

Keynote Address: The Ethics of Arbitration: Perspectives from a Practicing International Arbitrator

By
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WHY DO WE CARE ABOUT ETHICS AND TRANSPARENCY?

The first question that we must ask ourselves is “why do we care about ethics and transparency?” The answer, of course, is that ethics and transparency better ensure legitimacy—general public acceptance that any rule-based system is authoritative and binding. Courts require legitimacy if they are to remain stable and maintain their power.¹ If courts lose legitimacy, they will not be obeyed. If they are not heeded, they lose their power. If they lose their power—if parties abandon faith in the law—people will seek recourse in self-help, returning society to a Hobbesian state of nature.

According to Martin Shapiro, Berkeley’s resident expert on the subject, courts’ central task in maintaining legitimacy is to preserve their basic triad or triptych structure—composed of two disputants and a neutral third intervener—and to prevent it from breaking down to the point where one disputant perceives it as “two against one.” Courts have employed numerous strategies over the centuries to prevent such collapse, including ensuring that parties have consented to the triad, and the court applies truly neutral legal principles.² Nowadays, parties have increasingly sought private arbitration of their disputes, particularly where those disputes are international in character. Though arbitral tribunals almost are universally *ad hoc* adjudicating mechanisms, arbitrators and arbitral institutions also have an interest in maintaining legitimacy, both for the mutual acceptance of their awards by the parties before them and for broad public acceptance of the entire law-based system of which they are a part.

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1. See MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 1-8 (U. OF CHICAGO PRESS, 1981).

2. *Id.* at 1-2.

At times, however, arbitrating parties have become dissatisfied when it has been perceived that their consent was not freely given³ or that a supposedly neutral intervener was not wholly independent and unbiased. This is apparently what occurred in California earlier in this decade, when its legislature reacted to perceived injustices related to mandatory arbitration by passing new disclosure requirements for arbitrators⁴ and arbitration institutions.⁵ A much broader regulatory response is also currently underway in Congress—the Arbitration Fairness Act of 2009⁶ and the Fairness in Nursing Home Arbitration Act⁷—two bipartisan bills that seek to limit the more regrettable ways that mandatory arbitration regimes infringe on consumer and citizen rights.⁸ Similarly, international arbitration has faced criticism that it lacks sufficient transparency and requires firmer ethical guidance for arbitrators. To this year's Stefan A. Riesenfeld Symposium I offer my views on ethics and transparency, developed over nearly five decades in the law.

WHY HAVE ETHICS AND TRANSPARENCY BECOME SO IMPORTANT IN ARBITRATION?

Before continuing, we must first reach some common ground on what we mean by “arbitration.” To my mind, there are at least four types: first, domestic arbitration between individual consumers and service providers, to which most, if not all of you sitting in this room have consented at various times, sometimes more knowingly than at others,⁹ or between two commercial entities engaged in

3. See generally Catherine A. Rogers, *The Arrival of “Have-Nots” in International Arbitration*, 8 NEV. L. J. 341, 348 (2007) (noting that U.S. courts have “systematically downgraded the consent requirement,” interpreting it broadly to find valid consent in “contracts of adhesion where the arbitration clause is made known only after the agreement has been completed and with no opportunity to object or withdraw.”).

4. See *infra* notes 43-60 and accompanying text.

5. CAL. CODE CIV. PROC. § 1281.92 (prohibiting private arbitration companies from administering consumer arbitrations for parties in which they have financial interest); *id.* § 1281.96 (requiring disclosures by private arbitration companies administering consumer arbitrations); *id.* § 1284.3 (regulating fees charged in consumer arbitrations).

6. For a general discussion of the Act and its implications for international commercial arbitration, see David D. Caron and Seth Schreiber, *Anticipating The 2009 U.S. “Fairness in Arbitration Act,”* 2 WORLD ARBITRATION & MEDIATION REVIEW 15 (2008).

7. The Fairness in Nursing Home Arbitration Act of 2009 (S. 512 / H.R. 1237), sponsored by Sen. Herb Kohl (D-Wis.) and Rep. Linda Sanchez (D-Calif.), would eliminate forced arbitration clauses in nursing home contracts. See “H.R. 1237 – Fairness in Nursing Home Arbitration Act of 2009,” at <http://www.opencongress.org/bill/111-h1237/show> (accessed Jan. 2, 2010).

8. The Arbitration Fairness Act of 2009 (S. 931 / H.R. 1020), sponsored by Sen. Russ Feingold (D-Wis.) and Rep. Hank Johnson (D-Ga.), would render invalid and unenforceable any pre-dispute arbitration agreement if it “requires arbitration of an employment, consumer, franchise, or civil rights dispute.” See “S.931 – The Arbitration Fairness Act of 2009” § 402(a), <http://www.opencongress.org/bill/111-s931/text> (accessed Jan. 2, 2010).

9. See, e.g., Christopher R. Drahozal & Raymond J. Friel, *Consumer Arbitration in the European Union and the United States*, 28 N.C. J. INT'L L. & COM. REG. 357, 379-83 (2003); Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: *The Average Consumer’s Experience*, 67 LAW & CONTEMP. PROBS. (Winter/Spring 2004)

business (e.g., franchise agreements or sales contracts);¹⁰ second, arbitration within trade or industry-specific contexts, such as maritime disputes and commodity sales, where the arbitrators most often are experts in the field who have earned the trust of their peers for their knowledge and fairness;¹¹ third, international investment arbitration, arising out of either arbitration clauses in contracts for large investments or dispute resolution provisions in bilateral or multilateral investment treaties;¹² and fourth, non-investment related international arbitration, which typically arises out of non-investment commercial transactions and on-going business relationships. Each of these types entails similar, yet distinct, processes that involve different (but sometimes overlapping) actors, regimes and constituencies, whose relationships, in turn, implicate different public policy questions and prescriptions. Thus, while these different contexts may offer each other useful lessons, a set of pressing concerns in one context does not necessarily apply as forcefully or at all in another.

Now, how can we account for the palpable increase in focus on ethics and transparency in international arbitration? My answer is twofold. First, today there is much more at stake in arbitrated disputes (excluding State-to-State ones, which, by definition, are “high stakes”). These high-stakes arbitrations, whether they be treaty-based or contract-based, whether they involve a State qua State or not, increasingly are about investments in some form, and the sums in dispute are huge, even gargantuan. Second, as the involved “communities” have become global, there is less instinctive trust, either in institutions or in individual adjudicators.¹³ Just as the village headman, due to the respect he is accorded by the village, was, and in places still is, the generally accepted judicial authority, so were (and are), for example, maritime arbitrators, specialized commodity arbitrators and the like, trusted by all because they are known by all—“all”

at 55, 64. The inclusion of arbitration clauses in consumer and employment contracts has been very controversial. For opposing views, compare Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996) (critiquing pre-dispute arbitration clauses in consumer contracts) with Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements - With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251 (2006) (defending pre-dispute arbitration clauses in consumer contracts).

10. See Christopher R. Drahozal, “Unfair” Arbitration Clauses, 2001 U. ILL. L. REV. 695, 726-27 (45% of franchise agreements studied included an arbitration clause).

11. See generally Lisa Bernstein, *Private Commercial Law*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 3, 108 (Peter Newman, ed., 1998).

12. See CHRISTOPHER R. DRAHOZAL & RICHARD W. NAIMARK (eds.), TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH (KLUWER, THE HAGUE 2005) 59 (2005) (almost 90% of international joint venture contracts studied included an arbitration clause).

13. See International Bar Association, IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION, *Introduction* (2004), <http://www.ibanet.org/Document/Default.aspx?DocumentUid=E2FE5E72-EB14-4BBA-B10D-D33DAFEE8918> (accessed Dec. 21, 2009) (noting that “[t]he growth of international business and the manner in which it is conducted, including interlocking corporate relationships and larger international law firms, have caused more disclosures and have created more difficult conflict of interest issues to determine.”) [hereinafter “IBA GUIDELINES”].

being the members of the affected community, which may in fact be global. However, outside of such narrowly confined contexts, arbitrations typically are one-off affairs that lack communal features, such as shared knowledge and experiences. This fact in turn limits individuals' capacities to trust and be trusted. Further, in international arbitration, the process is not attached to an accepted unitary sovereign system, meaning that at least two "tribes," i.e., parties from different nationalities, are involved, allowing suspicion and mistrust to arise even more easily than they might otherwise.¹⁴

THE ETHICS OF ARBITRATOR DISCLOSURES

The issue of impartiality in international arbitration is caught between the abstract notion of justice, and the unique principle of international arbitration that a party is entitled to appoint, as one of the three decision-makers, a person of its own choosing, who brings to the task the biases and instincts inherent in his or her particular worldly experience. While there seems to be universal

14. A case in point is that of David Mildon QC, a member of the Essex Court Chambers in London, who had been engaged as counsel for the respondent in a recent case chaired by David Williams QC, a member of that same chambers. The case was held at the World Bank Group's International Centre for the Settlement of Investment Disputes (ICSID), and was between Slovenia and a wholly State-owned entity of Croatia, mutually suspicious Balkan neighbors neither conversant with, nor necessarily trusting of, the system in England, pursuant to which members of the same barrister chambers appear before each other, sit with each other, and oppose each other, all with professional impunity. See *Laker Airways Inc v FLS Aerospace* [1999] 2 Lloyds Rep 45 (under § 24 of the Arbitration Act of 1996, Laker, an American company, unsuccessfully challenged FLS's nominated arbitrator, who came from the same chambers as FLS's counsel). The claimant questioned Mr. Mildon's participation in the case as counsel for the respondent. Though the tribunal declined to adopt a blanket rule that an arbitrator could not share chambers with an attorney appearing before the tribunal, it did conclude in the particular circumstances of that case that Mildon must withdraw in order to avoid any appearance of a conflict of interest. See generally *Hrvatska Elektroprivreda d.d. v. The Republic of Slovenia*, ICSID Case No. ARB/05/24, Order Concerning the Participation of a Counsel (May 06, 2008), available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC950_En&caseId=C69 (accessed Jan. 3, 2010). Had different parties been involved in this case, the challenge to Mildon might never have occurred, let alone have been granted.

It should be noted, however, that the International Bar Association's Guidelines on Conflicts of Interest has placed such a relationship on its "Orange List," meaning that it recommends disclosure of such a relationship as soon as it becomes known. See IBA GUIDELINES, *supra* note 13, at Part II – "Orange List" § 3.3.2; see also Otto L.O. de Witt Wijnen, Nathalie Voser & Neomi Rao, *Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration*, 5 BUS. L. INT'L 433, 455-56 (Sept. 2004) (noting that, "[w]hile the peculiar nature of the constitution of barristers' chambers is well recognised and generally accepted in England by the legal profession and by the courts, it is acknowledged by the Working Group that, to many who are not familiar with the workings of the English Bar, particularly in light of the content of the promotional material which many chambers now disseminate, there is an understandable perception that barristers' chambers should be treated in the same way as law firms. It is because of this perception that the Working Group decided to keep on the Orange List, and thus subject to disclosure, the situation in which the arbitrator and another arbitrator or counsel for one of the parties are members of the same barristers' chambers."), available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=A6CF1D1E-30AF-42C1-8F2D-22E7FD5EACEA> (accessed Dec. 17, 2009) (hereinafter "*IBA Guidelines Background*").

acceptance of the principles of independence and impartiality, the application of these principles, particularly with regard to arbitrator disclosure, is subject to opposing views.¹⁵ Because one of the themes of this Symposium is “Developing California,” and because it is in the area of arbitrator disclosures that California seems to have struggled in recent years, I will focus my comments on this thorny issue. In my view, California’s efforts in response to popular discontent may have gone too far. After first discussing this example of “over-legislating,” I will turn my attention to an area where the international arbitration community thus far has missed an opportunity to enhance its system: namely, the publication of reasoned challenge decisions.

Frameworks For Arbitrator Disclosure

One must be very careful to keep separate the standard by which an arbitrator may be disqualified for bias, or for the appearance thereof, and the different test of what an arbitrator must disclose. That being said, the two inevitably intersect insofar as the failure of an arbitrator to make a required disclosure may itself raise an issue regarding that arbitrator’s qualification to continue serving. A prominent example follows.

In the United States, standards for arbitrator behavior are selected by contract, and, in the absence of a different agreement by the disputing parties, the Federal Arbitration Act (“FAA”),¹⁶ and the Uniform Arbitration Act (“UAA”) or Revised Uniform Arbitration Act (“RUAA”), set the default standard.¹⁷ Under the FAA, courts asked to vacate an award for arbitrator bias,

15. See Emilio Cárdenas and David W. Rivkin, *A Growing Challenge for Ethics in International Arbitration*, in GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION – LIBER AMICORUM IN HONOUR OF ROBERT BRINER 195 (ICC 2005, Gerald Aksen, Karl-Heinz Böckstiegel, Michael J. Mustill, Paolo Michele Patocchi and Anne Marie Whitesell, eds.) (“While there is widespread agreement about these fundamental principles of international arbitration, problems arise because of their inconsistent application.”). See also Yves Derain and Eric A. Schwarz, *GUIDE TO THE ICC RULES OF ARBITRATION*, 2ND ED 116 (Kluwer Law International 2005) (noting that the failure to define “independence” or refer to “impartiality” has resulted in “confusion and controversy” about the nature of the requirement set out in Article 7(1) of the ICC Rules, which states that every arbitrator must be and remain “independent” of the parties); IBA GUIDELINES, *Introduction*, *supra* note 13 (Working Group concluding that “even though laws and arbitration rules provide some standards,” there was a lack of detail both “in their guidance and of uniformity in their application.”).

