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Settlement of commercial disputes: Preparation of rules of uniform law on transparency in treaty-based investor-State dispute settlement

Note by the Secretariat

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I. Introduction

1. At its forty-first session (New York, 16 June-3 July 2008), the Commission agreed that the topic of transparency in treaty-based investor-State arbitration was worthy of future consideration and should be dealt with as a matter of priority immediately after completion of the revision of the UNCITRAL Arbitration Rules. As to the scope of such work, the Commission agreed by consensus on the importance of ensuring transparency in investor-State dispute resolution. The Commission was of the view that, as noted by the Working Group at its forty-eighth session (A/CN.9/646, para. 57), the issue of transparency as a desirable objective in investor-State arbitration should be addressed by future work. As to the form that any future work product might take, the Commission noted that various possibilities had been envisaged by the Working Group (ibid., para. 69) in the field of treaty-based arbitration, including the preparation of instruments such as model clauses, specific rules or guidelines, an annex to the UNCITRAL Arbitration Rules in their generic form, separate arbitration rules or optional clauses for adoption in specific treaties. The Commission decided that it was too early to make a decision on the form of a future instrument on treaty-based arbitration and that broad discretion should be left to the Working Group in that respect. With a view to facilitating consideration of the issues of transparency in treaty-based arbitration by the Working Group at a future session, the Commission requested the Secretariat, resources permitting, to undertake preliminary research and compile information regarding current practices. The Commission urged member States to contribute broad information to the Secretariat regarding their practices with respect to transparency in investor-State arbitration.[1] Replies by States to a questionnaire circulated by the Secretariat on States' practices with respect to transparency in investor-State arbitration pursuant to the request of the Commission can be found in document A/CN.9/WG.II/WP.159 and its addenda (see paragraph 6 below).

2. At its forty-third session (New York, 21 June-9 July 2010), with respect to future work in the field of settlement of commercial disputes, the Commission entrusted the Working Group with the task of preparing a legal standard on the topic of transparency in treaty-based investor-State arbitration.[2] Support was expressed for the view that the Working Group could also consider undertaking work in respect of those issues that arose more generally in treaty-based investor-State arbitration, and that would deserve additional work. The prevailing view, in line with the decision previously made by the Commission, was that it was too early to make a decision on the precise form and scope of a future instrument on treaty-based arbitration and that the mandate of the Working Group should be limited to the preparation of rules of uniform law on transparency in treaty-based investor-State arbitration. However, it was agreed that, while operating within that mandate, the Working Group might identify any other topic with respect to treaty-based investor-State arbitration that might also require future work by the Commission. It

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[1] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* (A/63/17), para. 314.

[2] Report of the 43rd session of the Commission, in preparation.

was agreed that any such topic might be brought to the attention of the Commission at its next session, in 2011.[3]

3. An international investment agreement is a treaty between States for the reciprocal encouragement, promotion and protection of investments. International investment agreements include, for example, bilateral treaties for the promotion and protection of investment (or bilateral investment treaties ("BITs")), treaties for the avoidance of double taxation (or double taxation treaties), other bilateral and regional trade and investment agreements as well as various multilateral agreements that contain a commitment to liberalize, protect and/or promote investment. The provisions contained in chapters on investment protection of international investment agreements typically cover the following areas: scope and definition of investment and the investor, rules on admission and establishment referring either to the domestic laws and regulations of the host State or to special rights of establishment granted by the treaty, most-favoured treatment provisions and protection provisions such as fair and equitable treatment, compensation in the event of expropriation or damage to the investment, guarantees of free transfers of funds, stabilization clauses and mechanisms for the settlement of both State-State and investor-State disputes. There are at present more than 2,500 international investment agreements.[4]

4. Investor-State dispute settlement provisions in international investment agreements aim at establishing a mechanism for the settlement of disputes allowing an investor from a State party to a treaty to submit to international arbitration a claim against another State party for the breach of an obligation under the treaty. International investment arbitration is one of the fastest growing areas of international dispute settlement. The United Nations Conference on Trade and Development (UNCTAD) reported that, as of the end of 2009, 350 treaty-based investment arbitration claims had been initiated. Seventy per cent of treaty-based investor-State claims had been filed since 2000 (see annex I).[5]

