



**Strathmore University**

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**Law School**

**CONFIDENTIALITY AND TRANSPARENCY IN INTERNATIONAL  
ARBITRATION: FINDING THE RIGHT BALANCE**

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,  
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By

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## ABSTRACT

*Confidentiality and Transparency are both cardinal principles of International Arbitration. They are both vital aspects that are required in order to ensure the procedural integrity of the arbitral process is upheld. However, they are seen as opposing principles within the arbitration realm. Confidentiality is seen as one of the main reasons why arbitration is attractive especially to private parties as opposed to litigation. This is due to several reasons such as the need to protect the reputation of businesses, reducing public posturing, protecting sensitive information and several others. There are areas where confidentiality is very necessary and should be upheld so as to ensure the procedural integrity of the arbitral process and the interests of the parties are guaranteed. However, confidentiality in some cases, leads to grave injustices especially when matters of public interest are involved. In such cases, the issue of transparency comes up. Transparency ensures that the arbitral process upholds cardinal principles like public policy, fairness, justice, fairness and predictability in the process. However, transparency has disadvantages as well. For example, it can make the process costly thus disadvantaging smaller investors. In addition, it can make the process timely, and it can also turn away private parties using the process especially since their sensitive information will not be protected. Therefore, both these principles have advantages and disadvantages that should be keenly assessed before purporting to uniformly apply either of them. Thus, there is need to find the delicate balance between confidentiality and transparency. Any balance found would need to be under constant review because of the ever-shifting nature of the world. The balance has to be constantly tipped one way or the other to provide for a proactive system that accounts for both judicial realism, and changes in the law and practice of international arbitration. This dissertation purports to do that by offering means and methods to balance these two principles. The means and methods proposed include the use of Institutional rules, the use of the legitimate interest test, the use of work-product doctrine and the extension of the UNCITRAL Rules on Transparency to ICA. The dissertation, however, acknowledges that there is no need to find the perfect balance between transparency and confidentiality. Indeed, a quest to achieve this, if possible, would be short lived as the line of actual contact and equilibrium between the two principles is a moving one. Both principles must respond as active principles based on the context and the*

*kind of proceedings before the arbitral tribunal, the subject matter at issue, and the relevant facts inherent to the relevant proceeding.*

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Finally, I would like to thank my family for all their support during this journey.

## Declaration

I, **Ibrahim Benazir**, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:  .....

Date: .....

This dissertation has been submitted for examination with my approval as  
University Supervisor.

Signed: 

Supervisor Name: Balla Galma

### **List of Abbreviations**

IA	International Arbitration
UNCITRAL	United Nations Commission on International Trade Law
ICSID	International Centre for the Settlement of Investment Disputes
NAFTA	North American Free Trade Agreement
ICC	International Chamber of Commerce
LCIA	London Court of International Arbitration
HKIAC	Hong Kong International Arbitration Centre
ICA	International Commercial Arbitration



## List of Cases

### United Kingdom

*Ali Shipping Corporation V. Shipyard Trogir*. [1998] 1 Lloyd's Rep. 643. L

*Associated Electric and Gas Insurance Services Ltd. (AEGIS) v. European Reinsurance Co. of Zurich*, [2003] 1 W.L.R. 1041 (P.C.)

*Department of Economic Policy & City of Moscow v. Bankers Tr.* (2004) EWCA (Civ) 314.

*Dolling-Baker v Merrett and others* [1991] 2All E.R.890.

*Hassneh Ins. V. Stuart J. Mew (1993)* 2 Lloyd's Rep. 243 (K.B.).

### France

*Aita v Ojeh*, Cour d'appel [CA] [regional court of appeal] Paris, 4 Revue De L'arbitrage 584, Feb. 18, 1986.

*Nafimco v Foster Wheeler Trading Company AG*, Cour d'appel [CA] [regional court of appeal] Paris, le ch., Jan. 22, 2004

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### Singapore

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### United States

*Hickman v. Taylor*, 329 U.S. 495, 1947.

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*Aguas del Tunari SA v. Republic of Bolivia*, ICSID, Case No ARB/02/3, 21 Oct. 2005.

*Amco Asia Corp. v. Repub. of Indonesia*, Decision on Request for Provisional Measures in ICSID Case No. ARB/81/1 of 9 December 1983, XI Y.B. Comm. Arb. 159, 161 (1986)

*Biwater Gauff (Tanzania) Ltd United Republic of Tanzania*, Procedural Order No.3 in ICSID Case No. ARB/05/22 of 29 September 2006, 114.

*Metalclad Corporation v United Mexican States*, Award in ICSID Case No. ARB(AF)/97/1 (NAFTA) of 30 August 2000

*Methanex Corporation v United States*, Final Award on Jurisdiction and Merits, (2005)

*Myers Inc v Government of Canada*, NAFTA Procedural Order No.16 of 13 May 2000.

*Philip Morris Asia Limited v. Australia*, ICSID Case No ARB/05/22, 24 July 2008.

*Piero Foresti v. Republic of South Africa*, ICSID Case No ARB(AF)/07/1, 4 Aug. 2010.

*Sociedad Anonima Eduardo Vieira v. Republica de Chile*, ICSID Case No ARB/04/7, 21 Aug. 2007.

*Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.) v. Argentine Republic (II)* (ICSID Case No. ARB/03/19)

*The Government of Sudan/The Sudan People's Liberation Movement/Army (Abyei Arbitration)*, Public Hearing in PCA Case of 18-23 April 2009.

*The Government of Sudan/The Sudan People's Liberation Movement/Army (Abyei Arbitration)*, Public Hearing in PCA Case of 18-23 April 2009,

*The Loewen Group v. U.S.A.*, Decision on Competence and Jurisdiction in ICSID Case No. ARB(AF)/98/3 (NAFTA) of 5 January 2001, 26.

## **List of Legal Instruments**

UNCITRAL Model Law on International Commercial Arbitration, 10 June 1958.

ICSID Arbitration Rules (2003).

UNCITRAL Transparency Rules

NAFTA Rules

ICC Rules

HKIAC Rules

LCIA Rules

Mauritius Convention on Transparency Rules

# 1.

## INTRODUCTION

### 1.1. Background

International arbitration (IA) is a conflict resolution mechanism through which parties agree to refer a conflict to an arbitrator to reach a final and binding solution.<sup>1</sup> IA can be carried out either under institutional rules or ad hoc rules. Institutional regulations provide for pre-existing arbitration regulations and an appointing authority to form an arbitral tribunal and supervise other procedural matters.<sup>2</sup> Ad hoc international arbitration is subject to arbitration arrangements between the parties and the relevant national arbitration legislation.<sup>3</sup> International commercial arbitration (ICA) resulting from trade relations between private parties, and investor-state arbitration (ISDS) resulting from multilateral or bilateral investment treaties between nations, are the two categories of IA discussed in this dissertation. Under both means of arbitration, confidentiality remains a vital element of the proceedings.<sup>4</sup>

Confidentiality can be defined as the parties' right to ensure that their dispute and the information about it will not be disclosed to anyone other than the arbitrating parties. Confidentiality extends to; the issues discussed, the evidence submitted, the hearings conducted, and the awards issued.<sup>5</sup> It is one of the hallmarks of arbitration as many parties opt for arbitration as a means for resolving disputes due to its confidential nature. The rationale for upholding confidentiality in IA is that it is believed that parties who submit their disputes to arbitrators and not courts, deserve to have their wish to keep their matter withheld from the public eye respected.<sup>6</sup> As was held by an English Judge, 'The concept of private [or

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<sup>1</sup> Zhao M, 'Transparency in International Commercial Arbitration: Adopting a Balanced Approach' *Virginia Journal of International Law* 59, 2019, 178.

<sup>2</sup> Zhao M, 'Transparency in International Commercial Arbitration: Adopting a Balanced Approach,' 178.

<sup>3</sup> Zhao M, 'Transparency in International Commercial Arbitration: Adopting a Balanced Approach,' 179.

<sup>4</sup> Zhao M, 'Transparency in International Commercial Arbitration: Adopting a Balanced Approach,' 179.

<sup>5</sup> Poorooye A and Feehily R, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' 22 *Harvard Negotiation Law Review* 275, 2017, 2.

<sup>6</sup> Laverde S, 'Analysis of the Principle of Transparency with Special Reference to Its Implications for the Procedure of International Investment Arbitration', 109.

confidential] arbitration derives simply from the fact that the parties have agreed to submit to particular arbitration disputes arising between them and only between them.’<sup>7</sup>

Confidentiality offers a myriad of advantages. For example, confidentiality reduces the chances of permanently damaging the continuing business relationships. It ensures trade secrets are protected, parties can make arguments or submit documents that they would have been hesitant to if the case was before the court. Additionally, confidentiality is generally recognised to facilitate settlement of a dispute effectively and within a short period as it minimises the role of public posturing in the case.<sup>8</sup> In the subject matter of Investor-State arbitration the main advantage is maintaining national security, as such arbitration’s duty of confidentiality comes in handy.<sup>9</sup> Over the years, confidentiality has suffered high-level attacks as a body of opinion looking to restrict or deny its presence in IA is slowly building up. This is because as much as confidentiality is a vital acolyte of arbitration, it can be very problematic in some cases.<sup>10</sup> For example, what happens when the matter involves a state, a state entity or a state instrumentality? Or when public interest is at stake? Should confidentiality be an element in this type of arbitration? Confidentiality in these cases becomes inherently problematic because the outcome of arbitration that involves the state or the adjudication of a dispute involving public interest matters could lead to adverse effects on the general public.<sup>11</sup> Therefore, applying the same confidentiality standards in cases where states are parties to the dispute becomes troublesome. Furthermore, confidentiality leads to a high degree of uncertainty in the arbitral processes because there is no consistency in interpreting the law.<sup>12</sup> Since arbitration awards are rarely published there is no uniform way the law is applied in these cases.

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<sup>7</sup> *Oxford Shipping Co. Ltd. v. Nippon Yusen Kaisha, (The "Eastern Saga")*, (1984) Queen's Bench Division.

<sup>8</sup> Monique P, ‘Confidentiality and the Public Interest Exception: Considerations for Mixed International Arbitration’ 2019.

<sup>9</sup> Monique P, ‘Confidentiality and the Public Interest Exception: Considerations for Mixed International Arbitration’ 2019.

<sup>10</sup> Andrew N & Axelle L, ‘Should Amici Curiae Participate in Investment Treaty Arbitrations?’ 22.

<sup>11</sup> Monique P, ‘Confidentiality and the Public Interest Exception: Considerations for Mixed International Arbitration’ 2019.

<sup>12</sup> Zhao M, ‘Transparency in International Commercial Arbitration: Adopting a Balanced Approach,’ 189.

These facts have resulted in high demand for transparency within IA, especially where the state is involved. In our day and age, the unwillingness to become more transparent has increasingly been met with sinister suspicions of wrongdoing and equated with a reluctance of individuals and institutions to assume responsibility for their decisions.<sup>13</sup> Transparency has not been correctly defined within the international law corpus. However, it is widely agreed that transparency is an information-centric concept which relies on openness and access to information.<sup>14</sup> Transparency is seen to lead to a more accountable, more democratic and more legitimate system of global governance. In IA transparency implies access to the hearings, notice of the arbitral proceedings, disclosure of documents, participation of third parties in the proceedings and access to the awards.<sup>15</sup> There are several benefits of transparency in IA. For example, it legitimizes the process by increasing public confidence. It increases the accountability of arbitrators as they know they are under scrutiny and ensures that there are coherence and consistency of the law's interpretation.

Both confidentiality and transparency are essential to the arbitral process. Thus, this dissertation seeks to discuss both concepts to propose a way to reconcile both concepts in the arbitral process.

## **1.2.Statement of the problem**

Confidentiality is one of the main characteristics of arbitration and one of the most important reasons arbitration is such a popular choice for solving commercial disputes. It keeps disputes between private parties discrete, reducing the possibility of a damaging effect by disclosing the dispute to the public or disclosing other commercially sensitive information.<sup>16</sup> It is clear that confidentiality is an enormous asset for parties when choosing arbitration to solve their

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<sup>13</sup> Andrea M, *Piercing the Veil of Confidentiality: The Recent Trend Towards Greater Public Participation and Transparency in Investor-State Arbitration in Arbitration Under International Investment Agreements: A Guide to the Key Issues*, Oxford university Press, 2010, 20.

<sup>14</sup> Andrea M, *Piercing the Veil of Confidentiality: The Recent Trend Towards Greater Public Participation and Transparency in Investor-State Arbitration in Arbitration Under International Investment Agreements: A Guide to the Key Issues*, 20.

<sup>15</sup> David V, 'Confidentiality in International Commercial Arbitration: Mourner or a Cornerstone' *Harmonius: Journal of Legal and Social Studies in South East Europe*, 2019, 350.

<sup>16</sup> Zhao M, 'Transparency in International Commercial Arbitration: Adopting a Balanced Approach,' 189.

issues. On the hand, transparency offers many advantages to the arbitration process, such as enabling the public to be informed of arbitration cases that affect their interests, ensuring accountability of the arbitrators, and improving consistency and uniformity in legal issues under evaluation in arbitration etc.<sup>17</sup> Therefore, making room for confidentiality in arbitral proceedings, arbitrators and the international community are side-lining a fundamental concept that could ensure justice and equity are upheld in arbitration. Thus, balancing the two principles is vital.

### **1.3. Significance of the Study**

Confidentiality in IA is critical to the arbitral proceedings. This is because it offers excellent advantages to the arbitral proceedings. It is even considered the most valuable arbitration asset as it is what draws most disputants from litigation to arbitration. However, as the years have gone by, it is evident that confidentiality cannot prevail in all arbitration cases. This is because shrouding the arbitration proceedings in secrecy leads to a lack of scrutiny of the arbitral proceedings which in turn causes a myriad of problems such as the inability to hold the arbitrators accountable, the lack of public participation in the process, the inconsistencies in the awards given and the failure to grow the arbitration case law realm. These disadvantages led to the demand for greater transparency in the arbitration proceedings. Transparency is a fundamental concept that seeks to ensure accountability, equity and justice prevail in the proceedings.

