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**Confidentiality and the Public Interest Exception:  
Considerations for Mixed International Arbitration**

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*Arbitration is a universal institution arising out of a deep need of society. As many such institutions it has, on one side, a common core, expressed in some general features and in its functions, and on the other side, it has been submitted to a historical evolution determined by changing circumstances and requirements.*

**I INTRODUCTION**

Despite having suffered two high level attacks in recent years, confidentiality is still considered by many to be an important, and some would say even "core", feature of international commercial arbitration. A survey of cases from various jurisdictions dealing with the issue reveals that, on balance, more courts have affirmed confidentiality as a legal feature of commercial arbitration than have denied it. These include trial level and appeal courts in the United Kingdom; a trial level Canadian court; the Paris Court of Appeal; and the Stockholm District Court and the SVEA Court of Appeal (although the decisions of these last two courts have been overturned by the Supreme Court of Sweden). But these confirmations of confidentiality are counterbalanced by a building body of opinion in favour of restricting, or even denying, confidentiality in arbitration. As Yves Fortier has remarked, "What is evident today is that, with respect to confidentiality in international commercial arbitrations, *nothing should be taken for granted.*"

The rationale for enforcing confidentiality — and the corollary principle of privacy — in arbitration, is most persuasively that private parties, who have specifically contracted to resolve commercial disputes arising between them in a private forum, deserve to have their desire to withhold the matter from public scrutiny respected. As one English judge sagely put it, "The concept of private [or confidential] arbitration derives simply from the fact that the parties have agreed to submit to arbitration particular disputes *arising between them and only between them.*"

But, one may ask, what happens to confidentiality when one of the parties to an international commercial

arbitration is not a private actor, but a State, government or public agency (collectively, "public actors")? Should confidentiality be a feature of this type of arbitration? Arguably, a commercial dispute between a private company and a public actor is not something "arising between them and only between them." A public actor by definition "concerns the people as a whole", and it may have a duty to publicly disclose information about its activities. This raises the possibility that the dimensions of a dispute between a private party and a public actor will actually be "between them and everyone else"; and that confidentiality, if it exists at all, will be seriously restricted.

The challenges that arise in respect of confidentiality in international commercial arbitration between public and private parties have only recently begun to be articulated, despite the fact that this sort of "mixed" arbitration is by no means new. This paper will examine the nature of these challenges. My goals are threefold. First, I will attempt to describe the content of what has come to be called the "public interest" exception to confidentiality in arbitration, by examining how national courts and international tribunals have dealt with the intersection of confidentiality and public actor participation in commercial arbitration. Second, I will look at some of the factors that inform the content of the public interest exception, and which are variously used to expand or limit its scope. In my conclusion, I briefly set out a position on the extent to which mixed international commercial arbitration ought to be confidential, bearing in mind the competing interests, desires and demands of private and public actors.

From the outset, it should be noted that this paper is not about *whether* there is any legitimate public interest exception to confidentiality in arbitration. I start from the position that the high level of confidentiality, which ought normally to be promoted in arbitrations between private parties, will very often be inappropriate where a public actor is involved. What this paper is about is the proper *nature* and *extent* of the public interest exception.

## **II MUNICIPAL AND INTERNATIONAL / "DELOCALISED" CASE LAW:**

Judicial and arbitral consideration of the boundaries of confidentiality in mixed international commercial arbitration is by no means abundant. It appears to be confined to two decisions from Australia, and a handful of decisions from international tribunals, principally those created to arbitrate disputes arising under Chapter 11 (the investment chapter) of the North American Free Trade Agreement ("NAFTA").

### **(A) The Australian case law:**

#### **1. The *Esso* Case:**

The best known decision on the public interest exception to confidentiality is undoubtedly the Australian High Court's 1995 decision in *Esso Australia Resources Ltd. et al. v. the Honourable Sidney James Plowman et al.* In a controversial finding, the High Court (1) denied that there exists an implied duty of confidentiality in commercial arbitrations in Australia, and (2) found that even if such duty of confidentiality existed, it would be subject to a public interest exception in the circumstances of the case.

The case is sufficiently notorious that its facts may be stated in brief. Public energy authorities in Victoria were involved in certain arbitrations with their suppliers of natural gas (Esso and others) over price increases. The Minister responsible for the public authorities applied to the Victoria Supreme Court for declarations that the authorities were not barred from disclosing to the Minister and third parties information revealed by Esso and the other vendors in the arbitral proceedings. Esso and the other vendors protested, *inter alia*, that some of the information sought to be disclosed was of a private, confidential, proprietary and/or commercially sensitive nature, and therefore should be protected from

disclosure.

The Minister concerned had a broad statutory power to obtain information "which he requires either for Parliament or himself" from one of the public energy authorities, although no similar provision existed with respect to the other authority. Further, under the sales agreements between the vendors and public energy authorities, the vendors were obliged to provide to the buyers details of price increases or decreases. The vendors did not provide the requisite details before commencement of arbitral proceedings. In arbitration, they refused to provide the information unless the energy authorities entered into confidentiality agreements.

The case was heard by two levels of court before reaching the High Court.

The lead decision at the High Court was written by Mason CJ and supported in its entirety by Dawson and McHugh JJ. Brennan J wrote a separate concurring judgment. The fifth judge, Toohey J, wrote in dissent.

*(a) The decision of Chief Justice Mason*

Mason CJ's decision grappled with three main issues: the status of an implied duty of confidentiality in Australian arbitrations; the existence of disclosure obligations for public authorities; and the standards for disclosure of information arising in an arbitration that is found to be of legitimate public interest. In my respectful view, his reasoning is subject to considerable difficulties.

The first, and broadest, of the issues was whether there exists in Australia any implied duty of confidentiality in arbitration. Mason CJ found in the negative on this point, and also held that parties desiring confidentiality are free to make provision for it in the arbitration contract. His statement was unequivocal:

An obligation not to disclose may arise from an express contractual provision. If the parties wished to secure the confidentiality of the materials prepared for or used in the arbitration and of the transcripts and notes of evidence given, they could insert a provision to that effect in their arbitration agreement. ... such a provision would bind the parties and the arbitrator...

Mason CJ next went on to address the nature of public authorities' duty to account to the public. He held that public actors can sometimes be under a positive duty to disclose information to the public:

... there may be circumstances, in which third parties and the public have a legitimate interest in knowing what has transpired in an arbitration... [This] would give rise to a 'public interest' exception [to confidentiality].

Now, this last finding would seem limit the ability of a public actor to make blanket promises to maintain confidentiality in arbitration; in any circumstances where the public interest demands disclosure, a promise to maintain confidentiality will be overridden. In this writer's view, Mason CJ's reasoning amounts to a finding that, in essence, certain contracts for confidentiality in mixed arbitration will be *unenforceable*.

