TRANSPARENCY IN INVESTOR-TO-STATE ARBITRATION
MARCOS A. ORELLANA

INTRODUCTION
From Commercial Arbitration to Investment Law
Tradition, Inertia & Change
Actors, Venues & Issues
Public Interest in Investment Disputes (Why CIEL focuses on this?)
State is a Party & Public Budget Monies
Subject-Matter (eg: Viera, Cochabamba, Glamis, Loewen, Tecmed)
Governance & Democracy in a Globalizing World
Transparency (Access to Pleadings, Open Hearings, Publication Awards)
Participation (Third/party submissions)
Accountability (To be addressed in another session)

ANALYTICAL FRAMEWORK: WHY TRANSPARENCY & PUBLIC PARTICIPATION?
Human Rights: Claims against the State & the International Community
Transparency & Participation
Burdens: Time, Cost, Politics (e.g., water cases, Pulp & Paper mills case)
Values: democratic & accountability; quality; sunshine & corruption;
participatory; systemic; credibility
Legitimacy & Accountability
Potential Conflicts of Interest
ICSID & IFC Equity
Counsel & Arbitrator Roles
Arbitrator & Expert Roles

SECRECY: ARBITRATION RULES DESIGNED FOR COMMERCIAL DISPUTES
Commercial Arbitration
Privacy & Confidentiality v. Public Interest Exception (State is a Party)
Investment Arbitration
State is always a Party and subject-matter involves the public interest
ICSID
Contract, Statute & Treaty sources of jurisdiction
UNCITRAL
Not even a register of claims
ICC, LCIA, SCC
Secrecy as an element of comparative advantage?

**RECOMMENDATION I: TRANSPARENCY BY AGREEMENT**

General & Documents
- NAFTA: *Metalclad & Loewen* (Rejection of Requests for Confidentiality)
- NAFTA FTC Interpretation & Practice
  - *UPS* distinction between commercial & investment arbitration
  - *Corn Products* & commercial information among competitors
  - 2003 FTC Statement & notice of intent (nature of the claims; translation)
- US Model BIT (US position & FOIA)
  - Notice of intent; notice of arbitration; pleadings, memorials, and briefs; minutes or transcripts of hearings; decisions, orders, award.

Hearings
- NAFTA: open by agreement (*Methanex, UPS, Canfor*)
  - Low cost, no disruption, precedent followed in *US-Hormones* case
- ICSID: closed by lack of agreement (*Suez Vivendi*) – claimant opposed

**RECOMMENDATION II: PARTICIPATION & THE TRIBUNAL’S INHERENT POWERS**

ICSID:
- *Suez/Vivendi* decision (Amicus is a procedural issue – inherent powers)
  - Amicus & Civil Law: Argentina S.Ct & *Amici* Participation
  - Purpose of *amici* participation & Access to Documents

UNCITRAL:
- Iran-US Claims Tribunal
  - Note 5: oral or written submissions from non-disputing parties (also publication of awards)
- NAFTA
  - *Methanex* & Truthfulness in Submissions
    - NGO Accountability Charter
    - Misrepresentation by Methanex to the Tribunal
  - *UPS* & additional parties to the arbitration

**RECOMMENDATION III: AMENDMENT OF ARBITRAL RULES**

ICSID Amendment of Arbitral Rules
- Participation: Significant Interest? (Standing, third/party, *amici*?)
- Open Hearings: Consent by the Investor?
  - *Biwater Gauff* case (Tanzania) – Claimant opposes

UNCITRAL
- *Ad Hoc* Rules used mainly for commercial disputes
- New UNCITRAL Rules designed for Investment Disputes?
**Transition from the IF to the HOW? Salient Issues:**

_Suez/Vivendi_ Requirements:
1. Who are the Applicants & What is their interest
2. Disclosure of Funding Sources
3. Perspective that aids the Tribunal in reaching the correct decision
4. Procedural Fairness: Opportunity for Parties to Respond to _Amici_

**UPS Limitations:**
1. length
2. inability to call (or cross/examine) witnesses

**Approaches to Third-Party Submissions**

_WTO_

_Shrimp/Turtle_ – Interpretation of DSU & recognition of powers
Generally: accepted but not considered

_IACtHRs_

Court has allowed _Amici_ to present oral arguments in Hearings
Court has referred to _Amici_ arguments in Opinions

**Conclusions**

**Transparency:**
- Progress has been made in the NAFTA, BUT PROBLEMS remain to be fixed in the 2400+ other IIAs
- ICSID Arbitration Rules have been amended, BUT UNCITRAL and other Arbitration Rules contain serious shortcomings

**Participation:**
- In ICSID context, progress has been made on basis of _Suez/Vivendi_, BUT Question is whether Tribunals will really consider _amici_ submissions

**Governance & Democracy**
- Practice shows that transparency & participation can be introduced to arbitrations without disrupting the proceedings or burdening the parties
- The inertia of secrecy is coming to an end…
ANNEX

1.1. Public Hearings

UNCITRAL – Interpretation of “in Camera”
ICSID – Amendments to the Arbitration Rules: (1) to give tribunal power to decide, with agreement of the parties, about open hearings; (2) to accept amicus briefs as evidence; (3) to publish the legal reasoning in awards

1.2. Access to Documents

Submissions of the Parties: Internet posting (notice of intent; notice of arbitrations; pleadings memorials, and briefs submitted by parties and non-disputing parties)
Tribunal Activities: (transcripts; orders, awards, and decisions).
Privileged Information: Either designated by party or protected by law. Options: (1) Tribunal decides; (2) full disclosure; (3) Disclosure of Redacted documents.
Timing?: Options: (1) as they are presented; (2) after the parties have had a chance to see them

1.3. Public Submissions

Procedures: (1) who can submit?; (2) should a request to file a submission precede a submission?; (3) if so, what should such request for leave contain? (interest, affiliation, etc.; (4) language?; (5) at what time in the process?; (6) what should the submission contain?