents will be determined by the Tribunal. Evidently, the Tribunal envisaged

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81 R.S.C. 1985, c. A-1.

82 Para. 6, Interim Order, 5 March 2002, available at www.naftaclaims.com.

that specific orders for confidentiality under Chapter 11 would prevail over FOIA legislation. The Tribunal distinguished the confidentiality ruling in *Mondev International Ltd. v United States* on the ground that there was no confidentiality order in that case.

83. In fact the ATIA itself has a number of exceptions to disclosure, which might have covered at least some of the documents sought to be protected in *Pope & Talbot*. For example, if the information Canada sought to disclose in *Pope & Talbot* had been genuinely confidential business information, it would apparently be protected from disclosure under ATIA s. 20.

84. Evidently, in the context of international arbitration there is some potential for conflict between the authority of the tribunal to deal with individual issues of confidentiality, on the one hand, and the domestic law obligations of NAFTA Parties under freedom of information legislation to release documents in their possession, on the other hand. In practice (as in the *Mondev* case) it will usually be possible to resolve difficulties that arise in the particular case, e.g. by redaction or by the concurrent application of exceptions to disclosure by the tribunal and national authorities. In such cases there is no presumption of conflict or inconsistency. It is true that problems did arise in the *Pope and Talbot* case, but there were special features in that case, and I do not believe such conflict represents the norm.

(d) Summary

85. I would summarize this review of the international experience as follows.

86. First, it is evident that the general position with respect to confidentiality and privacy in international commercial arbitration is changing. There may be powerful justifications for confidentiality of at least some information and evidence produced for the purposes of international arbitration, and tribunals need to be able to deal with such cases as a normal aspect of their procedural powers.[83] On the other hand, especially in cases where the state is a party, the development is towards greater transparency, and sweeping assumptions of confidentiality are no longer justified.

87. Of the arbitral body rules and domestic arbitration legislation reviewed, only the LCIA Rules and the WIPO Rules have provisions requiring the parties to keep confidential information relating to and disclosed in the arbitration, unless agreed otherwise. Of domestic arbitration legislation, only the New Zealand legislation has a provision requiring confidentiality of the arbitration. Other arbitral rules and domestic laws do not have an express confidentiality provision

[83] E.g, UNCITRAL Rules, Article 15(1); LCIA Rules, Articles 14.2, 22; ICSID Rules, Article 20; ICSID (Additional Facility) Rules, Article 27; ICC Rules, Article 15(1).

requiring the parties to keep the arbitration and information prepared for or disclosed therein confidential.

88. Treatment of the issue by domestic courts varies between jurisdictions. There are relatively few cases, and these depend on their own facts and on the terms of the agreement (if any) between the parties as to confidentiality. The principal difference between jurisdictions is whether they treat all information disclosed in an arbitration as *prima facie* confidential but subject to exceptions (e.g., England) or as disclosable subject to exceptions (e.g. the United States, Australia, Sweden). In relation to specific items of information, there may not be much difference in practice between the two approaches.

89. Secondly, if arbitration rules seek to impose *general* limitations on disclosure of pleadings or evidence, they do so expressly – as with the WIPO Rules or the LCIA Rules (after their amendment in 1998).[84] In the light of this practice, there is no room for any implication that decisions or awards, or for that matter pleadings, are permanently protected by confidentiality. This confirms the correctness of the position taken by the Free Trade Commission in ruling that NAFTA does not tacitly impose any general obligation of confidentiality on the disputing parties to a Chapter 11 arbitration.

90. Thirdly, the comparative experience with human rights does not suggest that the privacy of consensual arbitration, or the confidentiality of pleadings and awards, infringes the freedom of expression or of the press. So far it has not been suggested that international human rights obligations require that the press or third parties be entitled to attend arbitration proceedings or to have access to pleadings and evidence in such proceedings. The only case before the Strasbourg organs under the European Court of Human Rights appears to be *Scarth v United Kingdom*,[85] which concerned court-annexed arbitration and the specific right to a public hearing in Article 6(1) of the European Convention.[86] It has not to my knowledge been suggested (still less decided) that a domestic or international arbitration tribunal is covered by Article 6, although there is no doubt that proceedings before domestic courts in relation to arbitrations are covered.[87] In the present case the claim is brought under the provision of the Canadian Charter dealing with freedom of expression and the press – i.e., the equivalent to Article 10

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[84] The same is true, incidentally, of pleadings before the International Court of Justice, which are expressed to be confidential until the start of the oral proceedings: International Court of Justice, Rules, Art. 53(2). In stark contrast with NAFTA, not even States Parties seeking to intervene in International Court proceedings are entitled as of right to copies of the pleadings: Article 53(1). Cf. *Case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Application by Philippines for Permission to Intervene)*, judgment of 23 October 2001, paras. 61-62.