Therefore, one problem for private parties to mixed arbitrations — even if they were to accept that public interest may be a legitimate restraint on confidentiality — is that they will not know for certain whether a contract for confidentiality entered into with a public actor will hold up once the arbitration has begun and confidential information is put on the table. Patrick Neill has put the discomfort arising from such uncertainty in pointed terms. He says, "Any party to an arbitration [in Australia] is now enabled to run up the flag labelled 'public interest' and to claim the right to (or to assert the duty to) communicate to the public at large confidential disclosures obtained as a result of the arbitral process... "

The third aspect of Mason CJ's judgment deals with standards for disclosure of information that is of legitimate interest to the public, which Mason CJ calls "governmental" information. The equation of "governmental" information with the information sought to be disclosed from the natural gas arbitrations is assumed without discussion. Then, working on this assumption, Mason CJ argues for the release of the information as follows. He asserts, first, that "government secrets" are different from personal and commercial secrets. He opines, second, that because of this difference, "the judiciary must view the disclosure of governmental information 'through different spectacles'." In effect, this means reversing the ordinary onus of proof on disclosure and assuming, contrary to the norm, that governmental information ought to be available to the public unless it can be proved that the public interest lies in non-disclosure. For this last proposition Mason CJ relies on his decision in *The Commonwealth of Australia v. John Fairfax & Sons Ltd.*

This part of Chief Justice's reasons is undoubtedly the most troubled. The first problem is a basic one: Mason CJ's uncritical assumption that the information sought to be disclosed from the natural gas arbitrations is *actually and properly* classified as "governmental" in nature. In my respectful view, this assumption is too quickly and too easily made. The pertinent information originated with Esso and the other vendors; to the extent that it could be considered "governmental", this would appear to be only because of communication (compulsory or voluntary) from the vendors to the public energy authorities. But communication alone seems inadequate to transform originally private information into "governmental" information that is subject to disclosure requirements. Were mere communication sufficient to effect this transformation, then personal — say, medical — information supplied on a government job application form could become "governmental" information available to the public, though such information would clearly not be of legitimate public interest in normal circumstances.

Further, the Chief Justice's analysis is not improved even if the provider of the information is assumed to be under a legal duty to communicate it. Legal and natural persons are required, by law, to supply many kinds of information to government (consider the legal obligation in many countries to provide personal data during a census, for example); the legal requirement to do so does not, on its own, make the information of legitimate public interest. Clearly, something more is needed.

However, even if one assumes for the sake of argument that it is valid to consider as "governmental" information that passes from private actors to government pursuant to a legal duty, e.g. the energy sales agreements, Mason CJ's reasoning is still unsatisfying. He does not consider whether the information sought to be disclosed from the arbitrations might exceed that which the vendors would have been obliged to disclose pursuant to the sales agreements. Arguably, if any of the information arising from the arbitrations fell outside the disclosure requirements in the agreements — a distinct possibility given the escalation of the dispute from the pre-arbitration period to the arbitral stage itself — this would raise the possibility of "non-governmental" information being subject to disclosure. But following the Chief Justice's own reasoning, the presumption is against, rather than in favour, of releasing such information.

A final problem with the Chief Justice's reasoning is his reliance on the *John Fairfax* case. The information arising from the natural gas arbitrations was inherently different from the kind of information considered in *John Fairfax*. In that case, the information in question was all related to Australian defence

and foreign policy. It purportedly included "unpublished memoranda, assessments, briefings and cables relating to such matters as the 'East Timor Crisis' ... the renegotiation of agreements covering United States military bases in Australia, the presence of the Soviet Navy in the Indian Ocean, Australia's support for the Shah of Iran ... outlines of the structures of United States and United Kingdom intelligence services and the A.N.Z.U.S. Treaty." Quite simply, this information is not analogous to the information at stake in the *Esso* case. The parallel drawn by the Chief Justice is false.

Thus, taking the Chief Justice's reasons as a whole, it is submitted that Mason CJ has arrived at a partially right result but by a series of wrongly reasoned steps. His decision recognizes that there can be legitimate reasons to override expectations of confidentiality, but fails to set any real parameters for the public interest exception, and fails to provide a well-reasoned basis for the conclusion that, in this case, the public interest demands full disclosure of any and all information arising from the arbitrations. It is telling that in the last part of his judgment, the Chief justice puts to the reader a question obviously meant to strike an emotional chord, but which he has never really managed to answer in his judgment. He asks, "Why should the consumers and the public ... be denied knowledge of what happens in these arbitrations, the outcome of which will affect, in all probability, the prices chargeable to consumers by the public utilities?" In response, one can only ask, "Yes, Your Lordship, *why?*"

*(b) The minority decision of Mr. Justice Brennan*

Brennan J's decision concurred with Mason CJ in the result, but reasoned somewhat differently and, I shall argue, more carefully. Brennan J agreed with the Chief Justice that for a party to be subject to a duty of confidentiality in arbitration, the origin of the duty must be contractual. In his Honour's view, a qualified duty of confidentiality covering documents produced in arbitration proceedings could be implicit in the arbitration contract, if it is necessary to give the contract "such business efficacy as the parties must have intended." However, Brennan J held that there exists a baseline exception to any such undertaking on confidentiality, where a party is in possession of a document and has a duty, legal or otherwise, to communicate the information to a third party.

His Honour was clear that the duty to disclose to a third party could include disclosure in the public interest. Brennan J further established that what constitutes the public interest is "more than mere curiosity" in knowing what is contained in documents sought to be disclosed.

Additionally, Brennan J, unlike the Chief Justice, provided the public interest exception some structure by adopting a variant of the four categories of the exception to confidentiality originally set out by Bankes LJ in *Tournier v. National Provincial and Union Bank of England*, and discussed by Colman J. in *Hassneh Insurance*. Only two of these four categories are relevant to the present discussion. They are, in Brennan J's words, situations "(a) where disclosure of the otherwise confidential material is under compulsion by law; [and] (b) where there is a duty, albeit not a legal duty, to the public to disclose ... "

The advantage of this structured approach to the public interest exception over the approach taken by the Chief Justice is clear: information of public interest need not dress in the legal fiction of "governmental information" for disclosure to occur. Instead, it must be of the nature that there is a duty to the public to disclose it. This said, it must still be admitted that Brennan J's categories do not provide any parameters for determining *how* information comes to be of public interest.

In the key section of his reasons, Brennan J writes that "the public generally has a real interest in knowing the outcome, and perhaps the progress, of each [natural gas] arbitration." The energy authorities were under a duty to satisfy this public interest, which was at least moral, but might also have been legal in the case of the State Electricity Commission of Victoria, given the nature of its governing statute at the time the arbitrations began. Wisely, however, Brennan J. went on to make the important statement that:

They duty to convey information to the public may not operate uniformly upon each document or piece of information... Performance of the duty to the public is unlikely to require the revelation of every document or piece of information. It may be possible to respect the commercial sensitivity of information contained in particular documents while discharging the duty to the public and, *where that is possible, the general obligation of confidentiality must be respected.*

It is submitted that, comparing the Chief Justice's approach to confidentiality, and that of Brennan J, the latter is superior both in terms of reasons and results. Brennan J's approach admits that there will be circumstances in which the public have a right to information about arbitrations in which public actors are involved, but does not engage a half-baked legal fiction to permit disclosure. Further, Brennan J is not inclined to easily sacrifice information which the private party to arbitration views as specially sensitive. In the result, Brennan J's approach to the public interest exception to confidentiality attains a better balance between confidentiality and disclosure than does that elaborated by Mason CJ.

