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Settlement of commercial disputes

Transparency in treaty-based investor-State arbitration

Comments of the Governments of Canada and of the United States of America on transparency in treaty-based investor-State arbitration under Chapter Eleven of the North American Free Trade Agreement (NAFTA)

Note by the Secretariat

In preparation for the fifty-fourth session of Working Group II (Arbitration and Conciliation), during which the Working Group is expected to work on the preparation of a legal standard on transparency in treaty-based investor-State arbitration, the secretariat has sent questions to States parties to the North American Free Trade Agreement (NAFTA) with a view to collect information on the practical aspects of transparency in treaty-based arbitration. In response, the Governments of Canada and of the United States of America, on 30th November 2010, submitted comments on the practical aspects of transparency in treaty-based investor-State arbitration under Chapter Eleven of NAFTA. The texts of the comments are reproduced as an annex to this note in the form in which they were received by the secretariat.

V.10-58332 (E)

Annex

1. Comments of the Government of Canada

The Government of Canada herein provides a response to the Secretariat's request of information on our experience implementing transparency in the NAFTA context.[1]

I. Canada's Experience with respect to the Publication of the Initiation of NAFTA Arbitrations

The Government of Canada gives public notice of the initiation of arbitral proceedings against it by posting the initiating documents submitted by potential claimants on the website of the Department of Foreign Affairs and International Trade as soon as possible, and in all cases, prior to the appointment of the arbitral tribunal. Indeed, Canada first provides public notice of potential arbitrations even before a claim is formally submitted. In particular, it has been Canada's practice to publish, promptly upon receipt from an alleged investor, the Notice of Intent to Submit a Claim to Arbitration ("Notice of Intent").[2] Prior to publishing the Notice of Intent, and later the Notice of Arbitration, Canada sends a letter to the alleged investor, describing Canada's obligations under its Access to Information Act, as well as the position of Canada pursuant to the *Notes of Interpretation* of the NAFTA Free Trade Commission on access to documents. The letter indicates Canada's intent to make the Notice of Intent or Notice of Arbitration, as the case may be, public, and therefore, requests that the alleged investor provide Canada with a version of the document with any confidential information redacted. In light of the fact that Canada publishes these documents itself, we have no experience where there has been a failure to make the initiation of an arbitration public.

In our experience, concerns that the publication of these initiating documents could have deleterious consequences in the case a claim is not pursued, or is frivolous, are unjustified. We have made public all 28 Notices of Intent submitted against Canada. To date, arbitral proceedings against Canada have been initiated with respect to only 15 of these potential claims. Further, of those 15 proceedings, only 10 have, to date, proceeded to the actual appointment of an arbitral tribunal. We have experienced no negative effects from making the early initiating documents publicly available in either the 13 cases which have not even proceeded to arbitration, nor in the 5 cases which, while submitted, have never reached the appointment of a Tribunal.

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[1] Canada notes, for the sake of clarity, that while pursuant to NAFTA Article 1137 and Annex 1137.4 Canada may publish arbitral awards without the consent of the investor, the other practices which have resulted in enhanced transparency in NAFTA arbitrations are not provided for in the text of NAFTA itself, but rather are a result of efforts subsequent to the NAFTA's adoption. These include the Notes of Interpretation of Certain Chapter 11 Provisions (2001) regarding access to documents; the NAFTA Parties' statements on open hearings in NAFTA Chapter Eleven arbitrations (2003); and the Statement of the Free Trade Commission on non-disputing party participation (2003).

[2] In the NAFTA context, the filing of a Notice of Intent does not formally initiate arbitral proceedings. Rather, such a filing merely satisfies a prerequisite of the Parties' consent to arbitration. An investor may submit a claim to arbitration (e.g. by filing a Notice of Arbitration under the UNCITRAL Arbitration Rules) only after 90 days has passed after the filing of the Notice of Intent.

II. Canada's Experience with respect to Public Access to Documents in NAFTA Arbitrations

Under the 1976 and 2010 versions of the UNCITRAL Arbitration Rules, there is no rule governing what documents can or cannot be made publicly available. In early NAFTA arbitrations against Canada, access to documents tended to be limited to the primary pleadings (Notice of Intent, Notice of Arbitration, Statement of Claim and Statement of Defense) and the decisions of the Tribunal. However, in 2001, in order to ensure that Tribunals were acting in the fullest interests of transparency, the NAFTA Free Trade Commission issued Notes of Interpretation, binding under the NAFTA, pursuant to which the NAFTA parties agreed to "make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal."[3]

Subsequent to these Notes of Interpretation, Tribunals in NAFTA arbitrations against Canada have allowed access to all documents submitted to or issued by the Tribunal.[4] In Canada's experience, the phrase "all documents submitted to, or issued by" by the Tribunal creates a rule that is simple to follow: if it goes to or comes from the Tribunal, it is public, and if it is just between the parties, it is not. Accordingly, formal and informal written submissions, exhibits, witness statements/affidavits, expert reports, correspondence to and from the Tribunal and all decisions, orders, and awards by the Tribunal are made publicly available by Canada in redacted form. The only documents not publicly available pursuant to this approach are correspondence solely between the parties, as well as documents exchanged between the parties during document disclosure which are never offered into the evidentiary record by either party.

