
TRANSPARENCY IN
INTERNATIONAL TRADE AND INVESTMENT
DISPUTE SETTLEMENT
EDITED BY JUNJI NAKAGAWA
ROUTLEDGE

Transparency in International Trade and Investment Dispute Settlement

An increasing number of international trade disputes are settled through the World Trade Organization (WTO) dispute settlement (DS) procedure. In parallel, an increasing number of international investment disputes are settled through an investor-host state arbitration procedure. What does "transparency" mean in the context of international trade and investment dispute settlement? Why is enhanced transparency demanded? To what extent and in what manner should these dispute settlement procedures be transparent? The book addresses these issues of securing transparency in international trade and investment dispute settlement.

Transparency in international trade and investment dispute settlement drew the attention of international economic law scholars in the late 1990s, but most literature discusses the transparency in trade DS and investment DS separately. The book deals with the issue in a comprehensive and coherent manner, combining the analyses of the issue in both DS procedures and comparing the pros and cons to enhanced transparency in them. The main argument of the book is, firstly, that transparency in these procedures should be enhanced so that they may be accountable to a wider range of stakeholders, but, secondly, that the extent and the manner of transparency might differ in these two procedures, reflecting their structural and functional differences.

The book appeals to both scholars and students interested in international economic law and international relations, as well as lawyers and government officials who deal with international trade and investment regulation.

Junji Nakagawa is Professor of International Economic Law at the Institute of Social Science, University of Tokyo. Born in Hiroshima, Japan, in 1955, Nakagawa obtained his BA, MA and Ph.D. from the University of Tokyo. He has also taught at Tokyo Institute of Technology, City University of Hong Kong, University of Denver, Tufts University and El Colegio de México. His publications include *International Harmonization of Economic Regulation* (2011, Oxford University Press), *Multilateralism and Regionalism in Global Economic Governance* (2011, Routledge), *Anti-Dumping Laws and Practices of the New Users* (2007, Cameron May) and *Managing Development: Globalization, Economic Restructuring and Social Policy* (2006, Routledge).

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Contributors

Florentino P. Feliciano is a Senior Counsel at the Law Office of SyCip Salazar Hernancez & Gatmaitan. He was a former member of the WTO Appellate Body from 1995 to 2000, and a Justice of the Supreme Court of the Philippines from 1986 to 1995.

Yuka Fukunaga is a Professor at the School of Social Sciences, Waseda University, Japan.

Peter L. Lallas is the Executive Secretary of the World Bank Inspection Panel.

Chin Leng Lim is Professor at the Faculty of Law at the University of Hong Kong.

Daniel Magraw is the President Emeritus and Distinguished Scholar at the Center for International Environmental Law, Washington, DC.

Junji Nakagawa is a Professor of International Economic Law at the Institute of Social Science, University of Tokyo.

Federico Ortino is Reader in International Economic Law in the School of Law at King's College London.

Sofia Plagakis is a Policy Analyst at the OMB Watch, Washington. She was former Program Associate at the Center for International Environmental Law.

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The second intermediary result was the panel session on 'Transparency in International Trade and Investment Dispute Settlement' at the Asian Society of International Law 2nd Biennial Conference at the University of Tokyo in August 2009. Nakagawa chaired the panel, and Florentino Feliciano, Federico Ortino and Peter Lallas read their papers. The members of the project were grateful for the comments they received at the ensuing floor discussion, most notably from Professor Edith Brown Weiss. The results of the discussion were later reflected in each member's contribution to the book, though, of course, the final responsibility of each contribution is owed by its author.

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Tokyo, June 2012
Junji Nakagawa

Abbreviations

AANZFTA	Australia and New Zealand FTA
ADR	alternative means of dispute resolution
AEM	ASEAN Economic Ministers' Meeting
AFTA	ASEAN Free Trade Area
APEC	Asia Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
BIT	bilateral investment treaty
BRIC	Brazil, Russia, India and China
CEC	Commission on Environmental Cooperation
CIEL	Center for International Environmental Law
CSR	Corporate Social Responsibility
DDA	Doha Development Agenda
DR-CAFTA	Dominican Republic–Central America-United States Free Trade Agreement
DSB	Dispute Settlement Body
DSM	WTO Dispute Settlement Mechanism
DSS	WTO Dispute Settlement System
DSU	WTO Understanding on Rules and Procedures Governing the Settlement of Disputes
EC	European Communities
ECHR	European Court of Human Rights
EPA	Economic Partnership Agreement
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
IACHR	Inter-American Commission of Human Rights
IAM	independent accountability mechanism
IBRD	International Bank for Reconstruction and Development
ICA	International Court of Arbitration
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights

ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICTY	International Criminal Tribunal for the Former Yugoslavia
IFC	International Finance Corporation
IFI	international financial institution
IIA	International Investment Agreement
IISD	International Institute for Sustainable Development
ILO	International Labour Organization
ISO	International Organization for Standardization
ITLOS	International Tribunal for the Law of the Sea
LCIA	London Court of International Arbitration
MAI	Multilateral Agreement on Investment
MNE	multinational enterprise
NAAEC	North American Agreement on Environmental Cooperation
NAFTA	North American Free Trade Agreement
NCP	national contact point
NGO	non-governmental organization
ODA	official development assistance
OECD	Organisation for Economic Co-operation and Development
PCA	Permanent Court of Arbitration
PRC	People's Republic of China
RTA	Regional Trade Agreement
SCC	Stockholm Chamber of Commerce
TNC	transnational corporation
TOR	Terms of Reference
TPP	Trans-Pacific Partnership Agreement
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Program
WTO	World Trade Organization

1 Introduction

Transparency in international trade and investment dispute settlement

Junji Nakagawa and Daniel Magraw

An increasing number of international trade disputes are settled through the World Trade Organization (WTO) dispute settlement procedure.[1] Also, disputes between foreign investors and host states are increasingly being submitted to international arbitration.[2] Although these dispute settlement processes differ in the characteristics of the parties (the former being state to state, and the latter being private investor to state) and their applicable laws, they share the same function of judging the lawfulness of a wide range of domestic regulations and measures of states under international law. When the disputed domestic regulations and measures have some bearing on non-trade/investment issues such as environment and public health, settlement of such disputes can have serious economic and social impacts on the disputing state parties. Thus, more and more stakeholders are speaking out for enhanced transparency in these dispute settlement procedures (cf. Knahr 2007).

What does "transparency" mean in the context of international trade and investment dispute settlement? Why is enhanced transparency strongly asserted? Conversely, why is transparency strongly resisted by some? To what extent and in what manner should these dispute settlement procedures be transparent, and why is it so? This book aims at analyzing the theoretical and practical issues of securing transparency in these dispute settlement procedures.

Call for transparency in the WTO dispute settlement procedure

The issue of transparency in international trade dispute settlement first drew worldwide attention in the late 1990s, when the WTO dispute settlement procedure took up the case concerning the US trade restriction of shrimps to protect sea turtles (cf. Mavroidis 2002). The panel received amicus curiae briefs from two environmental non-governmental organizations (NGOs), but it declined to take them into consideration.[3] It reasoned that while a panel had the authority to seek information from any source under Article 13.1 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU),[4] it had not sought information from the NGOs that submitted the briefs.[5] However, the panel suggested that if any of the party wished to put forward the briefs as part of

their own submissions, they were free to do so.[6] In response, the United States designated part of one of the briefs submitted as an annex to its submission.

The WTO Appellate Body reversed the reasoning of the panel, stating that a panel had the discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not* (emphasis in the original).[7] The Appellate Body further expanded the possibility of accepting non-solicited amicus curiae briefs in its Report in *United States – Lead and Bismuth II*, stating that the Appellate Body had the legal authority under the DSU to accept and consider amicus curiae briefs in an appeal when it found it pertinent and useful to do so.[8]

In *EC – Asbestos*, the Appellate Body, in anticipation of a large number of amicus curiae submissions on appeal, proposed an additional procedure to deal with such submissions in this appeal only, which provided that "(a)ny person, whether natural or legal, other than a party or a third party to this dispute, wishing to file a written brief with the Appellate Body, must apply for leave to file such a brief from the Appellate Body by noon on Thursday, 16 November 2000."[9] However, this initiative was opposed by a number of WTO Members. Egypt, on behalf of the Informal Group of Developing Countries, requested a special meeting of the General Council to discuss this additional procedure. The special meeting was held on 22 November 2000, and many developing countries raised voices against the Appellate Body's accepting unsolicited amicus curiae briefs.[10] Uruguay, for instance, stated that the practical effect of the additional procedure had been to grant individuals and institutions outside of the WTO a right that Members themselves did not possess.[11] Egypt argued that, if the procedure was implemented, a severe harm and a grave imbalance would be done to the rights of Members vis-à-vis external parties or individuals who were not even contractually committed to the obligations of the WTO system.[12] On the other hand, the United States asserted that the Appellate Body had the authority under Rule 16(1) of its Working Procedures[13] to adopt the additional procedure regarding the acceptance and consideration of amicus curiae briefs in that case. The United States added that the Appellate Body had adopted the additional procedures to manage the issue of accepting unsolicited amicus curiae briefs in appeal in a fair, legal and orderly manner, taking into account the interests of members of civil society in having their views considered, the interests of the parties and third parties in being able to review and respond to any amicus submissions, and the interests of all in resolving the dispute.[14] In its Report, the Appellate Body noted that it had received 11 applications for leave to file an amicus curiae brief, but each application was denied without further explanation.[15]