5. International investment agreements traditionally did not include transparency provisions. A majority of international investment agreements, particularly bilateral investment treaties were concluded in the 1990s and the issue of procedural transparency was not discussed at that time. Furthermore, many international investment agreements refer to mechanisms inspired by international commercial arbitration as the main option for investor-State dispute settlement, which is by nature based on confidentiality of the proceedings. With the increase of cases involving investor-State disputes under international investment agreements, and particularly with the first cases under the North American Free-Trade Agreement (NAFTA) in early 2000, issues such as availability of information regarding cases,

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[3] Ibid.

[4] For an online compilation of all international investment agreements, see the database of the United Nations Conference on Trade and Development (UNCTAD), available on 28 July 2010 at http://www.unctadxi.org/templates/Startpage____718.aspx.

[5] United Nations Conference on Trade and Development, International Investment Arrangements: World Investment Report, 2010, United Nations publication, Sales No. E.10.II.D.2.; at p. 84, available on 28 July 2010 at: http://www.unctad.org/en/docs/wir2010_en.pdf. This statistic included only claims that had actually been submitted to arbitration. It did not include cases in which only a notice of an intention to submit a claim to arbitration had been filed. It should be noted that there is no complete public record of such cases.

access to investor-State dispute settlement awards, access of the public to hearings were raised. States started addressing issues relating to procedural transparency in their national legislation and in investor-State dispute settlement provisions of their investment agreements, while international arbitration institutions began discussing how to address the matter of transparency in arbitration rules and arbitral proceedings. It is only in the international investment agreements negotiated after 2004 that these issues have been addressed.[6]

6. For the purpose of this note, transparency in treaty-based investor-State dispute settlement is understood as a general principle that may pertain to various aspects of the arbitral proceedings. The source for transparency obligations in treaty-based investor-State arbitration may be found in different legal texts, such as the dispute settlement provisions contained in international investment agreements, designated arbitration rules, legislation on arbitration at the place of arbitration and arbitral tribunals' decisions. This note and its addendum seek to provide the Working Group with information on the extent to which transparency is addressed under those legal texts. In order to assist the Working Group in its determination of the possible content and form of its work on transparency in treaty-based investor-State dispute settlement, the concluding remarks, contained in the addendum to this note, provide questions and suggestions for the Working Group's consideration. This note complements document A/CN.9/WG.II/WP.159 and its addenda, which contain a compilation of comments by Governments on their practices or experience with respect to transparency in treaty-based investor-State arbitration received pursuant to the questionnaire circulated by the Secretariat on that matter (see paragraph 1 above).

II. Transparency in treaty-based investor-State dispute settlement

A. Dispute settlement provisions in international investment agreements

7. As discussed in this section, where dispute settlement provisions in international investment agreements address transparency, they usually contain provisions on matters of public access to procedural documents and hearings, and publication of awards. Examples of such provisions that can be found in model international investment agreements or in international investment agreements actually concluded are contained in this section. It may be noted that a number of international investment agreements are silent on that question and do not contain any provision on transparency, leaving that matter to be resolved by applicable rules.

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[6] See *International Investment Arrangements: Trends and emerging issues*, UNCTAD Series on International Investment Policies for Development, Part II. Key Issues in New Generations IIAs, J. Investor States Dispute settlement (New York and Geneva 2006), pp. 46-54; available on 28 July 2010 at http://www.unctad.org/en/docs/iteiit200511_en.pdf.

1. Public access to procedural documents and arbitral awards

(a) General remarks

8. Dispute resolution clauses in international investment agreements that deal with public access to procedural documents and awards usually provide that documents submitted to, or issued by, the arbitral tribunal shall be publicly available, unless the disputing parties agree otherwise, subject to the deletion of confidential information. Confidential information is usually described as information that is not generally known or accessible to the public and, if disclosed, would cause or threaten to cause prejudice to an essential interest of any individual or entity, or to the interest of a party or would be contrary to personal privacy.