As a matter of policy, the Government of Canada takes upon itself the obligation to make these documents available to the public and, to date, it has borne the costs of doing so. In practice, Canada has a dual approach to the method of publication for these documents. Canada posts to the website of the Department of Foreign Affairs and International Trade the primary documents submitted to or issued by the Tribunal, such as pleadings (e.g. Notice of Intent, Notice of Arbitration, Statement of Claim and Statement of Defense), formal submissions (e.g. memorial, counter-memorial, reply and rejoinder), and decisions, orders and awards of the Tribunal. However, Canada does not post to the web, but instead makes publicly available upon request, other submissions, such as motions, expert reports, witness statements and exhibits. Such a request could be made either through Canada's Access to Information Act, or simply by requesting that Canada provide these documents pursuant to the Confidentiality Order in the arbitration.

All of the above-described documents are made publicly available in the language in which they were submitted or issued. As a bilingual country, Canada is particularly

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[3] *Notes of Interpretation of Certain Chapter 11 Provisions*, July 31, 2001, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/nafta-interpr.aspx?lang=en.

[4] For two different approaches giving effect to the Notes of Interpretation, *compare Chemtura Corp. v. Canada*, Confidentiality Order, dated January 21, 2008, ¶11, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Confidentialityorder.pdf with *V.G. Gallo v. Canada*, Confidentiality Order, dated June 4, 2008, at ¶5, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ConfidentialityOrder2008-06-04.pdf.

aware of the importance of providing meaningful access to documents for different linguistic groups. However, to date, we have not received a request that any documents be translated and thus, have no relevant experience to share with the Secretariat in this regard.

III. Canada's Experience with Submissions by Third Parties in NAFTA Arbitrations

Canada's experience in NAFTA arbitrations with respect to *amicus curiae* participation is that, as long as reasonable limits are established, *amicus* submissions can be a benefit for the Tribunal.

In this regard, the NAFTA Free Trade Commission issued a *Statement of the Free Trade Commission on non-disputing party participation* in 2003.[5] Pursuant to that Statement, whether to allow an interested *amicus* to participate is left to the discretion of the Tribunal. The disputing parties are permitted to comment on whether the Tribunal should grant leave for the *amicus* to file, but the Tribunal may, in principle, accept the submission over the objection of both disputing parties. The Statement recommends that in exercising its discretion, the Tribunal should consider a number of factors designed to help it determine whether or not the *amicus* submission will be helpful to the Tribunal—these include whether the *amicus* has knowledge or insight different from the parties and whether there is both an interest of the *amicus* and of the public in the dispute.

Recognizing that "written submissions by non-disputing parties in arbitrations under Section B of Chapter 11 of NAFTA may affect the operation" of Chapter 11 arbitration, the Free Trade Commission Statement also contains detailed guidelines for *amicus* submissions: an interested *amicus* must request leave to file a submission, *amicus* submissions must be in written form and must be attached to the application for leave, and the submission cannot be more than 20 pages in length. In preparing submissions, *amicus* have access only to the publicly available documents.

Amicus submissions have been made in two of the seven NAFTA arbitrations against Canada that have, to date, reached the stage of a hearing.[6] Further, procedural orders in other arbitrations have expressly addressed the issue of potential participation by *amicus*.[7] In the two cases where *amicus* submission were made, the disputing parties have been granted the opportunity to respond. In those cases, Canada and the Claimant each chose to respond to some but not all of the *amicus* submissions made. In our experience, Tribunals have not needed guidance on *amicus* submissions in addition to that contained in the Free Trade Commission Statement.

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[5] *Statement of the Free Trade Commission on non-disputing party participation*, October 7, 2003, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Nondisputing-en.pdf.

[6] Specifically, *amicus curiae* made submissions in *UPS v. Canada* and in *Merrill & Ring Forestry L.P. v. Canada.*

[7] *Bilcon v. Canada,* Procedural Order No. 1, dated April 9, 2009, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ProceduralOrderNo1April9.pdf.

Finally, we note that in our NAFTA practice, the United States and Mexico have the right to make submissions on questions regarding the interpretation of the NAFTA pursuant to Article 1128 of NAFTA Chapter 11. In our view, such submissions are of a different type than an *amicus* submission.