16. The standards under the Federal Arbitration Act are codified at 9 U.S.C. § 10(a) (providing for an order vacating an arbitral award upon the application of any party to the arbitration “(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.”).

17. See Merrick T. Rossein and Jennifer Hope, *Symposium: Transatlantic Perspectives on Alternative Dispute Resolution: Disclosure and Disqualification Standards for Neutral Arbitrators: How Far to Cast the Net and What is Sufficient to Vacate Award*, 81 ST. JOHN’S L. REV. 203, 231

including for non-disclosure, determine whether there was, among other grounds, “evident partiality” in an arbitrator.¹⁸ The Supreme Court interpreted the FAA’s “evident partiality” standard in *Commonwealth Coatings Corp. v. Continental Casualty Company*,¹⁹ in which it held that an undisclosed business relationship between an arbitrator and one of the parties constituted “evident partiality” requiring vacatur of an award. Members of the Court disagreed, however, on the requisite scope of disclosure and the impact of non-disclosure.

Justice Black, writing for an apparent plurality of the Court,²⁰ concluded that non-disclosure of “any dealings that might create an impression of possible bias” or create “even an appearance of bias” would amount to evident partiality requiring vacatur,²¹ whereas Justice White, in a concurrence joined by Justice Marshall, proposed a more limited test that eschewed automatic disqualification for non-disclosure of merely “trivial” relationships and required disclosure only

(2007). The Uniform Arbitration Act, promulgated in 1955, sought to harmonize divergent state practice related to arbitration. Before being revised in 2000, 49 jurisdictions had adopted the UAA or substantially similar legislation. The Revised Uniform Arbitration Act, approved by The National Council of Commissioners on Uniform State Laws in August 2000, updates the original Uniform Arbitration Act to reflect the modern practice of arbitration and changes in the law. The RUAA has been adopted by 13 jurisdictions, including the District of Columbia, and has been introduced in four others. See RUAA, Prefatory Note, <http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.htm> (accessed Dec. 16, 2009); see also The National Council of Commissioners on Uniform State Laws, “A Few Facts About the ... Uniform Arbitration Act,” http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-aa.asp (accessed Dec. 15, 2009).

18. FAA, Chapter 1, § 10, codified at 9 U.S.C. §10(a)(2). The FAA may preempt a state arbitration act where there is a substantive law conflict between the FAA and the state law in question, particularly with respect to the FAA’s broad pro-arbitration policy. See, e.g., *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008), in which the Supreme Court resolved a split in the Courts of Appeals over the exclusiveness of the statutory grounds in the FAA to confirm, vacate, or modify an award by concluding that “§§10 and 11 respectively provide the FAA’s exclusive grounds for expedited vacatur and modification.” *Id.* at 1403. The doctrine of preemption under the FAA is a vexed one that is beyond the confines of the present lecture. For useful general discussions, see Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 393-95 (2004); and RUAA, Prefatory Note, *supra* note 17.

19. 393 U.S. 145, 89 S. Ct. 337 (1968).

20. See *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 282 (5th Cir. 2007) (en banc), *cert denied*, 127 S. Ct. 2943 (2007) (noting that “[r]easonable minds can agree that *Commonwealth Coatings*, like many plurality-plus Supreme Court decisions, is not pellucid,” before describing alternative understandings of the Justices’ opinions). As the en banc opinion in *Positive Software* notes, it is only if “one lays primary emphasis on Justice White’s statement that he was ‘glad to join’ the plurality,” that his opinion “can be deemed reconcilable with that of Justice Black,” which is the only way that the plurality opinion can be binding on lower courts. See *id.* at 282. However, in that court’s view, the “more persuasive” reading (because it “accords scope to the full White opinion, unlike the view that focuses on the introductory ‘glad to join’ sentence”) is that Justice Black’s opinion “uses an egregious set of facts as the vehicle to require broad disclosure of ‘any dealings that might create an impression of possible bias,’” and Justice White’s “joinder” is “magnanimous but significantly qualified,” because he really supports “ample but not unrealistic disclosure,” and a “cautious approach to vacatur for nondisclosure.” *Id.* In this reading, Justice White’s concurrence, “pivotal to the judgment, is based on a narrower ground than Justice Black’s opinion, and it becomes the Court’s effective ratio decidendi.” *Id.* (quoting *Marks v. United States*, 430 U.S. 188, 193-94, 97 S. Ct. 990 (1977)).

21. 393 U.S. at 149, 89 S. Ct. at 339-40.

of an arbitrator's "*substantial interest* in a firm which has done *more than trivial* business with a party," noting that an arbitrator "cannot be expected to provide the parties with his complete and unexpurgated business biography."²² Justice Fortas, joined by Justices Harlan and Stewart, dissented, favoring an approach under which an arbitrator's failure to disclose certain relationships established a rebuttable presumption of partiality.²³ The majority of the Courts of Appeals that have addressed the issue have concluded that Justice White's "additional remarks" deprived Justice Black's opinion of majority status and thus of binding authority, and have espoused Justice White's narrower and more pragmatic view as the Court's "effective *ratio decidendi*."²⁴

In rejecting Justice Black's comparison of arbitrators to Article III judges, Justice White observed that it is often because arbitrators are "men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function." Thus he presciently identified a central difficulty in arbitration that endures until today, continuing to influence both how we think about impartiality and what we expect arbitrators to disclose. To "accommodate the tensions between concepts of partiality and the need for experienced decision-makers, as well as the policy of relative finality in arbitral awards," the RUAA follows Justice White's line in providing that supposedly neutral arbitrators who fail to disclose a "known, *direct*, and *material* interest in the outcome of the arbitration proceeding or a *known, existing*, and *substantial* relationship with a party"²⁵ are presumed to have acted with "evident partiality," thereby creating a ground for vacatur of the arbitral award, which may be rebutted by the party defending the award by showing that the award was "not tainted by the non-disclosure or there in fact was no prejudice."²⁶

22. *Id.* at 150-52, 89 S. Ct. at 340-41 (emphasis added).

23. *Id.* at 154, 89 S. Ct. at 341-42 (it is not "necessary, appropriate, or permissible to rule, as the Court does, that, regardless of the facts, innocent failure to volunteer information constitutes the 'evident partiality' necessary under § 10 (b) of the Arbitration Act to set aside an award. 'Evident partiality' means what it says: conduct -- or at least an attitude or disposition -- by the arbitrator favoring one party rather than the other. This case demonstrates that to rule otherwise may be a palpable injustice, since all agree that the arbitrator was innocent of either 'evident partiality' or anything approaching it.").

24. *See Marks*, 430 U.S. at 193-94, 97 S. Ct. at 993-94. Indeed, "While the[ir] . . . interpretations of *Commonwealth Coatings* may differ in particulars," a majority of circuits including the Second, Fourth, Fifth, Sixth, Seventh, Tenth and Eleventh circuits now agree that "nondisclosure alone does not require vacatur of an arbitral award for evident partiality," but that an arbitrator's failure to disclose "must involve a significant compromising connection to the parties." *Positive Software Solutions, Inc.*, at 282. This accords with Justice White's views against automatic disqualification. *See Commonwealth Coatings*, 393 U.S. at 150, 89 S. Ct. at 340 ("arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial.").

25. *See generally* RUAA § 12, Comment 4, *supra* note 17.

26. RUAA § 12(e) and 23(a)(2) and § 12, Comment 4, *supra* note 17 (noting, in contrast, that a party-appointed, non-neutral arbitrator's failure to disclose would be covered under the corruption and misconduct provisions of Section 23(a)(2) because "in most cases it is presumed that a party arbitrator is intended to be partial to the side which appointed that person.").

Similarly, the most prominent and influential professional code of conduct, the American Bar Association/American Arbitration Association's Code of Ethics for Arbitrators in Commercial Disputes ("ABA/AAA Code of Ethics"), originally adopted in 1977 and revised in 2004, "recognizes the[] fundamental differences between arbitrators and judges."²⁷ The sponsors of the Code believe it is preferable that all arbitrators be neutral and comply with the same ethical standards (particularly in arbitrations with "international aspects").²⁸ The Code prescribes that all arbitrators should disclose "[a]ny *known direct or indirect* financial or personal interest in the outcome of the arbitration," and "[a]ny *known existing or past* financial, business, professional or personal relationships which *might reasonably affect* impartiality or lack of independence in *the eyes of any of the parties*."²⁹ The Code also prescribes in Canon II(B) that arbitrators have an ongoing duty to "make reasonable efforts to inform themselves of any interests or relationships" subject to disclosure.³⁰

The United Nations Commission on International Trade Law's ("UNCITRAL") Model Law provides the disclosure requirements most commonly accepted by the international community.³¹ In contrast to the

27. As the Code's *Preamble* explains, "[a]rbitrators, like judges, have the power to decide cases. However, unlike full-time judges, arbitrators are usually engaged in other occupations before, during, and after the time that they serve as arbitrators. Often, arbitrators are purposely chosen from the same trade or industry as the parties in order to bring special knowledge to the task of deciding. This Code recognizes these fundamental differences between arbitrators and judges." ABA/AAA Code of Ethics (9 Feb. 2004), http://www.abanet.org/dispute/commercial_disputes.pdf (accessed Dec. 21, 2009). The *Preamble* establishes that the presumption of neutrality applies for all arbitrators, including party-appointed arbitrators, "unless the parties' agreement, the arbitration rules agreed to by the parties or applicable laws provide otherwise." *Id.* The *Preamble* notes that "all party-appointed arbitrators, whether neutral or not," must make pre-appointment disclosures of "any facts which might affect their neutrality, independence, or impartiality." *Id.* Furthermore, the Code requires all party-appointed arbitrators to "ascertain and disclose as soon as practicable whether the parties intended for them to serve as neutral or not. If any doubt or uncertainty exists, the party-appointed arbitrators should serve as neutrals unless and until such doubt or uncertainty is resolved in accordance with Canon IX." *Id.* Though they can be adopted by arbitration provider organizations, the ABA/AAA Code of Ethics is otherwise merely voluntary and does not have the force of law unless codified by Congress or a state legislature. *See Rossein and Hope, supra* note 17, at n. 173 (citing *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 680-81 (1983)).

28. However, the Code recognizes that parties in "certain domestic arbitrations in the United States" may prefer that party-appointed arbitrators be "predisposed toward the party appointing them." It accordingly proposes that they be governed by special ethical considerations. Such exceptions are deemed "Canon X arbitrators" and they "are not to be held to the standards of neutrality and independence applicable to other arbitrators," and are instead subject to "special ethical obligations" described in Canon X. *See* ABA/AAA Code of Ethics, Canons IX and X, *supra* note 27.

29. *See id.*, Canon II(A) (emphasis added). The Code prescribes, however, that non-neutrals in tripartite panels are "not obliged to withdraw" if requested to do so only by the party who did not appoint them. *See id.*, Canon IX(B)(2).

30. *See id.*, Canon II(B). Canon I(C) also counsels that "[a]fter accepting appointment and while serving as an arbitrator, a person should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality," and should also abstain from entering such relationships for "a reasonable period of time after the decision of a case." *Id.*

31. *See, e.g.*, UNCITRAL Model Law on International Commercial Arbitration (1985) (with

ABA/AAA Code of Ethics' approach to disclosure, it requires in Article 12(1) that "[w]hen a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances *likely to give rise to justifiable doubts* as to his impartiality or independence," an obligation that continues through the course of the arbitration.³² Many jurisdictions have adopted the Model Law or provisions based on it.³³ A recent Paris Court of

amendments as adopted in 2006) arts. 12(1) and 12(2)(providing a standard for arbitrator impartiality: "An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties."). All of the fourteen jurisdictions surveyed by the International Bar Association Working Group in 2004 (hereafter "IBA Working Group") agree that a challenge to the impartiality and independence of an arbitrator depends on the *appearance* of bias and not actual bias. See *IBA Guidelines Background*, *supra* note 14, at 441.

Leading arbitral institutions have adopted similar standards of impartiality. See, e.g., London Court of International Arbitration Rules (Jan. 1, 1998) arts.5.2 ("All arbitrators conducting an arbitration under these Rules shall be and remain at all times impartial and independent of the parties"), http://www.lcia.org/ARB_folder/arb_english_main.htm (accessed Jan. 21, 2010). See also Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (Jan. 1, 2010) art. 14(1) ("Every arbitrator must be impartial and independent"), http://www.sccinstitute.com/filearchive/3/30366/2010_Arbitration_RulesI.pdf (accessed Jan. 21, 2010). The Rules of Arbitration of the International Chamber of Commerce (Jan. 1, 1998) differ, providing at art. 15(2) that "[i]n all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case." See <http://www.iccwbo.org/court/arbitration/id4093/index.html> (accessed Jan. 21, 2010).