WTO Members have been discussing enhanced transparency in WTO dispute settlement procedures in the review negotiations of the DSU since 1997. Acceptance of unsolicited amicus curiae briefs has been one of the major issues. Some Members argue for a general prohibition on unsolicited briefs, which they argue would be in line with the intergovernmental nature of the WTO dispute settlement procedure. For others, regulating the timing of amicus curiae briefs, their length and the procedures to address the admissibility and contents

of the briefs would ensure that appropriate guarantees are in place to manage such briefs.[16]

Opening panel and Appellate Body hearings to the public has been another important issue in the review negotiations of the DSU. A number of Members, including the US, Canada and EU, have called for enhanced transparency through opening panel and Appellate Body hearings to the public, and suggested that such openness could contribute to greater public confidence in the WTO dispute settlement procedure.[17] Other Members have expressed concern in relation to the preservation of the intergovernmental character of the WTO dispute settlement procedure, the protection of confidential information, as well as practical modalities and potential budgetary implications.[18] Some panels have recently opened their hearings to public viewing upon the request of the parties,[19] principally through the use of closed-circuit television.[20]

What were the major reasons for the recent call for enhanced transparency in the WTO dispute settlement procedure? One of the major reasons was the subject matter of some dispute cases that drew wide attention of the public. *US – Shrimps*, *EC – Asbestos* and *EC – Hormones* were prime examples, as they dealt with environmental protection (protection of endangered species) and/or protection of human life or health. These cases were widely publicized, and many NGOs expressed concerns about the allegedly pro-trade bias of the WTO law and the WTO dispute settlement procedure. They succeeded in persuading some WTO Members to call for enhanced transparency in the WTO dispute settlement procedure to ensure that the procedure would strike a balance between trade interests and broader public interest such as environmental protection and protection of human life or health.

On the other hand, many WTO Members, including most developing Members and some developed Members, expressed concern that enhanced transparency might erode the intergovernmental character of the WTO dispute settlement procedure.[21] Though it is not necessarily clear what they meant by the term *intergovernmental character*, it is safe to assume that it implies that the WTO dispute settlement procedure, in spite of its judicialized characteristics, still takes on a character of government-to-government, or diplomatic, settlement of disputes, where confidentiality and flexibility are needed.[22] It has also been asserted that strictly confidential information, mainly business information, should be protected in the WTO dispute settlement procedure and that this cannot be accomplished with increased transparency.[23]

A call for transparency in investor–state arbitration

In the late 1990s, transparency also became an issue in the practice of investor–state arbitration under the North American Free Trade Agreement (NAFTA) Chapter Eleven, with respect to the public access to arbitral awards and other documents (cf. Van Harten 2007: 162–163; also see Knahr and Reinisch 2007). While Article 1137.4 of the NAFTA provides a rule in favor of public access to arbitral awards when Canada or the United States is the party,[24] it leaves open the

possibility that other documents may not be open to the public without the consent of both the host state and the investor. Applicable arbitration rules appeared to support a presumption in favor of confidentiality. For instance, Article 32(5) of the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules provided that the award may be made public only with the consent of both parties. Applying this rule, the tribunal in *S.D. Myers, Inc.* v. *Government of Canada* declined to publish documents without the consent of the disputing parties.[25] The NAFTA member states, however, intervened in 2001 in favor of enhanced transparency by announcing that they would publish all documents submitted to, or issued by, NAFTA Chapter Eleven arbitral tribunals.[26]

A NAFTA tribunal went further by accepting amicus curiae briefs from NGOs. The tribunal in *Methanex Corporation* v. *United States of America* found that it had the power to accept amicus curiae briefs from NGOs under the UNCITRAL Arbitration Rules.[27] The tribunal based its decision on Article 15(1) of the UNCITRAL Arbitration Rules, which grants to the tribunal a broad discretion as to the conduct of arbitration.[28] It pointed out two additional reasons for accepting amicus curiae briefs. First, there was a public interest in the arbitration that arose from its subject matter.[29] Second, there was a broader argument, as suggested by the respondent (the United States) and Canada, that the Chapter Eleven arbitral process could benefit from being perceived as more open and transparent, or conversely be harmed if seen as unduly secretive.[30] On the other hand, the tribunal declined the NGO's request to attend hearings and to receive copies of all submissions and materials without the consent of the parties.[31]