IV. Canada's Experience with Open Hearings in NAFTA Arbitrations

Three of the seven hearings in NAFTA Chapter 11 arbitrations against Canada have, so far, been open to the public.[8] Further, in another arbitration, where the hearing has yet to be held, the parties have agreed to an open hearing.[9] In two other cases, Canada has sought open hearings, but pursuant to the Claimants' objection under the UNCITRAL Arbitration Rules, the hearings were closed.[10] The opening of the hearings did not pose significant logistical or operational hurdles, and nor, in Canada's opinion, did it negatively affect the hearing process in any way.

All three public hearings have been in arbitrations administered by ICSID and accordingly, the hearings have all been held at the World Bank in Washington, D.C. Public access was provided through the use of the ICSID closed-circuit television system. Members of the public were permitted to view the proceedings in a separate room. When confidential information was to be discussed, the video and audio feeds into this public viewing room were simply interrupted. In at least one case, the members of the public who were planning to attend the hearing were required to provide their names and affiliations in advance. Such measures can be used so as to ensure that people who have been excluded from the hearings (i.e. witnesses yet to testify) are not able to view the proceedings in contravention of that order. Media have attended these public hearings, but in all cases so far, any form of recording of the proceedings has been prohibited.

With respect to these three public hearings, Canada has posted two of the transcripts on the webpage maintained by the Department of Foreign Affairs and International Trade,[11] and intends to post the transcript of the most recent hearing as soon as it is available in redacted form.

V. Canada's Experience with the Publication of the Award in NAFTA Arbitrations

Pursuant to Article 1137 and Annex 1137.4 of Chapter 11 of the NAFTA, Canada is entitled to publish any arbitral awards in NAFTA arbitrations. Canada does so by

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[8] Specifically, *UPS v. Canada*, *Merrill & Ring v. Canada,* and *Mobil Investments Inc. and Murphy Oil Corporation v. Canada*.

[9] W*illiam Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Canada*, Confidentiality Order, dated May 4, 2009, ¶26, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ProceduralOrderNo2-May42009.pdf.

[10] *Chemtura v. Canada*, Confidentiality Order, ¶ 10, dated January 21, 2008, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Confidentialityorder.pdf; *V.G. Gallo v. Canada*, Procedural Order No. 1, ¶ 31, dated June 4, 2008, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ProceduralOrder12008-06-04.pdf.

[11] *UPS v. Canada*, Hearing Transcripts available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/parcel_archive.aspx?lang=en; *Merrill & Ring v. Canada* transcripts available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/merrill_archive.aspx?lang=en.

making such awards available, in redacted form, on the webpage maintained by the Department of Foreign Affairs and International Trade. In our experience, this process has been relatively efficient, and has presented no significant concerns with respect to the conduct of the arbitration or indeed the writing of the award by the Tribunal. To date, Canada has published all of the awards—jurisdictional, merits, damages and costs—in all 7 arbitrations that have issued awards. The typical procedure followed for publishing the award is the same followed for publishing all documents, described below.

VI. Canada's Experience Protecting Confidential Information in NAFTA Arbitration

In every one of our NAFTA arbitrations to date, confidential information has been protected from public disclosure. Neither the text of NAFTA nor the subsequent Note of Interpretation on access to documents defines or identifies the information that is confidential and should be protected. As a result, arbitral tribunals in NAFTA cases have entered Confidentiality Orders which both define what is to be considered confidential information in a particular case, and the process for the protection of that information. For the most part, in our arbitrations, Tribunals have adopted similar definitions designed to protect business confidential information of either the parties or third parties. We have no experience with a Tribunal ordering information to be withheld from the public on grounds other than confidential business information, such as protecting the integrity of the arbitral process.

In terms of the process for protecting confidential information, in our practice, Tribunals have required that a party intending to make a document public give notice to the other disputing party of its intent to do so. The other disputing party then has a set period of time to review the document and redact any confidential information.[12] Because the redaction of information as confidential is done pursuant to an Order of the Tribunal, any disputes are also resolved by Tribunal.

There have been several cases where Canada has felt that the Claimant inappropriately over-used the "confidential information" designation. In such cases, we have filed a motion with the Tribunal, and the Tribunal has issued a decision on what information can and cannot be redacted prior to public disclosure.[13]

We have no experience with respect to a disputing party violating the Confidentiality Order of the Tribunal, and making public a document that was intended to be kept confidential. In this regard, we note that the Tribunal likely has the same powers it does to enforce any of its Orders, including imposing any relevant costs as a sanction. Further, we also note that in our practice, individuals, other than the representatives of the disputing parties, who are given access to confidential documents in order to assist in the preparation of the case, are typically required to sign a "Confidentiality Undertaking." In our practice, such an

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[12] *See, e.g., Chemtura v. Canada*, Confidentiality Order, ¶¶ 11-12, dated January 21, 2008, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Confidentialityorder.pdf.