With respect to disclosure, the LCIA Rules and SCC Rules mirror those of the Model Law. See LCIA Rules art. 5.3 (before appointment a prospective arbitrator "shall furnish to the Registrar a written résumé of his past and present professional positions . . . and he shall sign a declaration to the effect that there are no circumstances known to him likely to give rise to any justified doubts as to his impartiality or independence, other than any circumstances disclosed by him in the declaration," a duty that continues through the course of the arbitration); SCC Rules art. 14 (2) (before appointment a prospective arbitrator "shall disclose any circumstances which may give rise to justifiable doubts as to his/her impartiality or independence. If the person is appointed as arbitrator, he/she shall submit to the Secretariat a signed statement of impartiality and independence disclosing any circumstances which may give rise to justifiable doubts as to that person's impartiality or independence," a duty that continues through the course of the arbitration). The ICC Rules, in contrast, are closer to the IBA Guidelines in that art. 7(2) stipulates that before appointment a prospective arbitrator shall sign a statement of independence and disclose in writing to the Secretariat "any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence *in the eyes of the parties*."

32. UNCITRAL Model Law arts. 12(1) and 12(2) (emphasis added). The only difference between the UNCITRAL Model Law standard of disclosure and its standard for a successful challenge on the grounds of bias is that with regard to disclosure, the facts and circumstances need only be *likely* to give rise to justifiable doubts, whereas for a successful challenge, the circumstances must *actually* give rise to such doubts. .

33. According to UNCITRAL, the following jurisdictions have adopted legislation based on the 1985 Model Law (* indicating adoption with the 2006 amendments): Armenia (2006), Australia (1991), Austria (2005), Azerbaijan (1999), Bahrain (1994), Bangladesh (2001), Belarus (1999), Bulgaria (2002), Cambodia (2006), Canada (1986), Chile (2004), China (the Hong Kong Special Administrative Region (1996) and the Macao Special Administrative Region (1998)), Croatia (2001), Cyprus, Denmark (2005), Dominican Republic (2008), Egypt (1996), Estonia (2006), Germany (1998), Greece (1999), Guatemala (1995), Honduras (2000), Hungary (1994), India (1996), Islamic Republic of Iran (1997), Ireland (1998), Japan (2003), Jordan (2001), Kenya (1995), Lithuania (1996), Madagascar (1998), Malta (1995), Mauritius (2008*), Mexico (1993), New Zealand (1996, 2007*), Nicaragua (2005), Nigeria (1990), Norway (2004), Oman (1997), Paraguay

(2002), Peru (1996, 2008*), the Philippines (2004), Poland (2005), the Republic of Korea (1999), the Russian Federation (1993), Rwanda (2008*), Serbia (2006), Singapore (2001), Slovenia (2008*), Spain (2003), Sri Lanka (1995), Thailand (2002), the former Yugoslav Republic of Macedonia (2006), Tunisia (1993), Turkey (2001), Uganda (2000), Ukraine (1994), the United Kingdom of Great Britain and Northern Ireland (Scotland (1990) and Bermuda, an overseas territory of the United Kingdom), the United States of America (the States of California (1996), Connecticut (2000), Illinois (1998), Louisiana (2006), Oregon and Texas), Venezuela (Bolivarian Republic of) (1998), Zambia (2000) and Zimbabwe (1996). See United Nations Commission on International Trade Law, *Status: 1985 - UNCITRAL Model Law on International Commercial Arbitration*, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (accessed Dec. 29, 2009).

Other jurisdictions have adopted similar provisions. Switzerland has adopted a rule virtually identical to the UNCITRAL Model Law, though it excludes the word “impartiality;” and Germany also has a similar standard, though it excludes the word “justifiable.” Sweden requires disclosure of any facts that “may be deemed” to prevent service in accordance with that jurisdiction’s arbitration rules (any facts, in the words of the Swedish Arbitration Act, that “may diminish confidence in impartiality”). See *IBA Guidelines Background*, *supra* note 14, at 448.

The Netherlands’ Arbitration Act states that a prospective arbitrator who “presumes that he could be challenged shall disclose in writing to the person who has approached him the existence of such grounds.” Netherlands Code of Civil Procedure, Book IV art 1034 (1). An already appointed arbitrator “shall, if the parties have not previously been notified, immediately notify the parties as prescribed in the preceding paragraph.” *Id.* at 1034(2).

Under Section 24(1)(a) of The English Arbitration Act of 1996, a party may petition a court to remove an arbitrator if “circumstances exist that give rise to justifiable doubts as to his impartiality” (thus excluding the additional ground of “independence” present in the UNCITRAL Model Law). Under *Laker Airways Inc. v. FLS Aerospace Ltd.* [1999] 2 Lloyd’s Rep 45, an arbitrator is subject to automatic disqualification for actual bias or where he has a pecuniary or proprietary interest in the outcome of the arbitration. Awards themselves may be set aside under Section 68 on the ground of “serious irregularity affecting the tribunal, the proceedings or the award,” a “serious irregularity” being one the court considers “has caused or will cause substantial injustice to the applicant,” § 68(2), which may include failure by the tribunal to comply with its duty under Section 33 of the Act to “act fairly and impartially between the parties.”

The Act, however, contains no express duty of disclosure. Moreover, the Court of Appeal in *AT&T Corp. v. Saudi Cable Co.*, [2002] 2 Lloyd’s Rep. 127 rejected the argument that there was a “duty of disclosure on the part of an arbitrator independent of the ICC rules as both a matter of common law and as a matter of contract between the arbitrators and the parties.” *Id.* at 133. However, earlier, in *Locabail (U.K.) Ltd. v. Bayfield Properties, Ltd.* [2000] Q.B. 451, the Court of Appeal clarified general circumstances giving rise (and those generally not giving rise) to a “real danger of bias” (the pre-*Porter* terminology for the “real possibility of bias” standard) and held that a solicitor/QC sitting as a deputy High Court judge was not required to recuse himself for bias when it was discovered during a trial that his firm had represented clients who had claims against the claimant’s husband. With respect to disclosure, Lord Wolf stated:

If, in any case not giving rise to automatic disqualification and not causing personal embarrassment to the judge, he or she is or becomes aware of any matter which could arguably be said to give rise to a real danger of bias, it is generally desirable that disclosure should be made to the parties in advance of the hearing. If objection is then made, it will be the duty of the judge to consider the objection and exercise his judgment upon it. He would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance.

Id. at 478-79. Lord Woolf continued to describe situations where “a real danger of bias might well be thought to arise” and where such a danger would not be justified. See *id.* at 480. He concluded by observing that “[i]n most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal.” *Id.* He reemphasized that “every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection

Appeals decision, applying France's different statute, however, clarified that an arbitrator's decision on whether to disclose should be approached from the perspective of the parties.³⁴

An objective approach to disclosure was considered but ultimately rejected by the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration, a code of professional ethics that has grown to particular prominence in recent years. Similar to the ABA/AAA Code of Ethics, they recommend that,

[i]f facts or circumstances exist that *may, in the eyes of the parties*, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority. . . .³⁵

will be." *Id.*

Given that in the seminal case of *R v. Gough* [1993] A.C. 646, Lord Goff had suggested that the same standard should be "applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators," *id.* at 670, Lord Woolf's approach in *Locabail* arguably would apply equally to arbitrators. The "real danger of bias" test was also applied to arbitrators in *Laker Airways* and in *AT&T v. Saudi Cable*.

34. See *La S.A. J&P Avax SA v. La Societe Tecnimont SPA*, Paris Court of Appeal, Feb. 12, 2009, RG 07/22164, available at <http://www.trac.ir/readnews.aspx?id=16> (accessed Jan. 2, 2009). Claiming breach of Article 1502(2) of the French Code of Civil Procedure (annulment of an award may be requested if the arbitral tribunal had been improperly composed), Avax argued that the chairman of a Tribunal constituted in 2002, a well-known arbitrator from a large international firm, failed to reveal completely the links existing between his law firm and Tecnimont. Avax had questioned these links and requested additional information during the course of the proceedings, eventually challenging the chairman's appointment on the basis of this additional information, a challenge the ICC denied. Avax did not relent, however, and wrote multiple letters through which it obtained additional information revealing the relationship between the firm and Tecnimont, which proved more extensive than had originally been disclosed. See Dany Khayat, *Paris Court's Strict Approach to the Independence and Impartiality of Arbitrators*, MAYER BROWN – INT'L ARBITRATION PERSPECTIVES (Winter 2009) at 1-2, <http://www.mayerbrown.com/publications/article.asp?id=8308&nid=6> (accessed Jan. 2, 2009) (reporting a translated excerpt of the decision: "[c]onsidering that the bond of confidence between an arbitrator and the parties must continually be preserved, the parties must be informed throughout the duration of the arbitration of relations that *might in their eyes* influence the judgment of the arbitrator and which is of a nature that could affect his independence. . . ." (emphasis added)).

35. IBA GUIDELINES, *supra* note 13, General Standard 3(a). The Guidelines further recommend in Standard 7(c) that an arbitrator is "under a duty to make reasonable enquiries to investigate any potential conflict of interest, as well as any facts or circumstances that may cause his or her impartiality or independence to be questioned. Failure to disclose a potential conflict is not excused by lack of knowledge if the arbitrator makes no reasonable attempt to investigate." It should be noted that accompanying the General Standards are three lists the Working Group developed to provide practical guidance in application of the General Standards. These lists—colored Red (consisting of both a "nonwaivable" and "waivable" list), Orange and Green—are meant as a loose classification of different situations that might or might not call for disclosure. As the IBA Guidelines explain, the Red Lists are a "non-exhaustive enumeration of specific situations which, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator's impartiality and independence; ie, in these circumstances an objective conflict of interest exists from the point of view of a reasonable third person having knowledge of the relevant facts (see General Standard 2(b))." *Id.*, Part II, at 17. The nonwaivable Red List includes situations in which even disclosure cannot cure the conflict, whereas the waivable Red List "encompasses situations that are serious but not as severe," which "[b]ecause of their seriousness, unlike circumstances described in

In considering the relevance of facts or circumstances to determine whether a potential conflict of interest exists or whether disclosure should be made, the Guidelines urge a “reasonable” and contextual approach to the particular situation at hand.³⁶ In cases of doubt, the Guidelines’ view is that disclosures should be made.³⁷

To balance the “eyes of the parties” test and prevent both strategic challenges and unnecessary disclosures (which then can stimulate undue concerns of bias in parties’ minds), the IBA Guidelines emphasize that disclosure based on subjective grounds should not lead to automatic disqualification.³⁸ In the Working Group’s view, non-disclosure “cannot make an arbitrator partial or lacking independence; only the facts or circumstances that he or she did not disclose can do so.”³⁹ Thus, when it comes to actual

the Orange List,” should be considered waivable by agreement of the parties. *Id.*

The Orange List is a “non-exhaustive enumeration of specific situations which (depending on the facts of a given case) in the eyes of the parties may give rise to justifiable doubts as to the arbitrator’s impartiality or independence.” *Id.* at 18. Situations on the Orange List “would fall under General Standard 3(a),” i.e., the arbitrator “has a duty to disclose such situations.” *Id.*

The Green List contains a “non-exhaustive enumeration of specific situations where no appearance of, and no actual, conflict of interest exists from the relevant objective point of view,” and therefore, the arbitrator “has no duty to disclose situations falling within the Green List.” *Id.* at 19.

36. IBA GUIDELINES, *supra* note 13, General Standard 6(a).

37. This was a compromise of the Working Group’s original vision. The Working Group was concerned that while, on the one hand, a duty to disclose in case of doubt could help eliminate possible grounds for challenging arbitral awards, on the other hand, such duty might encourage “over-disclosure.” Moreover, excessive disclosure could raise an implication of bias and might unnecessarily undermine the parties’ confidence in the arbitrator or provoke an opportunistic and unmeritorious challenge. See *IBA Guidelines Background*, *supra* note 14, at 451.

38. The introductory notes to Part II of the IBA Guidelines note:

It should be stressed that, as stated above, such disclosure should not automatically result in a disqualification of the arbitrator; no presumption regarding disqualification should arise from a disclosure. The purpose of the disclosure is to inform the parties of a situation that they may wish to explore further in order to determine whether objectively — ie, from a reasonable third person’s point of view having knowledge of the relevant facts — there is a justifiable doubt as to the arbitrator’s impartiality or independence. If the conclusion is that there is no justifiable doubt, the arbitrator can act. He or she can also act if there is no timely objection by the parties or, in situations covered by the waivable Red List, a specific acceptance by the parties in accordance with General Standard 4(c). Of course, if a party challenges the appointment of the arbitrator, he or she can nevertheless act if the authority that has to rule on the challenge decides that the challenge does not meet the objective test for disqualification. In addition, a later challenge based on the fact that an arbitrator did not disclose such facts or circumstances should not result automatically in either nonappointment, later disqualification or a successful challenge to any award. In the view of the Working Group, non-disclosure cannot make an arbitrator partial or lacking independence; only the facts or circumstances that he or she did not disclose can do so.