9. Provisions on public access to procedural documents most often include either a general statement on publicity of all procedural documents or a list of procedural documents that should be made publicly available. In that latter case, the following documents have been listed: request for arbitration, notice of arbitration, pleadings, briefs submitted to the tribunal by a disputing party and any written submissions, minutes or transcripts of hearings of the tribunal, where available; and orders, awards, and decisions of the tribunal. Some international investment agreements leave the decision on publication of documents to the parties to the dispute.[7]

10. The responsibility for making that information available to the public lies in certain instances with the arbitral tribunal, in others with the parties. Where parties are authorized to make information public, certain international investment agreements provide that either party may make all information public whereas others limit the right of a party to publicize only its own statements or submissions. In general, agreements do not provide details on the manner in which the information is to be conveyed to the public.

11. Concerning the timing for publication, certain international investment agreements provide that the information shall be made available "immediately" or "in a timely manner", whereas others are silent on that question.

(b) Examples of dispute settlement provisions in international investment agreements addressing public access to procedural documents and awards

(i) Energy Charter Treaty

12. The 1994 Energy Charter Treaty[8] contains a comprehensive system for settling disputes on matters covered by the Treaty. Article 26 provides various options for investors to have recourse to international arbitration in the event of an alleged breach of the Treaty's investment provisions. It does not contain specific provisions on public disclosure of the existence of proceedings. The Model Host Government Agreement (HGA) for agreements between an individual State and the project investors for cross-border pipelines presented to the Energy Charter Conference

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[7] See, for instance, the Agreement between the United Mexican States and the Government of the Republic of Iceland on the Promotion and Reciprocal Protection of Investments, signed 24 June 2005, which states the following:

"Article 17 — Awards and Enforcement (…) (4) The final award will only be published with the written consent of both parties to the dispute."; available on 28 July 2010 at http://www.unctad.org/sections/dite/iia/docs/bits/Mexico_Iceland.PDF.

[8] Available on 28 July 2010 at http://www.encharter.org/.

in 2007 contains in its article 19 (11) a provision on dispute settlement, which states that "A copy of the award shall be deposited with the Energy Charter Secretariat, which shall make it generally available."[9]

(ii) Model international investment agreements proposed by States

13. Article 38, paragraphs (3) to (8), of Canada's Model Foreign Investment Promotion and Protection Agreement 2004 (FIPA),[10] which has also been used in concluded BITs,[11] provides that:

> "(3) All documents submitted to, or issued by, the Tribunal shall be publicly available, unless the disputing parties otherwise agree, subject to the deletion of confidential information. (4) Notwithstanding paragraph 3, any Tribunal award under this Section shall be publicly available, subject to the deletion of confidential information. (5) A disputing party may disclose to other persons in connection with the arbitral proceedings such unredacted documents as it considers necessary for the preparation of its case, but it shall ensure that those persons protect the confidential information in such documents. (6) The Parties may share with officials of their respective federal and sub-national governments all relevant unredacted documents in the course of dispute settlement under this Agreement, but they shall ensure that those persons protect any confidential information in such documents. (7) […] the Tribunal shall not 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 Cabinet confidences, personal privacy or the financial affairs and accounts of individual customers of financial institutions, or which it determines to be contrary to its essential security. (8) To the extent that a Tribunal's confidentiality order designates information as confidential and a Party's law on access to information requires public access to that information, the Party's law on access to information shall prevail. However, a Party should endeavour to apply its law on access to information so as to protect information designated confidential by the Tribunal."

14. The United States of America Model Treaty concerning the Encouragement and Reciprocal Protection of Investment ("US Model BIT"),[12] adopted in 2004 contains, in its section B, specific provision on transparency of arbitral proceedings. Article 29 (1) provides that:

> "(1) Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Party and make them available to the public: (a) the notice of intent; (b) the notice of

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[9] Ibid.