[13] *See, e.g., Bilcon v. Canada*, Procedural Order No. 4, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Bilcon-ProceduralOrderNo4.pdf; *Chemtura v. Canada*, Procedural Order No. 3, dated August 8, 2008, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ProceduralOrder3Aug82008.pdf.

Undertaking is expressly made enforceable pursuant to domestic law, and the individual executing the Undertaking agrees to a domestic court in which disputes relating to a breach can be heard.

VII. Canada's Experience with Administering a Repository for the Public Information in its NAFTA Arbitrations

As referenced above several times, Canada uses primarily a web-based repository to store the public documents in its NAFTA arbitrations. However, also as explained above, in order to minimize the web resources required, we limit the types of documents that we post to this repository, making subsidiary or supporting documents instead available upon request.

In our experience, a web-based repository of information provides an efficient and cost-effective way to disseminate information to the widest possible public audience in Canada. Further, several of our arbitrations are being administered by either ICSID or the PCA, and in such cases, public documents are also made available on their web-based repositories. In our experience, allowing multiple portals of access ensures availability to as wide an audience as possible.

2. Comments of the Government of the United States of America

The United States takes this opportunity to respond to the Secretariat's questions regarding the experience of the United States with ensuring appropriate transparency of arbitral proceedings under Chapter Eleven of the North American Free Trade Agreement ("NAFTA"). In response to these questions, and as a supplement to the U.S. comments submitted previously to UNCITRAL on this subject,[14] the United States provides the following additional information regarding its current transparency practices.

(1) Publicity regarding the initiation of arbitral proceedings (for instance, what is your experience regarding the publication of the notice of arbitration at an early stage of the proceedings? What would be the consequences of a failure to publish information on the initiation of arbitral proceedings?)

As part of its commitment to ensuring the transparency of its investor-State arbitrations, the United States makes available promptly to the public, subject to the redaction of protected information,[15] documents regarding the initiation of arbitral proceedings. Pursuant to the NAFTA Free Trade Commission's July 31, 2001 Notes of Interpretation of Certain Chapter 11 Provisions ("NAFTA FTC Interpretation"), the Department of State makes available, "in a timely manner,"[16] Notices of Arbitration ("NOAs") that it receives by posting them on its website.[17] Under recent

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[14] *See* Comments received from the United States of America on transparency in treaty-based investor-State arbitration, A/CN.9/WG.II/WP.159/Add.3 at 7-11 (Aug. 4, 2010) ("U.S. Comments on Transparency").

[15] The categories of protected information are described in the United States' comments on transparency in treaty-based investor-State arbitration. *Id.* at 9-10.

[16] *See* Notes of Interpretation of the Free Trade Commission of Certain Chapter 11 Provisions ¶ A(2)(b) (July 31, 2001), *available at* http://www.state.gov/documents/organization/38790.pdf.

[17] *See* NAFTA Investor-State Arbitrations, U.S. Department of State, http://www.state.gov/s/l/c3439.htm.

free trade agreements ("FTAs"), such as the U.S. – Central America – Dominican Republic Free Trade Agreement ("CAFTA-DR"), and bilateral investment treaties ("BITs") based on the 2004 U.S. Model BIT,[18] the United States is required to "promptly" make available to the public both Notices of Intent ("NOIs") and NOAs that it receives.[19]

As practiced in the NAFTA context, the Department of State responds to the receipt of a NOI with a letter that both confirms receipt and discusses "several aspects of NAFTA Chapter Eleven and U.S. law that are relevant to the disclosure of documents in NAFTA investor-State arbitrations."[20] That letter notifies the claimant that:

> (1) under NAFTA Articles 1127 and 1129, copies of documents generated in connection with the arbitration will be provided to the Governments of Canada and Mexico;
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> (2) under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, these documents may be disclosed to members of the public, who have a right of access, enforceable in court, to federal agency records or portions thereof, except to the extent they are protected by applicable exemptions or exclusions; one of which, under 5 U.S.C. § 552(b)(4), protects from disclosure "trade secrets and commercial or financial information . . . [that is] privileged or confidential";
>
> (3) under the NAFTA FTC Interpretation, the NAFTA Parties agreed to provide access to the public to information in NAFTA Chapter Eleven arbitrations;
>
> (4) under NAFTA Article 1126(10), a copy of any request for arbitration or NOA will be recorded in a public register at the NAFTA Secretariat; and,
>
> (5) the United States' general practice is to make documents available to the public, to the fullest extent feasible, by posting them to the Department of State's website.[21]

Accordingly, the letter also recommends that, particularly with respect to U.S. FOIA obligations, should the claimant

> believe that any part of any document that it provides in this matter reflects confidential business information or is otherwise protected from disclosure under FOIA, it should clearly mark the specific information for which