## 2. *The Cockatoo Dockyard case:*

*Commonwealth of Australia v. Cockatoo Dockyard Pty. Ltd.* is a second important case from Australia. The issues in the case were closely related to those in *Esso*, and the decision in the case was released a mere two and one half months after the decision in *Esso*.

The arbitration in issue in *Cockatoo Dockyard* was between the Commonwealth of Australia and Cockatoo Dockyard Pty. Ltd. ("Codock"). It concerned environmental conditions on Cockatoo Island, near Sydney. The Island had been leased to Codock by Australia for the operation of a naval dockyard between 1857 and 1991. Australia was dissatisfied with the condition of the Island upon its return in the 1990s, and the matter of whether Codock had breached certain covenants of its lease with Australia went to arbitration.

At some point in the arbitration, a journalist made a request pursuant to Australia's *Freedom of Information Act* 1982 for information about toxic waste on Cockatoo Island. Codock applied to the sole arbitrator for directives securing the confidentiality of documents relevant to the arbitration. From the outset, Australia resisted Codock's applications, on the basis that restrictions on the release of documents concerning Cockatoo Island would impair the free flow of information in society and impinge upon governmental powers.

The arbitrator issued several awards on the confidentiality issue. In his final order, he directed that "neither party ... disclose or grant access to:

any documents or other material prepared for the purposes of the arbitration;

any documents or other material, whether prepared for the purposes of this arbitration or not, which reveal the contents of any document or other material which was prepared for the purposes of this arbitration;

(a) any documents or material produced for inspection on discovery by the other party for the purposes of these proceedings; or

(b) any documents or material filed in evidence in these proceedings."

On application to the Supreme Court of New South Wales, Australia asserted that the arbitrator had exceeded his powers, and had unreasonably and inconveniently purported to interfere in governmental rights and duties. The Supreme Court denied relief to Australia. Australia appealed and the decision was

overturned 2 to 1 at the Court of Appeal. The majority decision was written by Kirby P.

In brief, the majority found (1) that the Court has jurisdiction to intervene in an arbitration to correct error in an arbitral award, and (2) where a government is a party to an arbitration, the arbitrator has no power to make procedural orders imposing an obligation of confidentiality on the government, so as to limit the government's duty to account to the public or pursue the public interest.

It is important to note that Kirby P's judgment was to a large extent concerned with the proper interpretation of the New South Wales *Commercial Arbitration Act* and *Supreme Court Act*. These will not be discussed here. However, the case also dealt with general principles of arbitration applicable beyond Australia's shores, and Kirby P made a number of significant observations worthy of international interest.

For example, Kirby P, implicitly, and without making reference to their text, confirmed the view advanced by Mustill and Boyd that the validity of arbitration, as a private form of dispute resolution, is dependent upon its acceptability to the state. Thus the President stated, "The rule of law requires that the court ... will define and, where necessary and appropriate, declare the limits beyond which the purported powers in pursuit of private arbitration intrude into competition with other legitimate public and private rights and duties."

Second, Kirby P took the view that awards addressing the confidentiality of arbitration relate to matters of procedure. This perspective was adopted without discussion of the point, and his Honour did not provide any justification for his conclusion on the matter. This merits comment.

There is no firm agreement in the international community on the proper categorization of confidentiality as procedural or substantive. One leading textbook states that "uncertainties remain regarding the extent and the justification of the confidentiality of arbitration ... " They illustrate this point by questioning how an arbitral tribunal faced with an argument against disclosure of documents on the basis of law or regulation (e.g. a law to maintain national security) should treat the issue. They ask: should the law or regulation to be taken into account as a matter of procedure or substance, or as a mandatory rule of public policy/*loi de police*? Significantly, no answer is provided.

Further, Jan Paulsson and Nigel Rawding have opined that "... a general duty of confidentiality cannot be said to exist *de lege lata* in international arbitration. At best, it is a duty in *statu nascendi*. Most national jurisdictions have not addressed the issue at all [and] ... *those that have seem to produce more questions than answers.*"

Thus, with all due respect to Kirby P, it would not appear that one can assume that confidentiality is simply a matter of procedure. This fact gains significance when considered in relation to the remainder of the President's decision.

In the next part of his reasons, Kirby P finds — without admitting that he is doing so — a substantive basis for overturning the confidentiality rulings made by the arbitrator in the Australia—Codock arbitration: the nature of the public interest in Cockatoo Island. He says, "For all this court knows, it is both significant and urgent that the material should be made available, *for the protection of public health and the restoration of the environment*, both to [various governmental agencies] ... or even to the public generally." Now, it is clear that Kirby P is not here invoking procedure to reverse the arbitrator's awards on confidentiality, but is referring to the substance of the public interest in the island.

Shortly thereafter, Kirby P goes a step further into substantive territory, by finding that allowing the

arbitrator's order to stand could interfere with Australia's rights and duties under its Constitution and bring into question its very capacity to enter into an agreement for private arbitration. Noting that it is problematic to introduce broad confidentiality requirements that would suppress documents "having a wider public interest and utility" than for the arbitral

proceeding itself, he continues: "Were 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... "

Thus, in light of this finding, which clearly draws the link between confidentiality and the highest form of substantive law for a public actor (its Constitution), it would appear that Kirby P initially underestimated or misapprehended the nature of confidentiality issues. Confidentiality and disclosure are not simply matters of procedure, but a more complicated mix of procedure and substance. This issue is addressed further in the next section. For now, though, it must be admitted that the reader of the decisions in both *Cockatoo Dockyard* and *Esso* gets the impression that the basic impulse motivating the courts to favour public disclosure over confidentiality was the *substantive features of the issues involved in the arbitrations*: environmental health and safety on the one hand, and fuel price increases that would potentially effect energy costs for consumers.

### 3. Summary of observations on the Australian case law:

What information can be taken from the decisions in *Esso* and *Cockatoo Dockyard*?

First, it is clear that *there is* a public interest exception to whatever norms of confidentiality may exist in arbitration where public actors are involved in arbitral proceedings. The exception would seem to apply equally to situations where the State itself is a party to arbitration, and to those where a public corporation is the participant.

Second, when there is a statutory requirement that information under consideration in an arbitration be revealed, no duty of confidentiality, whether implied or contractual, will override the statutory requirements. This position appears to be generally consistent with academic opinion on the matter.

Third, there does not seem to be agreement as to why information to be released, other than in accordance with a statutory duty, should be made public. Is it because such information is "governmental" in nature; because it is of legitimate interest to the public; or because an arbitrator, in attempting to protect it from release, made a procedural error and went beyond the scope of his arbitral powers? For the reasons given above, it is submitted that the better view is the second.

Fourth, there is still no certainty for private parties to mixed international commercial arbitrations in terms of knowing when a contract for confidentiality is likely to be upheld, or when it is likely to be overridden by public interest considerations. This resurrects a bugaboo that was all too common in mixed arbitration of past decades — sovereign immunity — but in a new form: now the question is not so much about immunity from arbitration as immunity from whatever degree and form of confidentiality may exist. In short: are private parties facing some form of sovereign immunity from arbitral confidentiality when confidentiality is judged to be against the public interest?