IBA GUIDELINES, Part II, *supra* note at 13.

39. This was an important reversal of the IBA’s previous view as expressed in the first international professional code of ethics for arbitrators, the IBA’s 1987 Rules of Ethics for International Arbitration, which the Working Group determined to be more stringent with respect to disclosure than the rules adopted in most jurisdictions at the time. *IBA Guidelines Background*, *supra* note 14, at 457-58. Accordingly, the Working Group proposed that in cases of conflict between the 1987 Rules and the 2004 Guidelines, the Guidelines should be followed. See IBA GUIDELINES, *Introduction*, no. 8, *supra* note 13.

disqualification, the IBA Guidelines, like many jurisdictions, recommend an objective standard: “if facts or circumstances exist, or have arisen since the appointment, that, from a *reasonable third person’s point of view* having knowledge of the relevant facts, give rise to *justifiable doubts* as to the arbitrator’s impartiality or independence.”⁴⁰ Doubts are “justifiable” if

a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.⁴¹

The Guidelines themselves do not define or describe “likelihood,” which, however, is defined as a “probability,” or “the state of being likely or probable,” or “something that is probable.”⁴²

It is against this background that one must gauge the reasonableness of the changes made by California to its disclosure requirements earlier this decade.

Going Too Far – California’s Saga with Disclosure Standards

The California disclosure standards, which I am now going to discuss, are not applicable to international arbitrations.⁴³ Nonetheless, they provide an

40. *Id.*

41. *See id.*, General Standard 2(b) and (c). The Guidelines continue by noting that “[j]ustifiable doubts necessarily exist as to the arbitrator’s impartiality or independence if there is an identity between a party and the arbitrator, if the arbitrator is a legal representative of a legal entity that is a party in the arbitration, or if the arbitrator has a significant financial or personal interest in the matter at stake.” *Id.* at (d).

42. “Likelihood,” *The Free Dictionary* (2010), <http://www.thefreedictionary.com/likelihood> (accessed Jan. 25, 2010) (drawing definitions from THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th Ed., 2000) and COLLINS ENGLISH DICTIONARY – COMPLETE AND UNABRIDGED (6th Ed., 2003)).

43. The new standards do not apply to international arbitration, judicial arbitrations, attorney-client fee arbitrations, automobile-warranty disputes and arbitrations arising under collective-bargaining agreements. *See* Judicial Council of California, *Ethics Standards for Neutral Arbitrators in Contractual Arbitration Standard 3*, available at http://www.courtinfo.ca.gov/rules/documents/pdfFiles/ethics_standards_neutral_arbitrators.pdf (accessed 29 December 2009) (precluding application to “[a]n international arbitration proceeding subject to the provisions of title 9.3 of part III of the Code of Civil Procedure”). Section 1297.11 of Title 9.3 provides that “[t]his title applies to international commercial arbitration and conciliation, subject to any agreement which is in force between the United States and any other state or states.” Hence, “state,” in Title 9.3 of part III, means a foreign state.

Title 9.3 of part III continues by defining the “international” character of an arbitration or conciliation:

An arbitration or conciliation agreement is international if any of the following applies:

- (a) The parties to an arbitration or conciliation agreement have, at the time of the conclusion of that agreement, their places of business in different states.
- (b) One of the following places is situated outside the state in which the parties have their places of business:
 - (i) The place of arbitration or conciliation if determined in, or pursuant to, the arbitration or conciliation agreement.
 - (ii) Any place where a substantial part of the obligations of the commercial relationship is to be performed.

important object lesson in how one can simply go so far on the subject of disclosure as to impair the utility of the system.

In 2001, in response to consumer frustration and “lack of public confidence” over pre-dispute mandatory arbitration agreements in consumer contracts,⁴⁴ and perceived abuses by individual arbitrators and arbitration providers in concert with arbitrators,⁴⁵ the California legislature imposed expansive new disclosure obligations on neutral arbitrators,⁴⁶ enabled parties to

(iii) The place with which the subject matter of the dispute is most closely connected.

(c) The parties have expressly agreed that the subject matter of the arbitration or conciliation agreement relates to commercial interests in more than one state.

(d) The subject matter of the arbitration or conciliation agreement is otherwise related to commercial interests in more than one state.

CAL. CIV. PROC. CODE § 1297.13.

44. See Jaimie Kent, *The Debate in California Over and Implications of New Ethical Standards for Arbitrator Disclosure: Are the Changes Valid or Appropriate?*, 17 GEO. J. LEGAL ETHICS 903, 911-12 (2004). Public outcry came in large part in response to a series of articles in the San Francisco Chronicle highlighting abuses by provider organizations, specifically the financial ties between provider organizations and repeat users of their services. See generally Reynolds Holding, *Private Justice: Millions are losing their rights*, S.F. CHRONICLE, Oct. 7, 2000, at A1; Reynolds Holding, *Can public count on fair arbitration?* S.F. CHRONICLE, Oct. 8, 2000, at A15; Reynolds Holding, *Judges' actions cast shadow on court integrity*, S.F. CHRONICLE Oct. 9 2000, at A13.

45. See Ruth V. Glick, *California Arbitration Reform: The Aftermath*, 38 U.S.F. L. REV. 119, 120-21 (2003) (noting that governing Supreme Court precedent under *Doctor's Associates, Inc. v. Casarotto*, which held that state laws cannot treat arbitration agreements in contracts differently than it treats provisions in contracts as a whole, prevented California from passing legislation that would protect citizens from mandatory arbitration, so the Senate Bill 475 focused on arbitrators rather than on arbitration contracts themselves). Subsequent legislation focused on arbitration provider organizations themselves. See CAL. CIV. PROC. CODE § 1281.96(a) (2003). Under the new law, among other requirements, providers are required to post information (including names of non-consumer parties, how many times they have been parties to an arbitration by the provider, the type and amount of the claim and the name and fee of the arbitrator) on arbitrations they have conducted in the past five years on the internet in a searchable format. *Id.* In addition, providers are now restricted from administering consumer arbitrations if there has been any financial involvement between the provider and a party or attorney within the past year. *Id.* at § 1281.92.

46. Under the revised Civil Procedure Code, arbitrators must disclose in writing within ten days of his or her proposed appointment “all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial,” including:

- (1) “The existence of any ground specified in Section 170.1 for disqualification of a judge”
- (2) “Any matters required to be disclosed by the ethics standards for neutral arbitrators adopted by the Judicial Council pursuant to this chapter,” which includes detailed information concerning arbitrations during the previous five years that involve parties or lawyers in the current arbitration, including the names of all parties and lawyers and the results of each arbitration as codified
- (3) “The names of the parties to all prior or pending noncollective bargaining cases in which the proposed neutral arbitrator served or is serving as a party arbitrator for any party to the arbitration proceeding or for a lawyer for a party and the results of each case arbitrated to conclusion, including the date of the arbitration award, identification of the prevailing party, the names of the parties’ attorneys and the amount of monetary damages awarded, if any; and
- (4) “The names of the parties to all prior or pending noncollective bargaining cases involving any party to the arbitration or lawyer for a party for which the proposed neutral arbitrator served or is serving as neutral arbitrator, and the results of each case arbitrated to conclusion, including the date of the arbitration award, identification of the prevailing party, the names of the parties’ attorneys and

disqualify proposed arbitrators for failure to disclose or on the basis of such disclosure,⁴⁷ and *required* courts to vacate arbitral awards if an arbitrator failed to disclose a ground for disqualification of which he or she was aware or failed to disqualify himself or herself upon receipt of a party's disqualification demand.⁴⁸ In addition, the law delegated authority to the California Judicial Council to develop new mandatory ethics standards, to which the Judicial Council responded with a set of Ethical Standards, including an additional thirteen separate disclosure obligations that also can furnish grounds for disqualification or vacatur.⁴⁹

My own view, which is shared by others, is that these new requirements, which apparently echo those imposed on judges,⁵⁰ were they applied to

the amount of monetary damages awarded, if any.”

(5) “Any attorney-client relationship the proposed neutral arbitrator has or had with any party or lawyer for a party to the arbitration proceeding.”

(6) “Any professional or significant personal relationship the proposed neutral arbitrator or his or her spouse or minor child living in the household has or has had with any party to the arbitration proceeding or lawyer for a party.”

CAL. CIV. PROC. CODE § 1281.9. Further provisions of § 1281.9 broadly define a “lawyer for a party” to include “*any lawyer or law firm* currently associated in the practice of law with the lawyer hired to represent a party.” *Id.* § 1281.9(c) (emphasis added).

47. If the arbitrator fails to comply with section 1281.9, then any party may disqualify the arbitrator pursuant to section 12891.91(a). *Id.* (“A proposed neutral arbitrator shall be disqualified if he or she fails to comply with Section 1281.9 and any party entitled to receive the disclosure serves a notice of disqualification within 15 calendar days after the proposed nominee or appointee fails to comply with Section 1281.9.”). Similarly, if such disclosure is made, then under section 1281.91(b)(1), the proposed neutral arbitrator “shall be disqualified on the basis of the disclosure statement after any party entitled to receive the disclosure serves a notice of disqualification within 15 calendar days after service of the disclosure statement.” *Id.*

48. Pursuant to section 1286.2(a), a court “*shall* vacate the award if the court determines . . . (6) . . . [a]n arbitrator making the award either: (A) failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware; or (B) was subject to disqualification upon grounds specified in Section 1281.91 but failed upon receipt of timely demand to disqualify himself or herself as required by that provision.” CAL. CIV. PROC. CODE § 1286.2(a)(6) (emphasis added).

49. Pursuant to this mandate, the Judicial Council adopted the California Ethics Standards, which became effective on July 1, 2002. See Judicial Council of California, *News Release: Judicial Council Approves Ethical Standards for Arbitrators* (April 19, 2002), available at <http://www.courtinfo.ca.gov/presscenter/newsreleases/NR34-02.HTM> (accessed Dec. 29, 2009); see also Judicial Council of California, *Ethics Standards for Neutral Arbitrators in Contractual Arbitration*, available at http://www.courtinfo.ca.gov/rules/documents/pdfFiles/ethics_standards_neutral_arbitrators.pdf (accessed 29 December 2009). Standard 7 contains the new arbitrator disclosure requirements. See also CAL CIV. PROC. CODE § 1281.9(a)(2) (requiring arbitrators to disclose “[a]ny matters required to be disclosed by the ethics standards for neutral arbitrators”).

50. As noted, under the revised statute, arbitrators must disclose, among other things, “[t]he existence of any ground specified in Section 170.1 for disqualification of a judge.” CAL CIV. PROC. CODE § 1281.9(a). This departs from the traditional view in the United States that treated arbitrators differently than judges. See, e.g., *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 679-80 (7th Cir. 1983) *cert. denied*, 464 U.S. 1009 (1983) (“the standards for disqualification in the Commercial Arbitration Rules and the Code of Ethics for Arbitrators are not so stringent as those in the federal statutes on judges, see, e.g., 28 U.S.C. § 455, or in Canons 2 and 3(C) of the Code of Judicial Conduct for United States Judges and the ABA’s Code of Judicial Conduct.”); see also

international arbitration, would likely be counter-productive and ultimately inefficient, in addition to being out of line with broader norms and federal court precedent.⁵¹ At their most extreme, the new Standards require disclosure about a wide variety of relatively minor personal relationships⁵² and professional affiliations⁵³ that would not typically call into question the arbitrator's impartiality under the pragmatic approach adopted by most federal appellate courts. More problematically, the failure of an arbitrator to disclose can itself become grounds for disqualification or later vacatur of the award, with no good faith required on the part of the party seeking the disqualification or vacatur.⁵⁴

Commonwealth Coatings, 393 U.S. at 150, 89 S. Ct. at 340 (“The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges”) (White, J., concurring); *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 137 (2d Cir. 2007) (“Unlike a judge, who can be disqualified ‘in any proceeding in which his impartiality *might* reasonably be questioned,’ an arbitrator is disqualified only when a reasonable person, considering all of the circumstances, ‘would *have* to conclude’ that an arbitrator was partial to one side”) (emphasis added) (citing *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Ben. Funds*, 748 F.2d 79, 84 (2d Cir. 1984) (additional citations omitted)).