[10] Available on 28 July 2010 at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/2004-FIPA-model-en.pdf. See also the comments of Canada in document A/CN.9/WG.II/WP.159/Add.1.

[11] See for instance the agreement between Canada and the Republic of Peru for the Promotion and Protection of Investment, signed on 14 November 2006 which contains, in its article 38 on "Public Access to Hearings and Documents" provisions similar to Canada's FIPA. Available on 28 July 2010 at http://www.unctad.org/sections/dite/iia/docs/bits/canada_peru.pdf. See also the comments of Canada in document A/CN.9/WG.II/WP.159/Add.1.

[12] Available on 28 July 2010 at http://www.state.gov/documents/organization/117601.pdf. See also the comments of the United States of America in document A/CN.9/WG.II/WP.159/Add.3.

arbitration; (c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 28 (2) [Non-Disputing Party submissions] and (3) [Amicus Submissions] and Article 33 [Consolidation]; (d) minutes or transcripts of hearings of the tribunal, where available; and (e) orders, awards, and decisions of the tribunal."

15. Regarding protected information, article 29 (3) provides that "Nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 18 [Essential Security Article] or Article 19 [Disclosure of Information Article]." Article 29 (5) of the US Model BIT deals with potential conflict with a party's national law on access to information and provides that "nothing in this Section requires a respondent to withhold from the public information required to be disclosed by its laws."

(iii) Regional investment agreements

16. The North American Free Trade Agreement ("NAFTA") came into force in January 1994, creating a free trade area between Canada, Mexico and the United States of America. NAFTA Chapter 11 contains details on access for non-disputing NAFTA parties to procedural documents and awards.[13] Article 1127 provides that the non-disputing NAFTA parties shall receive written notice of any arbitration and copies of all pleadings. Article 1129 (1) specifies that the non-disputing NAFTA parties also have the right to receive all the evidence submitted to the tribunal as well as the written arguments of the disputing parties. Under Article 1129 (2) any information received under paragraph (1) must be treated as if the recipient were a disputing Party. In relation to disclosure of award details, article 1137 (4) states that "Annex 1137 (4) applies to the Parties specified in that Annex with respect to publication of an award". Annex 1137 (4) provides that, in an arbitration involving either Canada or the United States, either one of those countries or a disputing investor that is a party to the arbitration may make an award public. In the case of Mexico, the applicable arbitration rules apply to the publication of an award.

17. The "Notes of Interpretation of Certain Chapter 11 Provisions" published by the NAFTA Free Trade Commission (FTC) on 31 July 2001 clarify the question of access to documents as follows:

> "(a) Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration and, subject to the application of Article 1137 (4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal. (b) In the application of the foregoing: (i) In accordance with Article 1120 (2), the NAFTA Parties agree that nothing in the relevant arbitral rules imposes a general duty of confidentiality or precludes the Parties from providing public access to documents submitted to, or issued by, Chapter Eleven tribunals, apart from the limited specific exceptions set forth expressly in those rules." [The remaining subparagraphs and

[13] Available on 28 July 2010 at http://www.nafta-sec-alena.org/en/view.aspx?x=343&mtpiID=142. See also the comments of Canada in document A/CN.9/WG.II/WP.159/Add.1 and the comments of the United States of America in document A/CN.9/WG.II/WP.159/Add.3.

paragraph (c) of the Notes contain provisions on protection of confidential information.]

18. The Free Trade Agreement between the United States, Central America and the Dominican Republic (CAFTA-DR)[14] signed on 5 August 2004 contains under chapter 10, article 10.21 on "Transparency of Arbitral Proceedings" the following provisions:

> "1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Parties and make them available to the public: (a) the notice of intent; (b) the notice of arbitration; (c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 10.20.2 and 10.20.3 and Article 10.25; (d) minutes or transcripts of hearings of the tribunal, where available; and (e) orders, awards, and decisions of the tribunal. […] 3. Nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 21.2 (Essential Security) or Article 21.5 (Disclosure of Information). 4. Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures: (a) Subject to subparagraph (d), neither the disputing parties nor the tribunal shall disclose to any non-disputing Party or to the public any protected information where the disputing party that provided the information clearly designates it in accordance with subparagraph (b); (b) Any disputing party claiming that certain information constitutes protected information shall clearly designate the information at the time it is submitted to the tribunal; (c) A disputing party shall, at the same time that it submits a document containing information claimed to be protected information, submit a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the non-disputing Parties and made public in accordance with paragraph 1; and (d) The tribunal shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may (i) withdraw all or part of its submission containing such information, or (ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph (c). In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under (i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under (ii) of the disputing party that first submitted the information. 5. Nothing in this Section requires a respondent to withhold from the public information required to be disclosed by its laws."

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[14] Available on 28 July 2010 at http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text. See also the comments of the Dominican Republic and El Salvador in document A/CN.9/WG.II/WP.159/Add.2.

19. The Agreement Establishing the Asean-Australia-New Zealand Free Trade Area (AANZFTA),[15] signed on 27 February 2009, contains under chapter 11, article 26 on "Transparency of Arbitral Proceedings" the following provisions:

> "1. Subject to Paragraphs 2 and 3, the disputing Party may make publicly available all awards and decisions produced by the tribunal. […] 3. Any information specifically designated as confidential that is submitted to the tribunal or the disputing parties shall be protected from disclosure to the public. 4. A disputing party may disclose to persons directly connected with the arbitral proceedings such confidential information as it considers necessary for the preparation of its case, but it shall require that such confidential information is protected. 5. The tribunal shall not 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 Cabinet confidences, personal privacy or the financial affairs and accounts of individual customers of financial institutions, or which it determines to be contrary to its essential security. 6. The non-disputing Party shall be entitled, at its cost, to receive from the disputing Party a copy of the notice of arbitration, no later than 30 days after the date that such document has been delivered to the disputing Party. The disputing Party shall notify all other Parties of the receipt of the notice of arbitration within 30 days thereof."

(iv) Examples of bilateral investment agreements

20. The Agreement between Japan and the United Mexican States, for the strengthening of the economic partnership signed on 17 September 2004 ("Japan-Mexico FTA")[16] contains specific provisions concerning public access to procedural documents and awards. Article 94 (4) provides that:

> "Either disputing party may make available to the public in a timely manner all documents, including an award, submitted to, or issued by, a Tribunal established under this Section, subject to redaction of: (a) confidential business information; (b) information which is privileged or otherwise protected from disclosure under the applicable law of either Party; and (c) information which the Party must withhold pursuant to the relevant arbitral rules, as applied."

21. In addition, article 94 includes a note that specifies that:

> "For greater certainty, it is confirmed by both Parties that a Party may share with officials of its central or local government in the case of Japan, and its federal or state government in the case of Mexico, all relevant documents in the course of dispute settlement under this Section, including confidential information and that the disputing parties may disclose to other persons in connection with the arbitral proceedings the documents submitted to, or issued by, a Tribunal established under this Section, as they consider necessary for the preparation of their cases; provided that they shall ensure that those persons protect the confidential information in such documents."

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[15] Available on 28 July 2010 at http://www.dfat.gov.au/trade/fta/asean/aanzfta/contents.html.

[16] Available on 28 July 2010 at http://www.mofa.go.jp/region/latin/mexico/agreement/agreement.pdf

22. The Singapore-Australia Free Trade Agreement, signed on 17 February 2003,[17] allows a party to disclose its own procedural documents to the public subject to protection of designated confidential information. Article 7 (2) of section 16 "Dispute Settlement" of the Agreement provides that:

> "2. The deliberations of an arbitral tribunal and the documents submitted to it shall be kept confidential. Nothing in this Article shall preclude a Party from disclosing statements of its own positions or its submissions to the public; provided that a Party shall treat as confidential information submitted by the other Party to the arbitral tribunal which that Party has designated as confidential. Where a Party submits a confidential version of its written submissions to the arbitral tribunal, it shall also, upon request of the other Party, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public."