### **(B) Decisions from International / "Delocalised" Tribunals — The NAFTA Chapter 11 Cases:**

There has been relatively little international or "delocalised" consideration of confidentiality in mixed arbitrations, let alone consideration of the public interest exception to confidentiality. Indeed, until

recently, *Amco Asia Corp. et al. v. Republic of Indonesia* stood out as perhaps the only commonly known decision on confidentiality in mixed arbitration. The arbitration of disputes arising under from Chapter 11 of NAFTA has changed this, however, and there is now a small, but growing, collection of Chapter 11 decisions addressing confidentiality and the public interest. Three are considered here.

Part B of Chapter 11 of NAFTA provides for arbitration of disputes between an Investor of a State Party and another State Party. A Chapter 11 claim may be submitted for arbitration under the ICSID Convention (if the Investor's State and the respondent State are both Parties to the ICSID Convention), the ICSID Additional Facility Rules (if one, but not both, of the relevant States is a Party to the ICSID Convention), or the UNCITRAL Arbitration Rules. There have been proceedings under both of the last two processes, but none under the first.

### 1. The *Metalclad* case

The *Metalclad* case involved a claim by Metalclad Corporation ("Metalclad") against Mexico. Metalclad alleged that government actions in Mexico had prevented Metalclad from carrying out its disposal facility enterprise, thereby breaching various provisions of Chapter 11. Arbitration of the dispute was convened under the ICSID Additional Facility Rules.

Early in the proceedings (in September 1997), Mexico complained of a telephone communication made by Metalclad's Chief Executive Officer, which was alleged to have been "intended to provide information to shareholders, investment analysts, and other members of the public who were interested in the Claimant's activities." Mexico filed with the Tribunal for a confidentiality order, pursuant to Article 1134 of NAFTA and Article 28 of the ICSID Additional Facility Rules. Mexico also requested a declaration to the effect that breach of the confidentiality order sought would permit Mexico to request sanctions against Metalclad. In its submissions, Mexico argued that the expectation of confidentiality is implicit in the arbitral process.

The Tribunal made a determination on the request in October 1997. It denied Mexico a confidentiality order on the ground that Mexico had failed to meet the test for provisional relief. Nonetheless, the Tribunal went on to address the substantive issue of whether the parties were entitled to expect the arbitration to be confidential. Completely rejecting the notion that confidentiality was an implied condition of the arbitration, the Tribunal stated:

[n]either the NAFTA nor the ICSID (Additional Facility) Rules contain any express restriction on the freedom of the parties in ... respect [of communications to third parties]. Though it is frequently said that one of the reasons for recourse to arbitration is to avoid publicity, unless the agreement between the parties incorporates such a limitation, *each of them is still free to speak publicly of the arbitration.*

The Tribunal additionally noted that under the domestic law of the United States, where Metalclad is resident, a company whose stock is traded on a public stock exchange has certain positive duties to provide to shareholders information that could affect share value. This, in itself, would place a limit on any expectations for confidentiality in the arbitration.

However, the Tribunal recommended that to ensure "the orderly unfolding of the arbitral process and ... the maintenance of working relations between the Parties," public discussion of the case should be limited "to a minimum". Thus, while rejecting confidentiality as an implied aspect of the arbitration, the Tribunal nonetheless did not encourage abundant disclosure.

### 2. The *Loewen* case

The *Loewen* case was begun under the ICSID Additional Facility in 1998, and is still pending. In brief, the claimants allege that the United States violated Articles 1102 (National Treatment), 1105 (Minimum Standard of Treatment), and 1110 (Expropriation and Compensation) of NAFTA by failing to secure procedural and substantive justice for the claimants in a civil suit prosecuted against the claimants in Mississippi.

In May 1999, the United States requested that all filings in the arbitration, including the minutes of the proceedings, be treated as open and available to the public. The Loewens' agreed that the minutes and other filings should be publicly available, but only after the case was concluded. The Loewens' reasons for opposing disclosure during the arbitration was twofold: (1) that both the ICSID Additional Facility Rules and NAFTA contain disclosure limitations, and (2) that the Parties were under a general duty to maintain confidentiality in respect of the proceedings.

The Tribunal rendered a decision in the matter in late September, 1999. The Tribunal rejected the United States' request, effectively supporting the first leg of Loewen's argument. The Tribunal found that Article 44(2) of the ICSID Additional Facility Rules, which provides that minutes of proceedings are not to be published without the consent of the parties, prohibited release of information sought to be disclosed, absent the agreement of both parties. The Tribunal noted that "this prohibition is primarily directed to the Tribunal," and, therefore, it would not be appropriate to bring about a situation permitting the Tribunal or the ICSID Secretariat to make public materials related to the arbitration. However, the Tribunal also pointed out that the prohibition "was understood in the *Metalclad Arbitration Decision* as [also] being directed to the parties... "

Significantly, however, the Tribunal did not accept Loewens' argument that the Parties to the arbitration were "under a general duty of confidentiality". In particular:

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.

Nonetheless, as in *Metalclad*, the Tribunal recommended that the parties limit public discussion of the case to "what is considered necessary."

### 3. The *Methanex* case

The *Methanex* case represents the most recent, and most fulsome, consideration of confidentiality in mixed international arbitration. In 1999, Methanex Corporation ("Methanex"), a Canadian company, initiated Chapter 11 proceedings against the United States ("U.S.") under the UNCITRAL Rules in relation to the decision of the California Governor in March 1999 to ban a methanol derivative, produced by Methanex, from California gasoline by 2002. Methanex alleged, in particular, violations of Articles 1105 (Minimum Standard of Treatment) and 1110 (Expropriation and Compensation) of NAFTA.

In August 2000, the Canadian-based International Institute for Sustainable Development ("IISD") petitioned the *Methanex* Tribunal for standing in the arbitration as an *amicus curiae*. An identical petition was made by a coalition of U.S. environmental groups ("the Coalition") in October 2000. IISD and the Coalition sought permission to (1) deliver written submissions to the Tribunal, (2) attend hearings at which the Parties made oral submissions, and (3) receive copies of all materials filed with the Tribunal by the Parties. The petitions touched off an extensive debate on the permissibility of *amicus* participation in a Chapter 11 proceeding under the UNCITRAL Rules, and the role of confidentiality in such an

arbitration (although IISD was the only Petitioner to address the legal aspects of confidentiality in detail in its submissions to the Tribunal).

The Tribunal received many pages of arguments prior to answering the petitions, and decided the petitions on the basis of these written briefs; no oral arguments were presented. IISD filed two briefs in support of its petition; three sets of submissions were made by Methanex (in opposition); and two sets of submissions were filed by the U.S. (in support). Canada also made submissions in support of the petitions, while Mexico filed arguments against them.