51. See Ruth V. Glick, *Should California's Ethics Rules Be Adopted Nationwide?: No! They Are Overbroad and Likely To Discourage Use of Arbitration*, DISP. RESOL. MAG. (Fall 2002) at 13; see also *Judicial Council of California Adopts Ethics Standards for Private Arbitrators*, 13 WORLD ARB. & MEDIATION REP. 176 (2002) (arguing that the volume of information that must be disclosed under California's new standards “may be too burdensome” and could “be used too readily” to disqualify arbitrators). For a positive view on the new standards, see Gail Hillebrand, *Should California's Ethics Rules be Adopted Nationwide? Yes! They represent thoughtful solutions to real problems*, 9 DISP. RESOL. MAG. 10-12 (2002) (noting that “[t]he disclosure of ties between provider organizations and repeat players in arbitration could improve the marketplace in three ways”: (1) repeat players and lawyers may choose to restrict their other relationships with provider organizations, eliminating “apparent” and “actual” conflicts of interest; (2) provider organizations might adopt policies of not soliciting or accepting “grants, memberships contributing or consulting contracts” from entities that have named them to administer arbitrations; (3) individual arbitrators could choose which providers to affiliate with based in part on the quality of their conflict of interest guidelines and relationships with repeat players); see also Jay Folberg, *Arbitration Ethics: Winds of reform blowing from the West?*, 9 DISP. RESOL. MAG. 5-9 (2002) (describing the evolution of the standards and their part in a national movement for reform).

52. For example, disclosure of not only the arbitrator's relationships, but also those of his or her “extended family.” While Standard 2(n) (defining “Member of the arbitrator's immediate family” to mean the arbitrator's spouse or domestic partner and any minor child living in the arbitrator's household”) is likely equivalent to ABA/AAA's Canon II.A(2)'s requirement that prospective arbitrators disclose “any such relationships involving their families or household members,” Standard 2(o) details further requirements relating to the arbitrator's “extended family,” which it defines as “the parents, grandparents, great-grandparents, children, grandchildren, great-grandchildren, siblings, uncles, aunts, nephews, and nieces of the arbitrator or the arbitrator's spouse or domestic partner or the spouse of such person.”

53. The Standards define a “lawyer for a party” to include *anyone associated* with the law firm representing the party. See Standard 7(b)(7) (requiring disclosure of “[a]ny other professional relationship the arbitrator or a member of the arbitrator's immediate family has or has had with a party or a lawyer for a party”). Arbitrators also must disclose whether a “party or an officer, a director, or a trustee of a party is or, within the preceding two years, was a client of the arbitrator in the arbitrator's private practice of law or a client of a lawyer with whom the arbitrator is or was associated in the private practice of law.” Standard 7(b)(6)(A).

54. 393 U.S. at 150-51, 89 S. Ct. at 340-41. See Glick, *supra* note 45, at 128 (“[a]ny non-disclosure, no matter how immaterial, and any contravention of proscribed conduct, no matter how

Even if few parties would seek to disqualify an arbitrator based on insignificant connections, it is problematic that the Standards impose demands on the time of an arbitrator to gather and maintain information on such a vast range of relationships, or, in Justice White's words, "his complete and unexpurgated business biography."⁵⁵ The requirement to disclose so expansive a web of relationships and affiliations could very well work against the goal of having arbitrators with enough experience to render sound decisions.⁵⁶

It thus is small wonder that major national arbitration service providers, including the AAA,⁵⁷ initially opposed the new law. Moreover, a drawn-out

trivial, has the potential to become the basis for challenging the enforcement of the award."); see also *Azteca Construction, Inc. v. ADR Consulting, Inc.*, 121 Cal. App. 4th 1156, 1163; 18 Cal. Rptr. 3d 142, 146 (2004) ("Section 1281.91, subdivision (b)(1), . . . confers on both parties the unqualified right to remove a proposed arbitrator based on any disclosure required by law which could affect his or her neutrality. (See also Ethics Standards, former std. 10(a)(2) [now std. 12(a)(2)].) There is no good faith or good cause requirement for the exercise of this right, nor is there a limit on the number of proposed neutrals who may be disqualified in this manner. As long as the objection is based on a required disclosure, a party's right to remove the proposed neutral by giving timely notice is absolute.") (citations omitted); cf. *Ovitz v. Schulman*, 133 Cal.App.4th 830, 845, 35 Cal. Rptr. 3d 117 (2005) ("On its face, the statute leaves no room for discretion. If a statutory ground for vacating the award exists, the trial court must vacate the award.").

The California standard ("all matters that *could* cause a person aware of the facts to *reasonably entertain a doubt* that the proposed neutral arbitrator would be able to be impartial") arguably goes beyond current federal appellate understandings of the "evident partiality" standard and an arbitrator's duty to disclose, which typically extends only to "nontrivial" conflicts. See *Positive Software Solutions, Inc.*, 476 F.3d at 282 (surveying current precedent).

55. For example, the arbitrator must disclose "the number of pending and prior cases involving each party or lawyer in the arbitration" and "the date of decision, the prevailing party, the names of the parties' attorneys, and the amount of monetary damages awarded, if any, in each such prior case." Standard 7(b)(12)(D). The burden on individual arbitrators to collect this data was perhaps eased by the disclosure requirements imposed on provider organizations, but it nonetheless adds transaction costs for individual arbitrators.

56. See Glick, *supra* note 51, at 14. Glick elsewhere notes that an unintended consequence of the new provider organization requirements was that the cost of collecting and maintaining the required information about consumer arbitrations was prohibitively expensive for small, community-based providers, leading some to eliminate arbitration service for small claims. See Glick, *supra* note 45, at 129-30. She argues that this could lead small businesses and individuals to turn increasingly to mediation, which can only be effective in solving disputes with the threat of a litigation or arbitration deadline motivating parties to settle, which would not be in place if there were decreased opportunities to arbitrate. See *id.* at 130. Beyond the one case documented by Glick, it is unclear the extent to which this threat has materialized in the years since the California legislation passed.

57. See Folberg, *supra* note 45, at 8 (noting that the AAA indicated that it may not be able to provide the information required and urged the governor to veto two of the bills then on his desk because they create "burdens and costs that are either impossible or too costly for the AAA to remain in service for this segment of our work in California."). According to Folberg, the San Francisco Trial Lawyers Association subsequently called for a boycott of the AAA based on comments made by the AAA president about trial lawyers, a boycott later joined by the Consumer Attorneys of California, a 5,000 member organization. See *id.* In contrast to AAA's initial reaction, JAMS enhanced its disclosure forms and computerized information tracking system to comply with the new requirements. See *id.* The AAA has subsequently come into compliance with the new requirements, which, along with disclosures by other provider organizations under CAL. CIV. PROC. CODE § 1286.91, has made it possible for empirical research to be conducted on consumer arbitrations. See generally Searle Civil Justice Institute, *Consumer Arbitration Before the American Arbitration Association – Preliminary Report* (March 2009), <http://www.searlearbitration.org/p/>

battle against the Standards was mounted by the New York Stock Exchange and the National Association of Securities Dealers,⁵⁸ who first sought an exemption from them and later sued, leading eventually to a declaration in *Mayo v. Dean Witter Reynolds, Inc.* that the Securities Exchange Act's comprehensive regulation of the securities industry preempted the California Standards,⁵⁹ a result later confirmed by the Ninth Circuit in *Credit Suisse First Boston Corp. v. Grunwald*.⁶⁰

Because these Standards do not affect international arbitration, they presumably would not affect anyone's choice of California as the place for such an arbitration. While it seems that various international arbitral institutions and sovereign States are jockeying for position as desirable fora for hosting arbitrations, with mixed results,⁶¹ there are certain historical institutional legacies and environmental factors that have led certain places—such as New York, Paris, London, Geneva, Zurich, Washington, D.C. and The Hague—to be favored over others; and thus, there is only so much any State or city can do to

full_report.pdf (accessed 1 Jan. 2010).

58. The NASD and NYSE commissioned a study – the Perino Report – which evaluated the extent to which the new California rules conflicted with their own and with the ABA/AAA Code for Ethics. See Michael A. Perino, *Report to the Securities and Exchange Commission Regarding Arbitrator Conflict Disclosure Requirements in NASD and NYSE Securities Arbitrations* (Nov. 4, 2002) at 3, <http://www.sec.gov/pdf/arbconflict.pdf> (accessed Dec. 27, 2009) (concluding that “there is little if any indication that undisclosed conflicts represent a significant problem in SRO-sponsored arbitrations,” and that while some critics, particularly those representing investors, “suggest that SRO-arbitrations have a distinct pro-industry bias . . . available data on arbitration outcomes do not suggest that industry members fare better than investors,” and accordingly, there is “little evidence that an overhaul of current conflict disclosure rules is needed.”). The Report also concluded that adopting the new California Ethics Standards would not likely yield many benefits for investors because “[a]ny lingering perceptions of pro-industry bias appear to stem from rules governing panel composition, not from the presence of undisclosed arbitrator conflicts,” and furthermore, although the NASD and NYSE rules “represent a very different drafting philosophy from the Standards, both call for many of the same kinds of disclosures.” *Id.* Finally, Perino cautioned that adopting the California Standards could discourage the most experienced arbitrators from serving and have other unintended consequences, with a potential net result of “less accurate case resolutions and more judicial challenges to arbitral awards.” *Id.* at 3-4. Perino nonetheless did propose several recommendations to the NASD and NYSE to improve the arbitrator disclosure process, see *id.* at 4-5, some of which were adopted in 2004. See Rossein and Hope, *supra* note 17, at 246-47. In 2007, the NASD and the member regulation, enforcement and arbitration functions of the NYSE were consolidated into The Financial Industry Regulatory Authority (“FINRA”). See FINRA, *About FINRA* at <http://www.finra.org/AboutFINRA/index.htm> (accessed Jan. 1, 2010).

59. The court also held that, as they were applied in that case, the Standards were also preempted by § 2 of the FAA. *Mayo v. Dean Witter Reynolds, Inc.*, 258 F. Supp. 2d 1097 (N.D. Cal. 2003), *amended at*, 260 F. Supp. 2d 979, 1116 (N.D. Cal. 2003).

60. *Grunwald*, 400 F.3d 1119 (9th Cir. (Cal.) 2005).

61. Drahozal's statistical analysis shows that the number of ICC arbitration proceedings held in a country does in fact increase by a statistically significant amount after the country enacts a new arbitration law. Christopher R. Drahozal, *2007 Distinguished Professor Inaugural Lecture: Busting Arbitration Myths*, 56 KAN. L. REV. 663, 668-69 (2008). He notes, however, that while the increase in arbitrations following enactment of a new statute was large in percentage terms, it was quite small in absolute number of claims and the amounts in dispute, resulting on average in “less than \$ 600,000 per year for a larger country.” *Id.*

elevate its position among arbitration capitals.⁶² Whatever the goals—enhancing the locale as a site for arbitration, legislating in the public interest or trying to enhance legitimacy—I think the lesson to be learned from California’s saga is that attempts to legislate must be carefully calibrated, and above all, practical.

Not Going Far Enough – The Need for Publication of Reasoned Challenge Decisions

There are areas—particularly at the international level—where I think we have not gone far enough. A prime example is the historical reluctance of Appointing Authorities to issue *reasoned* challenge decisions. Most arbitral institutions consider challenge decisions to be “administrative” in nature, which has allowed the institutions to keep them behind closed doors.⁶³ There have been some positive developments in the direction of publishing reasoned

62. Individual states like California might have less control over their destinies in this regard than they would like, given the effect of preemption by the FAA and more importantly, the effect of what historical economists describe as “path dependency”—the accumulation of factors, such as geography, historical concentration of wealth, industry and concentration of legal professionals—that has led particular places to develop into preferred fora for arbitration. The point is that no legislative tinkering will make Los Angeles or San Francisco into a New York, London or Paris. Moreover, sophisticated parties often choose New York law (or United Kingdom law) to govern their contracts because of the significant business experience developed by courts in these jurisdictions. Things can of course change gradually over time, but we should be modest in our approximation of the amount of control a particular forum has over its relative appeal as a site of arbitration.