2. Open hearings

(a) General remarks

23. Dispute resolution provisions in international investment agreements favouring transparency provide that hearings shall be open to the public, subject to the protection of confidential information. Logistical arrangements are usually left to the arbitral tribunal to be determined, in consultation with the disputing parties.

(b) Examples of dispute settlement provisions in international investment agreements addressing open hearings

(i) Model international investment agreements proposed by States

24. Article 38 (1) of Canada's FIPA,[18] which has also been used in concluded BITs,[19] provides as follows:

> "1. Hearings held under this Section shall be open to the public. To the extent necessary to ensure the protection of confidential information, including business confidential information, the Tribunal may hold portions of hearings in camera. 2. The Tribunal shall establish procedures for the protection of confidential information and appropriate logistical arrangements for open hearings, in consultation with the disputing parties."

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[17] Available on 28 July 2010 at http://www.austlii.edu.au/au/other/dfat/treaties/2003/16.html.

[18] Available on 28 July 2010 at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/2004-FIPA-model-en.pdf. See also the comments of Canada in document A/CN.9/WG.II/WP.159/Add.1.

[19] See for instance the agreement between Canada and the Republic of Peru for the Promotion and Protection of Investment, signed on 14 November 2006 which contains, in its article 38 on "Public Access to Hearings and Documents" provisions similar to Canada's FIPA. Available on 28 July 2010 at http://www.unctad.org/sections/dite/iia/docs/bits/canada_peru.pdf.

25. The US Model BIT[20] includes in article 29 (2) a provision, which explicitly provides for public hearings and which has been used in concluded BITs:[21]

> "2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure."

26. In addition, article 29 (1) of the U.S. Model BIT provides that the respondent should make the minutes or transcripts of hearings of the tribunal available to the public.

(ii) Regional investment agreements

27. The CAFTA-DR provides for hearings in its article 10.21.2 "open to the public" and for the tribunal to determine "in consultation with the disputing parties, the appropriate logistical arrangements", as follows:

> "2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure."[22]

(iii) Examples of bilateral investment agreements

28. Article 10.22.2, contained in chapter 10 of the Australia-Chile Free Trade Agreement, signed on 30 July 2008,[23] provides that hearings shall be open to the public, provided that confidential information is protected. It provides that:

> "2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure including closing the hearing for the duration of any discussion of confidential information."

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[20] Available on 28 July 2010 at http://www.state.gov/documents/organization/29030.doc.

[21] See, for example, article 29 (2) of the Treaty between the United State of America and Uruguay concerning the Encouragement and Reciprocal Protection of Investment, signed 4 November 2005, which is available at: http://www.unctad.org/sections/dite/iia/docs/bits/US_Uruguay.pdf.

[22] Available on 28 July 2010 at http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text. See also the comments of the Dominican Republic and El Salvador in document A/CN.9/WG.II/WP.159/Add.2.

[23] http://www.dfat.gov.au/GEO/chile/fta/FTA_Text.html. See also the comments of Australia in document A/CN.9/WG.II/WP.159.

B. Arbitration rules used in treaty-based investor-State dispute settlement

29. With the exception of the arbitration rules of the International Centre for the Settlement of Investment Disputes (ICSID), arbitration rules in general do not provide for, nor prohibit, public access to procedural documents or hearings and publication of the award(s), and leave those matters to the agreement of the parties, or to the arbitral tribunal's determination based on the agreement of the parties, the applicable arbitration rules, and the law applicable to arbitral procedure.[24] As reported by UNCTAD in a 2010 report on "Latest Developments in Investor-State Dispute Settlement", "of the total 357 known disputes, 225 were filed with the International Centre for Settlement of Investment Disputes (ICSID) or under the ICSID Additional Facility, 91 under the United Nations Commission on International Trade Law (UNCITRAL) Rules, 19 with the Stockholm Chamber of Commerce, eight were administered by the Permanent Court of Arbitration in The Hague, five with the International Chamber of Commerce (ICC) and four are ad hoc cases. One further case was filed with the Cairo Regional Centre for International Commercial Arbitration. In four cases the applicable rules are unknown so far."