The remainder of this section will focus on the confidentiality issues arising from the petitions. Because *Methanex* appears to be the first mixed international arbitration to address confidentiality and the public interest in more than passing fashion, and because considerable documentation on the arguments presented to the Tribunal is available, the matter will be considered in some detail.

*(a) Arguments Advanced By the Petitioners and Parties*

**IISD's submissions and Methanex's initial response:** IISD did not raise confidentiality issues in its initial petition, but expressed its willingness to comply with any confidentiality obligations imposed by the Tribunal, should the Tribunal grant *amicus* status. Methanex, however, immediately raised confidentiality concerns in answering the IISD petition. "Confidential Nature of the Proceedings" was the first heading of Methanex's initial arguments to the Tribunal. There, Methanex maintained that Article 25 (4) of the UNCITRAL Rules, which stipulates that hearings shall be held *in camera*, not only means that all spectators should be excluded from hearings, but further carries an implied duty to hold confidential all documents created for the purpose of the hearings. Methanex also argued that permitting *amicus* participation would violate the agreement on confidentiality concluded by the Parties, this agreement having provided that transcripts and submissions by the Parties would be kept confidential, subject to disclosure on a need-to-know basis to a limited range of persons.

The Petitioner IISD retorted that the requirement for *in camera* proceedings in Article 25(4) of the Rules did not override the authority granted to the Tribunal by Article 15 of those Rules to conduct the arbitration in the manner it deems appropriate. In any case, IISD argued, the presence of an *amicus* authorized to attend by the Tribunal would make the proceedings no less *in camera*. IISD also argued that "the UNCITRAL Rules do not impose confidentiality restrictions ... [but] contemplate that such issues can be resolved by agreement between the parties, where appropriate, and with the approval of the Tribunal." Finally, IISD noted that, as a result of the participation of the U.S., the arbitration would be subject to the U.S. *Freedom of Information Act*. In the result, "access to key materials, such as memorials and counter-memorials can be obtained through an application" pursuant to the *Act*. Thus, IISD submitted, "the Petitioner is requesting no more than it is entitled to under applicable U.S. legislation."

In the submissions contained in its next and final brief, IISD reiterated its view that there is no "general principle of confidentiality that stands in the way of this Petition." In this respect, IISD relied upon *Metalclad* for the proposition that such a general principle is found in none of NAFTA, the ICSID (Additional Facility) Rules, the UNCITRAL Rules, or in the draft Articles on Arbitration adopted by the International Law Commission. IISD also cited *S.D. Myers v. Canada*, which, like *Metalclad*, denied the existence of a general principle of confidentiality. In *S.D. Myers*, the Tribunal said:

... whatever may be the position in private consensual arbitration between commercial parties, it has not been established that any *general principle* of confidentiality exists in an arbitration such as [this] ... 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 the disputing parties.

In short, despite its initial willingness to abide by any confidentiality measures imposed by the Tribunal, by the end of its submissions, IISD was emphatic in its rejection of a general principle of confidentiality.

**The United States:** The U.S. supported *amicus* participation in the arbitration, and did not consider that confidentiality concerns were pertinent to the determination of whether such participation ought to be permitted. In fact, in their second set of submissions, counsel for the U.S. even went so far as to say that "whether or not (*sic.*) this arbitration is deemed confidential is *irrelevant* to the issue of participation by *amici*..." Nonetheless, there can be no doubt that the common view of confidentiality — the maintenance of secrecy with respect to the arbitration — had been rejected by the U.S. as a basic premise of its arguments. And, in any case, the U.S. ultimately found it necessary to address confidentiality concerns notwithstanding its general position on the relevance of confidentiality to IISD's application.

The foremost U.S. submission was that the *Methanex* arbitration had to be understood in context, i.e. as a dispute brought by a private party against a State pursuant to a treaty, and not a commercial arbitration agreement. This context, the U.S. contended, made the *Methanex* arbitration "fundamentally different [in] nature than a typical international commercial dispute" and "even [different] from commercial arbitration involving a public entity, because ... [it goes] beyond the breaches of commercial contracts and implicate [s] core governmental functions." In support of this argument, the U.S. cited the Australian High Court's decision in *Esso*. It further relied on the *Esso* decision to deny that privacy in the hearings — admittedly contemplated by Article 25 of the UNCITRAL Rules — imports confidentiality into arbitration as an essential attribute of the arbitral process.

With respect to NAFTA, the U.S. argued that both Articles 1126(10) and 1137(4), together with Annex 1137.4, "demonstrate that the State Parties expected the substance of each Chapter Eleven dispute and most awards to be made available to the public."

Finally, the U.S. reiterated that the Order Regarding Disclosure and Confidentiality, which had formalized the Parties' confidentiality agreement first referred to by *Methanex*, "specifically envisage[d] that important documents generated during the course of the arbitration will be releasable immediately to the public and that the remainder would be releasable pursuant to lawful requests under the U.S. *Freedom of Information Act*."

**Methanex's Final Submissions:** *Methanex* took a new tack in its final submissions to the Tribunal by introducing the argument that permitting *amicus* participation in the arbitration would go beyond a matter of procedure, within the control of the Tribunal, to touch upon substantive matters, outside the scope of the Tribunal's powers under Article 15(1) of the Rules. Thus, Counsel for *Methanex* claimed that, "Unlike judicial proceedings, the admission of non-parties to a privately contracted arbitral agreement is a substantive interference with the rights of the parties." However, *Methanex* provided no authority for this proposition.

#### *(b) The Methanex Tribunal's Decision*

After having determined that it had jurisdiction to address the petitions for *amicus* standing (this entailed a detailed consideration of the Tribunal's powers under Article 15(1) of the Rules), the Tribunal expressed the view that it was minded to accept written submissions from *amici*. However, it held that it

was premature to determine whether such submissions would actually be of assistance to the Tribunal, so it reserved the right to make an ultimate determination at a later stage of the proceedings. Further, the Tribunal found that since the parties were not in agreement on the issue of the Petitioners' attendance at hearings, under the terms of Article 25(4) of the Rules, the Petitioners must be excluded.

The Tribunal's decision flowed from a detailed consideration of its powers under the Rules, as modified by NAFTA. Privacy in the arbitration, since it is provided for in Article 25(4) of the Rules, was an explicit theme in the Tribunal's discussion. Confidentiality, which is not mentioned in the Rules, was not discussed in the operative part of the decision. In fact, the Tribunal refused to decide the scope of confidentiality in the arbitration — this, in its view, being an issue settled by an agreement between the Parties. Therefore, the several paragraphs in the decision where the Tribunal discusses confidentiality plainly are clearly *obiter dicta*. However, the *obiter*, being the first detailed consideration of confidentiality and the public interested in a mixed international arbitration, is likely to be persuasive to other tribunals, and therefore retains considerable importance.