The NAFTA member states later clarified the rules and procedures for the acceptance of written submissions by non-disputing parties.[32] Although this clarification seemed to imply the NAFTA member states' unwillingness to open the Chapter Eleven arbitral hearings to the public, the *Methanex* tribunal opened its hearing to the public in June 2004,[33] and the NAFTA member states' Joint Statement of 16 July 2004 welcomed the fact that Mexico had joined the United States and Canada in their support of open hearings in the Chapter Eleven arbitral procedure.[34]

These developments under the NAFTA Chapter Eleven arbitration seemed to have stimulated other forums for investor–state arbitration to take steps for enhanced transparency. For instance, the tribunal in the *Suez-Vivendi* case, the first International Centre for Settlement of Investment Disputes (ICSID) tribunal to deal with amicus curiae submissions, admitted that it had the power to accept amicus curiae briefs. Based on Article 44 of the ICSID Convention,[35] which is similar to Article 15(1) of the UNCITRAL Arbitration Rules, the tribunal stated that "like the *Methanex* tribunal, the Tribunal in the present case finds that acceptance of amicus submissions is a procedural question that does not affect a disputing party's substantive rights since the parties' rights remain the same both before and after the submission."[36] Subsequent to this case, the ICSID Secretariat suggested changes to the ICSID Rules and Regulations that would expressly provide for submissions of non-disputing parties.[37] These changes were adopted in 2006. Rule 37(2) of the new Rules of Procedure for Arbitration Proceedings

provides that, after consulting both parties, the arbitral tribunal may allow a non-disputing party to file a written submission with the tribunal regarding a matter within the scope of the dispute.[38] Rule 32 was also changed to give a broader power to the tribunal to open up the oral procedure to the public.[39]

The UNCITRAL Arbitration Rules were revised in 2010, but the language of Article 17(1), which provides for general provisions for arbitral proceedings, is quite similar to that of its predecessor, namely, Article 15(1) of the original 1976 version. It provides that "the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings such party is given a reasonable opportunity of presenting its case."[40] As there is no specific rule concerning transparency such as acceptance of non-solicited amicus curiae briefs, opening the hearings to the public and disclosure of arbitral awards and other documents, a tribunal under the 2010 UNCITRAL Arbitration Rules will make specific arrangements for such transparency measures by resorting to the new Article 17(1).

At the same time, however, UNCITRAL's highest body declared that there is a need for greater transparency in disputes involving states and directed the same working group that prepared the 2010 amendments to ensure transparency in cases involving states. The working group is intensely engaged in that process as this book goes to press. Every government involved in those negotiations professes to favor transparency; but many of those countries follow such statements with the word "but", and the detailed positions of some countries belie any such pro-transparency views.

ICSID, UNCITRAL and the WTO are not the only bodies that engage in, or whose rules are used in, international economic dispute settlement, of course. It is also important how transparency will be treated in the rules of the Permanent Court of Arbitration (PCA), the Stockholm Chamber of Commerce (SCC), the International Chamber of Commerce (ICC), and the London Court of International Arbitration (LCIA), among others, as well as in international economic treaties such as bilateral investment treaties.

The need for transparency in international trade and investment dispute settlement

The preceding two sections briefly traced the recent developments in international trade and investment dispute settlement toward enhanced transparency. These developments can be explained by a number of factors that are pertinent to international trade and investment dispute settlement, including the subject matter of the dispute and the involvement of states in the disputes. When the disputed domestic regulations and measures have some bearing on non-trade/investment issues such as environment and public health, settlement of such disputes can have serious economic and social impacts on the disputing state parties. Enhanced transparency is needed in these cases, as they involve important public interests. Similarly, these cases can involve large financial claims, raising an obvious public

interest. Also, the involvement of a state, through the government, a ministry or a state body, in these dispute settlement procedures has led to the call for enhanced transparency based on the public's right to know, particularly since cases against states invariably include a charge that the state violated international law (cf. Delaney and Magraw 2008: 723–724). Additionally, the fact that these cases are adding significantly to the body of international economic law implicates that public's interest in them. Finally, the human right of access to information presumably requires some degree of transparency.

On the other hand, enhanced transparency in international trade and investment dispute settlement cannot be achieved without costs. In general, the disadvantages of enhanced transparency fall into the following categories (cf. Delaney and Magraw 2008: 762–763):

Costs: The process of making information public, for instance, entails some financial costs. The cost might become substantial if the hearings are broadcast.