### **1.4. Hypothesis**

1. Confidentiality is a vital aspect of IA and still affirmed by many courts and arbitral tribunals.
2. The parameters of transparency have not been expressly delaminated in IA, and different institutions apply inconsistent standards.
3. There needs to be a reconciliation between transparency and confidentiality to ensure that both principles are upheld in arbitral proceedings.

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<sup>17</sup> Zhao M, 'Transparency in International Commercial Arbitration: Adopting a Balanced Approach,' 189.

### **1.5. Research questions**

1. What is the place and role of confidentiality in IA?
2. What are the parameters of transparency and who does it apply to in IA?
3. After explaining the two concepts, what are the best reconciliation methods to ensure justice and equity prevail in the arbitral process while upholding the disputants' private interests?

### **1.6. Research objectives**

1. To understand the place of confidentiality in IA proceedings and how different jurisdictions and arbitral institutions have applied the concept.
2. To analyse the parameters of transparency in IA and its benefits to the arbitration process.
3. To determine how to conduct arbitral proceedings in a manner that balances transparency and confidentiality to ensure the two principles work together to enable the tribunal to resolve disputes effectively.

### **1.7. The rationale of the study**

Transparency and confidentiality are currently seen as two competing principles in IA. On the one hand, transparency seeks to uphold equity and justice in the arbitration proceedings by calling for these proceedings' openness. On the other hand, arbitrating parties submit their disputes to arbitration to keep their dispute confidential. This is one of the main reasons why several commercial parties gravitate towards arbitration. Both of these concepts are thus invaluable to the arbitral proceedings. Therefore, none can be entirely side-lined for the other. Thus, it is essential to reconcile the two principles and find the right balance to ensure arbitration's efficacy as a dispute resolution method. This study aims to solve this conundrum and offer valuable insight to the debate.



### 1.7.1. Procedural justice

According to Rawls, justice as the truth of thinking systems is the primary value of social intentions.<sup>18</sup> Rawls understands that justice is fair, preconceived for equal opportunity and freedom while explaining the Aristotle concept of retributive justice.<sup>19</sup> The procedural justice principle clarified the procedural fairness, which guarantees that the case's resolution is appropriate to both sides. So, even if people lose, when they experience fairness, they feel better. Procedural justice fosters legitimacy by allowing individuals to speak and respect neutrally and trustworthily. In Galligan's view, just proceedings made known to and acceptable by the parties' lead, even if the result does not favour one of the parties, to fair and satisfactory results.<sup>20</sup>

In relation to this study, the procedural justice theory provides that the procedure to be used when hearing and determining arbitral disputes should be fair. To ensure this, it is mandatory to avail the proceedings and awards to the public. This will ensure that the people who are greatly affected by these decisions have a say at how these proceedings occur. It is very unfair to lock out the public when these decisions affect their daily lives, environment, economy, etc. Procedural justice is also based on the premise that all interested parties' perspectives and concerns are considered. This means that this theory presupposes that the public (who are relevant stakeholders) should be considered and involved in the proceedings. This can be done by ensuring that transparency is regarded as an essential concept in arbitration proceedings.

### 1.7.2. Social theory contract

Rousseau enunciates that the solution to the problem of legitimate authority is the “social contract where citizens come together for their mutual preservation.”<sup>21</sup> This act of association

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<sup>18</sup> Aristotle, *The Nicomachean Ethics*, translated by J A Thompson, London, Penguin Books Ltd, 1976, 741.

<sup>19</sup> Aristotle, *The Nicomachean Ethics*, translated by J A Thompson, London Penguin Books Ltd, 1976, 741.

<sup>20</sup> Aristotle, *The Nicomachean Ethics*, translated by J A Thompson, London Penguin Books Ltd, 1976, 741.

<sup>21</sup> Lori Wallach, Beachy B, ‘Occidental v Ecuador Award Spotlights Perils of Investor State System: Tribunal Fabricated a Proportionality Test to Further Extend the FET Obligation and Used “Egregious” Damages Logic to Hit Ecuador with \$ 2.4 Billion Penalty in Largest Ever ICSID’ Public Citizen, 21 November 2012, -<https://www.citizen.org/sites/default/files/oxy-v-ecuador-memo.pdf>- on 23 September 2017.

creates the body called the “sovereign”. The sovereign’s duty is to promote the common good.<sup>22</sup> The common good is that which is in the best interests of a society in its entirety. It is what the social contract aims to achieve. <sup>23</sup>This study demands that states come together and draw up conventions that aim to increase transparency in IA disputes to enable the public to have a say in the parties' awards when it directly affects them. This responsibility is on the States because under this social contract theory; they must promote the common good and champion society's best interests.

### **1.8.Literature review**

In supporting the study, a wide array of literature proves and disproves the paper's questions and hypothesise. This section will discuss these authors in their contribution to the problem.

Azaham acknowledges the importance of confidentiality in IA but believes it is preposterous to use the same procedural rules in arbitration cases between private parties and ones which a state is involved.<sup>24</sup> He highlights that the current arbitration practice has started to depart from its earlier position as it has reversed the obligations of confidentiality and shifted towards transparency and openness.<sup>25</sup> Effectively, this is in line with the argument that this paper makes on the need for greater transparency in IA.<sup>26</sup> The author further adds that arbitral tribunals should carefully weigh transparency and the need for confidentiality because such balancing will significantly benefit the international community.<sup>27</sup> The arguments he puts

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<sup>22</sup> Lori Wallach, Beachy B, ‘Occidental v Ecuador Award Spotlights Perils of Investor State System: Tribunal Fabricated a Proportionality Test to Further Extend the FET Obligation and Used “Egregious” Damages Logic to Hit Ecuador with \$ 2.4 Billion Penalty in Largest Ever ICSID’ Public Citizen, 21 November 2012, -<https://www.citizen.org/sites/default/files/oxy-v-ecuador-memo.pdf>- on 23 September 2017.

<sup>23</sup> The Gradesaver, ‘The Social Contract’ -<http://www.gradesaver.com/the-social-contract/study-guide/summary>- accessed on 10 February 2018.

<sup>24</sup> Azaham P, ‘Transparency and Confidentiality Requirements in Investment Treaty Arbitration, Indian Institute of Technology Kharagpur (Kharagpur, India), 2018 7.

<sup>25</sup> Azaham P, ‘Transparency and Confidentiality Requirements in Investment Treaty Arbitration, Indian Institute of Technology Kharagpur (Kharagpur, India), 2018 7.

<sup>26</sup> Azaham P, ‘Transparency and Confidentiality Requirements in Investment Treaty Arbitration, Indian Institute of Technology Kharagpur (Kharagpur, India), 2018 10.

<sup>27</sup> Azaham P, ‘Transparency and Confidentiality Requirements in Investment Treaty Arbitration, Indian Institute of Technology Kharagpur (Kharagpur, India), 2018 10.

forth are relevant to this study because it highlights the immediate need for greater transparency in the arbitral proceedings that involve states.

Monique also begins her paper by acknowledging the rationale behind confidentiality in IA disputes.<sup>28</sup> She explains that the rationale for enforcing confidentiality is private parties who have specifically contracted to resolve commercial disputes arising between them in a private forum, deserve to have their desire to withhold the matter from public scrutiny respected.<sup>29</sup> She also acknowledges that many private investors opt for arbitration because it helps save their public image.<sup>30</sup> If they opted to address their issues through litigation, all their ‘dirty laundry’ would be aired out, and they may lose customers, business deals etc. Additionally, many private companies and individual investors hold very highly profitable trade secrets they would like to keep away from the public.<sup>31</sup> If they use more open dispute resolution mechanisms, they could be exploited by people who would ‘steal’ their trade secrets and thus incur severe losses. Monique argues that even if confidentiality is a fundamental principle of arbitration, it is essential for States to realise that this secrecy is not serving its citizens, as it is unfair to lockout citizens from these proceedings, yet these decisions significantly affect their day-to-day lives.<sup>32</sup> Monique further goes onto argue that it is essential for *amicus curiae* to be present during these proceedings.<sup>33</sup> This way, civil societies, human rights group etc. can participate and ensure that their voices are heard.<sup>34</sup> Monique’s work is relevant to this study as it effectively lays down the argument for increased transparency in IA. This

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<sup>28</sup> Monique P, ‘Confidentiality and the Public Interest Exception: Considerations for Mixed International Arbitration’ 2019, 2.

<sup>29</sup> Monique P, ‘Confidentiality and the Public Interest Exception: Considerations for Mixed International Arbitration’ 2019, 2.

<sup>30</sup> Monique P, ‘Confidentiality and the Public Interest Exception: Considerations for Mixed International Arbitration’ 2019, 2.

<sup>31</sup> Monique P, ‘Confidentiality and the Public Interest Exception: Considerations for Mixed International Arbitration’ 2019 3.

<sup>32</sup> Monique P, ‘Confidentiality and the Public Interest Exception: Considerations for Mixed International Arbitration’ 2019 3.

<sup>33</sup> Monique P, ‘Confidentiality and the Public Interest Exception: Considerations for Mixed International Arbitration’ 2019 3.

<sup>34</sup> Monique P, ‘Confidentiality and the Public Interest Exception: Considerations for Mixed International Arbitration’ 2019.

dissertation is going a step further by analysing how to find a balance of confidentiality and transparency in IA cases involving states to understand the parameters correctly.

Poorooye and Feehily acknowledge that confidentiality and transparency have a strenuous relationship within the arbitration realm.<sup>35</sup> They highlight the need to develop a balance that guarantees to attract commercial parties to arbitration and the concurrent need for equity and justice. The authors argue that although confidentiality and transparency have been described as competing values but can coexist in practice.<sup>36</sup> According to their study confidentiality encourages a comprehensive investigation of the issues without the invasion of privacy. Still, it also provides the parties with their best chance to save the underlying business relationship.<sup>37</sup> They further argue that the disparity in the jurisdictional treatment of confidentiality and transparency should be managed to increase predictability, which can be achieved by States adopting and applying the UNCITRAL Transparency Rules.<sup>38</sup> On the other hand, the study is criticised for not recognising the gaps left by the UNICTRAL Transparency Rules such as the fact that it has an opt-out clause which enables parties to easily exclude the application of the rules from their arbitration proceedings.

Ondrej begins by stating it has been universally acknowledged that more transparency and participation in the proceedings can enhance IA's acceptability and credibility.<sup>39</sup> The author's paper is based on the argument that although significant progress has been made in recent years in transparency by the UNCITRAL Transparency Rules and the Mauritius Transparency Convention, there are many continuing gaps and challenges be overcome to

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<sup>35</sup> Poorooye A and Feehily R, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' *22 Harvard Negotiation Law Review* 275, 2017, 6.

<sup>36</sup> Poorooye A and Feehily R, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' *22 Harvard Negotiation Law Review* 275, 2017, 6.

<sup>37</sup> Poorooye A and Feehily R, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' *22 Harvard Negotiation Law Review* 275, 2017, 8.

<sup>38</sup> Poorooye A and Feehily R, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' *22 Harvard Negotiation Law Review* 275, 2017, 8.

<sup>39</sup> Ondrej S, 'Current State of Transparency in Investment Arbitration: Progress Made But Not Enough' *SSRN Electronic Journal*, 2017.

achieve a transparent in IA.<sup>40</sup> The first key issue he discusses is applying transparency standards to “old” treaties via the broadly accepted Transparency Convention. Despite all visible effort at international fora and public declarations of state representatives and officials, the current number of state parties or only signatories to this treaty are very few.<sup>41</sup> Ondrej further discusses several other problems such as the Energy Charter Treaty whose changes are under current unimaginable conditions as the high expectations associated with both documents broadly supported by various states in the Working Group II and subsequently at the General Assembly of the United Nations remain hitherto unfulfilled.<sup>42</sup> The study uses the findings and arguments put forward by Ondrej in portraying confidentiality, as opposed to transparency, as the prevailing principle in the IA.

Feliciano appreciates confidentiality and transparency as competing interests and seeks to show confidentiality weighs more than the need for greater transparency in some instances and vice versa.<sup>43</sup> To illustrate this, the author gives examples including ICA proceedings involving construction dispute regarding specifications of materials accorded a larger scope of confidentiality.<sup>44</sup> While on the other hand, IA between a private party and the host State presents a different context.<sup>45</sup> The author argues that public funds portray public interest. Therefore, due to the use of public funds the need for transparency practices - such as access to documents and other evidence of potential criminal acts or corrupt practices, and the ability to use such records and evidence in separate proceedings brought by the host State or

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<sup>40</sup> Ondrej S, ‘Current State of Transparency in Investment Arbitration: Progress Made But Not Enough’ *SSRN Electronic Journal*, 2017.

<sup>41</sup> Ondrej S, ‘Current State of Transparency in Investment Arbitration: Progress Made But Not Enough’ *SSRN Electronic Journal*, 2017.

<sup>42</sup> Ondrej S, ‘Current State of Transparency in Investment Arbitration: Progress Made But Not Enough’ *SSRN Electronic Journal*, 2017, 4.

<sup>43</sup> Ondrej S, ‘Current State of Transparency in Investment Arbitration: Progress Made But Not Enough’ *SSRN Electronic Journal*, 2017, 6.

<sup>44</sup> Ondrej S, ‘Current State of Transparency in Investment Arbitration: Progress Made But Not Enough’ *SSRN Electronic Journal*, 2017, 7.