Before moving to consideration of the *obiter*, however, some comment is warranted on the Tribunal's approach to the analysis in the operative part of its decision. There, the Tribunal seemed to be of the view that, *in its entirety*, the Petitioners' request to attend hearings and receive copies of all submissions and materials adduced before the Tribunal went to the question of *privacy*, and not *confidentiality*. (Indeed, since confidentiality is not addressed by the Rules, as modified by NAFTA, the Tribunal was more or less *required* to frame the issues as matters affecting privacy, in order to render decisions on the requests.) Thus, in discussion of the reasons for not granting the Petitioners access to hearings and documentation, the Tribunal said:

... Article 25(4) [of the Rules] is relevant to the Petitioners' request to attend hearings and to receive copies of all submissions and materials adduced before the Tribunal. ... The phrase 'in camera' [in Article 25(4)] is clearly intended to exclude members of the public, i.e. non-party third persons such as the Petitioners. ... *Article 25(4) relates to the privacy of the oral hearings of the arbitration, and it does not in like terms address the confidentiality of the arbitration.*

Assuming that the "*in camera*" phraseology in Article 25(4) is indeed aimed at protecting privacy (a perfectly logical assumption), then admitting the Petitioners into hearings without the agreement of both parties would be a violation of privacy. So far, so good. However, framing the requests to receive documentation as a privacy issue under Article 25(4) leads to a strained analysis.

First, it is not clear how Article 25(4) bears on the issue of whether *amici* should have access to documents produced in the arbitral hearings. The provision does not at any point mention documentation presented to the tribunal, but only addresses the "hearings" and the examination of witnesses in those hearings. On the ordinary meaning of the words, "hearings" would only address the *oral* proceedings, thus leaving the provision silent on *written* documentation. In the result, it cannot be assumed that the provision applies to written documentation. In fact, to suppose that it does apply is question-begging: given the silence of the provision with respect to written materials, the only way in which it could be supposed to protect such materials from distribution to third parties would be if such protection were *implied* in the language of Article 25(4); but the task of the Tribunal is precisely to determine *whether* this implication is tenable.

Second, and as a result of the first point, if it is unclear that Article 25(4) provides a basis to determine whether *amici* should receive materials filed by the Parties, then it is also unclear that disclosure of those

materials to *amici* is really a matter of *privacy*, as opposed to *confidentiality*.

Now, two paragraphs after the fragment quoted above, the Tribunal seems to recognize that there is a live question of interpretation with respect to Article 25(4), and an issue of separating privacy concerns from confidentiality concerns. It says at paragraph 43,

As to confidentiality, the Tribunal notes the conflicting legal materials [the *Bulbank*, *Esso* and *Cockatoo Dockyard* cases on the one side; the *Ali Shipping* case on the other] as to whether Article 25(4) ... imposes upon the Disputing Parties a further duty of confidentiality (beyond privacy) in regard to the materials generated by the parties within the arbitration.

However, this statement only seems to confuse matters more.

First, the purported distinction drawn between privacy and confidentiality with respect to documents is puzzling. As it is commonly understood in the arbitral context, "privacy" means the exclusion of strangers from the arbitration, and is a term almost exclusively used in the literature to describe the character of arbitral *hearings*. "Confidentiality", on the other hand, generally expresses the maintenance of secrecy with respect to the documents generated for/in an arbitration and, sometimes, the outcome of the arbitration. It would appear that, as a consequence of the way the terms "private" and "confidential" are used in relation to arbitration, release of materials to *amici* would be a matter affecting confidentiality, not privacy. In the context of the decision, this is more than a matter of semantics; it goes to the heart of the subject matter of Article 25(4). Now, because the Tribunal found that the confidentiality agreement between the Parties sufficiently answered the question of whether (and how) *amici* could receive materials generated in the arbitration, it did not plumb the ultimate depths of Article 25(4). However, had the confidentiality agreement been defective or absent, the Tribunal's analysis would not have answered the point.

Second, the Tribunal's citation of cases from national courts as an aid to interpretation of Article 25(4) is surprising. While such cases may illuminate what particular judiciaries think about an implied duty of confidentiality in arbitration, they cannot address the question of whether such duty is implied in Article 25(4) of the Rules. The cases cited did not deal with interpretation of Article 25(4); in fact, in all cases except *Bulbank*, they dealt with statutes completely unrelated to the UNCITRAL Rules. Therefore, they cannot lead to an authentic interpretation of Article 25(4).

In the result, the Tribunal's reasons do not satisfactorily settle the matter of whether *amici* authorized to make submissions to the Tribunal should have access to materials generated in the arbitration. That is, it is no clearer at the end of the operative part of the Tribunal's reasons than it was at the beginning whether Article 25(4) properly addresses distribution of documents, and the attempt to characterize this issue as a matter affecting privacy, rather than confidentiality, is unconvincing.

Now, it might be remarked that the operative reasons in the *Methanex* decision did not address the policy considerations surrounding participation of *amici* in the arbitration and the consequent effect of such participation on confidentiality. This is striking, given the extent to which such policy considerations were argued in the submissions to the Tribunal. Policy is discussed only in the *obiter dicta* of the decision, but there the Tribunal's comments are forceful.

By the end of the *obiter* section, it is clear that the Tribunal favours disclosure over secrecy in the arbitration. The Tribunal cites with approval a comment on confidentiality and the public interest by Professor Hans Smit, *viz.* "In determining to what extent arbitration is confidential, proper consideration must also be given to the public interest in knowing how disputes are settled." It also admitted the general relevance of the public interest to its determination:

There is undoubtedly public interest in this arbitration. ... [It] arises from its subject matter, as powerfully suggested by the Petitions. There is also the broader argument, as suggested by the Respondent and Canada: the Chapter 11 arbitration process could benefit from being perceived as more open or transparent; or conversely be harmed if seem as unduly secretive. In this regard, the Tribunal's willingness to receive *amicus* submissions might support the process ... whereas a blanket refusal could possibly do harm.

It is also noteworthy that in *obiter* the Tribunal expressed some doubts about the validity of presuming arbitration to be confidential at all, especially where public authorities are involved. The Tribunal noted, for example, that even in the bastion of support for confidentiality, the United Kingdom, "the present position is arguably equivocal in regard to public authorities." It was significant, in the Tribunal's view, that the *Arbitration Act 1996* had failed to include confidentiality provisions. In any case, the Tribunal opined, the law on strict confidentiality was a recent innovation dating from the decision in *The Eastern Saga*; before this case decisions were published from time to time. These comments, if they were to be accepted as the consensus on confidentiality in mixed arbitration would profoundly change the perceived impact of public interest on confidentiality. No longer would there be a public interest *exception to* confidentiality because confidentiality in such circumstances could not be presumed.

#### 4. Trends discernible in the NAFTA cases?

The delocalised/international jurisprudence on confidentiality in mixed arbitrations is still young. NAFTA Chapter 11 tribunals, as Genviève Burdeau notes, have introduced innovations into arbitration that accentuate the particularities of this forum as against other instances of international commercial arbitration. Given this, it should not be readily assumed that the conclusions reached in the NAFTA arbitrations will be shared by tribunals deciding confidentiality and public interest questions in mixed arbitrations convened to deal with more prosaic breach of contract issues. Nonetheless, there are two features of the judgments discussed above that are noteworthy.