Delay: Transparency can entail delay, for instance, in posting information on a website or in translating documents. Also, accepting amicus curiae briefs and analyzing them can entail delay in the dispute settlement procedure.

Confidentiality and privacy: Transparency results in a decrease in the confidentiality of business information and state secrets.

Party autonomy and flexibility: Transparency may erode party autonomy in the settlement of disputes.

While the first three disadvantages can be compensated by logistical arrangements,[41] the last disadvantage deserves special consideration, as it touches upon what some observers view as the intrinsic value of these dispute settlement procedures. First, the WTO dispute settlement procedure, even in its highly judicialized setting, contains elements of diplomatic negotiation (Roberts 2004: 415). For example, consultation between the parties shall be confidential (Article 4.6 of the DSU). Even during the panel procedure, the parties to the dispute may develop a mutually satisfactory solution, in which case the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached (Article 12.7 of the DSU). Negotiated solution between the parties is encouraged, and so is party autonomy and flexibility in the settlement of disputes. Enhanced transparency might be detrimental to such values in the WTO dispute settlement procedure. Secondly, investor–state arbitration has been acclaimed by foreign investors and their home governments as a means of disassociating an investment dispute from the domestic legal system of the host country.[42] Party autonomy and flexibility in the settlement of disputes have been regarded as part of the disassociated nature of investor–state arbitration (cf. Franck 2005: 1541–1542). Enhanced transparency might erode party autonomy and flexibility, and might discourage foreign investors.

A recent development is the acknowledgement of the international human right of access to information associated with the freedoms of opinion and

expression – a development that has profound implications for transparency in trade and investment disputes.[43] This book does not address that set of issues. For a discussion of the human right of access to information with respect to investment disputes, see Marcos Orellana's analysis of that topic.[44]

This leads us to the need of considering the appropriate design of international trade and investment dispute settlement procedures, taking into account sometimes conflicting values and policy concerns. A number of issues should be seriously considered: What kind of transparency is asserted by which stakeholder, and on what grounds? What are the major obstacles to securing transparency in each dispute settlement procedure, and how can they be overcome? On what ground and to what extent should transparency be limited in each dispute settlement procedure, including what should the exceptions be for confidential information? Are there any alternatives to one or the other means of enhanced transparency? This book is the result of a joint research project in tackling these issues on account of transparency in international trade and investment dispute settlement.

The structure of the book

Following on from this introduction, the book consists of six chapters that deal with a wide range of issues regarding transparency in international trade and investment dispute settlement. Chapter 2, prepared by Justice Florentino Feliciano, tries to strike a proper balance between confidentiality and transparency in international trade and investment dispute settlement. He begins by tracing the history of international arbitration and points out that the motivation of party autonomy was the main reason for the emphasis on confidentiality in international arbitration. He then describes the recent move toward enhanced transparency in international arbitration rules (UNCITRAL Arbitration Rules, ICSID Arbitration Rules, etc.), and moves on to propose a balance between confidentiality and transparency in international arbitration. He argues that the line of equilibrium is a moving one, and its particular location and shape are functions of differing factors including the kind of international arbitration proceeding involved and the nature of the subject matter of the dispute. In international investment arbitration where one of the parties is a sovereign state, he argues, it seems clearly improper to assume that confidentiality duties override reasonable securing of those important sovereign interests. His argument is, however, modest here. Rather than claiming a general transparency requirement, he argues for expanding the exception to confidentiality to the disclosure and access to arbitration documents for enforcement of local criminal and anti-corruption laws. On the other hand, in international trade arbitration[45] and more judicialized dispute settlement procedures of the WTO, where the parties are two sovereign states, Justice Feliciano argues that there is material accommodation of the interests of transparency and the necessity of developing coherent and consistent case law in interpreting and applying the covered WTO agreements.