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[18] As noted in the prior U.S. comments on transparency in treaty-based investor-State arbitration, *see* U.S. Comments on Transparency at 10, the following recent investment agreements negotiated by the United States "reflect the provisions" of the 2004 Model BIT with respect to transparency: U.S. – Uruguay BIT, art. 29; U.S. – Rwanda BIT, art. 29 (both available at http://www.ustr.gov/trade-agreements/bilateral-investment-treaties/bit-documents), and the investment chapters of the following recent FTAs "include similar transparency provisions": U.S. – Chile FTA, art. 10.20; U.S. – Colombia Trade Promotion Agreement, art. 10.21; U.S. – Peru Trade Promotion Agreement, art. 10.21; U.S. – Korea FTA, art. 11.21; U.S. – Morocco FTA, art. 10.20; U.S. – Oman FTA, art. 10.20; U.S. – Panama Trade Promotion Agreement, art. 10.21; and U.S. – Singapore FTA, art. 15.20 (all available at http://www.ustr.gov/trade-agreements/free-trade-agreements).

[19] *See* CAFTA-DR art. 10.21(1)(a)-(b), 2004 Model BIT art. 29(1)(a)-(b), and *supra* note 18.

[20] *See infra* Form Letter, app. A.

[21] *Id*.

> protection is claimed and provide a second version of the document in which such information is omitted or obscured.[22]

Without such a designation, the Department of State presumes that any information in the documents provided by the claimant is not exempt from disclosure to the public under the FOIA.[23]

After the letter is sent to claimant's counsel, and if a NOA is subsequently received, the Department of State posts the NOA to its website in a timely manner, subject to any relevant redactions for protected information. For example, in *Grand River Enterprises Six Nations, Ltd. et al. v. United States*, the Department of State timely posted that NOA on a page which contained the following description of the case:

> Grand River Enterprises Six Nations, Ltd., a Canadian corporation, Jerry Montour, Kenneth Hill and Arthur Montour have delivered a notice of arbitration under the UNCITRAL Arbitration Rules on their own behalf and on behalf of Native Wholesale Supply (collectively "Grand River"). Grand River is involved in the manufacture and sale of tobacco products. According to its Statement of Claim, Grand River seeks not less than $310 million to $664 million for damages allegedly resulting from a 1998 settlement agreement between various state Attorneys General and the major tobacco companies, and certain state legislation that partially implements the settlement.
>
> Grand River alleges violations of NAFTA Articles 1102 (national treatment), 1103 (most-favored-nation treatment), 1104 (better of national or most-favored-nation treatment), 1105 (minimum standard of treatment under international law) and 1110 (expropriation).
>
> The United States intends to defend this claim vigorously.[24]

As illustrated by the last sentence of the case description above, the United States indicates its position with respect to the defense of the claim when the NOA is posted.

The NAFTA FTC Interpretation reflects the political commitment of the NAFTA Parties to each other and to their respective national stakeholders to provide public access to each NOA, as well as other documents submitted to, or issued by, a Chapter Eleven tribunal.[25] The failure to provide public access would be inconsistent with this commitment.

(2) Documents to be published (for instance, have there been any uncertainties as to whether certain types of documents should be published; or issues raised with respect to translation or costs related issues?)

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[22] *Id.*

[23] *Id*.

[24] *Grand River Enterprises Six Nations, Ltd. et al. v. United States*, U.S. Department of State, http://www.state.gov/s/l/c11935.htm.

[25] *See* NAFTA FTC Interpretation ¶ A(2)(b).

The United States described the documents to be published under the NAFTA FTC Interpretation and the 2004 Model BIT in its previous comments on transparency in treaty-based investor-State arbitration.[26]

To date, the United States has not faced uncertainty as to whether certain types of documents submitted to, or issued by a NAFTA tribunal should be published. The Department of State has generally posted to its website written submissions, transcripts, orders, and decisions for the cases in which it is a disputing Party, and provides links to websites maintained by Canada and Mexico which provide access to documents in cases submitted to arbitration against those NAFTA Parties.[27] Documents that are not posted to the website may be requested by members of the public, subject to the redaction of protected information, by contacting the U.S. Department of State's Office of International Claims and Investment Disputes (L/CID).[28]

No issues have been raised with respect to the translation of these documents or costs related to making them available. The Department of State makes the documents available in the language or languages in which they were submitted to or issued by the tribunal.

(3) Submissions by third parties (for instance, have you ever experienced an arbitral tribunal in the need of more guidance with respect to the decision-making on the acceptance of submissions by third parties?)

The United States described the provisions relevant to consideration of amicus involvement in its previous comments on transparency in treaty-based investor-State arbitration.[29] Those comments also described the NAFTA FTC's Statement on Non-Disputing Party Participation ("FTC Amicus Statement"),[30] which recommended specific guidelines to be adopted by Chapter Eleven tribunals when considering proposed amicus submissions.[31] In practice, the United States has not been asked to provide guidance in addition to that recommended by the FTC Amicus Statement.