63. The ICC has previously published surveys bringing together the key “themes” of its challenge decisions, and the Arbitration Institute of the Stockholm Chamber of Commerce has periodically published selections of challenge decisions; though in both instances the decisions are given without reasons. See, e.g., Magnusson and Larsson, *Recent practice from the arbitration institute of the Stockholm Chamber of Commerce. Prima facie decisions on jurisdiction and challenge of arbitrators*, STOCKHOLM ARBITRATION REPORT (2004, no. 2). The Permanent Court of Arbitration also considers challenges to be administrative and does not generally publish them, though there have been exceptions to this policy, including the decisions of the Appointing Authority of the Iran-United States Claims Tribunal and two other decisions rendered pursuant to the UNCITRAL Arbitration Rules in the 1990s by PCA-designated Appointing Authorities. See generally Howard M. Holtzmann and B.E. Shifman, *UNCTAD, Dispute Settlement: General Topics 1.3: The Permanent Court of Arbitration*, UNCTAD/EDM/Misc.232/Add.26 at 21, available at http://www.unctad.org/en/docs/edmmisc232add26_en.pdf (accessed Dec. 18 2009). See also *Decision of the Appointing Authority of 26 September 1991 concerning the Challenge to Gaetano Arangio-Ruiz*, 17 Y.B. COM. ARB. 446 (1992); *Challenge Decision of 15 April 1993*, 22 Y.B. COM. ARB. 222 (1997); and *Challenge Decision of 11 January 1995*, 22 Y.B. COM. ARB. 227 (1997). More recently, in a rare case, the Deputy Secretary-General of ICSID published his challenge decision in a NAFTA Chapter 11 arbitration operating under the UNCITRAL Arbitration Rules. Under Article 1124(1) of NAFTA, the Secretary-General of ICSID shall serve as Appointing Authority for arbitrations under Section B of NAFTA Chapter 11. This decision was taken and published by Nassib G. Ziadé, then-Deputy Secretary-General, who was acting, pursuant to Article 10(3) of the ICSID Convention, on behalf of the Secretary-General. See *Decision on the Challenge to Mr. J. Christopher Thomas, QC in the arbitration Vito G Gallo v Government of Canada* (Oct. 14 2009), available at http://ita.law.uvic.ca/documents/Gallo-Canada-Thomas_Challenge-Decision.pdf (accessed Dec. 18, 2009). Vita G. Gallo, a U.S. national, challenged Mr. J. Christopher Thomas, QC because of his past and ongoing work in advising the Government of Mexico, which he argued was an “apparent conflict of interest,” particularly given Mexico’s right to make submissions in the matter under NAFTA.

decisions on challenges, however. In 2006, after a careful review process, the London Court of International Arbitration (“LCIA”) announced a “landmark decision” to publish the LCIA Court’s decisions on challenges to arbitrators.⁶⁴ Though as in other institutions, Article 29.1 of the LCIA rules treats challenge decisions as administrative and does not require that reasons be given, the LCIA Court nevertheless had long since adopted the practice of giving reasons.

The case for publication of reasoned challenge decisions is compelling: it will promote understanding of and consistency in standards for reviewing arbitrator challenges, leading to better decision-making by (1) individual arbitrators considering an appointment, (2) those facing challenge decisions, and finally, (3) national courts reviewing challenge decisions, who might pay greater deference to reasoned decisions than those that go unexplained and perhaps appear arbitrary. Publication of reasoned decisions might be particularly beneficial to the process of further clarifying disclosure standards by helping to counter the impression that disclosure too readily leads to disqualification, and that, contrary to popular belief, the purpose of disclosure is not to facilitate challenges, but rather to *forestall* them.⁶⁵ The development of a “common law” of challenges, particularly regarding disclosure requirements, may do much to increase the frequency and appropriateness of arbitrator disclosure while decreasing the incidence of challenges.

In this way, publication would refine the work started by the IBA Guidelines on Conflicts of Interest in International Arbitration, which has been criticized for not offering enough practical help to arbitral institutions in making actual decisions on arbitrator confirmations or challenges with respect to disclosure issues. One of the Guidelines’ drafters, Otto L.O. de Witt Wijnen, argues that the Guidelines were intended as only an initial step and that “it is precisely up to the institutions themselves . . . more than anyone else” to make further refinements,⁶⁶ which can, of course, best be done by publishing challenge decisions. Indeed, the more intangible, but equally important, service provided by such publication is public reassurance as to the fairness and legitimacy of the decision-making of arbitral institutions themselves, as well as their own confidence in their work product. Arguably this is more important than the legitimacy of individual arbitrators or tribunals, since the institutions

64. *LCIA to publish challenge decisions*, LCIA NEWS (June 2006), at http://www.lcia.org/NEWS_folder/news_archive3.htm (accessed Dec. 17, 2009). Before the vote, the LCIA considered a thorough report by Geoff Nicholas and Constantine Partasides of Freshfields Bruckhaus Deringer, who were given access on a confidential basis to the full file of LCIA challenge decisions.

65. As the Second Circuit has observed, “Disclosure serves the twin goals of ‘encourag[ing] conflicts over arbitrators to be dealt with early in the arbitration process and help[ing] limit the availability of collateral attacks on arbitration awards by a disgruntled party.’” *Applied Indus. Materials Corp.*, 492 F.3d 132, 139 (2d Cir. 2007) (quoting *Lucent Techs. Inc. v. Tatung Co.*, 379 F.3d 24, 29 (2d Cir. 2004) (internal quotation marks omitted).

66. Otto L.O. de Witt Wijnen, *The IBA Guidelines on Conflicts of Interest in International Arbitration Three Years On*, ICC BULLETIN 2007 SPECIAL SUPPLEMENT –INDEPENDENCE OF ARBITRATORS 107-112 (ICC Publication No. 690E) (2008).

are permanent bodies and the integrity of each such institution affects the legitimacy of the entire system of international arbitration.

These substantial benefits far exceed, in my mind, the traditional objections to publication, i.e., that challenge decisions' context-specificity gives them little precedential value, and that publication of challenge decisions will only encourage more challenges. However, as the report commissioned by the LCIA before it chose to publish its challenge decisions points out, the objection of fact-specificity does not really counter the *principle* of publication; it points to the care with which the decision must be used. Regarding the second objection, the report notes, the reality is that, with publication, abusive and clearly inappropriate grounds for challenges will be separated from justifiable ones, which over time should *decrease, not increase*, the ability of scheming parties to launch strictly tactical, and ultimately baseless, challenges that introduce inefficiencies and promote distrust in the system.⁶⁷ To me, this issue is a rather easy one to decide and I hope others will soon see the light as well.

TRANSPARENCY

The related but distinct issue I wish to address is transparency. Transparency can enhance the legitimacy of the arbitral process by facilitating greater accountability. At times, however, it conflicts with a distinguishing characteristic of commercial arbitration: namely, confidentiality.⁶⁸ Despite the centrality of confidentiality to such arbitration, calls for greater transparency have been heard from the very beginning of its rise in popularity.⁶⁹

67. See *LCIA to publish challenge decisions*, LCIA NEWS (June 2006), *supra* note 64 (discussing the conclusions of Geoff Nicholas and Constantine Partasides in *LCIA Court Decisions on Challenges to Arbitrators: A Proposal to Publish*, 23 ARBITRATION INTERNATIONAL 1 (2007)).

68. Indeed, the standard non-investment arbitration model ensures that the proceedings will be private, that the tribunal will be bound to curtail its public disclosures concerning the process and the merits, and that the parties can prohibit many dispute-related disclosures through mutual undertakings. See Jack J. Coe, Jr., *Symposium: Secrecy and Transparency in Dispute Resolution: Transparency in the Resolution of Investor-State Disputes - Adoption, Adaptation, and NAFTA Leadership*, 54 KAN. L. REV. 1339, 1341-43 (2006) (noting that an ICC arbitration can run its course without even the fact of its occurrence being disclosed, and, if published at all, the award may be redacted to obscure the identity of the parties); *but see* Andrea K. Bjorklund, *Penn State Law Review Symposium: Building the Civilization of Arbitration: The Emerging Civilization of Investment Arbitration*, 113 PENN ST. L. REV. 1269, 1287 (2009) (noting that "[t]his confidentiality has always been subject to abridgement by subsequent set-aside proceedings in the courts of the place of arbitration, as most court proceedings are public").

69. See William W. Park, *Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration*, 12 BROOK. J. INT'L L. 629, 630 (1986) (calling for greater transparency in the arbitral process and more uniform rules of procedure and publication of awards as means to increase legitimacy and lawfulness of international commercial arbitration). See also Richard M. Buxbaum, *Introduction*, 4 INT'L TAX & BUS. LAW. 205, 208 (1986); Thomas E. Carbonneau, *Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce*, 19 TEX. INT'L L.J. 33, 39 (1984); Julian D.M. Lew, *The Case for the Publication of Arbitration Awards*, in THE ART OF ARBITRATION 226-29 (Jan C. Schultz & Albert Jan van den Berg, eds., 1982); Bernardo M. Cremades & Steven L. Plehn, *The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions*, 2 B.U. INT'L L.J.

The simple argument here is that the goal of increased transparency—assured legitimacy—is equally important in the non-investment context as it is in other contexts, because, through the treatment of its decisions as influential, or “quasi-precedential,” it, too, *approximates* a national system of law. Indeed, even a relatively limited form of transparency—the publication of reasoned awards—can over time increase consistency and predictability, which in turn enhance legitimacy, thereby encouraging voluntary compliance, and thus, effectiveness.⁷⁰ Transparency also promotes democratic principles, in that the affected public, such as the shareholders of a publicly held corporation and consumers, are provided an opportunity to learn of corporate practices and management behavior that may influence their decisions.⁷¹ As some have noted, such increased transparency carries costs, particularly for parties worried about damage to their reputations or share prices; whereas more legitimate fears, such as disclosure of trade secrets, can always be assuaged by targeted confidentiality orders.⁷² While individual parties in one-off arbitrations justifiably might not see this goal as their concern, repeat players in the arbitration world—including parties, law firms, arbitral institutions and arbitrators—should keep this systemic concern in mind.

In my experience, respondent States in investment disputes have also expressed a preference for confidentiality, likely because the governments of those States preferred that both their citizens and the foreign investing community remained ignorant of the facts involved. However, such preferences are clearly less defensible in the investment arbitration context, because matters of public interest are almost always at the heart of the matter.⁷³ This raises the

317, 336-37 (1984) (suggesting “the formation of institutions which give arbitrators access to prior arbitration awards and require them to follow a more or less strict rule of stare decisis”).

70. See generally Catherine A. Rogers, *Emerging Dilemmas in International Economic Arbitration: The Vocation of the International Arbitrator*, 20 AM. U. INT'L L. REV. 957, 999-1004 (2005). Rogers presents another argument worth considering, namely, that non-investment international arbitration is more “public”—notably its production of legal rules that diffuse into other contexts and help to reinforce international law—than is commonly acknowledged in the rigid dichotomies made between the so-called “public” and “private spheres.” See also Thomas E. Carbonneau, *The Ballad of Transborder Arbitration*, 56 U. MIAMI L. REV. 773, 773-74 (2002) (describing international commercial arbitration as a “vital engine in the creation of a trans-border rule of law”).

71. Cindy G. Buys, *The Tensions Between Confidentiality and Transparency in International Arbitration*, 14 AM. REV. INT'L ARB. 121 (2003).

72. See *id.* at 137 n. 67.

73. See Gus Van Harten and Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EURO. J. OF INT'L LAW 122-23 (2006); Stephan W. Schill and Benedict Kingsbury, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law*, in 50 YEARS OF THE NEW YORK CONVENTION (ICCA Congress Series no. 14) (Albert Jan van den Berg, ed., Kluwer Law International, 2009); Coe, *supra* note 68, at 1343. See also Bjorklund, *supra* note 68, at 1271-72 (noting that arbitrating under the ICSID Convention “adds a public international law dimension even to contract-based investment disputes” because Article 42 of the ICSID Convention’s choice-of-law clause allows tribunals to apply, in the absence of the agreement of the parties, “the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable”).

more difficult question of who is to decide what truly is in the public interest of a State party to an investment dispute? Is it that State's government, even if it came to power through undemocratic means? Can one say that the Governments of Myanmar (Burma), North Korea, or Zimbabwe are the true and correct judges of the public interest of their citizenry? Is it the single-issue NGOs that may swarm around an arbitration, whose interests most often will be global, and not necessarily attuned to the specific case and State, let alone accountable to its citizens? Should three un-elected foreigners sitting as arbitrators outside of the national boundaries of the host State be the final judges of what is in the public interest of that State? In the end, of course, treaty commitments, and arbitration clauses in contracts between investors and sovereigns, dictate that an arbitral tribunal will make this decision. This still leaves open, however, the questions as to who justifiably can be regarded as having such legitimate interest in the outcome that their views should be considered during the decision-making process, and how much comparative weight should be given to them.

There has been a considerable evolution of the transparency of investment arbitration in a variety of contexts, including both increased access to information and intensified intervention in proceedings by non-disputing parties. With respect to access to information, driven by the United States' and Canada's strong legal cultures and structures guaranteeing open access to government information,⁷⁴ NAFTA proceedings were the first to develop transparency, including the publication not only of awards, but also of parties' memorials and tribunal orders.⁷⁵ This trend then spread to both U.S. and Canadian bilateral treaty practice.⁷⁶ The 2006 amendments to the ICSID Arbitration Rules and the

74. The United States enacted the Freedom of Information Act in 1966 and Canada enacted its Access to Information Act in 1985. Mexico has progressed more slowly on this front. In March 2007, the Mexican Constitution was amended to guarantee a public right of access to government information. Bjorklund, *supra* note 68, at 1288.

75. In Annex 1137.4 to Chapter 11, the United States and Canada confirmed that when either of them is a disputant, the award could be published by either the respondent State or the private disputant. Mexico, by contrast, would let this question be governed by the applicable arbitration rules. North American Free Trade Agreement, ch. 11, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 605 (1993), Annex 1137.4. Subsequently, in the Free Trade Commission's July 2001 interpretation of Chapter 11, the Parties agreed 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" and further agreed "to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal," subject to "redaction of confidential business information," "information which is privileged or otherwise protected from disclosure under the Party's domestic law" and "information which the Party must withhold pursuant to the relevant arbitral rules, as applied." Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions* (July 31, 2001), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en> (accessed Jan. 20, 2010).