The following two chapters try to elucidate the proper position of transparency in international trade dispute settlement by expanding the context of such dispute

settlement. In Chapter 3, Yuka Fukunaga focuses on the role of the domestic stage of international trade dispute settlement process in ensuring the transparency of such dispute settlement to the public. After discussing the possible merits and costs of enhanced transparency in the WTO dispute settlement proceedings, she discusses the role of the domestic stage in ensuring transparency in the three temporal sequences, namely, prior to, during, and post WTO dispute settlement proceedings. First, the stage prior to the reference of a dispute to the WTO dispute settlement system involves domestic discourse between the government and private parties, normally businesses who have encountered trade-related problems with a foreign government. While dealing with business complaints, she argues, the government can also engage in talks with citizens and take into account their interests and concerns in deciding how to address the business complaints. Second, at the stage during the WTO proceedings, the domestic discourse between the government and businesses often continues. The government should also be encouraged to maintain contact with citizens during the WTO proceedings, especially when a dispute is closely linked with the interests and concerns of citizens. The third stage ensues after the panel and Appellate Body review is completed and their recommendations are adopted by the Dispute Settlement Body (DSB). Because the DSB recommendations do not specify what measures should be taken, the responding party makes such determinations within its territory. Fukunaga emphasized that the discretion left to the government of the responding party enables it to take into account citizens' non-economic interests and concerns in determining how to domestically implement the DSB recommendations and to ensure that the implementation would not unduly harm the interests of citizens.

In Chapter 4, Chin Leng Lim takes up another important issue about transparency in international trade dispute settlement that has hardly been discussed; that is, transparency in dispute settlement in Regional Trade Agreements (RTAs), focusing on those in the East Asian region. Should parties to the RTAs in the region choose "closed" or "open" models of trade dispute settlement, especially in light of the debate on increasing the transparency of WTO dispute settlement? To answer this question, he first reviews some of the main arguments in favor of having an "open" model of trade dispute settlement. They are (1) the WTO dispute settlement system is a law court, (2) there is a trend towards greater transparency, (3) democracy and cosmopolitanism are international legal ideals, (4) a transparent model of dispute settlement is more likely to be perceived as being legitimate, and (5) democratic nations must push for democratic dispute regimes. He argues that (1) the WTO dispute settlement system still contains elements of a diplomatic model of dispute settlement, (2) we cannot extrapolate from the wishes of a few members the pattern of things to come, (3) East Asian nations are less likely to justify their policies along democratic lines but are more likely to talk about anticipated trade and commercial gains, (4) transparency is important but is unlikely to address the WTO's legitimacy crisis, and (5) the evidence thus far goes plainly against it. He thus neutralizes the arguments in favor of having an "open" model of trade dispute settlement. He then analyzes the actual treaty behavior of

East Asian nations. After an extensive survey of treaty practice in the region, he observes that there is an emerging intra-East Asian model of "closed" trade dispute settlement, whereas individual agreements with the United States demonstrate elements of an "open" model, which has also been adopted under the Trans-Pacific Partnership Agreement (TPP).[46] He concludes that East Asian nations interact on equal, sovereign terms (which leads to a "closed" model), while making small exceptions only as pragmatism might suggest, such as the perceived need under the TPP to have institutional arrangements which trans-continental partners would find more attractive.

In contrast to the preceding two chapters, Sofia Plagakis argues for enhanced transparency in international trade and investment dispute settlement in Chapter 5. Her focus is on the use of webcasting, a method of broadcasting live audio and visual to audiences via the Internet. She argues that webcasting has already been used successfully in a variety of domestic and international settings, including at the International Court of Justice (ICJ), and that webcasting international trade and investment dispute settlement proceedings is an excellent tool for expanding public access to information that affects public interest (e.g. health, safety and environmental information). Following a brief overview of the various institutions in the world that webcast their dispute proceedings, she discusses the advantages and concerns associated with webcasting international non-economic and domestic court proceedings. Among the former is an improved transparency and public awareness, increased accessibility, time and cost savings and accuracy in reporting. She argues that these will contribute to the enhancement of democracy in judicial proceedings. On the other hand, concerns associated with webcasting involve financial costs including one-off investment and operating costs, quality of the image and audio transferred, protecting personal identification and privacy, and a risk of content manipulation.

She then analyzes the ICSID's recent experience in webcasting hearings of investor–state arbitration cases. They were all based on Article 10.21(2) of the Dominican Republic–Central America Free Trade Agreement (DR-CAFTA), which requires hearings to be "open to the public". It was reportedly almost as costly as closed circuit broadcasting. To protect confidentiality, webcasts were interrupted whenever confidential information was discussed. Based on these analyses, she concludes that provisions should be added to international trade and investment dispute settlement rules requiring webcasting in all public interest cases. More specifically, a rule should be adopted that would make webcasting oral hearings the norm in state arbitrations, with exceptions to protect confidential business information and information which is protected from disclosure under that party's domestic law.