The first is an obvious point, but has deeper ramifications than might appear at first blush. The tribunals all decided the confidentiality questions (or, in the *Methanex* case, matters related to confidentiality) on the basis of the relevant rules governing the arbitration. This approach is undoubtedly proper, since such rules, in conjunction with the NAFTA, determine the limits of a tribunal's competence, and inform the parties' expectations for the arbitration. However, it must be admitted that use of this deductive reasoning technique alone imposes certain limitations. The most important of these is that confidentiality tends to be considered purely in light of what the rules of procedure do or do not say about it.

The problem with a purely procedural approach to confidentiality, as alluded to in the *Cockatoo Dockyard* discussion above, is that it does not do justice to the substantive motivations for tribunals' decisions, which, as extracts quoted from *Loewen* and *Methanex* show, are not

irrelevant to the final determinations made by such tribunals. Indeed, such considerations creep into tribunals' decisions, but usually outside of the operative part. Rather than trying to keep the substantive concerns around confidentiality at the edge of their reasoning, tribunals might do well to bring such concerns a little closer to the centre. Establishing the *conditions* for confidentiality is undoubtedly a matter of procedure in arbitration, but the *reasons* for establishing those conditions is undeniably a matter of substance.

A second observation is peculiar to *Metalclad*: to simply notice that, in that case, the State, rather than the private party, brought an application to enforce confidentiality. This raises the point that although in most

cases of mixed arbitration the private parties tended to be the source of efforts to enforce confidentiality, this is not always the case. This observation is considered in greater detail in the next section.

### **III COMPETING VALUES AND LEGAL OBLIGATIONS RELEVANT TO THE PUBLIC INTEREST EXCEPTION**

My purpose in this section is to examine several of the competing factors that variously tend to favour limitation or expansion of the public interest exception to confidentiality. The list of factors considered is not exhaustive, but does aim to capture the major considerations, especially those operative in the cases considered above.

#### **(A) Factors Tending to Limit the Public Interest Exception:**

##### **1. Public Image:**

It is a truism in international commercial arbitration that one of the reasons private companies incline to arbitration over litigation is to safeguard their public image. Redfern and Hunter put

the matter in these terms:

"International commercial arbitration is ... essentially a private process and this is seen as a considerable advantage by those who do not want discussion in open court, with the possibility of further publication elsewhere, of the kind of allegations which can and do arise in commercial disputes — allegations of bad faith, of misrepresentation, of technical and managerial incompetence, of lack of adequate financial resources, or whatever the case may be."

From a private party's point of view, the desire to keep a low profile on disputes that may have the potential to tarnish a company's public image or reputation, may be an important factor weighing in favour of confidentiality and against disclosure under the public interest exception.

The problem, of course, is that when weighed against a State's moral or legal obligation to inform its citizens of the progress/final outcome of an arbitration, the power of the private party's public image rationale starts to fade. In comparison with a State's duties to its citizens, a company's desire to exercise damage control with respect to a commercial dispute is of obviously lesser importance. However, the situation is not as clear when the party seeking to protect its image is not a private company, but a public actor.

As the *Amco* and *Metalclad* decisions on confidentiality demonstrate, State Parties may be as — or even more — eager than their private sector counterparts to maintain confidentiality and secrecy in proceedings. This tendency has been noted by two eminent publicists in the arbitration field.

In 1965, Karl-Heinz Böckstiegel, by then already the former President of the International Chamber of Commerce (ICC), noted that one of the reasons that arbitration at the ICC Court of Arbitration had been attractive to governments over the course of the twentieth century lay "no doubt partly in the remarkably confidential nature of the proceedings: ... even if the decision goes against the state, it is easier to avoid loss of prestige or a reaction from the public with its political repercussions."

An even more pointed commentary on the governmental desires for confidentiality was made by the French publicist Emmanuel Gaillard in 1987:

Les états sont plus attachés encore à la confidentialité [que les entreprises] et ce, tant en raison de l'ambivalence de leur activité que de la permanence de leur status. S'ils agissent souvent aujourd'hui en qualité de commerçants et participent à ce titre aux procédures de règlement des litiges du commerce international, les Etats doivent également et surtout assumer leur fonction de puissance publique. C'est la raison pour laquelle ils se montrent généralement soucieux d'éviter que les différends purement commerciaux, quelle en soit l'issue, puissent, par la publicité intempestive qui pourrait leur être donnée, ternir leur image de souverain. L'intégrité de cette image leur importe d'autant plus qu'à la différence de leurs partenaires privés, qui jouissent d'une très grande liberté dans le choix des formes juridiques destinées à structurer leur activité internationale, les Etats ne peuvent à l'évidence pas se restructurer, se dissoudre ou se mettre en sommeil pour exercer leurs activités sous d'autres formes ou d'autres formes commerciales.

One particularly interesting element of Gaillard's observation is that the maintenance of the State's public image is equated with perpetuating a perception of the State as, first and foremost, a sovereign entity: powerful and infallible. The assumption is that State actors have no desire to promote the State as, for example, a good international citizen willing to submit commercial disputes for resolution by neutral arbiters who are not tinged by the possibility of bias (as national courts might be), or as an example of a transparent and accountable government which seeks to keep its constituents informed of public activities.

While it is undoubtedly true that many States will cling to a desire to promote an image of themselves as ultimate sovereigns, to the extent that this is a justification for confidentiality in arbitration, it is a poor one. For one thing, preoccupation with sovereign power above all other values is arguably out of tune with the current nature of the international legal system, which now recognizes sovereignty *as among* the values to be honoured in the international system, not as *the singular or preeminent* value to be preserved above all others. Further, if protection of the sovereign public image were really taken seriously and used as a justification for enforcing confidentiality in mixed international arbitration, then confidentiality could potentially obtain ridiculous proportions. For example, it would be possible that a publicly traded private company that is party to arbitral proceedings with a State would be barred from communicating to its shareholders information that could affect share prices, if the nature of this information were such as to embarrass the State party.

## 2. Protection of Trade Secrets and Comparable Intellectual Property

Another important factor that would tend to militate in favour of greater confidentiality is the desire to protect intellectual property belonging to the private party to an arbitration. Without a doubt, protection of proprietary information is a legitimate and serious concern that must be addressed if there is to be an effective international system of mixed arbitration.

This said, since the coming into force of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ("TRIPs"), owners of trade secrets and other proprietary information will be able to protect their secret information in dealings with any government that is a member of the World Trade Organization. Article 39 of TRIPs provides protection so long as the information is: "secret in the sense that it is not ... generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question"; has commercial value relating to its secrecy; and "has been subject to reasonable steps under the circumstances ... to keep it secret." Provided these conditions are met, owners of secret information "shall have the possibility of preventing [the] information ... from being disclosed ... " Francois Dessemontet, in a review of the provisions of Article 39, concludes that "there is now ... everywhere ... a legal duty to respect confidentiality, with of course, all exceptions that are compatible with Article 39 ... and those exceptions only."