<sup>45</sup> Ondrej S, ‘Current State of Transparency in Investment Arbitration: Progress Made But Not Enough’ *SSRN Electronic Journal*, 2017, 7.

third parties is clear and pressing.<sup>46</sup> Therefore, these two different realms of IA should not be treated the same.

### **1.9. Research methodology**

The research will begin by debunking the duty of confidentiality entails, the study will use a comparative analysis from international arbitral institutions. The study then moves on to demarcating the significance of transparency within ICA, using a doctrinal approach. This will serve as the normative framework in striking a balance between the duty of confidentiality and transparency. The paper can balance the two by borrowing from primary and secondary resources supplementing both the normative and theoretical framework, which will enable the paper to come up with a test in chapter 4.

### **1.10. Delimitation of the study**

IA is a vast area that is shaped by, among other things, several treaties, domestic legal orders and arbitral case law. Thus, giving a complete insight into the area is not possible. Both international investment law and the law governing ICA are intensively discussed on many different levels, and there are firm positions on many issues. Trying to cover all these positions and examine every critical argument against the IA law regime would be impossible. This dissertation has, therefore limited the studies to specifically the lack of transparency in the system. I will also be limiting my research to the effects of a lack of transparency in IA to the Global South.

### **1.11. Chapter breakdown**

**Chapter one:** Introduction to the study. This chapter gives a brief background of the study.

**Chapter two:** Explanation of how different jurisdictions and arbitration institutions treat confidentiality to understand the concept properly.

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<sup>46</sup> Florentino P, 'The Ordre Public Dimensions of Confidentiality and Transparency in International Arbitration: Examining Confidentiality in the Light of Governance Requirements in International Investment and Trade Arbitration', *Phil. L.J.*, 2012.

**Chapter three:** Brief definition of “transparency” as the term is used in IA discussions. It then outlines the principal normative arguments that explain the recent drive for increased transparency in IA.

**Chapter four:** the chapter aims to reconcile the principle of transparency and confidentiality in developing a test to strike a balance between the two.

**Chapter five:** Recommendations and conclusions.

## 2. DEFINING CONFIDENTIALITY IN INTERNATIONAL ARBITRATION

### 2.1. Introduction

Inherently, ICA is a creature of contractual relationships. By deciding to subject their disputes to arbitral proceedings, parties believe that they will benefit from these proceedings' confidential nature.<sup>47</sup> However, on the other hand, investor-state arbitration generally stems from treaties.<sup>48</sup> This difference here plays a significant role in how each regime treats confidentiality. Before the late 1980s, there existed an unspoken and undisputed assumption that the private nature of arbitral proceedings required all participants to adhere to strict confidentiality rules without examining whether confidentiality was grounded in any obligation or legal right within the issue presented before the arbitrator.<sup>49</sup> Due to this advantage, arbitration became very attractive to parties seeking to settle their disputes.

Although the assumption that confidentiality is absolute in arbitral proceedings has eroded over the years, confidentiality remains a vital aspect of IA. There are numerous advantages it offers to the arbitral proceedings.<sup>50</sup> Therefore, this paper does not seek to eliminate confidentiality in the sphere of IA, instead; it aims to establish that confidentiality in arbitral proceedings that affords disputants a comprehensive shield to keep their information completely undisclosed must be first qualified.<sup>51</sup> This is because confidentiality, in many instances, clashes with crucial public interest matters and ideals that are now being embraced in the IA sphere, such as mandatory disclosure requirements to interested parties.<sup>52</sup>

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<sup>47</sup> Steve K, 'Confidentiality: Is International Arbitration Losing One of Its Major Benefits?' *Kluwer Law International*, 2005, 127.

<sup>48</sup> Kenny W, 'Transparency in Investor State Arbitration', *Journal of International Arbitration*, 2016, 472.

<sup>49</sup> Steve K, 'Confidentiality: Is International Arbitration Losing One of Its Major Benefits?' 127

<sup>50</sup> Hans B, 'Confidentiality: A Fundamental Principle in International Arbitration?' *Kluwer Law International*, 2001, 243.

<sup>51</sup> Hans B, 'Confidentiality: A Fundamental Principle in International Arbitration?' 243.

<sup>52</sup> Monique P, 'Confidentiality and the Public Interest Exception: Considerations for Mixed International Arbitration' 3.



Due to these conflicting interests between confidentiality and public interest matters that require a greater degree of transparency, courts and arbitration tribunals are starting to offer varying degrees of confidentiality application. In England, courts stated that there would be an implied duty of confidentiality in the absence of express provision excluding confidentiality from arbitral proceedings, whether due to the inherently private nature of arbitral proceedings or by operation of a set number of laws.<sup>53</sup> This can be seen through the Australian High Court's approach in the *Esso v Plowman* case where public interest was considered an exception to this implied confidentiality.<sup>54</sup> United States and Sweden have decided only to recognize a duty of confidentiality where there is an express provision requiring its application.<sup>55</sup> The debates of confidentiality further find itself on the international sphere when one analyses how the different arbitration institutions apply it. Furthermore, the New York Convention's success has led to arbitration being the leading option between parties seeking to resolve disputes while in different jurisdictions.<sup>56</sup> This led to numerous arbitrations taking place under endless modifications of arbitral jurisdictions, procedural rules, and substantive laws, making it very hard to make a general assumption on the application of confidentiality in these cases.<sup>57</sup>

## **2.2. Confidentiality in ICA**

In ICA, a higher degree of confidentiality is accorded to the parties. This is because ICA cases largely involve two private parties whose dispute has little to no interest to the public. There are three main approaches to confidentiality by national courts. These three approaches are an implied duty to confidentiality, an express duty of confidentiality and a statutory approach.

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<sup>53</sup> *Dolling-Baker v Merrett and others* [1991] 2All E.R.890.

<sup>54</sup> *Esso Australia Resources Ltd. and others v. Plowman (Minister for Energy and Minerals) and others* (1995) 183 C.L.R. 10.

<sup>55</sup> Steve K, 'Confidentiality: Is International Arbitration Losing One of Its Major Benefits?' 128.

<sup>56</sup> Kenny W, 'Transparency in Investor State Arbitration', 482.

<sup>57</sup> Kenny W, 'Transparency in Investor State Arbitration', 482.

## 2.2.1. Municipal law

### 2.2.1.1. *The English Approach*

England Courts acknowledge an implied duty to maintain confidentiality in arbitral proceedings with exceptions applied on a case-to-case basis in varying degrees. The mode in which the duty arises is subject to an extensive debate by courts and scholars ranging from the private nature of arbitration, business efficacy and arbitral customs, and the law's operation.<sup>58</sup> The practice of confidentiality in England can be effectively analysed using three leading cases analysed below.

In *Dolling-Baker v. Merrett*, the Court held that the documents presented during the arbitral proceedings could not be discovered in subsequent court proceedings by the parties involved. The court ruled on this stance because of the private nature of the arbitration.<sup>59</sup> The court believed that when parties voluntarily consent to present their dispute to arbitration, there is an implied assumption that they want their case to be only between the two of them.<sup>60</sup> Therefore, both parties are obligated not to disclose any documents produced in the arbitral proceedings except with the parties' consent or pursuant to an order by a court of law.<sup>61</sup> Furthermore, the court held that confidentiality was not tied to the information in the documents prepared to be used for the proceedings but to the facilitation and promotion of the arbitration proceedings' confidential nature.<sup>62</sup> So, this implied obligation stands whether or not the material can be considered confidential.

In *Hassneh Insurance Co. of Israel v. Mew*, the Court extended confidentiality to the arbitral award offered. Therefore, not only were the documents prepared for the proceedings confidential but also the arbitral award.<sup>63</sup> According to the court, disclosing the materials

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<sup>58</sup> Vijay B, 'Confidentiality and Integrity in International Commercial Arbitration Practice, *Arbitration Law Journal*, 2009, 11.

<sup>59</sup> *Dolling-Baker v Merrett and others* [1991] 2All E.R.890.

<sup>60</sup> *Dolling-Baker v Merrett and others* [1991] 2All E.R.890.

<sup>61</sup> *Dolling-Baker v Merrett and others* [1991] 2All E.R.890.

<sup>62</sup> *Dolling-Baker v Merrett and others* [1991] 2All E.R.890.

<sup>63</sup> *Hassneh Ins. V. Stuart J. Mew* (1993) 2 Lloyd's Rep. 243 (K.B.).

presented during arbitral proceedings would be similar to opening the closed proceedings to third parties and thus violating the sanctity of the arbitration's private nature.<sup>64</sup>

In *Ali Shipping Corporation v Shipyard Trogir*, the Court generally buttressed the rulings in *Dolling-Baker* and *Hassneh* by holding that there is an implied obligation of confidentiality in arbitration proceedings as a matter of law and not based on just custom or business efficacy. Furthermore, the court held that all parties' confidentiality duty emerges due to the private arbitration proceedings' private nature. The Court's judgment reinforced the above cases by emphasizing that parties who submit their arbitration issue want their issue to remain only between them and the arbitrator. The Court proposed that there should be a broad general obligation to maintain confidentiality in arbitration proceedings. So, in England there is an implied duty to confidentiality as it is inherent in arbitration.

#### *2.2.1.2. The French Perspective*

French Courts recognize that the duty of confidentiality is a vital element of an arbitration agreement. In *Aita v. Ojeh*, the Paris of Court of Appeal declined to invalidate an arbitral award that had been delivered. The court held that annulling the arbitral proceedings would lead to disclosing confidential documents used during the proceedings and violate the arbitration's private nature.<sup>65</sup> This case was highly criticized for failing to delineate why confidentiality was considered intrinsic to arbitration proceedings properly. Furthermore, the court was unable to delineate exceptions to this broad duty of confidentiality they purported.<sup>66</sup> This decision seemed to put France and England on the same side as they both believed that confidentiality is intrinsic to arbitration. Therefore, there is an implied obligation by all parties to uphold this duty of confidentiality.

This was buttressed in *Société True North et Société FCB International v Bleustein* where the court found the breaching party responsible by holding that unilaterally disclosing the information presented in arbitration proceedings was a breach of confidentiality initially

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<sup>64</sup> *Hassneh Ins. V. Steuart J. Mew* (1993) 2 Lloyd's Rep. 243 (K.B.).

<sup>65</sup> *Aita v Ojeh*, Cour d'appel [CA] [regional court of appeal] Paris, 4 Revue De L'arbitrage 584, Feb. 18, 1986.

<sup>66</sup> *Aita v Ojeh*, Cour d'appel [CA] [regional court of appeal] Paris, 4 Revue De L'arbitrage 584, Feb. 18, 1986.

anticipated by the parties when they decided to arbitrate their dispute even though the parties did not agree to keep the proceedings confidential.<sup>67</sup>

### *2.2.1.3. The Swedish perspective*

The Swedish court in *Bulgarian Foreign Trade Bank Ltd v. A.I. Trade Finance Inc.* ruled that confidentiality and privacy were not inherent to the arbitration proceedings. In this case, AI Trade had disclosed an arbitral award to a well-known international law journal that published an article on it for all their subscribers to see.<sup>68</sup> Furthermore, AI gave the copy of the article to the arbitral chairman who, in turn, gave it to his former colleague who happened to now be a judge. This judge further quoted the article that contained details of the award in one of his judgements. Bulgarian Foreign Trade then took AI trade to court claiming that they breached their duty of confidentiality by disclosing the documents to third parties that were not parties to the arbitration proceedings.<sup>69</sup> The Court ruled in favour of Bulgarian Foreign Trade and held that they did not violate any confidentiality duty because there was no confidentiality clause in their arbitration agreement.<sup>70</sup> According to the Court, the starting point for analysing whether or not confidentiality is a principle in the arbitration proceeding is whether it was included in the contract. This is because neither the Swedish Arbitration Act nor the chosen arbitral rules made confidentiality an integral part of arbitration proceedings.<sup>71</sup> Furthermore, the court noted that there was no resolved international view on the duty of confidentiality and its exact terms. So, the court took a different approach from France and England and held that unless there is an express provision for confidentiality in an arbitration

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<sup>67</sup> *Société True North et Société FCB International v Bleustein*, Tribunal de commerce [commercial court] Paris, 2003 Revue De L'arbitrage 189, Sept. 17, 1999

<sup>68</sup> *Bulgarian Foreign Trade Bank Ltd v. A.I. Trade Finance Inc.*, NYH Juridiskt Arkiv [NJA] [Supreme Court] 2000 ref. T1881-99.

<sup>69</sup> *Bulgarian Foreign Trade Bank Ltd v. A.I. Trade Finance Inc.*, NYH Juridiskt Arkiv [NJA] [Supreme Court] 2000 ref. T1881-99.

<sup>70</sup> *Bulgarian Foreign Trade Bank Ltd v. A.I. Trade Finance Inc.*, NYH Juridiskt Arkiv [NJA] [Supreme Court] 2000 ref. T1881-99.

<sup>71</sup> *Bulgarian Foreign Trade Bank Ltd v. A.I. Trade Finance Inc.*, NYH Juridiskt Arkiv [NJA] [Supreme Court] 2000 ref. T1881-99.

proceeding, there is no duty on the parties not to disclose the documents presented during the arbitral proceedings.<sup>72</sup>

#### *2.2.1.4. The Australian Perspective*

Australia's approach to confidentiality in the beginning years was similar to England's approach.<sup>73</sup> This means that courts would imply a duty of confidentiality on the parties in an arbitration proceeding, whether or not there was an express clause in the agreement providing for this. However, Australia is now considered one of the most fervent allies of an express duty of confidentiality. This shift from implied to express duty of confidentiality came as a seismic shock to the IA community. In *Esso Australia Resources Ltd. v Plowman*, the Australian Minister instituted proceedings against Esso and BHP. Esso and BHP had a contract with two state-owned utility companies to supply natural gas in Australia.