76. The 2003 Canadian Model Foreign Investment Protection and Promotion Agreement and the 2004 U.S. Model Bilateral Investment Treaty address transparency expressly and in detail. Canada's Foreign Investment Protection and Promotion Agreement Model, 2003, art. 35 ("Participation by the Non-Disputing Party"), art. 38 ("Public Access to Hearings and Documents") and art. 39 ("Submissions by a Non-Disputing Party"), <http://ita.law.uvic.ca/documents/Canadian2004-FIPA-model-en.pdf> (accessed Jan. 3, 2010); United

ICSID Additional Facility (Arbitration) Rules now allow, without the parties' consent, access to the legal reasoning behind awards in ICSID cases,⁷⁷ though the amended Rules stop short of requiring disclosure of the parties' memorials and evidence. A broader revolution outside of publicly underwritten institutions has yet to occur, however.⁷⁸ All major arbitral institutions still provide for closed proceedings as a default,⁷⁹ and several sets of institutional rules expressly provide that awards will not be published without the parties' consent, going so far as to impose a blanket duty of confidentiality on the parties.⁸⁰ This stance has been echoed by several national laws.⁸¹ Most pertinent to the investment arbitration context are the UNCITRAL Rules, which are the rules used most for

States Model Bilateral Investment Treaty, November 2004, art. 28 ("Conduct of the Arbitration") and art. 29 ("Transparency of Arbitral Proceedings"), <http://www.ustr.gov/sites/default/files/U.S.%20model%20BIT.pdf> (accessed Jan. 3, 2010).

77. ICSID Arbitration Rules 48(4) ("The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal.")

78. See generally ALAN REDFERN, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 28-35 (4th Ed., 2004) (surveying developments).

79. ICC Rules art. 21(3) ("Save with the approval of the Arbitral Tribunal and the parties, persons not involved in the proceedings shall not be admitted."); LCIA Rules art. 19.4 ("All meetings and hearings shall be in private unless the parties agree otherwise in writing or the Arbitral Tribunal directs otherwise."); SCC Rules art. 27(3) ("Unless otherwise agreed by the parties, hearings will be held in private."); see also Redfern, *supra* note 78, at 28 (citing institutional rules and commercial arbitration association rules providing for private hearings).

80. The LCIA Rules art. 30 state that "[u]nless 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." LCIA Rules art. 30.1. Similarly, "[t]he deliberations of the Arbitral Tribunal are likewise confidential to its members, save and to the extent that disclosure of an arbitrator's refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal under Articles 10, 12 and 26." *Id.* at 30.2. Moreover, 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." *Id.* at 30.3. See also SCC Rules art. 46 ("Unless otherwise agreed by the parties, the SCC and the Arbitral Tribunal shall maintain the confidentiality of the arbitration and the award."). The ICC Rules are silent with respect to the publication of awards, leaving this either to the law governing the arbitration or the agreement of the parties. ICC Rules at art. 20(7) do provide, however, that the arbitral tribunal "may take measures for protecting trade secrets and confidential information"), but otherwise do not impose a blanket duty of confidentiality on the parties or the arbitrators.

81. As Redfern notes, the Swiss Rules, which came into effect January 1, 2004, provide for the confidentiality of awards, orders and material submitted during the course of the arbitration, unless there is a legal duty of disclosure. Redfern, *supra* note 78, at 34. Similarly, the Spanish Arbitration Act of 2003 art. 24(2) provides for confidentiality of information disclosed during the course of an arbitration, *id.* at 35, as does Section 14 of New Zealand's Arbitration Act of 1996, which provides a qualified duty of confidentiality. See New Zealand Arbitration Act, § 14 (1996) ("Every arbitration agreement to which this section applies is deemed to provide that the parties and the arbitral tribunal must not disclose confidential information," subject to limitations imposed for the pursuit of certain legal rights and other particular circumstances). See *id.* § 14(e), (d), <http://www.legislation.govt.nz/act/public/1996/0099/latest/DLM403277.html> (accessed Jan. 21, 2010).

investor-State arbitrations outside of ICSID.⁸² Unless the parties using the UNCITRAL Rules agree otherwise, the Rules provide both for “in camera” hearings and non-publication of awards.⁸³ Although both UNCITRAL and its Working Group II have agreed that transparency in treaty-based investment arbitration is a topic worthy of future discussion, no work will be done on it until after Working Group II has completed its work on revisions to the generic Rules.⁸⁴

We have also witnessed the advent of non-disputing parties’ direct involvement in proceedings, bringing amicus participation in the investment arbitration context in line with the generally receptive approach to third-party participation in international dispute settlement.⁸⁵ As with access to information,

82. As of November 2005, 65 of the 87 claims not filed with ICSID (out of a total of 219 known claims) used the UNCITRAL Rules. United Nations Commission on Trade and Development, *Investor-State Disputes Arising From Investment Treaties: A Review* (UNCTAD Series on International Investment Policies for Development) (Feb. 2006), UNCTAD/ITE/IIT/2005/4, at 5, http://www.unctad.org/en/docs/iteiit20054_en.pdf (accessed Jan 21, 2010).

83. UNCITRAL Arbitration Rules, U.N. GAOR, 31st Sess., Supp. No. 17, U.N. Doc. A/31/17 (Apr. 28, 1976). The UNCITRAL Rules art. 25 states that “hearings shall be held *in camera* unless the parties agree otherwise.” Art. 32(5) states that “[t]he award may be made public only with the consent of both parties.”

84. See UNCITRAL, *Report of the Working Group on Arbitration and Conciliation on the work of its forty-eighth session (New York, 4-8 February 2008)*, UN Doc. A/CN.9/646 (Feb. 28, 2008) at ¶ 58-69 (noting “general agreement” that it would “not be desirable to include specific provisions on treaty-based arbitration in the UNCITRAL Arbitration Rules themselves” and deciding to “proceed with its work on the revision of the UNCITRAL Arbitration Rules in their generic form and to seek guidance from the Commission on whether, after completion of its current work on the Rules, the Working Group should consider in further depth the specificity of treaty-based arbitration and, if so, which form that work should take”), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V08/513/98/PDF/V0851398.pdf?OpenElement>; see also *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17 (A/63/17)*, ¶¶ 313-14 (noting that the Commission agreed that it would not be desirable to include specific provisions on treaty-based arbitration in the UNCITRAL Arbitration Rules themselves and that any work on investor-State disputes which the Working Group might have to undertake in the future should not delay the completion of the revision of the UNCITRAL Arbitration Rules in their generic form, and 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 current revision of the UNCITRAL Arbitration Rules, but 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) (cited in UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-first session (Vienna, 14-18 September 2009)*, UN Doc. A/CN.9/684 (10 Nov 2009) at ¶ 8, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V09/878/04/PDF/V0987804.pdf?OpenElement> (accessed Dec. 26, 2009).

85. See generally Duncan B. Hollis, *25 Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty* 235, 238-43 (2002) (discussing the practice of amici participation with respect to the ICJ, NAFTA, WTO, Iran-United States Claims Tribunal, International Criminal Court, the European Court of Justice, the European Court of Human Rights, and the Inter-American Court of Human Rights). The notable exception is the ICJ, which does not accept participation by anyone other than states, and in certain cases, public international organizations. See Statute of the International Court of Justice, June 26, 1945, arts. 34, 35, 61-64, 59 Stat. 1055, T.S. No. 993; but see Dinah Shelton, *The Participation of Nongovernmental*

the first gestures towards non-disputing party participation and open hearings in investment claims began in the NAFTA context in cases—*Methanex Corp. v. United States* and *United Parcel Service v. Canada*—that involved broad public interests and important new legal issues.⁸⁶ Subsequent decisions by tribunals in

Organizations in International Judicial Proceedings, 88 AM. J. INT'L L. 611, 623–24 (1994) (noting that the ICJ did accept one amicus brief from an NGO in the 1950 South-West Africa advisory proceeding, but rejected the same NGO's request to submit a brief in the contentious 1950 *Asylum* case).

86. For a complete re-telling of this history, see Coe, *supra* note 68, at 1370-79. Pursuant to NAFTA arts. 1128 and 1129, the non-disputing State Parties can receive evidence tendered to the tribunal and the written arguments of the parties and can make submissions to the tribunal on matters of treaty interpretation. Accordingly, in both *Methanex* and *UPS*, the non-disputing State Parties made Art. 1128 submissions. In *Methanex*, the Respondent United States was in favor of amicus petitions when the petitioner shows its submission would be relevant and helpful. Canada was also in favor of allowing amicus submissions but Mexico was opposed, as it would later be in the *UPS* case. See Coe, *supra* note 68, at 1372-74.

In *Methanex*, a Canadian-based producer of methanol, a key component of a compound—MTBE—used in the production of gasoline that was banned by the State of California claimed the California ban was tantamount to an expropriation of the company's investment. California argued the ban was necessary to prevent risks to human health and safety and the environment posed by MTBE contaminating drinking water supplies. The *Methanex* Tribunal decided that the Californian ban had been enacted free of bias, corruption or ulterior motives. See generally *Methanex Corp. v. United States*, Final Award of the Tribunal on Jurisdiction and Merits (Jan. 15, 2001), <http://www.state.gov/documents/organization/51052.pdf>. Non-disputing parties were motivated to participate by the novel legal issues in *Methanex*: the scope and definition of expropriation under international law and the ability of governments to legislate for the public welfare. See The International Institute for Sustainable Development, *Petition to the Arbitral Tribunal in the arbitration under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules between Methanex Corporation and United States of America* (Aug. 24, 2000) at ¶¶ 3.1-3.3, <http://www.state.gov/documents/organization/30475.pdf> (accessed Dec. 29, 2009); see also Earthjustice, *Submission of Non-disputing Parties Bluewater Network, Communities for a Better Environment and Center for International Environmental Law in the arbitration under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules between Methanex Corporation and United States of America* (Mar. 9, 2004), at ¶ 3, <http://www.state.gov/documents/organization/30472.pdf> (accessed Dec. 29, 2009).

In *UPS*, United Parcel Service claimed Canada Post was utilizing its letter monopoly infrastructure in anti-competitive practices aimed at reducing the costs of delivering its courier and parcel services. See generally *United Parcel Service of America v. Canada*, Award on the Merits (May 24, 2007), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/MeritsAward24May2007.pdf> (accessed Dec. 29, 2009). The Tribunal received petitions for participation from several non-disputing parties, including The Canadian Union of Postal Workers, representing approximately 90,000 current and retired employees of Canada Post, and the Council of Canadians, a 100,000 member NGO. These parties petitioned jointly, claiming “direct interests” in the dispute. See *Petition to the Arbitral Tribunal by Canadian Union of Postal Workers and The Council of Canadians, United Parcel Service of America Inc v Government of Canada*, at ¶¶ 24-35, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/08Nov00.pdf> (accessed Dec. 21, 2009). The union was concerned about potential employment impacts, including re-classifications, restructurings, lay-offs and permanent job reductions. *Id.* at ¶¶ 27-29. The Council of Canadians was concerned about increased costs and decreased services, particularly for rural communities and the elderly. *Id.* at ¶¶ 30-35.

Considering the views of the petitioners and the State Parties, the jurisprudence of the Iran-United States Claims Tribunal and the World Trade Organization, and the absence of any explicit provision for amici under NAFTA Chapter Eleven, the *Methanex* Tribunal determined that UNCITRAL Rule 15(1) (which provides the tribunal the power to “conduct the arbitration in such manner as it

ICSID Convention cases held that Article 44 of the ICSID Convention offered sufficient flexibility to permit participation by amici curiae,⁸⁷ which ultimately gave way to the revised ICSID Rules and Additional Facility Rules, which allow amici curiae participation, including through written submissions,⁸⁸ and

considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case”) accorded it “procedural flexibility” and discretion to accept written submissions from amici. See *Methanex Corp. v. United States*, Decision on Authority to Accept Amicus Submission (Jan. 15, 2001) at ¶ 31, <http://ita.law.uvic.ca/documents/Methanex-AmiciCuriae.pdf>. The *UPS* tribunal followed suit. See *United Parcel Service of America v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amicus Curiae (Oct. 17, 2001), at ¶¶ 61-63, <http://www.state.gov/documents/organization/6033.pdf> (accessed Jan. 1, 2010).