Now, in those (unfortunate) circumstances where a private party is involved in an arbitration with a State that is not a party to TRIPs, and the State presses for release of intellectual property, then matters may be

more complicated. However, due to the large number of States that have signed on to the World Trade Organization treaty — some 131 in total — it would be open to argue that the substance of Article 39 of TRIPS has passed into general international law and is therefore binding on the international community as a whole. Further, a private party threatened with release of proprietary information might also argue for application of standards like those included in the Rules of the World Intellectual Property Organization Arbitration and Mediation Center ("WIPO Rules"). In Articles 73 to 76, the WIPO Rules set out rigorous confidentiality provisions. These include a prohibition on unilaterally disclosing information about the existence of an arbitration, except in limited circumstances (Article 73); provisions to protect the confidentiality of evidence given by witnesses, to the extent that such information is not in the public domain (Article 74); provisions to protect the confidentiality of the award, with a list of circumstances in which communication of the award is permissible (Article 75); and a provision imposing confidentiality obligations on the arbitrator and Centre (Article 76). According to one commentator, these provisions "can be viewed as expressing a broad consensus among the practitioners of arbitration law [on the appropriate standards for confidentiality in arbitration]."

## **(B) Factors Tending to Expand the Public Interest Exception:**

### 1. The Growing Expectation of Public Participation in Governance and State Affairs

A factor which would tend to favour a more expansive view of the public interest exception may be termed the growing moral expectation that the public has a right to participate in governance.

At the most basic level, the expectation of participation presumes that citizens have a right to be informed about activities in which their government is engaged. In more developed forms, it may also include expectations of actual participation in specific fora, through consultative or other means.

The expectation of public participation in governance was, of course, a key concern in both the *Esso and Cockatoo Dockyard* cases from Australia. But it is in relation to NAFTA Chapter 11 arbitrations that the expectation has been more widely discussed: consider the decisions in *Loewen* and *Methanex*, and the public outcry in Canada about the foreshortened *Ethyl Corp. v. Government of Canada* arbitration. Taken together, the NAFTA arbitrations tend to show that a moral expectation of participation in the interpretation and application of NAFTA is real and pressing — not to mention explicitly recognized by two of the three NAFTA Parties.

### 2. Legal Obligations Assumed by the State That Call for A Broad Public Interest Exception to Confidentiality?

Taking the idea behind the moral expectation of transparency and public participation one step further, it might be argued that certain obligations that have been entered into by a large number of States at the international level could found a legal argument for an expansive public interest exception to confidentiality.

The most important of these commitments, which applies to 147 States, is the *International Covenant on Civil and Political Rights*. Article 25 of the Covenant provides that "Every

citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives ... " Gregory Fox, in a commentary on Article 25, argues that since the next sub-section (i.e. (b)) speaks specifically to the election process, sub-section (a) "must contemplate additional means of influencing public policy." In this vein, he notes that the Human Rights Committee

of the United Nations has stated that Article 25 "covers all aspects of public administration, and the formulation and implementation of policy at international, nation (*sic.*), regional and local levels." Fox's interpretation of Article 25 is supported by the drafting history of the provision: although an early version of it contained the formulation "Every citizens shall have the right to take part in the government of the State," this language was dropped in 1953 in favour of the phraseology ultimately included in the Covenant.

Now, arguably, if a mixed arbitration addresses matters touching upon the development, application or interpretation of public policy in more than a tangential fashion, there may be a positive right of public participation in that arbitration, at least to the extent of being informed of its progress and outcome. This would appear to be the case even for arbitrations that arise from provisions in ordinary commercial contracts, if the progress of the arbitration or the award rendered were integral to "the formulation and implementation of policy." Certainly, arbitrations

occurring pursuant to public law treaties, such as the NAFTA would seem to be strong candidates for a public interest exception to confidentiality by virtue of the fact that they are specifically concerned with the interpretation and development of public international law.

However, problems may arise from opening space for a "democracy exception" to confidentiality in this way. The most important is that such an exception may threaten to defeat the purpose of the structures that have been created specifically to depoliticize commercial disputes between public actors and private parties. For example, Aron Broches has emphasized that the purpose of the ICSID Convention and arbitration facilities is to "depoliticize investment disputes." By making arbitration a forum for dealings in public policy, the integrity of the forum, and the practicality of mixed international arbitration itself, may be seriously compromised.

#### **IV CONCLUSION: TO WHAT DEGREE SHOULD MIXED INTERNATIONAL ARBITRATIONS BE CONFIDENTIAL?**

In 1991, during his tenure as Canada's Ambassador to the United Nations, Yves Fortier made the somewhat startling statement that "Business disputes and commercial relationship at the international level are particularly well suited for ADR [i.e. arbitration], *except perhaps where state intervention is involved ...* " Given the pervasiveness of resort to arbitration for resolution

of disputes between private parties and public actors, Fortier's statement does have a certain odd ring to it. However, one does not have to go too far to imagine the idea lurking behind Fortier's words: where State participation is a feature of arbitration, the normal rules of the game for arbitrations between private parties may not apply.

This paper has been particularly concerned to understand the way in which public actors' participation in arbitration influences the level of confidentiality expected in such proceedings, and the justifications for releasing into the public domain information that normally would be expected to be confidential.

Case law from national jurisdictions and NAFTA Chapter 11 tribunals reveals that it is not safe for private parties to mixed international arbitration (or for States themselves) to assume that the proceedings will be subject to a shroud of confidentiality. On the contrary, the safer assumption is that disclosure about arbitral proceedings may well occur where the justification for so doing is protection of the public interest.

Assuming, then, that a public interest exception to confidentiality is upon us, what are the appropriate parameters for its application? I propose a two-part response.

First, it would seem that in light of basic ethical considerations and international legal commitments, information of a *proprietary nature* that meets the requirements of the definition of "undisclosed information" in Article 39 of the TRIPs Agreement should be protected. Such information would not be appropriate for disclosure under the public interest exception.

Second, information that does not meet the requirements of TRIPs, and that is of legitimate public interest, ought to be disclosed, provided that such information is of interest because it bears on (non-trivial) aspects of public law or policy. Disclosure under this principle honours the desirable goal of transparent governance and is also consonant with treaty obligations entered into by the majority of States that guarantee public participation in the political process. (Whether these treaty obligations require more than simple disclosure is separate question.)

The work that lies ahead for courts, tribunals and publicists, I would submit, falls into two areas. First, the notion of what is of "legitimate public interest" needs to be refined. As the majority judgment in the *Esso* case shows, there is real potential for all information arising from a mixed but otherwise ordinary commercial arbitration that, broadly speaking, addresses matters of public interest, to be deemed to be "in the public interest" and disclosed indiscriminately.

Second, given that part of the desirability of mixed international arbitration (particularly under the ICSID Convention) arises from the fact that private parties need depoliticized fora for dispute resolution, considerable work will need to be addressed to ensuring that the public interest exception to confidentiality does not ultimately undermine the practical value of mixed international arbitration, either in the purely commercial setting or in relation to the investor disputes arising under NAFTA or similar public law treaties.

As the quotation from Jerzy Jakubowski cited at the beginning of this paper suggests, however, arbitration is a flexible institution that is capable of adapting to changing needs and circumstances. It is, therefore, an institution that in my view is capable of adapting to the challenges presented by the participation of public actors in mixed international arbitration.

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