While performing their contract, they had a dispute arising out of the price review clause. To settle this dispute pursuant to the arbitration clause in their contract, they submitted the arbitration tribunal issue.<sup>74</sup> The Minister then instituted proceedings in the Court of Appeal and the High Court to stop the information and documents given to the two-state owned utilities from being confidential. His argument was based on the premise of public interest.<sup>75</sup> This case ruling was considered a landmark as the Australian High Court held that the parties were under no general duty to uphold confidentiality without an express confidentiality clause in the arbitration agreement.<sup>76</sup>

The court held that arbitration's private nature did not establish confidentiality as an indispensable trait of the arbitration proceedings. The Court argued that if confidentiality is a matter that can be expressly agreed upon by the parties, it cannot be presumed to be inherent

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<sup>72</sup> *Bulgarian Foreign Trade Bank Ltd v. A.I. Trade Finance Inc*, NYH Juridiskt Arkiv [NJA] [Supreme Court] 2000 ref. T1881-99.

<sup>73</sup> Steve K, 'Confidentiality: Is International Arbitration Losing One of Its Major Benefits?' 132.

<sup>74</sup> *Esso Australia Resources Ltd. and others v. Plowman (Minister for Energy and Minerals) and others* (1995) 183 C.L.R. 10.

<sup>75</sup> *Esso Australia Resources Ltd. and others v. Plowman (Minister for Energy and Minerals) and others* (1995) 183 C.L.R. 10.

<sup>76</sup> *Esso Australia Resources Ltd. and others v. Plowman (Minister for Energy and Minerals) and others* (1995) 183 C.L.R. 10.

to the arbitration process. You can presume its existence in the arbitration agreement, not indispensable.<sup>77</sup> The court acknowledged the benefits of confidentiality in arbitration and how it helps to ensure business efficacy. However, it pointed out that confidentiality is merely a consequential benefit attached to choosing arbitration if the parties expressly agree to it.<sup>78</sup>

## **2.3. Arbitral Rules of International Institutions**

### **2.3.1. International Chamber of Commerce**

The ICC Rules of Arbitration do not outrightly provide for a duty of confidentiality.<sup>79</sup> Therefore, it does not directly impel the parties or the other participants like the witnesses or experts to maintain the arbitration proceedings' confidence. This omission's main reason is that the drafters found it too difficult to include it in 1988 and 1998 rules. As illustrated above, there is no consensus on confidentiality and its exceptions by countries and the international community.<sup>80</sup> Furthermore, the ICC is the most preferred institution for ICA and therefore, many countries and individuals use it.<sup>81</sup> Thus, the drafters shied away from including specific guidance on the issue of confidentiality in arbitral proceedings.<sup>82</sup> However, some provisions in the ICC Rules discuss privacy and confidentiality briefly. Article 21(3) of the ICC Rules provides that arbitration hearings shall be held in private. It further requires the tribunal to take appropriate measures to protect trade secrets and confidential information.<sup>83</sup> Parties that seek to ensure that their proceedings remain confidential are needed to make an order indicating such. This shows that the ICC rules reject the idea of an implied duty of confidentiality, and parties are required to ensure that they draft a specific clause providing for confidentiality if the principle is to apply.

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<sup>77</sup> *Esso Australia Resources Ltd. and others v. Plowman (Minister for Energy and Minerals) and others* (1995) 183 C.L.R. 10.

<sup>78</sup> *Esso Australia Resources Ltd. and others v. Plowman (Minister for Energy and Minerals) and others* (1995) 183 C.L.R. 10.

<sup>79</sup> Kenny W, 'Transparency in Investor State Arbitration', *Journal of International Arbitration*, 2016, 482.

<sup>80</sup> Kenny W, 'Transparency in Investor State Arbitration', *Journal of International Arbitration*, 2016, 482.

<sup>81</sup> Queen Mary University of London, *2010 International Arbitration Survey: Choices in International Arbitration*, 2010, 23.

<sup>82</sup> Kenny W, 'Transparency in Investor State Arbitration', *Journal of International Arbitration*, 2016, 482.

<sup>83</sup> Article 21, *ICC Rules*, 2012.

### 2.3.2. London Court of International Arbitration

Unlike the ICC, the LCIA has codified confidentiality requirements. The confidentiality topic is divided into three main parts: the parties' undertaking to the proceedings, the tribunal's considerations and finally, the publication of the arbitral award.<sup>84</sup> The rules provide for the confidentiality of the tribunal's deliberations during the proceedings. Furthermore, the award cannot be published without both parties' consent, whether there was an express confidentiality clause in the arbitration agreement or not.<sup>85</sup> These strict confidentiality requirements are rooted in the English law approach to confidentiality. Thus, the LCIA provides for an implied duty of confidentiality that requires a broad duty of confidentiality in all cases regardless of the arbitration agreement or the subject matter of the case.<sup>86</sup> This, as explained above, is a very problematic approach to confidentiality as it impedes the progress towards finding the right balance between transparency and confidentiality. Furthermore, the categorization of confidentiality into three individual components as listed above shows that different confidentiality ambits should all be treated differently depending on the case's circumstances, especially when analysing the case's subject matter.<sup>87</sup> Article 30.1 of the rules lists several exceptions to the confidentiality rules in arbitration proceedings.<sup>88</sup> So, confidentiality will not apply where disclosure is mandatory to protect a party's legal right or to enforce or challenge an award before a court.

### 2.3.3. Hong Kong International Arbitration Centre

The HKIAC can be seen to offer a greater level of confidentiality than even LCIA. In line with the Hong Kong Arbitration Ordinance's that provides for an implied confidentiality duty,<sup>89</sup> the HKIAC Rules prohibits the parties to an arbitration proceeding from disclosing that the arbitration exists and any information and documents relating to the arbitration or

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<sup>84</sup> Article 30, *LCIA Rules*, 2012.

<sup>85</sup> Article 30, *LCIA Rules*, 2012.

<sup>86</sup> Article 30, *LCIA Rules*, 2012.

<sup>87</sup> Article 30, *LCIA Rules*, 2012.

<sup>88</sup> Article 30, *LCIA Rules*, 2012.

<sup>89</sup> Section 18, *Arbitration Ordinance*, Cap. 609.

awards.<sup>90</sup> Furthermore, HKIAC places a high threshold of confidentiality regarding the publication of documents and awards. The publication must be commenced by a written request from the party that seeks to publicize the proceedings' details. The approval of all the parties must then be sought. After this, all necessary redactions must be done before it can be publicized.<sup>91</sup>

#### **2.4. Confidentiality in ISDS**

There are differences between how confidentiality is handled in ICA and ISDS consistent with ICSID, NAFTA and other investment treaties.<sup>92</sup> This difference in this treatment is due to less significant matters than they might appear to be. The grounds for treating these two avenues of IA differently are less compelling than otherwise being purported. In the beginning, state-to-state arbitration was often considered 'public' as the agreements often permitted public access to the hearing, arbitral submissions, awards and the considerations behind those awards.<sup>93</sup> This practice seen in state-to-state arbitration influenced by the approach taken when it comes to ISDS. Many of the investment arbitration agreements shy away from affirmatively, including arbitration a confidentiality duty in the arbitral proceedings.<sup>94</sup> Some of the instruments even go a step further expressly stating that confidentiality should not be a principle in these ISDS.

The mechanisms contained in Chapter 11 of NAFTA do not lay out a duty of confidentiality in the proceedings. NAFTA goes a step further to explicitly exclude the majority of confidentiality obligations about arbitrations under Chapter 11. The parties to NAFTA released a statement trying to propound the meaning of Chapter 11 and how it approached the issue of confidentiality.<sup>95</sup> The parties' report stated that there is no duty of confidentiality on

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<sup>90</sup> Article 42.1, *HKIAC Rules*, 2013.

<sup>91</sup> Article 42.1, *HKIAC Rules*, 2013.

<sup>92</sup> Gary B, 'Confidentiality in International Arbitration' *Kluwer Law International*, 2014, 15.

<sup>93</sup> *The Government of Sudan/The Sudan People's Liberation Movement/Army (Abyei Arbitration)*, Public Hearing in PCA Case of 18-23 April 2009,

<sup>94</sup> Gary B, 'Confidentiality in International Arbitration' *Kluwer Law International*, 2014, 15.

<sup>95</sup> Gantz, 'The Evolution of the FTA Investment Provisions: From NAFTA to the United States-Chile Free Trade Agreement' *Journal of International Law*, 2004, 679.



the parties to an arbitration proceeding commenced under Chapter 11.<sup>96</sup> Furthermore, they provided that Chapter 11 placed no restrictions on parties seeking to release their arbitration documents and awards submitted to a Chapter 11 tribunal.<sup>97</sup> Arbitral tribunals formed about Chapter 11 of NAFTA have emphasized that there lacks a duty of confidentiality in these arbitration proceedings; thus, the submissions before the tribunal and awards delivered can be publicized by the parties or the tribunal.<sup>98</sup> However, the tribunals have noted that the actual proceedings may not be open to third parties. Some documents may contain sensitive information that third parties or the general public should not access.<sup>99</sup> This largely due to the tremendous public interest matters in the case.<sup>100</sup>

The second investment arbitration instrument discussed herein is ICSID Rules. ICSID tribunals have usually held no general rule that places a duty of confidentiality on the parties to an arbitration proceeding.<sup>101</sup> The tribunals have used the restricted express confidentiality provisions. The rules state that: (a) there is a presumptive exclusion of third parties from arbitral proceedings, however, they can be admitted if both parties agree to<sup>102</sup> (b) the ICSID Centre itself is prohibited from publicizing the awards without obtaining the parties' consent first<sup>103</sup> (c) there is no prohibition on the parties disclosing the award and the documents used during the arbitration proceedings if all the parties wish to do so.<sup>104</sup>

Using these rules that seek to delineate the duty of confidentiality under ICSID arbitration, the tribunals have sought to differentiate how confidentiality is applied to ISDS and ICA. In *Myers Inc v Government of Canada*, the tribunal stated an implied duty of confidentiality

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<sup>96</sup> Fracassi F, 'Confidentiality and NAFTA Chapter 11 Arbitration', 213.

<sup>97</sup> Fracassi F, 'Confidentiality and NAFTA Chapter 11 Arbitration', 213.

<sup>98</sup> Fracassi F, 'Confidentiality and NAFTA Chapter 11 Arbitration', 213.

<sup>99</sup> Gantz, 'The Evolution of the FTA Investment Provisions: From NAFTA to the United States-Chile Free Trade Agreement' 679.

<sup>100</sup> Gantz, 'The Evolution of the FTA Investment Provisions: From NAFTA to the United States-Chile Free Trade Agreement' 679.

<sup>101</sup> *Amco Asia Corp. v. Repub. of Indonesia*, Decision on Request for Provisional Measures in ICSID Case No. ARB/81/1 of 9 December 1983, XI Y.B. Comm. Arb. 159, 161 (1986)

<sup>102</sup> Rule 32(2), *ICSID Rules*, 2006.

<sup>103</sup> Rule 32(2), *ICSID Rules*, 2006.

<sup>104</sup> Rule 30, *ICSID Rules*, 1986.

under ICA that stems from an arbitration agreement between the two parties.<sup>105</sup> According to the tribunal in this case, once parties agree between each other to settle their dispute in arbitration and not in open court, there is an implied agreement between the two that they do not want third parties in their business.<sup>106</sup> However, this same assumption cannot be implied in ISDS because of the public nature of the disputes involved. Another ICSID Tribunal deliberated on this matter and put it more directly. In *Biwater Gauff (Tanzania) Ltd v United Republic v Tanzania*, the tribunal stated a clear difference between how confidentiality was treated in the realm of ICA and investment arbitration.<sup>107</sup> The tribunal acknowledged a greater tendency to work towards transparency in investment arbitration and limiting the broad confidentiality duty seen in ICA.

In *Metalclad Corp. v. United Mexican States*, the same sentiment was expressed. In this case, the tribunal recognized no general principle of confidentiality that sought to prohibit public discussions of the parties' arbitral proceedings.<sup>108</sup> Furthermore, there is no provision in NAFTA or in the ICSID rules that expressly restrict the parties' freedom to discuss the case's details and information publicly. However, the Tribunal considered it advantageous to limit the case's public discussions to a minimum to ensure that the arbitral proceedings occur in an orderly manner and a conducive environment.

This brief discussion of ISDS cases shows a general trend towards less and less confidentiality.

## **2.5.Conclusion**

In conclusion, it is important to note that the differences people use to try and ensure a balance between confidentiality in ISDS and not in ICA can be insignificant in some cases. For example, the public interest exception used to ensure greater transparency in ISDS also exists in ICA. States are also involved in many contractual obligations with businesses, and

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<sup>105</sup> *Myers Inc v Government of Canada*, NAFTA Procedural Order No.16 of 13 May 2000.

<sup>106</sup> *Myers Inc v Government of Canada*, NAFTA Procedural Order No.16 of 13 May 2000.

<sup>107</sup> *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, Procedural Order No.3 in ICSID Case No. ARB/05/22 of 29 September 2006, 114.

<sup>108</sup> *Metalclad Corporation v United Mexican States*, Award in ICSID Case No. ARB(AF)/97/1 (NAFTA) of 30 August 2000.

the route they use to settle these disputes is more often than that ICA.<sup>109</sup> Furthermore, it is not persuasive to state that ISDS is under a treaty while ICA stems from a contractual agreement between the parties.<sup>110</sup> This is because it is primary that an ISDS stems from an investor's acceptance to an offer from the host state to arbitrate the dispute. Thus, this acceptance gives rise to an arbitration agreement similar to one in ICA. Therefore, these arguments used to continue upholding high confidentiality in one sphere and not the other does not sound very convincing; thus, they should not deny transparency in ICA.