[85] *Scarth v United Kingdom (Application no. 33745/96)*, 21 October 1998.

[86] Article 6(1) of the European Convention requires "a fair and public hearing... by an independent and impartial tribunal established by law", both in civil and criminal cases.

[87] Cf. *Mousaka Inc v Golden Seagull Maritime Inc.* [2001] All ER (D) 418.

of the European Convention.[88] But under Article 10 of the Convention, in no case to date has the state been found to have a positive obligation to provide information. Rather this has been construed as a "negative right": "...the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him."[89]

Part IV. Conclusions

91. In general, neither international arbitration tribunals nor the domestic courts of a growing number of countries consider confidentiality as a necessary requirement of international arbitration. Rather it is a matter to be dealt with in accordance with the relevant arbitral rules and any agreement of the parties. Where the arbitral rules are silent and the parties do not agree, international arbitration tribunals have the power to rule on confidentiality by virtue of their general power to control the arbitral procedure.

92. Under the ICSID, Additional Facility and UNCITRAL Rules, NAFTA tribunals can rule on confidentiality where the parties do not agree and one party seeks to maintain the confidentiality of documents or pleadings prepared for the purpose of or submitted in the arbitration. In doing so, NAFTA Tribunals are required to bear in mind the distinction, authoritatively drawn by the FTC in its Interpretation of 31 July 2001, between the limited specific exceptions provided for in the rules and the imposition of a general duty of confidentiality. Decisions given by NAFTA Tribunals on this point before 31 July 2001 may have to be reconsidered in light of the FTC's Interpretation.

93. Turning to the specific questions raised in the Applicant's Notice of Application, the material reviewed above leads to the following conclusions.

(a) The requirement of *in camera* hearings

94. The ICSID, Additional Facility and UNCITRAL Rules all state that hearings are to be held *in camera*, i.e., they are not open to the public without the consent of the parties and the tribunal. In practice, *in camera* hearings are virtually universal in international and domestic arbitration. They do not in themselves

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[88] Article 10(1) of the European Convention deals with the right to freedom of expression, including "the right to receive and impart information and ideas without interference with public authority and regardless of frontiers".

[89] *Leander v Sweden* (1987) 9 EHRR 433 at para. 74, reaffirmed in *Gaskin v UK* (1989) 12 EHRR 36 at para. 52; *Guerra v Italy*, February 19, 1998, paras. 53-54. See also *McGinley and Egan v UK* (1998) 27 EHRR 1 at paras. 85-86. See also the review by N Jayawickrama, *The Judicial Application of Human Rights Law. National, Regional and International Jurisprudence* (CUP, Cambridge, 2002) 682-685.

imply that members of the public are not entitled to access to information about the proceedings.

95. In the case of NAFTA, the other NAFTA Parties are entitled to full information about pending proceedings, to a copy of the pleadings, and to attend hearings. By virtue of the FTC's Interpretation of 31 July 2001, the NAFTA Parties have in turn undertaken to make available to the public in a timely manner "all documents submitted to, or issued by, a Chapter 11 tribunal", subject to reasonable and limited exceptions. This provides much more by way of public information than is normally available in other forms of arbitration, national or international.

96. As to transcripts of hearings, it has been held that if the hearings themselves are not public, confidentiality extends to transcripts of the hearings. This is however merely an inference from the provisions dealing with the hearings themselves; it is not an express provision. At least some tribunals have held that this is without prejudice to statutory obligations of disclosure, e.g. under freedom of information legislation. In any event, this restriction does not preclude a party making statements or giving information about the course of the proceedings – subject only to the tribunal's powers to avoid measures tending to prejudice the resolution of the dispute.

(b) Publication of Awards

97. As to Tribunal decisions and awards, even before the FTC's Interpretation, Canada was entitled to publish decisions and awards of NAFTA tribunals without the consent of the other party. In fact all decisions and awards involving Canada are in the public domain.

98. By virtue of the FTC Interpretation of 31 July 2001, the NAFTA Parties including Canada have undertaken to publish in a timely manner all documents (including orders, decisions and awards) issued by a Chapter 11 tribunal. This is a valid undertaking which is fully consistent with NAFTA.

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28 March 2003