In *Glamis Gold, Ltd. v. United States*, the Tribunal applied the FTC Amicus Statement's guidelines. The Tribunal amended its first procedural order, which had established a deadline for amicus submissions, "respecting the filing of applications and submissions by non-parties in accordance with [FTC Amicus Statement]"[32] and

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[26] *See* U.S. Comments on Transparency at 9.

[27] The only documents that the Department of State posts on its web pages for claims against the Governments of Canada or Mexico are non-disputing Party submissions under Article 1128 of the NAFTA. *See, e.g., Pope & Talbot, Inc. v. Government of Canada*, U.S. Department of State, *available at*: http://www.state.gov/s/l/c3747.htm (providing a brief description of the matter, copies of the United States' Article 1128 submissions, and a hyperlink "[f]or further information and documents concerning this claim" to the Government of Canada's webpage).

[28] NAFTA Investor-State Arbitrations, International Claims and Investment Disputes (L/CID), U.S. Department of State, http://www.state.gov/s/l/c3439.htm.

[29] U.S. Comments on Transparency at 10-11.

[30] *Id.* (discussing Statement of the FTC on Non-Disputing Party Participation (Oct. 7, 2003), *available at*: http://www.state.gov/documents/organization/38791.pdf).

[31] *Id.*

[32] *Glamis Gold, Ltd. v. United States*, NAFTA/UNCITRAL, Procedural Order No. 4 ¶ 9 (Aug. 26, 2005), *available at*: http://www.state.gov/documents/organization/54151.pdf.

noted subsequently that amicus submissions "must satisfy the principles" of the FTC Amicus Statement.[33] As detailed in the Award, the Tribunal had expressed its view that it "should apply strictly the requirements specified in the FTC Statement, for example restrictions as to length or limitations as to the matters to be addressed..."[34] For its part, the United States had fully supported amicus participation, "insomuch as it met the requirements of the FTC Statement in terms of both length and content [and] as long as that participation was effectuated in a manner that avoided placing undue burden on the Parties."[35] Ultimately, the Tribunal decided to accept amicus submissions from the National Mining Association, the Quechan Indian Nation, Sierra Club and Earthworks, and Friends of the Earth,[36] and to "consider [them], as appropriate, in accordance with the principles stated in the FTC Statement and the particular criterion mentioned by [the United States] that each submission bring 'a perspective, particular knowledge or insight that is different from that of the disputing parties.'"[37]

In *Grand River Enterprises Six Nations, Ltd. et al. v. United States*, the parties agreed at the first session of the Tribunal that "the Tribunal should later adopt a process for receiving and considering *amicus* submissions, as necessary (but not at this stage), by having recourse to the recommendations of the [FTC Amicus Statement]."[38] When the Office of the National Chief of the Assembly of First Nations presented an amicus submission[39] without an accompanying application for leave to file, the Tribunal notified the parties that it "had received an unsolicited letter from a non-party supporting a Party in the pending arbitration."[40] The Tribunal stated further that, "[i]n considering whether to accept and consider this letter, or any other submissions by non-Parties, the Tribunal intends to be guided by the [FTC Amicus Statement] and will decide in due course whether to consider the

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[33] *Glamis Gold, Ltd. v. United States*, NAFTA/UNCITRAL, Letter from President Young regarding the Request for Extension to File Application for Leave to File a Non-Disputing Party Submission and Associated Submission at 2 (Oct. 10, 2006), *available at*: http://www.state.gov/documents/organization/73890.pdf; *see also Glamis Gold, Ltd. v. United States*, NAFTA/UNCITRAL, Decision on Application and Submission by Quechan Indian Nation ¶ 10 (Sept. 16, 2005), *available at*: http://www.state.gov/documents/organization/53592.pdf (noting that the Quechan Indian Nation's submission "satisfies the principles" of the FTC Amicus Statement).

[34] *Glamis Gold, Ltd. v. United States*, NAFTA/UNCITRAL, Award ¶ 286 (June 8, 2009) ("*Glamis* Award"), *available at*: http://www.state.gov/documents/organization/125798.pdf.

[35] *Id*. ¶ 285.

[36] The applications for leave to file and the submissions are available at http://www.state.gov/s/l/c10986.htm.

[37] *Glamis* Award ¶ 286 (quoting FTC Amicus Statement § B(6)(a)). Notably, the Quechan Indian Nation filed two amicus submissions, the second of which was accepted at the same time as the others above. *Id.* The Tribunal accepted the first submission in its Decision on Application and Submission by Quechan Indian Nation, dated September 16, 2005. *See supra* note 33.

[38] *Grand River Enterprises Six Nations, Ltd. et al. v. United States*, NAFTA/UNCITRAL, Minutes of the First Session of the Tribunal § II(1) (Mar. 31, 2005), *available at*: http://www.state.gov/documents/organization/45017.pdf.