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<sup>109</sup> Gary B, 'Confidentiality in International Arbitration' 17.

<sup>110</sup> Gary B, 'Confidentiality in International Arbitration' 17.

### 3. The Parameters of Transparency in International Arbitration

#### 3.1.Introduction

Transparency, though frequently invoked in the international realm, has not been defined. Transparency relies heavily on the idea of openness and access to information by the public.<sup>111</sup> The international community has been pushing for more transparency because the concept is viewed to lead to a more accountable, more legitimate and more democratic system of global governance.<sup>112</sup> In IA, transparency deals with how much the public knows about the existence of the said dispute, the parties involved, the issues being arbitrated, the arbitrators' appointment process, the selected arbitrators, the evidence presented, and lastly what the arbitral award was.<sup>113</sup> The main argument for increased transparency in IA is that the arbitrated issues do not just affect the two parties in the case.<sup>114</sup> This is because most decisions arrived at by the arbitral tribunal may involve other stakeholders and not only the two parties before it.

The lack of transparency in IA is rooted in the belief that if parties submit their disputes to an arbitrator or an arbitral tribunal then that dispute is solely between them and no one else has the right to know of it or be involved in the said case.<sup>115</sup> This argument is now continuously being shunned in the IA realm because the implications of arbitral awards on the public are being seen.<sup>116</sup> However, not all stages of an arbitration proceeding should be transparent as there is no concrete reason why the public should be informed on the said information.

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<sup>111</sup> Poorooye A and Feehily R, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' 22 *Harvard Negotiation Law Review* 275, 2017, 282.

<sup>112</sup> Poorooye A and Feehily R, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' 22 *Harvard Negotiation Law Review* 275, 2017, 282.

<sup>113</sup> Poorooye A and Feehily R, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' 22 *Harvard Negotiation Law Review* 275, 2017, 282.

<sup>114</sup> Srishti K and Raghavendra P, 'Transparency and Confidentiality in International Commercial Arbitration' *Kluwer Law International*, 2020, 472.

<sup>115</sup> Srishti K and Raghavendra P, 'Transparency and Confidentiality in International Commercial Arbitration' 472.

<sup>116</sup> Srishti K and Raghavendra P, 'Transparency and Confidentiality in International Commercial Arbitration' 472.

Therefore, it is essential to delineate transparency parameters to ensure that the arbitration process does not lose its intricate value.

This principle has garnered more support in the ISDS realm. This is because it involves more issues of public interest, and it always involves states. However, it is hazardous to overlook that these public interest issues also arise in ICA.<sup>117</sup> Thus, the imperative need for transparency in realms of IA cannot be overlooked. This Chapter will be divided into two parts to discuss why transparency is needed and its importance in both realms.

### **3.2. Transparency in ICA and its benefits**

Confidentiality in ICA is one of the core reasons why many disputants opt for it as a means of dispute resolution. Furthermore, confidentiality is generally an accepted implicit requirement of this type of arbitration.<sup>118</sup> However, there are many valid reasons for the increasing demand to make these proceedings transparent as discussed below.

#### **3.2.1. Public interest**

There are a lot of public interest matters in ICA. This is because big multi-national companies' indemnification claims or between two private companies can severely affect human rights and the environment.<sup>119</sup> Furthermore, ICA can significantly impact a state's public policy on infrastructure, generation of power, water, etc.<sup>120</sup> This is because it is usually private multi-national companies that play vital roles in providing these services to the public.<sup>121</sup> Furthermore, public health and market competition issues are also heavily arbitrated ICA that might raise a significant public interest concern. Besides, disputes involving essential products such as medicine can also increase prices, affecting the public.

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<sup>117</sup> Srishti K and Raghavendra P, 'Transparency and Confidentiality in International Commercial Arbitration' 473.

<sup>118</sup> Srishti K and Raghavendra P, 'Transparency and Confidentiality in International Commercial Arbitration' 473.

<sup>119</sup> Poorooye A and Feehily R, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' 22 *Harvard Negotiation Law Review* 275, 2017, 312.

<sup>120</sup> Poorooye A and Feehily R, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' 22 *Harvard Negotiation Law Review* 275, 2017, 312.

<sup>121</sup> Matthew C, 'Overturning the Presumption of Confidentiality: Should the UNCITRAL Rules on Transparency be applied to International Commercial Arbitration?' *International Trade Law Journal*, 2016, 157.

Furthermore, if the dispute between the tribunal involves a harmful good sold to the public, the public needs to have this information to know precisely what went wrong with the product. Lastly, the funds used to settle these disputes when a state is involved usually comes from the taxpayers. For example, in *The Secretary of State for the Home Department v. Raytheon Systems Ltd.*, where an arbitral award required the British government to pay 228 million pounds to Raytheon Systems led to a public outcry how big the award was. Still, no details were released on what went wrong with the contract.<sup>122</sup> Chapter 2 discussed a mirage of different commercial arbitration cases where public interest was an issue such as the *Esso Australia Resources Case*, the *Hassaneh Insurance case*, and several others. Therefore, although ICA claims do not raise public interest concerns as much as in ISDS, it would be false to state that ICA does not give rise to public interest issues. Therefore, this present system that enables commercial disputes that affect critical public policies to be resolved away from the public eye, thus, not providing room for review or scrutiny is flawed.

### 3.2.2. Predictability and consistency of arbitral awards

Many proponents of transparency in ICA have espoused the numerous advantages of publication of reasoned arbitral awards. This is because absolute confidentiality has hindered the growth of arbitral jurisprudence as reasoned awards that could aid in developing this legal body are kept highly confidential and cannot be accessed by the community's public.<sup>123</sup> Julian Lew recognized the benefits that can be garnered through transparency and publication of these arbitral awards as early as 1982. The most important advantage he realized is that transparency leads to legal certainty and predictability in the arbitration realm.<sup>124</sup> This is because developing a legal body of arbitration and an official case law docket would lead to greater consistency in the awards offered and promote the commercial world's knowledge and acceptance of the tribunals' rules and principles.

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<sup>122</sup> Matthew C, *Overturning the Presumption of Confidentiality: Should the UNCITRAL Rules on Transparency be applied to International Commercial Arbitration?* 157.

<sup>123</sup> Anjanette H, 'Confidentiality in a Forum of Last Resort: Is the Use of Confidential Arbitration a Good Idea for Business and Society?' *International Law Journal*, 486, 2005.

<sup>124</sup> Anjanette H, 'Confidentiality in a Forum of Last Resort: Is the Use of Confidential Arbitration a Good Idea for Business and Society?' 486.

Such a body of knowledge will additionally aid the businessmen when negotiating in the commercial world.<sup>125</sup> It will also help influence their decisions and help them make effective ones, especially when deciding whether to arbitrate a matter or not as they can make informed guesses about their chances of winning in an arbitration process and avoid unnecessary dispute.<sup>126</sup>

### 3.2.3. Holding Arbitrators accountable

If the arbitral proceedings are confidential, it is impossible to know how arbitrators perform in their roles. The arbitrators have such essential duties that it is paramount for the global community to understand how they perform these duties.<sup>127</sup> This helps to ensure accountability and rationality in a rather arbitrary process. Arbitrators who decide not to give full effect to the law while rendering awards are not held accountable because the arbitral awards are sealed due to confidentiality.<sup>128</sup> If the awards can be accessed by interested parties, arbitrators who render haphazard awards can be held responsible by denying further opportunities to arbitrate disputes as disputants will not choose them. Secondly, the publication of the awards will help to ensure that arbitrators render quality awards.<sup>129</sup> This is due to the pressure from the public, academics and legal community that will see and dissect these decisions. Lastly, by having access to arbitral awards rendered by individual arbitrators, the parties will have more knowledge and insight into who they can entrust their legal

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<sup>125</sup> Poorooye A and Feehily R, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' 22 *Harvard Negotiation Law Review* 275, 2017, 313.

<sup>126</sup> Poorooye A and Feehily R, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' 22 *Harvard Negotiation Law Review* 275, 2017, 313.

<sup>127</sup> Klaus P, 'International Arbitration Practice and the Unidroit Principles of International Commercial Contracts', *American Journal of Comparative Law*, 1998, 149.

<sup>128</sup> Sherlin T and Brian L, 'The Arbitrator and the Arbitration Procedure, More Transparency in International Commercial Arbitration: To Have or Not to Have?' 83.

<sup>129</sup> Sherlin T and Brian L, 'The Arbitrator and the Arbitration Procedure, More Transparency in International Commercial Arbitration: To Have or Not to Have?' 83.

dispute.<sup>130</sup> Furthermore, because other interested parties can access the proceedings, the arbitrators will ensure that they conduct the proceedings with the law's utmost fidelity.<sup>131</sup>

#### 3.2.4. Choice of Arbitral Seat

Multi-national corporations spend substantial amounts of money and time creating arbitration clauses to protect their commercial interests. The arbitration seat is significant when choosing where to arbitrate. Such a decision is influenced mainly by choice of law, the parties' convenience, and political climate.<sup>132</sup> Transparency will help businesses have enough information regarding how a State operates and its laws, making informed choices when choosing an arbitral seat.<sup>133</sup>

In conclusion, transparency in ICA is starting to gain attention from the legal community. From the benefits discussed above, it is clear why this is happening. However, currently, no convention has tried to incorporate transparency uniformly in the arbitration process.

### 3.3. **Transparency in ISDS**

Unlike in ICA, ISDS has taken significant steps to integrate transparency through the formal adoption United Nations Convention on Transparency in Treaty-based Investor-State Arbitration.<sup>134</sup> This development was due to the need to consider the public interest concerns in this type of arbitration.<sup>135</sup> This need finds its source in international law areas such as human rights and environmental law, which necessitated the general public's inclusion and

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<sup>130</sup> Sherlin T and Brian L, 'The Arbitrator and the Arbitration Procedure, More Transparency in International Commercial Arbitration: To Have or Not to Have?' 83.

<sup>131</sup> Sherlin T and Brian L, 'The Arbitrator and the Arbitration Procedure, More Transparency in International Commercial Arbitration: To Have or Not to Have?' 83.

<sup>132</sup> Kimberley C, 'Emerging Issues and Trends in International Arbitration' *California Western International Law Journal*, 2012, 77.

<sup>133</sup> Kimberley C, 'Emerging Issues and Trends in International Arbitration' *California Western International Law Journal*, 2012, 77.

<sup>134</sup> Kimberley C, 'Emerging Issues and Trends in International Arbitration' *California Western International Law Journal*, 2012, 77.

<sup>135</sup> Laurence B and Rukia B, 'Transparency in Investor-State Arbitration: An Incremental Approach' *BCDR International Arbitration Review* 2015, 67.



input. The matters discussed required their knowledge.<sup>136</sup> The disputes handled under this type of arbitration involve states regarding activities performed for the public's sake. Therefore, transparency is seen as a way to enhance accountability by making public members access documents and hearings while also allowing them to make submissions where it is deemed acceptable.

### 3.3.1. Public interest

Public interest is one of the main features of investment disputes. This has, therefore made transparency more welcome in ISDS. Public interest has not been defined in any law or rules of arbitration, and no convention or arbitration rules make a reference to it.<sup>137</sup> The concept has, however, been examined by arbitral tribunals in several investment disputes. In the *Methanex* dispute, the tribunal held that where a public interest matter was present in the case, the arbitration process could not be treated as one between private commercial parties.<sup>138</sup> Similarly, In *Vivendi v Argentine Republic (II)*, the tribunal stated that the reason the case had a public interest matter was that the dispute was centred on water distribution and sewage systems in the city of Buenos Aires and surrounding municipalities. The systems provide essential public services to millions of people and, therefore, result in questions on human rights and environmental considerations. Hence, any decision the tribunal may come to would affect those specific infrastructures' operations and thereby, the public they serve.<sup>139</sup> In *Aguas Provinciales de Santa Fe v Argentina*, the tribunal took a similar approach to the *Vivendi II* tribunal by holding that the case in question was one that was of public interest because the decision of the tribunal would potentially directly or indirectly affect members of

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<sup>136</sup> Laurence B and Rukia B, 'Transparency in Investor-State Arbitration: An Incremental Approach' BCDR International Arbitration Review' 2015, 67.

<sup>137</sup> Dimitrios K 'Transparency in International Investment Arbitration: From the Current towards the Future Normative Framework' Published LLM Thesis, International Hellenic University, Greece, 2014, 4.

<sup>138</sup> *Methanex Corporation v United States*, Final Award on Jurisdiction and Merits, (2005)

<sup>139</sup> *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.) v. Argentine Republic (II)* (ICSID Case No. ARB/03/19)

the public who were not involved in the case as the dispute was centred on the distribution of water and sewage systems in urban centres.<sup>140</sup>

Public interest necessitates transparency because, first, in most cases, the State is usually involved in the case in its capacity as a sovereign government democratically elected by the public to serve their interest. Thus, in cases where the State is acting in this capacity, the public is interested in the case.<sup>141</sup> Second, ISDS usually involves accusations of wrongdoing by the State.<sup>142</sup> The public, thus, has a right to know what government officials do wrong during these proceedings to hold these state officials implicated accountable effectively. Third, the arbitration may involve the interests of nationals and residents of the relevant State regarding regulations and policies put in place.<sup>143</sup> Many ISDS involve opposition to laws regulations and policies directly affecting natural resources, human rights, public health, cultural heritage etc. all the said State. Examples of cases illustrating the public character of ISDS include *Aguas del Tunari SA case*<sup>144</sup> and *Biwater Gauff case*<sup>145</sup> which pertained to the drinking water supply system in Bolivia and Tanzania respectively and *Methanex Corporation case*<sup>146</sup>, which related to the prohibition of the use of an additive in gasoline in California.