Regarding open hearings, Article 25 (4) of the UNCITRAL Arbitration Rules requires both disputing parties to consent to opening the hearings. In both *Methanex* and *UPS*, the disputing parties gave such consent with limited exceptions to ensure the confidentiality of proprietary information. The United States and Canada also announced their intention to consent to open public hearings at all Chapter 11 arbitrations to which either is a party following the 2003 NAFTA Commission Meeting. Following this, the Free Trade Commission, composed of the trade ministers of Canada, Mexico and the United States, confirmed the jurisprudential developments in *Methanex* and *UPS*, issuing a statement that confirmed that no provision of NAFTA limits a tribunal’s discretion to accept written submissions from a person or entity that is not a disputing party. The Statement also recommended specific guidance for NAFTA tribunals to administer amicus involvement: first, amicus participation must assist the tribunal in assessing the facts and legal issues by bringing a perspective to the proceedings different than that of the disputing parties; second, the brief must address matters within the scope of the dispute; third, the amicus must have a significant interest in the arbitration at hand; fourth, the subject matter of the arbitration must contain an element of public interest. See Free Trade Commission, *Statement on Non-Disputing Party Participation* (Oct. 7, 2003), <http://www.naftaclaims.com/Papers/Nondisputing-en.pdf> (accessed Dec. 29, 2009). See also Coe, *supra* note 68, at 1378-9. It was only following the 2004 meeting that Mexico also announced its commitment to open hearings. See NAFTA Free Trade Commission Joint Statement, *Decade of Achievement* (July 16, 2004), http://ustraderep.gov/Document_Library/Press_Releases/2004/July/NAFTA_Free_Trade_Commission_Joint_Statement_-_A_Decade_of_Achievement.html (accessed Dec. 29, 2009).

87. See *Agua Argentinas S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae* of May 19, 2005, 21 *ICSID Rev.—FILJ* 342 (2006) at ¶¶ 10-16; see also Convention on the Settlement of Investment Disputes Between States and National of Other States, Art. 44 (“If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.”). The Tribunal in *Agua Argentinas* relied on reasoning similar to that of the *Methanex* Tribunal in that it construed the matter as a procedural question under Art. 44. In discussing the burdens amicus participation could impose on the parties, the Tribunal looked to criteria similar to those elucidated in NAFTA Chapter 11 proceedings, including the appropriateness of the subject matter for non-disputing party input, the suitability of the applicants to act as amici and whether the submissions addressed issues related to the public interest. Another order by the same Tribunal in a different case also allowed for amicus submission in *Agua Provinciales de Santa Fe S.A. v. Argentina*, ICSID Case No. ARB/03/17, at ¶¶ 11-16 (Mar. 17, 2006) Order in Response to a Petition for Participation as Amicus Curiae, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC512_En&caseId=C18 (accessed Dec. 29, 2009).

88. See ICSID Arbitration Rule 37(2) (adopted 10 April 2006) at <http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partF-chap04.htm#r37>. ICSID Arbitration Rule 37(2), as amended, provides that “[a]fter consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute ... to file a written submission with the Tribunal regarding a matter within the scope of the

attendance at hearings,⁸⁹ subject to the tribunal's discretion.

While not everyone—particularly not some developing country governments—has been in favor of this increased participation,⁹⁰ the trend is irreversible. Given this, it is important that non-disputing party involvement be administered with attention to certain important considerations. First, amici must add something of significance to the process, typically a unique perspective that raises factors and arguments on which the parties themselves would not rely.⁹¹ Second, tribunals must take into account the added costs imposed by including amici, including extra time (and thus fees) spent by the tribunal and the parties' lawyers. Related to these cost concerns are the issues of efficiency, i.e., the unnecessary duplication of arguments and perspectives *among amici* that could

dispute." A recent ICSID Tribunal, *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, which involved a private water services concession, relied on the amended ICSID Arbitration Rules to permit amicus participation. See Procedural Order 5 of February 2, 2007 at ¶ 64 (emphasis added), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC532_En&caseId=C67 (accessed Dec. 21, 2009). Similar permission was recently granted under the Additional Facility Rules. See *Piero Foresti, Laura de Carli and others v. Republic of South Africa* (ICSID Case No. ARB(AF)/07/1), Tribunal's Oct. 5, 2009 Letter, <http://ita.law.uvic.ca/documents/ForestiNon-DisputingPartiesOrder.pdf> (informing petitioning non-disputing parties that the Tribunal had decided to allow their participation "in accordance with Arbitration (Additional Facility) Rule 41(3)").

89. Amended Rule 32(2) provides that "[u]nless either party objects," the Tribunal may allow other persons to attend or observe all or part of the hearings, subject to appropriate logistical arrangements.

90. See Bjorklund, *supra* note 68, at 1292-94 (describing opposition by developing countries in both the WTO and ICSID contexts).

91. There have thus far been some interesting developments related to this issue of what perspective the amici should bring. In *Biwater*, in granting the non-disputing parties' request to file a brief, the Tribunal limited the scope of their participation by keeping the Parties' memorials off limits to them. The Tribunal also specified that it was envisaged that the Petitioners will address "broad policy issues concerning sustainable development, environment, human rights and governmental policy," which areas the Tribunal determined were those that "fall within the ambit of Rule 37(2)(a) of the ICSID Rules," but that it did not expect the Petitioners "(a) will consider themselves as simply in the same position as either party's lawyers, or (b) that they will see their role as suggesting to the Arbitral Tribunal how issues of fact or law as presented by the parties ought to be determined (which is the sole mandate of the Arbitral Tribunal itself)." *Biwater*, Procedural Order 5 of February 2, 2007 at ¶ 64, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC532_En&caseId=C67 (accessed Dec. 21, 2009). Rule 37(2)(a) does not limit amicus curiae participation only to "broad policy areas," however. Rather, as a condition for submission, Rule 37(2)(a) states that the submission "would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties," and Rule 37(2)(b) states that the submission "would address a matter within the scope of the dispute." Apparently, this view of what the appropriate scope of the non-disputing parties' submissions would include then partially reinforced (along with considerations of the amici's particular issue areas) the Tribunal's view that the amici did not need broader access to the parties' pleadings and other documents. See Procedural Order 5, ¶ 65 ("This has been a very public and widely reported dispute. The broad policy issues on which the Petitioners are especially qualified are ones which are in the public domain, and about which each Petitioner is already very well acquainted. These, after all, are the very issues that have led to their application to intervene in these proceedings. None of these types of issue ought to require – at least for the time being – disclosure of documents from the arbitration.").

threaten to make proceedings lopsided, forcing one side to respond to a disproportionate number of opposing submissions.⁹² Finally, an important consideration is the scope of access to grant amici: arguably, to contribute meaningfully, i.e., to avoid duplicating the views of the parties or other amici and to advocate effectively their specific interests, amici need to know more than just the basic aspects of the case; they should be granted access to the parties' pleadings and evidence.⁹³

Several investment tribunals have faced this issue,⁹⁴ and two ICSID tribunals have already granted such access,⁹⁵ including *Foresti v. Republic of South Africa*, upon which I am currently sitting—. In *Foresti*, a group of European investors in granite quarrying companies in South Africa claim that their mineral rights effectively were “extinguished,” without compensation, by legislation passed by the South African Government in 2002, which was designed to ameliorate the social conditions of historically marginalized South Africans. Overcoming Claimants' objections, the *Foresti* Tribunal decided last September to allow non-disputing parties to receive unprecedented access to the Parties' key filings prior to the submission of the amici briefs.⁹⁶ We felt that

92. Bjorklund, *supra* note 68, at 1293.

93. Bjorklund, *supra* note 68, at 1294.

94. *Aguas del Tunari SA v. The Republic of Bolivia* (ICSID Case No. ARB/03/2), Decision on Respondent's Objections to Jurisdiction of October 21, 2005 (reciting Tribunal's letter rejecting, among other transparency-related requests, petitioners request to have immediate access to all submissions made to the Tribunal and for the Tribunal to publicly disclose all statements, including written submissions, concerning the claims and defenses of both Parties), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC629_En&caseId=C210 (accessed Dec. 28, 2009). In *Aguas Argentinas S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, the Tribunal initially deferred decision on this question “until such time as a the Tribunal grants leave to a nondisputing party to file an *amicus curiae* brief.” See *Order in Response to a Petition for Transparency and Participation as Amicus Curiae* (May 19, 2005), at ¶ 33, <http://ita.law.uvic.ca/documents/suezMay19EN.pdf> (accessed Dec. 28, 2009) and later decided to deny such access. See *Order in Response to a Petition by Five Non-governmental Organizations for Permission to Make an Amicus Curiae Submission*, <http://ita.law.uvic.ca/documents/SuezVivendiamici.pdf> (accessed Dec. 28, 2009).

95. The first tribunal to allow such access was *Electrabel v. Hungary*, in which the Tribunal provided the European Commission access to some of the pleadings so that it could frame its legal submissions in light of arguments made by the parties in the case. See generally Luke Eric Peterson, *European Commission seeks to intervene as amicus curiae in ICSID arbitrations to argue that long-term power purchase agreements between Hungary and foreign investors are contrary to European Community Law*, INVESTMENT ARBITRATION REPORTER (Sept. 17, 2007), <http://www.iareporter.com/Archive/IAR-09-17-08.pdf> (accessed Dec. 21, 2009); Luke Eric Peterson, *NGOs permitted to intervene in South Africa mining case and—for second time at ICSID—tribunal orders would-be petitioners to be given access to case documents*, INVESTMENT ARBITRATION REPORTER (Oct. 14, 2009) (noting that “access to pleadings has only been granted to an intervener in one other dispute, *Electrabel v. Hungary*. In that case arbitrators did provide the European Commission access to some of the pleadings so that it could frame its legal submissions in light of arguments made by the parties in the case.”).

96. See *Foresti v. South Africa*, Tribunal's Oct. 5, 2009 Letter, <http://ita.law.uvic.ca/documents/ForestiNon-DisputingPartiesOrder.pdf>; see also Elizabeth Whitsitt, *Innovative Steps are Introduced*

such access was necessary for the non-disputing parties to focus their submissions on the issues arising in the case and to see what the Parties' positions were on the issues at hand.⁹⁷

Given the relative "novelty" of the procedure we established, we decided that it would also be beneficial to all involved and to the wider investment dispute settlement community if we could receive feedback on the "fairness and efficacy" of the procedure adopted, which comments we indicated we might address in a special section of the Final Award.⁹⁸ No ICSID Tribunal has ever expressed interest in hearing the Parties or the non-disputing parties' *post hoc* views on such procedural matters. However, like all other ICSID tribunals before us, we have thus far decided not to allow the non-disputing parties to make oral submissions at the hearing. However, we have left open a determinative decision on this question until March 2010, after the Parties' scheduled responses to the non-disputing parties' submissions. I should note, though, that the fate of the *Foresti* arbitration is very much up in the air, since Claimant has filed for a discontinuance,⁹⁹ meaning that the innovative procedures we have devised might still await implementation in a future case.

CONCLUSION

The evolution of ethical practices and transparency in the world of international arbitration continues, and there remain unresolved issues to tackle. In our continued efforts to enhance the legitimacy of arbitration as a form of dispute resolution we must constantly keep in mind two principles: first and foremost, the system must continue to serve the needs of those who actively use the system, while at the same time accommodating the needs of external parties

Into Non-Disputing Party ICSID Procedure, INVESTMENT TREATY NEWS (Nov. 3, 2009), <http://www.investmenttreatynews.org/cms/news/archive/2009/11/01/innovative-steps-are-introduced-into-non-disputing-party-icsid-procedure.aspx> (accessed Dec. 21, 2009).

97. As noted, the Tribunal in *Biwater* took a different approach, issuing a confidentiality order based on Claimant's request for provisional measures following Respondent's posting on the internet of a procedural order on document production along with minutes of the Tribunal's first session. See *Procedural Order No. 3 of September 29, 2006 Concerning the Claimant's Second Request for Provisional Measures*, available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC531_En&caseId=C67 (accessed Dec. 21, 2009). For a critical perspective on Procedural Order No. 3, see James Chalker, *Biwater Gauff (Tanzania) v. United Republic of Tanzania: Using Confidentiality to Undermine Meaningful Amicus-Curiae Participation* (March 2007) (arguing that the Tribunal lacked authority for its claimed power to "minim[ize] the scope for any external pressure on any party, witness, expert or other participant in the process," including "avoid[ing] 'trial by media'" and accordingly, among other reasons, the confidentiality order was not legally justified), http://www.sdlnpo.org/pub/2007_Bricks_Without_Straw_Emailed_0907.pdf (accessed Dec. 26, 2009).

98. See Tribunal's Oct. 5, 2009 Letter, *supra* note 96.

99. See *Piero Foresti, Laura de Carli and others v. Republic of South Africa* (ICSID Case No. ARB(AF)/07/1), Case Details, available at <http://icsid.worldbank.org/ICSID/FrontServlet> (accessed Dec. 29 2009) (noting Claimant's November 2nd request for a discontinuance pursuant to Article 50 of the ICSID Additional Facility Arbitration Rules and Respondent's objection to Claimant's request and filing of an application for a default award).

who are affected by arbitral processes; and second, we must continue to aspire to fulfill Lord Hewart's pronouncement that "[i]t is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done."¹⁰⁰

100. *King v. Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256, 259.