1. ICSID Convention, Regulations and Rules[25]

(a) Public access to procedural documents and arbitral awards

30. Regulation 22 of the ICSID Administrative and Financial Regulations provides that:

> "1. The Secretary-General shall appropriately publish information about the operation of the Centre, including the registration of all requests for conciliation or arbitration and in due course an indication of the date and method of the termination of each proceeding. 2. If both parties to a proceeding consent to the publication of: (a) reports of Conciliation Commissions; (b) arbitral awards; or (c) the minutes and other records of proceedings, the Secretary-General shall arrange for the publication thereof, in an appropriate form with a view to furthering the development of international law in relation to investments."

31. The publication mentioned in Regulation 22 (1) of the ICSID Administrative and Financial Regulations is done on the ICSID website.

32. While it is not clear whether the parties themselves are allowed to disclose procedural documents, there are clear rules governing the Centre and the arbitrators. Article 48 (5) of the ICSID Convention provides that:

> "5. The Centre shall not publish the award without the consent of the parties."

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[24] See *Latest Developments in Investor-State Dispute Settlement*, IIA Issues Note No. 1 (2010), International Investment Agreements, p. 2; available on 28 July at http://www.unctad.org/en/docs/webdiaeia20103_en.pdf.

[25] Available on 28 July 2010 at http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

33. This prohibition is repeated in Rule 48 (4) of the ICSID Arbitration Rules and extends to ICSID arbitrators by the declarations they must make under Rule 6 (2) of the ICSID Arbitration Rules. The second part of Rule 48 (4) (revised in 2006), however, provides that, even without the parties' consent, "The Centre shall […] promptly include in its publications excerpts of the legal reasoning of the tribunal."

(b) Open hearings

34. Rule 32 (2) of the ICSID Arbitration Rules relates to third parties' presence at hearings and provides that:

> "2. Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information."

2. UNCITRAL Arbitration Rules[26]

(a) Public access to procedural documents and arbitral awards

35. The 1976 UNCITRAL Arbitration Rules as well as the Rules as revised in 2010 do not address the issue of public access to procedural documents. It therefore remains a matter to be agreed by the parties and, failing such agreement, to be decided by the arbitral tribunal.

36. Regarding publication of an award, article 32, paragraph (5), of the 1976 UNCITRAL Arbitration Rules provides that: "The award may be made public only with the consent of both parties." Article 34, paragraph (5), of the UNCITRAL Arbitration Rules (as revised in 2010) provides as follows:

> "5. An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority."

(b) Open hearings

37. Article 25, paragraph (4), of the 1976 version of the UNCITRAL Arbitration Rules and article 28, paragraph (3), of the UNCITRAL Arbitration Rules, (as revised in 2010) provides that: "Hearings shall be held in camera unless the parties agree otherwise. […]".

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[26] For the 1976 version of the UNCITRAL Arbitration Rules, see *Official Records of the General Assembly, Thirty-first Session, Supplement No. 17* (A/31/17), para. 57. For UNCITRAL Arbitration Rules (as revised in 2010), see Annex I of the report of the 43rd session of the Commission. Also available at http://www.uncitral.org.

3. Rules of international arbitration institutions

(a) International Chamber of Commerce — Rules of Arbitration ("ICC Arbitration Rules")[27]

38. The ICC Arbitration Rules contain no specific provision on public disclosure of the existence of proceedings, or public access to procedural documents. There is also no provision requiring the parties to keep confidential the information related to the arbitration. It may be noted that article 20 (7) authorizes the arbitral tribunal to take measures to protect trade secrets and confidential information.

39. Under article 21 (3) of the ICC Arbitration Rules, "[…] Save with the approval of the Arbitral Tribunal and the parties, persons not involved in the proceedings shall not be admitted".

(b) London Court of International Arbitration (LCIA) Rules[28]

40. Article 30.1 expresses the principle of non-disclosure of procedural documents and awards, as follows:

> "1. Unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards in their arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain — save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority".

41. Article 30.3 provides that:

> "3. The LCIA Court does not publish any award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal."