Fourth, the costs incurred by the government in defending such claims and the sums awarded to the investor, if any, will ultimately be borne by the public. As the sums at stake in this arbitration class could be quite substantial, the impact that satisfying such awards may have

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<sup>140</sup> Dimitrios K ‘Transparency in International Investment Arbitration: From the Current towards the Future Normative Framework’ Published LLM Thesis, International Hellenic University, Greece, 2014, 4.

<sup>141</sup> Enuma U, ‘The Quest for Transparency in Investor-State Arbitration: Are the Transparency Rules and the Mauritius Convention Effective Instruments of Reform?’ 165.

<sup>142</sup> Enuma U, ‘The Quest for Transparency in Investor-State Arbitration: Are the Transparency Rules and the Mauritius Convention Effective Instruments of Reform?’ 165.

<sup>143</sup> Enuma U, ‘The Quest for Transparency in Investor-State Arbitration: Are the Transparency Rules and the Mauritius Convention Effective Instruments of Reform?’ 165.

<sup>144</sup>*Aguas del Tunari SA v. Republic of Bolivia*, ICSID, Case No ARB/02/3, 21 Oct. 2005.

<sup>145</sup>*Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID Case No ARB/05/22, 24 July 2008.

<sup>146</sup> *Methanex Corporation v United States*, Final Award on Jurisdiction and Merits, (2005).

on the citizenry's welfare attracts public interest.<sup>147</sup> The public needs to know whether these costs are proportionate to the benefits that flow from investment treaties. In 2012, an investment arbitration tribunal required Ecuador to pay over 1.7 billion USD to Occidental, an oil company. This accounted for 55% of her annual budget for education and 135% of her yearly healthcare budget.<sup>148</sup> The highest sum to be paid by a Respondent State to an aggrieved investor is 50 Billion USD. In this case, Russia was ordered to pay the said amount to the former owners of the Russian oil giant, Yukos. Therefore, because the public is affected by these arbitrations' outcomes, it is only fair that they are allowed to receive requisite information.<sup>149</sup>

### 3.3.2. Foreign investors benefit

Transparency offers a lot of benefits to foreign investors as well. When information regarding investor-state arbitration is published online and made available to the general public, other investors interested in investing in a particular State will be better positioned to understand better their rights and how to best work with the said State.<sup>150</sup> This is because the investors can access the previous arbitration cases between the Respondent State and other investors. They can also view the publication of the awards in those cases to determine their rights and the merits of commencing arbitration proceedings. Foreign investors can also use these previous arbitration cases to determine which States respect the rule of law and which ones do not appear when deciding where to invest. Therefore, through transparency, investors can better assess the risk to their investment in states.

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<sup>147</sup> Enuma U, 'The Quest for Transparency in Investor-State Arbitration: Are the Transparency Rules and the Mauritius Convention Effective Instruments of Reform?' 165.

<sup>148</sup> Enuma U, 'The Quest for Transparency in Investor-State Arbitration: Are the Transparency Rules and the Mauritius Convention Effective Instruments of Reform?' 165.

<sup>149</sup> Enuma U, 'The Quest for Transparency in Investor-State Arbitration: Are the Transparency Rules and the Mauritius Convention Effective Instruments of Reform?' 165.

<sup>150</sup> Sherlin T and Brian L, 'The Arbitrator and the Arbitration Procedure, More Transparency In International Commercial Arbitration: To Have Or Not To Have?' 83.

### 3.3.3. Accountability

Transparency further aids in improving the quality of decision-making. In *Scott v Scott's leading case*, Lord Shaw quoted the philosopher, Jeremy Bentham, 'Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.'<sup>151</sup> Therefore, if an arbitrator knows that their decisions will be subjected to critical review and scrutiny, they will be motivated to conduct the arbitration to uphold the rule of law and give good quality decisions.<sup>152</sup> Also, because they know that the awards that they offer will be published, they will ensure that it is free from error. This is because publicity is usually seen to translate to accountability. Therefore, transparency will ensure that ISDS is appropriately conducted, and arbitrators are held to higher standards.

### 3.3.4. Public confidence

ISDS is seen to be undergoing a legitimacy crisis as the years go by. Legitimacy here is used to mean acceptance of the decisions and awards given by the ISDS institutions.<sup>153</sup> This acceptance helps instil public confidence in the institutions, which then enhance compliance by both arbitrating parties. They believe that the rules and institutions operate in conformity with the principle of the right process.<sup>154</sup> If the international community does not believe that the ISDS processes are not legitimate, the public will not have any confidence. This will, in turn, render this dispute settlement method ineffective.<sup>155</sup>

This legitimacy problem can be cured by justification and acceptance of the general public's arbitral tribunals' decisions. This can be done through increased transparency in the dispute

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<sup>151</sup> Sherlin T and Brian L, 'The Arbitrator and the Arbitration Procedure, More Transparency In International Commercial Arbitration: To Have Or Not To Have?' 83.

<sup>152</sup> Sherlin T and Brian L, 'The Arbitrator and the Arbitration Procedure, More Transparency In International Commercial Arbitration: To Have Or Not To Have?' 84.

<sup>153</sup> Sherlin T and Brian L, 'The Arbitrator and the Arbitration Procedure, More Transparency in International Commercial Arbitration: To Have Or Not To Have?' 83.

<sup>154</sup> Sherlin T and Brian L, 'The Arbitrator and the Arbitration Procedure, More Transparency in International Commercial Arbitration: To Have Or Not To Have?' 83.

<sup>155</sup> Sherlin T and Brian L, 'The Arbitrator and the Arbitration Procedure, More Transparency in International Commercial Arbitration: To Have Or Not To Have?' 83.

resolution process by involving the public during the treaty negotiation stage, opening the hearings to them, allowing third-party submissions from Civil rights groups in the country, and publishing the award.<sup>156</sup> By enabling the public to participate in these processes, they will stop viewing ISDS tribunals as secret trade courts that are only out there to serve investors' interests.<sup>157</sup>

### **3.4.The UNCITRAL Transparency Rules**

Article 1(4) added into the 2010 UNCITRAL Arbitration Rules explicitly include the Transparency in ISDS proceedings. This amendment was put in place to ensure transparency was a guaranteed phenomenon in ISDS due to the international community's uproar because of the lack of transparency in the arbitration proceedings. This amendment states that the UNICTRAL Rules on arbitration will incorporate Transparency Rules expressly in ISDS following any treaty agreed upon on or after April 2014 unless the parties to that specific Treaty made it clear that they are opting out of the transparency rules by for example referring to the use of a different version of the UNICTRAL Arbitration Rules in the concluded Treaty. The Rules will also not apply to treaties agreed upon before April 1, 2014, unless the parties expressly agree on this. They will also not apply to treaties where the parties' express reference to an older version of the UNICTRAL Rules unless the parties decide to opt-in to the new Transparency Rules. However, to ensure that parties do not unnecessarily derogate from the new Transparency Rules, Article 1(3)(a) states that parties can only opt-out of the Transparency Rules unless the Treaty concluded the two parties expressly provides for it.<sup>158</sup> The Rules present an opportunity to improve transparency in ISDS immensely. They have successfully enforced transparency as the default in ISDS.

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<sup>156</sup> Sherlin T and Brian L, 'The Arbitrator and the Arbitration Procedure, More Transparency in International Commercial Arbitration: To Have Or Not To Have?' 83.

<sup>157</sup> Jennings M, 'The international investment regime and investor-state dispute settlement: States bear the primary responsibility for legitimacy' 17 *Business Law International* (2016), 132.

<sup>158</sup> Article 1(3), *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, 2014.

### 3.4.1. The facets of transparency in the rules

The adoption of the Transparency Rules is a clear reflection of the significance of transparency in ISDS. To best address transparency, the Rules effectively addresses four aspects of transparency relevant to how arbitration proceedings are carried out.<sup>159</sup>

#### 3.4.1.1. *Open hearings*

Article 6 of the Transparency Rules provides that by default, all hearings should be public. This means that allowing the general public to attend the hearings is crucial for the Transparency Rules. Thus, unless explicitly agreed upon by the parties, all hearings shall be accessible to the public attend. However, this rule should be subjected to the critical need to protect confidential information or the arbitral tribunal's integrity. This is to ensure that the arbitration process is fair and effective.<sup>160</sup> The arbitral tribunal is left to decide whether a hearing should be held in camera on a case-by-case basis. It is best placed to balance the public interest with countervailing interests such as the need to ensure that the hearings remained manageable and avoid the dispute's aggravation.<sup>161</sup>

#### 3.4.1.2. *Notification of New Arbitration Proceedings*

The Transparency Rules provide for the mandatory and prompt disclosures of any new arbitrations under Article 2.<sup>162</sup> The disputing parties should transmit a notice of arbitration to the UNCITRAL Transparency Registry, the central repository for the publication of information and documents in treaty-based ISDS.<sup>163</sup> Upon receipt of the notice of arbitration and evidence that the respondent has been sent the message of arbitration, the repository is required to promptly disclose names of the disputing parties, relevant economic sector, and Treaty under which the claim is being made.

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<sup>159</sup> Article 1(3), *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, 2014.

<sup>160</sup> Article 6, *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, 2014.

<sup>161</sup> Article 6, *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, 2014.

<sup>162</sup> Article 2, *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, 2014.

<sup>163</sup> Article 2, *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, 2014.

### 3.4.1.3. Third-party Submissions

Third-party submissions are essential because they enhance transparency by enabling interested third parties to make submissions and participate in the proceedings. These third parties (mainly NGOs and Civil Rights Groups) will be able to access the documents related to the dispute, including notices of intent and arbitration, pleadings, memorials, and briefs. This will enable them to be able to scrutinize the case, thus enhancing transparency.<sup>164</sup> Concerning third-party submissions, the Transparency Rules draw a distinction between Third Persons and a Non-Disputing Party to the Treaty. The first type which is discussed under Article 4 refers to any third-party that has an interest in contributing to the solution of the dispute. The application for submitting must be in writing. It must provide relevant details of the Third Person, including its legal status and activities, connections it has with a disputing party, information on any financial assistance received in preparing the submission or for its overall operations, the nature of its interest in the arbitration, and issues it wishes to address.<sup>165</sup> In making its decision, the tribunal will consider the Third Person's interest in the arbitration and how its submissions will assist the tribunal in determining an issue in the proceedings by bringing a different perspective to the disputing parties.<sup>166</sup> The second type discussed under Article 5, is another Party to the investment treaty at issue before the tribunal, for example, a State or a regional economic integration organization that is not a party to the dispute. Unlike submissions under Article 4, these submissions are not restricted to written submissions.<sup>167</sup> A Non-Disputing Party to the Treaty may make submissions on treaty interpretations and other matters relevant to the dispute, subject to the same considerations given to third-party requests. Conscious of the risk of a non-disputing state party abusing this article, Article 5(2) directs the tribunal not to accept any submissions "which would support the claim of the investor in a manner tantamount to diplomatic protection."

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<sup>164</sup> Laurence B and Rukia B, 'Transparency in Investor-State Arbitration: An Incremental Approach' *BCDR International Arbitration Review* 2015, 67.

<sup>165</sup> Article 4, *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, 2014.

<sup>166</sup> Article 4, *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, 2014.

<sup>167</sup> Article 5, *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, 2014.

#### *3.4.1.4. Access to Documents*

Documents in the proceedings will be disclosed to the public as a matter, of course. Article 3 of the Transparency Rules, subject to the exceptions under Article 7, establishes three categories of documents to be disclosed. The first includes documents that must be mandatorily and automatically disclosed. This encompasses a comprehensive set of documents submitted by the disputing parties to the tribunal, to parties that are not a party to the dispute but a party to the relevant Treaty.<sup>168</sup> It also includes orders, decisions, and awards issued by the tribunal during the proceedings, including all hearings transcripts.<sup>169</sup> The second category covers documents that must be mandatorily disclosed once any person requests their tribunal disclosure.<sup>170</sup> It includes witness statements and expert reports. The third category relates to documents that do not fall under either of the above categories. After consulting the disputing parties, the tribunal has discretion regarding making available such documents.<sup>171</sup> This may include making the documents available at a specified location. A person granted access to documents under this category is responsible for the administrative costs of making them available, but not the costs of making them available to the public through the repository. The disclosed documents will be made public via the repository after the tribunal ensures that steps have been taken to restrict disclosure of protected or confidential information.<sup>172</sup>

### **3.5. The Mauritius Convention on Transparency**

The UNCITRAL Rules on Transparency discussed above can only apply to treaties concluded after April 2014.<sup>173</sup> This saw the exclusion of many treaties that were concluded before the said date. In the spirit of enhancing transparency in ISDS, the UNCITRAL Working Group II developed the Mauritius Convention on Transparency which provides for applying the UNCITRAL Rules on Transparency to the disputes arising out of investment

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<sup>168</sup> Article 3, *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, 2014.

<sup>169</sup> Article 3, *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, 2014.

<sup>170</sup> Article 3, *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, 2014.

<sup>171</sup> Article 3, *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, 2014.

<sup>172</sup> Article 3, *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, 2014.

<sup>173</sup> Laurence B and Rukia B, 'Transparency in Investor-State Arbitration: An Incremental Approach' 67.



treaties concluded before April 2014.<sup>174</sup> Thus, the Convention seeks to provide an efficient basis for States to opt-into the Transparency Rules regarding their pre-April 2014 investment treaties. The Convention gives those States that wish to make the Transparency Rules applicable to their treaties, a flexible mechanism to do so, without creating an expectation that other States would necessarily have to use the tool offered by the Convention. In short, the Convention provides States that so wish a powerful instrument to enhance transparency in ISDS.<sup>175</sup>

### **3.6.Conclusion**

In conclusion, the study recognizes that transparency in IA has some disadvantages despite the advantages identified by this Chapter. The global community's main disadvantage is that transparency could lead to delays and higher costs in the arbitration process.<sup>176</sup> This can be seen in the increase of time and expenses caused by parties' involvement other than the two disputants.<sup>177</sup> The inclusion of amicus curiae is seen to require the inclusion of more materials and more oral presentations, therefore, leading to more time and costs. Another legitimate concern of increased transparency is the potential impact it might have on the parties' ability to access fair and equitable process.<sup>178</sup> This is because for smaller investors who do not have resources, the extra time and cost required to engage with this transparency would be counter-productive and an unfair burden. Therefore, a balance is needed.