The last two chapters deal with transparency in international investment dispute settlement. In Chapter 6, Federico Ortino addresses the issue of the transparency of international investment arbitral awards in a binary manner, namely by examining their external transparency and internal transparency separately. By "external transparency" he addresses the issue of whether investment arbitral awards should be made publicly available. Examination of major investment arbitration rules

leads him to conclude that the general stance is the one favoring confidentiality of arbitral awards, though there are a growing number of international investment treaties that require external transparency. Based on the empirical analysis and the analysis of the discussion between those favoring confidentiality and those favoring transparency, he concludes that, given the public nature of the issues at stake in international investment arbitration, there is a growing consensus on the need to favor external transparency over confidentiality.

Ortino moves on to the issue of internal transparency, namely the clarity of the legal reasoning of arbitration tribunals in adjudicating international investment disputes. He begins with an examination of the arbitration rules provided by the major arbitration institutions as well as those found in international investment treaties with regard to the legal reasoning of arbitral awards. He then explains the importance of the internal transparency of investment arbitral awards, as it strengthens the legitimacy of the system of international investment law and arbitration. He finally analyzes some of the instances where the legal reasoning of investment arbitral awards lacks clarity, which were caused by (1) abuse of precedents, (2) lack of internal consistency, or by (3) the lack of adequate justification supporting tribunals' legal findings.

Finally, in Chapter 7, Peter Lallas addresses an important issue of transparency in international investment law that has rarely been discussed, namely, whether the normative framework relevant to foreign direct investment (FDI) is fostering sustainable FDI, with transparency and accountability for locally affected people. At the outset, he poses an open question: given that there are nearly 3000 international investment agreements with strong legal norms and rights of recourse to protect the interests of foreign investors, why do such agreements not contain similarly strong norms and rights of recourse to protect the interests of local communities and the environment which may be affected by such investment activities? He then examines some leading examples of an emerging trend addressing this issue, including: the accountability mechanisms at international financial institutions (such as the World Bank Inspection Panel); the public submission procedure of the North American Agreement on Environmental Cooperation (NAAEC); and the complaint procedure available to NGOs, workers and other stakeholders under the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises. He argues that giving locally affected people an avenue for recourse and accountability under international law can provide an important means to identify and resolve adverse social and environmental impacts associated with international investment activities.

Notes

1 As at March 2012, 434 requests for consultations were submitted to the WTO dispute settlement procedure. See WTO, Chronological list of disputes cases, available at http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm. Last visited 30 March 2012.

2 The total number of known cases of investor–state arbitration reached 390 by the end of 2010. See UNCTAD 2011: 101.

3 Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R and Corr.1, adopted 6 November 1998, as modified by the Appellate Body Report, WT/DS58/AB/R, para. 3.129.
4 Article 13.1 of the DSU provides that "Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate."
5 The Panel stated that "(a)ccepting non-requested information from non-governmental sources would be, in our opinion, incompatible with the provisions of the DSU as currently applied." Supra n.3, para. 7.8.
6 *Idem.*
7 Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para. 108.
8 Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted 7 June 2000, para. 42.
9 *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, Communication from the Appellate Body, WT/DS135/9, 8 November 2000, para. 2.
10 See WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, 23 November 2000.
11 Ibid., para. 7.
12 Ibid., para. 18.
13 Rule 16(1) of the Working Procedures for Appellate Review provides that "(i)n the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a division may adopt an appropriate procedure for the purposes of that appeal only, provided that it is not inconsistent with the *DSU*, the other covered agreements and these Rules." See WT/AB/WP/1, 15 February 1996. Although the Working Procedures have since been revised six times, the current version of the Working Procedures contains the same rule.
14 Supra n.10, para. 74.
15 *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, Report of the Appellate Body, WT/DS135/AB/R, adopted 5 April 2001, para. 56.
16 See WTO Special Session of the Dispute Settlement Body, *Report by the Chairman*, JPB(08)/81, 18 July 2008, reproduced as Appendix A to the WTO Special Session of the Dispute Settlement Body, *Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee*, TN/DS/25, 21 April 2011, p. A-38.
17 Ibid., p. A-37.
18 *Idem*.
19 For instance, the compliance panel for the *EC – Bananas III* (DS27) agreed to open its hearings of 6 and 7 November 2007 for observation by WTO Members and the general public. See WTO News Item, 29 October 2007. Available at http://www.wto.org/english/news_e/news07_e/dispu_banana_7nov07_e.htm.
20 For instance, in the *US – Hormones (Continued Suspension)* case (DS320) and *Canada – Hormones (Continued Suspension)* case, the panels allowed broadcasting the hearings through closed-circuit television. For details, see the explanation of Sofia Plagakis in infra pp. 91–92.
21 See supra n.16, pp. A-37–A-39.
22 See the argument of Chin Leng Lim in infra p. 54.
23 See supra n.16, pp. A-37–A-38.
24 Annex 1137.4 provides that, where Mexico is the disputing party, the applicable arbitration rules apply to the publication of an award.
25 See *S.D. Myers, Inc.* v. *Government of Canada*, Procedural Order No. 11, 28 October 1999, para. 2, which provides that "(a)ll transcripts and other records taken