42. Under article 19.4, "[a]ll meetings and hearings shall be in private unless the parties agree otherwise in writing or the Arbitral Tribunal directs otherwise."

(c) Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC Arbitration Rules")[29]

43. The SCC Arbitration Rules contain a general principle on confidentiality, stated in article 46 as follows:

> "Unless otherwise agreed by the parties, the SCC Institute and the Arbitral Tribunal shall maintain the confidentiality of the arbitration and the award."

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[27] Available on 28 July 2010 at http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf.

[28] Available on 28 July 2010 at http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx.

[29] Available on 28 July 2010 at http://www.sccinstitute.se/filearchive/3/33776/Skiljedomsregler%20eng%202010%20-%20utan%20modellklausulsidan.pdf.

44. Article 27, paragraph (3), of the SCC Arbitration Rules provides that:

> "Unless otherwise agreed by the parties, hearings will be held in private."

(d) International Arbitration Rules of the American Arbitration Association ("AAA International Arbitration Rules")[30]

45. The AAA International Arbitration Rules provide in their article 27 that:

> "An award may be made public only with the consent of all parties or as required by law."

46. Article 34 on confidentiality provides that:

> "[…] unless otherwise agreed by the parties, or required by applicable law, the members of the tribunal and the administrator shall keep confidential all matters relating to the arbitration or the award."

(e) Arbitration Rules of the Permanent Court of Arbitration ("PCA") involving States[31]

47. The PCA Optional Rules for Arbitrating Disputes Between Two States (1992) are based on the 1976 UNCITRAL Arbitration Rules, with modifications to reflect the public international law character of inter-States disputes. According to article 32, paragraph (5), an award may only be made public with the consent of the parties. In accordance with article 25, paragraph (4), hearings are held in camera, unless the parties agree otherwise. The same provisions are contained in the PCA Optional Rules for Arbitrating a Dispute Between Two Parties, Of Which Only One Is a State (1993).

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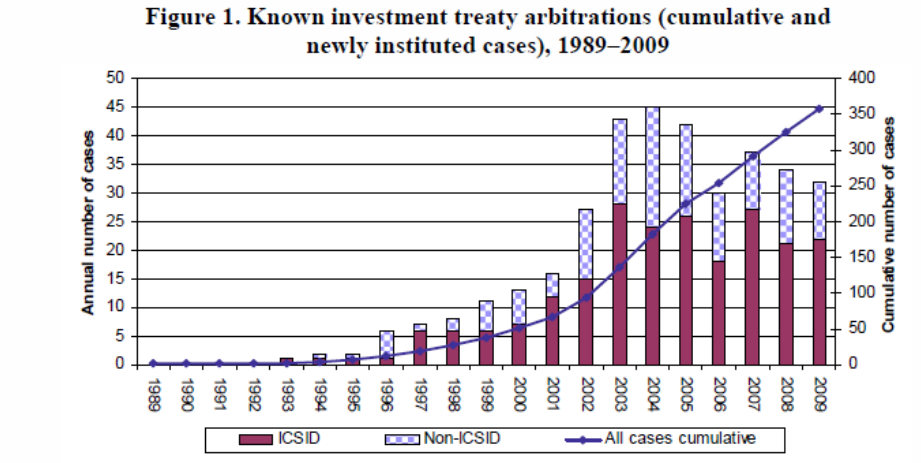
[30] Available on 28 July 2010 at http://www.adr.org/sp.asp?id=33994#INTERNATIONAL%20ARBITRATION%20RULES.

[31] The PCA Optional Rules for Arbitrating Disputes Between Two States (1992) were available on 28 July 2010 at http://www.pca-cpa.org/upload/files/2STATENG.pdf and at the PCA Optional Rules for Arbitrating a Dispute Between Two Parties, Of Which Only One Is a State were available (1993) on 28 July 2010 at http://www.pca-cpa.org/upload/files/1STATENG.pdf.

Annex I

Figure 1
Known investment treaty arbitrations (cumulative and newly instituted cases), 1989-2009



Source: UNCTAD.