This chapter sought to establish the vitality of transparency as an element in both realms of IA. It also shows the advantages increase transparency could offer to IA. Some of the benefits discussed include increased public participation in matters that involved public interest, increased public confidence in the systems, uniformity and predictability in arbitration cases, and arbitrators' accountability. The chapter further discussed the UNCITRAL Transparency Rules and how they have endeavoured to handle transparency.

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<sup>174</sup> Laurence B and Rukia B, 'Transparency in Investor-State Arbitration: An Incremental Approach' 67.

<sup>175</sup> Laurence B and Rukia B, 'Transparency in Investor-State Arbitration: An Incremental Approach' 67.

<sup>176</sup> João R and Michael D, 'Transparency in Investor-State Arbitration: The Way Forward' *Asian International Arbitration Journal*, 2015, 59.

<sup>177</sup> João R and Michael D, 'Transparency in Investor-State Arbitration: The Way Forward' 59.

<sup>178</sup> Kenny W, 'Transparency in Investor State Arbitration', *Journal of International Arbitration*, 2016, 480



## 4. RECONCILIATION OF TRANSPARENCY AND CONFIDENTIALITY IN INTERNATIONAL ARBITRATION

### 4.1. Introduction

IA has led to the sufficient resolution of disputes worldwide and is now considered one of the most desirable dispute resolution methods.<sup>179</sup> However, this success cannot mask the apparent tensions that are seen in the process. Thus, IA is expected to change, develop, and adapt to the world's changes to continue thriving and offering practical solutions to the disputants and the global community.<sup>180</sup> A balanced approach between confidentiality and transparency when either handling arbitral disputes or drafting provisions that include transparency in arbitration agreements can allow both the arbitrating parties and the public to benefit from both concepts.<sup>181</sup>

Transparency and confidentiality do not have to be viewed as opposing interests. They can co-exist in the IA realm to ensure sufficient dispute resolution that benefits the parties and interested individuals.<sup>182</sup> For example, an institutional rule can require the publication of an award on its website, but demand that sensitive and confidential information be redacted from the award.<sup>183</sup> Solutions that offer such harmonization between these two cardinal principles is what this Chapter intends to discuss.

This Part thus examines different approaches to reconciling transparency and confidentiality in both ISDS and ICA.<sup>184</sup> These approaches proposed below can be used in both realms of

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<sup>179</sup> Poorooye A and Feehily R, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' 316.

<sup>180</sup> Poorooye A and Feehily R, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' 316.

<sup>181</sup> Poorooye A and Feehily R, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' 323.

<sup>182</sup> Poorooye A and Feehily R, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' 323.

<sup>183</sup> Poorooye A and Feehily R, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' 323.

<sup>184</sup> Poorooye A and Feehily R, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' 323.

IA. They are meant to apply on a case-by-case basis and are not to be taken to apply uniformly across all arbitration cases. This Chapter thus looks at reconciliation of the two principles from the perspective of the work-product doctrine, the ICSID Rules, the UNCITRAL Transparency Rules, the legitimate interests' tests and the interests of justice criteria.

#### **4.2.Reconciliation means through institutional rules**

The inclusion of transparency in institutional procedural rules for IA shows the principle's developing international recognition.<sup>185</sup> The institutional rules address transparency in ISDS and ICA differently.<sup>186</sup> In ISDS, these rules tend to provide public disclosure as the default, with provisions enabling parties to exclude some information they consider sensitive.<sup>187</sup> On the other hand, ICA rules generally seek to include confidentiality as the proceedings' default.<sup>188</sup> Thus, ICA rules provide an option to disclose information to the public rather than imposing an obligation of disclosure on the parties.

Primarily, ICSID tailored its Arbitration Rules expressly for ISDS. These Arbitration rules place weight on transparency.<sup>189</sup> The Rules aim to make the ICSID proceedings “more streamlined and transparent while instilling greater confidence in the arbitral process.”<sup>190</sup> Thus, public disclosure is the default in these proceedings. However, the Rules try to balance confidentiality and transparency by providing that public disclosure is the default option; the parties' confidential information is protected from disclosure.<sup>191</sup> For example, when it comes to arbitral awards, the Secretary-General is expected to publish arbitral awards only with both

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<sup>185</sup> Zhao M, 'Transparency in International Commercial Arbitration: Adopting a Balanced Approach,' 195.

<sup>186</sup> Zhao M, 'Transparency in International Commercial Arbitration: Adopting a Balanced Approach,' 195.

<sup>187</sup> Zhao M, 'Transparency in International Commercial Arbitration: Adopting a Balanced Approach,' 195.

<sup>188</sup> Zhao M, 'Transparency in International Commercial Arbitration: Adopting a Balanced Approach,' 196.

<sup>189</sup> Zhao M, 'Transparency in International Commercial Arbitration: Adopting a Balanced Approach,' 199.

<sup>190</sup> Matthew C, 'Overturning the Presumption of Confidentiality: Should the UNCITRAL Rules on Transparency Be Applied to International Commercial Arbitration?', *International Trade Law Journal*, 2016, 120.

<sup>191</sup> Zhao M, 'Transparency in International Commercial Arbitration: Adopting a Balanced Approach,' 199.

parties' consent.<sup>192</sup> If one or both parties withhold their support, Rule 48(4) of the ICSID Rules expects the Centre to ensure that it publishes excerpts of the tribunal's legal reasoning only.<sup>193</sup> This aims to balance the parties' interests to keep their sensitive information confidential and the need for increased transparency. When it comes to hearings, Rule 37(2) enables the tribunal to exercise its discretionary powers to allow third parties to attend the hearings if both parties consent to it.<sup>194</sup> If either party withhold their consent, the tribunal can grant it if it does not disrupt the said proceedings or unduly burden or unfairly prejudice either party.<sup>195</sup> This again seeks to develop a balance between the two principles by enabling the introduction of amicus curiae but ensuring that the proceedings are not compromised.<sup>196</sup> The ICSID tribunals' approach to the disputes before it reflects the ICSID Arbitration Rules' balancing of transparency and confidentiality. First, they recognize that there is no general duty of confidentiality imposed on the parties.<sup>197</sup> Thus, the tribunals seek to balance transparency and confidentiality by balancing the need to ensure justice and equity are upheld through transparency against the parties' interest and procedural integrity.<sup>198</sup> For example, in the *Biwater Gauff* case, the tribunal held that absence of an express agreement stating the opposite; there was no implied duty of confidentiality. Thus, each tribunal should seek to find a balance between transparency and confidentiality.<sup>199</sup> The tribunal necessitated that this balance is done by balancing the interests of transparency in each case with the parties' interests in procedural integrity.<sup>200</sup> Therefore, the tribunal in this dispute held that the parties

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<sup>192</sup> International Centre for Settlement of Investment Disputes [ICSID], ICSID Convention, Regulations and Rules (2006 – Present), ICSID/15, at 66 (Apr. 2006).

<sup>193</sup> Article 48(4), *ICSID Convention*.

<sup>194</sup> Article 37(2), *ICSID Convention*.

<sup>195</sup> Article 37(2), *ICSID Convention*.

<sup>196</sup> Article 37(2), *ICSID Convention*.

<sup>197</sup> *Metalclad Corporation v United Mexican States*, Award in ICSID Case No.ARB(AF)/97/1 (NAFTA) of 30 August 2000.

<sup>198</sup> *Metalclad Corporation v United Mexican States*, Award in ICSID Case No.ARB(AF)/97/1 (NAFTA) of 30 August 2000.

<sup>199</sup> *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, Procedural Order No.3 in ICSID Case No. ARB/05/22 of 29 September 2006, 114.

<sup>200</sup> *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, Procedural Order No.3 in ICSID Case No. ARB/05/22 of 29 September 2006, 114.

could engage in public discussions of the case in general, however, due to the intense media coverage of this particular dispute the parties should not disclose documents or disclose minutes of the proceedings to ensure that the proceedings are not compromised, and the dispute is not intensified.<sup>201</sup> This approach seeks to ensure that transparency is upheld but not to the extent that it hampers procedural integrity of the proceedings, thus prejudicing the parties' interests.

The UNCITRAL Transparency Rules also seek to establish a balance between transparency and the parties' interests to conduct fair and efficient arbitration proceedings. Article 1(3)(a) recognizes the importance of transparency in the arbitral proceedings by preventing the parties from derogating from the Rules unless expressly permitted to do so by the investment treaty at play.<sup>202</sup> However, Article 1(3)(b) recognizes that there is a great need to balance this need for greater transparency with other interests by enabling the tribunals to use their discretionary powers to, after consulting with the disputing parties, adapt the requirements of any provision in the Rules to that specific dispute.<sup>203</sup> The Rules require tribunals to look at both the public interests associated with transparency and the parties' interest in procedural integrity. This can be seen translating through the Rules and discussions. The Working Group developing these Rules stated that, for example, not all documents could be disclosed and certain sensitive information that would hamper with the parties' interests and cause hindrance to the orderly unfolding of the proceedings should be confidential.<sup>204</sup> Article 3 states that the documents should be released to the public but only after being subjected to qualifications under Article 7, requiring that confidential and sensitive information be withheld. Article 4 and 5 grant third-party submissions but only after the third-party making such a request can prove that it has a substantial interest in the matter and that such submission would not disrupt the arbitral proceedings or cause prejudicial harm to one of the disputing parties. Lastly, Article 6 provides for public hearings, but only after the tribunal is

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<sup>201</sup> *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, Procedural Order No.3 in ICSID Case No. ARB/05/22 of 29 September 2006, 114.

<sup>202</sup> Article 1(3), UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, 2014.

<sup>203</sup> Article 1(3), *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, 2014.

<sup>204</sup> Zhao M, 'Transparency in International Commercial Arbitration: Adopting a Balanced Approach,' 200.

satisfied that the proceedings' procedural integrity will not be compromised. This shows that the Rules are committed to creating a balance.

Although both institutional rules above address only ISDS, this balancing the two can also be used in ICA. The approach above seeks to ensure that transparency needs are addressed while ensuring that the arbitration proceedings' procedural integrity is upheld. This balance is applied on a case-to-case basis as these cases' circumstances and documents vary.

#### **4.3. Legitimate interests of the parties**

The protection of the disputing parties' legitimate interests can ensure that transparency and confidentiality are effectively balanced.<sup>205</sup> For example, the enforcement of an arbitrating party's rights under an arbitration award would be considered a valid excuse for disclosure as it is meant to protect one of the parties' legitimate interests.<sup>206</sup> A party may also seek to disclose an arbitration award or documents from a previous arbitration proceeding to adduce evidence of an opposing party's previous position to raise an estoppel.<sup>207</sup> In the *AEGIS case* discussed in Chapter 2, the Reinsurance Company sought to disclose details of an award from a previous arbitration between the two parties to raise a plea of estoppel.<sup>208</sup> AGEIS sought to bar this disclosure because of the confidentiality obligations between the parties.<sup>209</sup> Thus, before the Privy Council, the issue was whether a confidential agreement between the two arbitrating parties could bar reliance on the arbitral award as evidence in the second arbitration.<sup>210</sup> The council held that the principle of issue estoppel meant that the parties to proceedings were bound by an earlier arbitral award on the same problem and that

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<sup>205</sup> Michael H, Chung K, 'Defining the indefinable; Practical Problems of Confidentiality in Arbitration' Kluwer Law International, 2018, 38.

<sup>206</sup> Michael H, Chung K, 'Defining the indefinable; Practical Problems of Confidentiality in Arbitration' 38.

<sup>207</sup> Michael H, Chung K, 'Defining the indefinable; Practical Problems of Confidentiality in Arbitration' 38.

<sup>208</sup> Associated Electric and Gas Insurance Services Ltd. (AEGIS) v. European Reinsurance Co. of Zurich, [2003] 1 W.L.R. 1041 (P.C.)

<sup>209</sup> Associated Electric and Gas Insurance Services Ltd. (AEGIS) v. European Reinsurance Co. of Zurich, [2003] 1 W.L.R. 1041 (P.C.)

<sup>210</sup> Associated Electric and Gas Insurance Services Ltd. (AEGIS) v. European Reinsurance Co. of Zurich, [2003] 1 W.L.R. 1041 (P.C.)

confidentiality was immaterial.<sup>211</sup> The Privy Council so considered that issue estoppel was ‘a species of the enforcement of the rights given by the award just as much as it would be a cause of action estoppel’ even though it was a rule of evidence than a mechanism for enforcement as such.<sup>212</sup> Therefore, this case brings about valid criteria that can be used to balance confidentiality and transparency. If confidentiality is seen not to protect the interests of the arbitrating parties effectively, then transparency in that circumstance prevails.

This approach to ensuring a balance between confidentiality and transparency can be effectively used to create a uniform application of the two cardinal principles when an interested party requests increased transparency in one way. For example, suppose one of the interested parties is requesting the arbitral tribunal to include third-party submissions to effectively prove their case. In that case, the tribunal will determine the request by analysing whether it serves a legitimate interest. Thus, the third-party has to show substantive and legitimate interest and the extent to which its submissions will assist the tribunal in determining an issue in the proceedings by bringing a different perspective to the disputing parties.