[39] *Grand River Enterprises Six Nations, Ltd. et al. v. United States*, NAFTA/UNCITRAL, Letter from Phil Fontaine, National Chief of the Assembly of First Nations, to the Tribunal (Jan. 19, 2009), *available at*: http://www.state.gov/documents/organization/117812.pdf.

[40] *Grand River Enterprises Six Nations, Ltd. et al. v. United States*, NAFTA/UNCITRAL, Letter from the Tribunal to the Parties Concerning the Amicus Curiae Submission at 1 (Jan. 27, 2009), *available at*: http://www.state.gov/documents/organization/117813.pdf.

submission, in light of any views the Parties may wish to indicate in the Reply and Rejoinder."[41] The United States stated in its Rejoinder that

> The Assembly of First Nation's submission was not accompanied by an application for leave to file a non-party submission. The procedures recommended by the [FTC Amicus Statement] – which the Tribunal has indicated will guide their consideration of amicus submissions in this case – require that any proposed amicus submission be accompanied by an application for leave to file. Because the Assembly of First Nations did not seek leave to file, their submission should not be considered in this arbitration.[42]

The Tribunal has not yet decided whether to accept the submission.

(4) Public hearings (for instance, how are public hearings organized? What is your experience with respect to the publication of transcripts?)

The United States has a clear policy in support of open hearings. In the NAFTA context, the United States has declared that it "will consent, and will request the consent of disputing investors and, as applicable, tribunals, that hearings in Chapter Eleven disputes to which it is a party be open to the public, except to ensure the protection of confidential information, including business confidential information."[43] Moreover, in the CAFTA-DR and under the 2004 Model BIT, the commitment to public hearings is even stronger because the relevant articles require that

> [t]he tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.[44]

In practice, NAFTA hearings have been open to the public via closed-circuit television feed. That feed may be cut, however, for portions of a hearing involving protected information. As explained in detail by the *Glamis* Tribunal in its Procedural Order No. 11:

> with respect to public access to the hearing, ICSID explained that a separate room had been reserved [at the World Bank in Washington, D.C.] into which a television broadcast would be made through the Bank's video channel. Neither Party objected to public access in this form. Both Parties did, however, recognize that public viewing would not be possible during the discussion of specific confidential information, including the presentation of company

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[41] *Id.* at 1-2.

[42] *Grand River Enterprises Six Nations, Ltd. et al. v. United States*, NAFTA/UNCITRAL, Rejoinder at 77, n.277 (May 13, 2009), *available at*: http://www.state.gov/documents/organization/125482.pdf.

[43] Statement on Open Hearings in NAFTA Chapter Eleven Arbitrations (Oct. 7, 2003), *available at*: http://ustraderep.gov/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file143_3602.pdf.

[44] *See* CAFTA-DR art. 10.21.2, 2004 Model BIT art. 29(2), and *supra* note 18.

> financial information and details as to the exact locations of culture sites and artifacts.[45]

At the most recent merits hearing in *Grand River Enterprises Six Nations, Ltd. et al. v. United States*, the hearing was open to the public in the same manner. In that arbitration, the parties had agreed that

> [s]ubstantive hearings on merits would be open to the public via a live closed-circuit television transmission, provided that ICSID [was] able to make the appropriate logistical arrangements. It was also noted that no member of the public would be admitted into the hearing room.[46]

Pursuant to that agreement, the hearing was broadcast to a public viewing room at the World Bank in Washington, D.C., subject to cuts of the feed for the protection of confidential business information.

The Department of State also publishes complete hearing transcripts on its website, subject to the redaction of protected information.[47]

(5) Publication of awards (for instance, have there been any cases in which certain decisions or awards were excluded from publication? In the affirmative, what were the reasons?)

To date, there have not been any cases where the United States was the disputing Party in which decisions or awards were excluded from publication. In Annex 1137.4 of the NAFTA, the United States specified that where it "is the disputing Party, either the United States or a disputing investor that is a party to the arbitration may make an award public." Moreover, the United States has committed to making awards public under the NAFTA FTC Interpretation.[48] Additionally, the United States is required to make awards public under the CAFTA-DR and the 2004 Model BIT.[49]

(6) Possible exceptions to the transparency rules (how to deal in practice with those exceptions, in particular in case of disagreement between the parties and how to ensure compliance?)

As detailed in the U.S. comments on transparency in treaty-based investor-State arbitration, the NAFTA FTC Interpretation and the 2004 Model BIT provide for the non-disclosure of protected information.[50] In prior cases, the United States has concluded confidentiality agreements with claimants to ensure the non-disclosure of protected information and to particularize a procedure for determining whether certain information should be protected.