of hearings (except those documents mentioned in Procedural Order No.3, paragraph 1, namely the Notice of Intention , Notice of Arbitration, Statement of Claim and Statement of Defense) shall be kept confidential". Available at http://www.naftaclaims.com/Disputes/Canada/SDMyers/SDMyers-AllProceduralOrders.pdf.

26 See NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001, para. 1a. Available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/nafta-interpr.aspx?lang=en&view=d.

27 See *Methanex Corporation* v. *United States of America*, Decision of the Tribunal on petitions from third persons to intervene as amici curiae, 15 January 2001, paras 24–47. Available at http://www.state.gov/documents/organization/6039.pdf. See ibid., para. 26.

28 See ibid., para. 26. Article 15(1) provides that "(s)ubject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it 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". The decision was adhered to by a tribunal on *United Parcel Services of America* v. *Canada*, in its decision on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001, which also found that it was within the scope of Article 15(1) of the UNCITRAL Arbitration Rules for the tribunal to accept amicus curiae submissions. Available at http://www.state.gov/documents/organization/6033.pdf.

29 The arbitral tribunal dealt with a California ban on the use or sale in the State of California of the gasoline additive MTBE. See US Department of State, *Methanex Corp.* v. *United States of America*. Available at http://www.state.gov/s/l/c5818.htm.

30 See supra n.27, para. 49.

31 The tribunal based its decision on this matter on Article 25(4) of the UNCITRAL Arbitration Rules, which provides that "(h)earings shall be held in camera unless the parties agree otherwise". See ibid., paras 41–42.

32 See Statement of the Free Trade Commission on non-disputing party participation, 27 October 2003. Available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Nondisputing-en.pdf.

33 See OECD 2005: para. 29. Note that the *Methanex* tribunal was not the first NAFTA Chapter Eleven arbitral tribunal to open its hearings to the public. The tribunal of the *United Parcel Services of America* v. *Canada* opened its hearings to the public by broadcasting live on 29 to 31 July 2002, as the parties to the dispute had agreed to make the hearings open to the public. See ICSID News Release, *United Parcel Service of America, Inc*. v. *Government of Canada* NAFTA/UNCITRAL Arbitration Rules Proceeding, 28 May 2001. Available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPages=NewsReleases&pageName=Archive_Announcement6.

34 See NAFTA Free Trade Commission, Joint Statement, 16 July 2004. Available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/JS-SanAntonio.aspx?lang=eng&view=d.

35 Article 44 of the ICSID Convention provides that "(i)f 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."

36 See *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.* v. *Argentine Republic*, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, ICSID Case No. ARB/03/19, 19 May 2005, para. 14.

37 See ICSID 2005.

38 Rule 37(2) provides that the tribunal shall consider, in determining whether to allow such a filing, the extent to which:

(a) The non-disputing party 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;

(b) The non-disputing party submission would address a matter within the scope of the dispute;

(c) The non-disputing party has a significant interest in the proceeding.

39 The new Rule 32(2) provides that "(u)nless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements."

40 Jan Paulsson and Georgios Petrochilos, who commented on the revision of the UNCITRAL Arbitration Rules, highlighted flexibility in the conduct of the proceedings and reliance on the expertise of the arbitrators, which were embodied in the original Article 15(1) and the new Article 17(1), as two of the hallmarks of arbitration. See Paulsson and Petrochilos 2006: 64.

41 See, for instance, the procedures for dealing with the non-disputing party submission in the NAFTA Chapter Eleven arbitration, in supra n.32.

42 See the argument of Justice Feliciano in infra pp. 15–16.

43 See UN Human Rights Committee (International Covenant on Civil and Political Rights) (2011).

44 See Orellana (2011).

45 Article 25 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) provides that "(e)xpeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties."

46 Signed by New Zealand, Chile and Singapore on 18 July 2005 and by Brunei on 2 August 2005, entered into force for New Zealand and Singapore on 1 May 2006, for Brunei provisionally from 12 June 2006 and came into full force in July 2009, and for Chile on 8 November 2006. According to Section 21 of its Model Rules of Procedure for Arbitral Panels, the disputing parties may decide that the hearings of the arbitral tribunals be open to the public.

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