#### **4.4. The ‘work-product’ doctrine**

This doctrine is rooted in the United States civil law. It seeks to provide qualified protection of the work product of legal representatives during an ongoing case. It provides that disclosure can be compelled under two conditions; the first condition can be defined as the “substantial need principle” and it provides that a party has to demonstrate that there is a significant need for the material sought and the second condition is the “undue hardship principle” which requires a party to prove that they cannot acquire that information elsewhere without extreme hardship.<sup>213</sup> These two conditions articulated in *Hickman v Taylor* could be used to provide for a more practical alternative to the currently unpredictable practice of

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<sup>211</sup> Associated Electric and Gas Insurance Services Ltd. (AEGIS) v. European Reinsurance Co. of Zurich, [2003] 1 W.L.R. 1041 (P.C.)

<sup>212</sup> Associated Electric and Gas Insurance Services Ltd. (AEGIS) v. European Reinsurance Co. of Zurich, [2003] 1 W.L.R. 1041 (P.C.)

<sup>213</sup> Poorooye A and Feehily R, ‘Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance’ 316.



confidentiality and transparency in IA.<sup>214</sup> This doctrine is meant to create a fair balance between confidentiality and transparency in arbitral proceedings regarding mainly disclosure of documents which is an essential facet of transparency.

The disclosure of documents is one of the main requests a tribunal receives from the arbitrating or interested parties. Thus, this doctrine tries to deal with this important facet and offer an effective solution that can ensure the rule of law is upheld by doing away with arbitrary decisions made by arbitrators on this matter.<sup>215</sup> Furthermore, the doctrine will also help ensure uniformity in the various jurisdictions across the world, thus serving as the foundation to achieve international consensus when applying transparency to arbitration.<sup>216</sup>

Although this doctrine will mainly help create a balance between the two principles when discussing disclosure of documents, it can create harmony between other facets of transparency and confidentiality.<sup>217</sup> For example, suppose one of the disputing parties or an interested third-party request for the hearings to be open to the public in ICA. In that case, they need to show what substantial need will be achieved. They have to prove that the substantial need achieved through the holding of the public proceedings cannot be achieved through other means unless the party making the request undergoes undue hardship. This same criterion can also be used when analysing whether or not to allow third-party submissions in the proceedings by requiring the party making such a request to prove a legitimate and substantive need. This dissertation recognizes that Transparency in IA is rooted in public policy matters while disclosure in attorney-client privilege (which this doctrine is based on) is not. However, the two-prong test established by the doctrine can effectively determine when confidentiality should prevail over transparency and vice versa. Thus, the doctrine requires tribunals to balance the probative value of the transparency

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<sup>214</sup> Poorooye A and Feehily R, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' 316.

<sup>215</sup> Christoph Henkel, 'The Work-Product Doctrine as a Means toward a Judicially Enforceable Duty of Confidentiality in International Commercial Arbitration' *North Carolina Journal of International Law*, 2012. 1060.

<sup>216</sup> Christoph Henkel, 'The Work-Product Doctrine as a Means toward a Judicially Enforceable Duty of Confidentiality in International Commercial Arbitration' 1060.

<sup>217</sup> Poorooye A and Feehily R, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' 316.

request sought by a party against the prejudicial effect of this request.<sup>218</sup> If its potential for prejudice overshadows the request's probative value, the tribunal will deny the request and vice-versa.

There are differences in how this doctrine will apply in ICA and ISDS. In ICA, the arbitral tribunals can place a higher burden of proof on the parties seeking to establish this doctrine.<sup>219</sup> This is because, in ICA, the dispute is between two private parties in many circumstances.<sup>220</sup> Therefore, to prove great substantial need by a third party would be difficult. However, in ISDS, many public interest matters are involved, and thus substantial need can be easily proven. Furthermore, ICA proceedings usually seek to include confidentiality as the default, thus, to protect the arbitrating parties' interest, a higher degree of burden of proof should be placed on a party seeking to enforce transparency. When applying this doctrine to ISDS, the threshold for proving the two-part test should be lower. This is because, in ISDS, there are a lot of public interest matters involved.

#### **4.5. Conclusion**

As discussed throughout the dissertation, confidentiality and transparency have a strenuous relationship within the arbitration realm. A long-overdue need to develop a balance between the two to continue attracting parties to arbitration while ensuring equity and justice is upheld. However, there is no need to find a strict and perfect balance between the two concepts.<sup>221</sup> This is because a quest to achieve this will be short-lived. After all, the line of actual contact between the two principles is always changing and moving.<sup>222</sup> Therefore, both principles must respond as active principles based on the context and the kind of proceedings before the arbitral tribunal, the subject matter at issue, and the relevant facts inherent to the appropriate proceeding.

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<sup>218</sup> David H and Michael D, '*Commercial Arbitration - Does it Really Have a Future?*' 117.

<sup>219</sup> David H and Michael D, '*Commercial Arbitration - Does it Really Have a Future?*' 117.

<sup>220</sup> Christoph Henkel, 'The Work-Product Doctrine as a Means toward a Judicially Enforceable Duty of Confidentiality in International Commercial Arbitration' 1104.

<sup>221</sup> Poorooye A and Feehily R, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' 323.

<sup>222</sup> Poorooye A and Feehily R, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' 323.

This chapter proposes using the two-prong test in the work-product doctrine that would require parties to prove a substantial need and undue hardship before the request for a facet of transparency to be achieved is granted. Also, the UNCITRAL Transparency Rules and ICSID Rules' approach, which weights the transparency request against the effects it would have on the procedural integrity of the proceedings and the interests of the arbitrating parties, is considered a viable reconciliation method by this Chapter. Besides, determining whether a transparency request can achieve one of the parties' legitimate interests is also proposed. This will ensure that an arbitrating party's request for transparency will not be granted without first applying a well-reasoned test.

## **5. RECOMMENDATIONS AND CONCLUSION**

### **5.1.Introduction**

This chapter discusses the findings, recommendations and conclusion of the study. The purpose of the study was to restrict the place of transparency and confidentiality in IA. The dissertation sought to try and find a well-balanced solution that ensured both concepts would be able to coexist in arbitration proceedings effectively. This would ensure that arbitration would retain one of its main advantages: confidentiality in appropriate cases while guaranteeing due process and the rule of law is upheld through transparency.

### **5.2.Findings**

#### **5.2.1.The place of confidentiality**

Confidentiality is seen as one of the most significant advantages of arbitration. Many disputants, especially commercial parties, usually opt out of litigation and choose arbitration due to the proceedings' private and confidential nature. The study found that a large percentage of the international community believed that confidentiality was inherent in arbitration and could not be excluded from the proceedings. This is due to the benefits confidentiality offers the arbitral proceedings. However, although it is agreed that confidentiality is vital to the arbitration process, there is no uniform application of the principle in the arbitration proceedings across jurisdictions.

Some jurisdictions offer an implied duty of confidentiality that requires parties to adhere to strict confidentiality standards as soon as arbitration proceedings start whether or not it was agreed upon in their arbitration process. Other jurisdictions, on the other hand, offer an express duty of confidentiality. These jurisdictions only uphold confidentiality in arbitration proceedings where the parties expressly agreed to it in their arbitration contracts. Lastly, some jurisdictions offer confidentiality in Statute to not leave it entirely to the parties.

Arbitration institutions also do not apply this principle uniformly. For example, the ICC Rules do not outwardly provide for the duty of confidentiality and leaves it entirely up to the parties. However, the LCIA Rules provide for a general implied duty of confidentiality which is to be implied in the arbitration contract. Lastly, the HKIAC Rules also give the duty of

confidentiality to a stricter level than the LCIA Rules. The HKIAC Rules places a higher duty of confidentiality on the parties to the proceedings and even prohibits them from disclosing the said disputes' existence.

This inconsistent application of confidentiality arises from the fact that while a sector of the international legal community believes that confidentiality is an inherent feature of arbitration and should always be upheld, the other sector believes that the arbitration process should be more open and transparent ensure equity and justice. Therefore, this study found that the place of confidentiality in the international realm has not been defined and effectively outlined.

### 5.2.2.The parameters of transparency

Transparency is a relatively new concept in arbitration. This is because confidentiality was always an unspoken rule of arbitration proceedings. However, the international community started pushing for more transparency in IA proceedings to legitimize the process and ensure the rule of law is upheld. This dissertation found that although transparency is now gaining traction in the arbitration realm, its parameters have not been defined primarily in ICA. In ISDS, transparency is generally more accepted because it deals with public interest more than ICA. This has led to the passing of the UNCITRAL Rules on Transparency, which ease ISDS transparency. However, these rules do not apply to ICA. Furthermore, the Transparency Rules have an opt clause for states and investors who want to bar these Rules from applying to their proceedings.

This study finds that although transparency is increasingly embraced in both spheres of IA, confidentiality is considered more important. Furthermore, the lack of proper Rules on Transparency continues to ensure that it is trumped over during arbitral proceedings.

### 5.2.3.The dire need for their reconciliation

Confidentiality and transparency have a strenuous relationship in arbitration. Thus, to guarantee a balance that upholds equity and justice through transparency while still attracting commercial partners to arbitration through the advantages offered by confidentiality, there needs to be some sort of reconciliation between the two. However, this study finds that these two principles do not have to be described as competing values as they can coexist in practice

and the relevant arbitration proceedings. However, this study finds no need to find a perfect balance between the two principles. This is because such a quest will be short-lived as the line of contact between the two cardinal principles is an ever moving and changing one. These concepts should behave as active principles based on the circumstances and the kind of arbitral proceedings in question. The subject matter is arbitrated over and the facts implicit to the relevant proceeding. Therefore, this study recognises a dire need to reconcile these two principles through organic means that do not curtail arbitration development by enabling the dispute mechanism to effectively and efficiently solve disputes. Due to this need, the dissertation proposes several tools meant to realize this reconciliation goal.

### **5.3.Recommendations**

#### 5.3.1.Reconciliation through the ‘work-product’ doctrine

This dissertation recommends the use of the work-product doctrine to reconcile transparency and confidentiality in arbitration proceedings. The integration and adoption of the work-product doctrine within the arbitration rules will increase IA predictability. This doctrine will help define uniform limits for otherwise undefined or very broadly defined exceptions to confidentiality in ICA. It also can render arbitral practices more predictable and to cure many shortcomings of the arbitral process. The substantial need and undue hardship tests have proven their worth in protecting work product litigation and can significantly improve ICA. Therefore, the arbitration tribunals will be able to use a well valid two-prong test to determine whether a transparency request should be granted or not.

#### 5.3.2.Reconciliation through the approach provided by the ICSID and UNCITRAL Rules on Transparency Institutional Rules

The ICSID and UNCITRAL Rules on Transparency only apply to ISDS. However, the approach they take in reconciling transparency and confidentiality can be effectively used in both realms of arbitration. These rules harmonize the two principles and decide which one is upheld over the other by balancing the arbitrating parties' rights and interests to ensure that the procedural integrity over their arbitral proceedings is not compromised. For example, suppose a party is seeking to discuss details of the arbitral proceedings in public. In that case, they have to show that the request will not compromise the case's procedural integrity. In

discussing the public issue will bring a lot of unnecessary attention to the case that would lead to the dispute's worsening and disruption of the arbitral proceedings, the request will be denied. This reconciliation method can be efficient because it does not intend to be set in stone and apply only one way and is thus flexible.

#### 5.3.3. Reconciliation through the 'legitimate interest' test

The use of the legitimate interest test is also one approach this study recommends for the reconciliation of transparency and confidentiality. This test dictates that for a request seeking increased transparency where the confidentiality is the default or vice versa, the party seeking such as a request has to show that it will help fulfil a legitimate interest if the request is upheld. This test further dictates that the party's legitimate interest must be one of reasonable necessity that is urgent. Therefore, the request should not be merely helpful in achieving the interest, but reasonably necessary to its realization. This study finds this approach would help achieve the essential balance between the two principles while prioritizing the two parties' needs and interests before it first.

#### 5.3.4. Harmonization of the approach to confidentiality across several jurisdictions

The disparity in jurisdictional treatment of confidentiality should be managed to increase predictability. Some jurisdictions like England recognize an implied duty of confidentiality, other jurisdictions such as Australia reject such an approach and advocate for express confidentiality agreements. This kind of practice results in inconsistency and unpredictability. Considering the legal and jurisprudential variances between jurisdictions, moving toward a more uniform treatment of confidentiality in IA would require an unprecedented level of inter-jurisdictional cooperation as well as elaborate amendments to IA rules. Therefore, countries with the aid of arbitral institutions should find a consistent way to apply confidentiality to aid in the reconciliation of confidentiality and transparency.

#### 5.3.5. Application of the UNCITRAL RULES to ICA

UNCITRAL Transparency has handled different facets of transparency and tried to create a balance. For example, the Rules provide for the awards' publication but dictates that all confidential and sensitive information be redacted. The tribunal can also grant third-party requests to make submissions in the case; however, the party has to show a substantive

interest in the case. Furthermore, the Rules have an 'opt-out' mechanism that enables ICA parties to exclude these Rules' application cases deemed highly confidential. This study proposes the modification and extension of the Transparency Rules to ICA. The application of the Rules with the 'opt-out' clause for this regime would serve the interests of transparency objectives, whilst not defeating private parties' interests in ICA. Therefore, this Rules should be extended because it would be beneficial for the system to embrace the shift towards transparency that has been primarily recognised as desirable in ISDS.

#### **5.4.Conclusion**

As discussed in this dissertation, confidentiality and transparency have had an arduous relationship in arbitration. Therefore, there has been a great need to formulate a balance between the two that guarantees that States and other legal persons are attracted to arbitration while ensuring equity and justice are upheld. Although the two concepts are seen as opposing and always in conflict, they can coexist in practice.



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