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[45] *Glamis Gold, Ltd. v. United States*, NAFTA/UNCITRAL, Procedural Order No. 11 ¶ 15 (July 9, 2007), *available at*: http://www.state.gov/documents/organization/88173.pdf.

[46] *Grand River Enterprises Six Nations, Ltd. et al. v. United States*, NAFTA/UNCITRAL, Minutes of the First Session of the Tribunal § I(10) (Mar. 31, 2005), *available at*: http://www.state.gov/documents/organization/45017.pdf.

[47] *See* Cases Filed Against the United States of America, U.S. Department of State, *available at*: http://www.state.gov/s/l/c3741.htm. For an example of a dispute concerning the redaction of a hearing transcript, *see infra* response to question six.

[48] *See* NAFTA FTC Interpretation ¶ A(2)(b).

[49] *See* CAFTA-DR art. 10.21.1(e), 2004 Model BIT art. 29(1)(e), and *supra* note 18.

[50] *See supra* note 15.

In practice, the United States seeks to resolve matters of confidentiality with the opposing party. In the event that the parties cannot reach agreement on whether certain information should be protected, the dispute is submitted to the tribunal for resolution, in accordance with any applicable confidentiality agreement. For example, in *Grand River Enterprises Six Nations, Ltd. et al. v. United States*, the United States disagreed with the claimants' designation of specific information in the hearing transcripts as confidential business information. In the interest of making the transcripts public "in a timely manner," as required by the NAFTA FTC Interpretation, the Department of State posted the hearing transcripts with this information redacted by the claimants to its website. However, the United States brought its challenge of certain of these redactions to the Tribunal, arguing that the claimants' designation of the information as business confidential was not justified under the terms of the applicable confidentiality agreement. The Tribunal has not yet resolved this issue.

The United States has not encountered, in its investor-State practice as a disputing Party, any compliance issues regarding the non-disclosure of protected information.

(7) Repository of published information (for instance, what difficulties have been encountered in the procedure of publication?)

The Department of State has not encountered any particular difficulties with the publication of documents on its website. Nor has the Department encountered any particular difficulties with, in accordance with NAFTA Article 1126(10), providing a copy of any request for arbitration or NOA to the NAFTA Secretariat for inclusion in a public register.

Appendix A: Form Letter

By E-mail & Courier

Re: [Caption of Matter]

Dear [Addressee]:

This letter will confirm the receipt on [date] by the United States Government of [the claimant's] Notice of Intent to Submit a Claim to Arbitration under Section B of Chapter Eleven of the North American Free Trade Agreement ("NAFTA") concerning [brief description of the matter].

We take this opportunity to note several aspects of NAFTA Chapter Eleven and United States law that are relevant to the disclosure of documents in NAFTA investor-State arbitrations. First, the United States is obliged under NAFTA Articles 1127 and 1129 to provide to the other NAFTA Parties copies of many categories of documents generated in connection with arbitrations under Chapter Eleven. [The claimant] should understand that, by invoking the dispute-resolution provisions of Chapter Eleven, it has submitted itself to a process by which its documents can and will be provided to the Governments of Canada and Mexico.

Second, we note the United States' obligations under the Freedom of Information Act ("FOIA"), codified at 5 U.S.C. § 552. Under the FOIA, any member of the public has a right of access, enforceable in court, to federal agency records or portions thereof, except to the extent protected from disclosure by applicable exemptions or exclusions. One of the FOIA exemptions most often

invoked for documents provided by litigants to agencies is 5 U.S.C. § 552(b)(4), which protects from disclosure "trade secrets and commercial or financial information . . . [that is] privileged or confidential."

Should [the claimant] believe that any part of any document it provides in this matter reflects confidential business information or is otherwise protected from disclosure under FOIA, it should clearly mark the specific information for which protection is claimed and provide a second version of the document in which such information is omitted or obscured. Absent such a designation, we will presume that [the claimant] does not claim that any information in documents provided by it is exempt from disclosure to the public pursuant to the FOIA.

Third, we note the July 31, 2001 statement of interpretation of the Free Trade Commission established under NAFTA Article 2001, which is available at <http://www.state.gov/documents/organization/38790.pdf >. That statement, among other things, recorded the intentions of the three NAFTA Parties to grant, subject to limited exceptions, access to the public to information in investor-State arbitrations pursuant to Chapter Eleven of the NAFTA.

Fourth, we note that NAFTA Article 1126(10) requires a disputing Party to provide a copy of any request for arbitration or notice of arbitration to the NAFTA Secretariat for inclusion in a public register. Any document submitting a claim to arbitration in this matter will be made available to the public at the United States Section of the NAFTA Secretariat.

Fifth, the United States' general practice is to post to the website of the Department of State – to the fullest extent feasible – all submissions, orders and decisions in Chapter Eleven cases against the United States that are of interest to the public.