

Transparency in International Commercial Arbitration: Adopting a Balanced Approach

MARY ZHAO*

The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration entered into force on October 18, 2017, and marks a step in the growing international effort to increase transparency in international arbitration. International arbitration is a commonly preferred means of resolving international disputes, including investor-state disputes arising from the North American Free Trade Agreement and international commercial disputes arising from private contracts. While procedural rules governing investor-state arbitration include increasingly detailed transparency standards, those governing international commercial arbitration at present generally do not stipulate transparency obligations.

This Article argues that international commercial arbitration should adopt transparency standards similar to those governing investor-state arbitrations. In pressing for transparency standards in investor-state arbitration, scholars have emphasized the presence of public interests in investor-state disputes. This Article reconsiders the traditional view that public interests are limited to investor-state disputes. By analyzing specific international commercial arbitration disputes, it shows that although international commercial arbitration does not involve the state as a disputing party, international commercial arbitration nonetheless involves some of the same types of public interest issues. This Article proposes adopting a balance between transparency and confidentiality in international commercial arbitration, establishing public disclosure as the general rule while allowing exclusions for confidential information. As a concrete step toward establish higher transparency standards, this Article proposes the systematic publication of arbitral awards.

* Graduate Fellow, Stanford Center on International Conflict and Negotiation (2017-2018); J.D., M.Sc. Stanford University. I would like to express my gratitude to Professor Alan Sykes and Professor Janet Martinez for their thoughtful guidance and feedback on the earlier drafts. I am grateful to the *Max-Planck-Institut zur Erforschung multireligiöser und multiethnischer Gesellschaften*, Professor Ayelet Shachar and Professor Ran Hirschl and my colleagues there, for the experience and enlightening conversations that allowed me to finish this article. I would also like to thank my colleagues Luis Bergolla, Earl Dolera, Haemin Lee, Jeffrey Chieh Lo, Yeghishe Kirakosyan, and Sidhant Kumar in the UNCITRAL policy practicum at Stanford Law School for sharing their thoughts on the subject. Finally, I am grateful for my experience as a legal intern in UNCITRAL, Working Group II, in fall 2016 and the opportunity there to exchange thoughts with my colleagues Eleanne Hussey, Victor Kasatkin, Tadiwa Mandinyenya, and Emanuele Marchi.

I.	INTRODUCTION.....	178
II.	THE VALUE OF TRANSPARENCY IN INTERNATIONAL COMMERCIAL ARBITRATION.....	184
A.	<i>Democratic Deficit in Disputes Involving Public Interests</i>	185
B.	<i>Public Interests in International Commercial Arbitration</i>	188
1.	<i>Public Order and Corruption</i>	190
2.	<i>Bad Faith Actions Endangering Public Health</i>	191
3.	<i>Sale of Harmful Goods</i>	193
III.	BALANCING TRANSPARENCY AND CONFIDENTIALITY INTERESTS IN EXISTING PROCEDURAL RULES	195
A.	<i>Institutional Rules</i>	196
B.	<i>International Investment Agreements</i>	202
C.	<i>States' Model International Investment Agreements</i>	204
D.	<i>National Legislation</i>	205
IV.	THE SYSTEMATIC PUBLICATION OF ARBITRAL AWARDS	209
A.	<i>Consistent Decisions on Similar Legal Issues</i>	210
B.	<i>Independence and Impartiality of Arbitrators</i>	212
C.	<i>Selection of Arbitrators with Specialized Knowledge</i>	215
V.	CONCLUSION	217

I. INTRODUCTION

The entry into force of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention) on October 18, 2017,¹ marks a step in international efforts to address the issue of transparency in international arbitration.² In response to the growing recognition of transparency in international arbitration, the United Nations Commission on International Trade Law (UNCITRAL)³ had requested that the UNCITRAL Secretariat during its Sixty-Third session in 2008 undertake preliminary research on the topic of transparency in treaty-based investor-state arbitration.⁴ The Commission noted that the topic was a matter of priority that should be dealt with immediately after the completion of the revision of the UNCITRAL Arbitration Rules for international arbitration.⁵

International arbitration is a commonly preferred means of resolving international commercial disputes and investor-state disputes.⁶ It is a dispute resolution process by which parties consensually submit an international dispute⁷ to a non-

1. Judith Knieper, *The UNCITRAL Transparency Standards in ISDS As a Result of Multilateral Negotiation*, in EUROPEAN INVESTMENT LAW AND ARBITRATION REVIEW 155, 157 (Loukas Mistelis & Nikos Lavranos eds., 2016). The Mauritius Convention is one of the three legal instruments in the U.N. Commission on International Trade Law (UNCITRAL) Transparency Standards. The other two instruments are the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (Transparency Rules) and the Transparency Registry. *Id.* at 157; *see also* United Nations Convention on Transparency in Treaty-based Investor-State Arbitration art. 1(1)-2(1)2, Dec. 10, 2014, Reg. No. 54749 (entered into force Oct. 18, 2017) [hereinafter Mauritius Convention on Transparency], adopted by G.A. Res. 69/116 (Dec 10, 2014) in U.N. GAOR, 69th Sess., 68th plen. mtg., U.N. Doc. A/Res/69/116 (Dec. 18, 2014).

2. Matthew Carmody, *Overturning the Presumption of Confidentiality: Should the UNCITRAL Rules on Transparency Be Applied to International Commercial Arbitration?*, 19 INT'L TRADE & BUS. L. REV. 96, 120 (2016).

3. G.A. Res. 2205 (XXI) (Dec. 17, 1966). UNCITRAL is the core legal body of the U.N. system in the field of international trade law. Its mandate is to further the progressive harmonization and unification of the law of international trade. *Id.* at Annex I.

4. U.N. Comm'n on Int'l Trade Law, Rep. on the Work of Its Forty-First Session, U.N. Doc. A/63/17, at 61 ¶ 314 (2008) [hereinafter U.N. Doc. A/63/17].

5. *Id.* at 60 ¶ 314.

6. GARY BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 9 (2012).

7. G.A. Res. 40/72 (Dec. 11, 1985) [hereinafter UNCITRAL Model Law], adopted in U.N. GAOR, 40th Sess., 112th plen. mtg., U.N. Doc. A/40/17 (Dec. 11, 1985), amended by G.A. Res. 61/33 (Dec. 4, 2006), adopted in U.N. GAOR, 61st Sess., 64th plen. mtg., at art. 1(3), U.N. Doc. A/61/17 (Dec. 4 2006). An arbitration is international if (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; (b) one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration, (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely

governmental decision-maker for a binding decision in accordance with neutral, adjudicatory procedures.⁸ International arbitration can be conducted either pursuant to institutional rules or ad hoc.⁹ Institutional rules provide pre-existing arbitration rules and an appointing authority for constituting the arbitral tribunal, as well as for overseeing other procedural matters.¹⁰ Ad hoc international arbitration is subject only to the parties' arbitration agreement and applicable national arbitration legislation.¹¹ Two types of international arbitration are international commercial arbitration, arising from commercial relationships between private parties,¹² and investor-state arbitration, arising from multilateral or bilateral investment treaties between states.¹³ Investor-state arbitration generally involves the foreign investor filing claims against the host state.¹⁴

The United States plays an important role in international arbitration in several aspects. It is a signatory to over forty bilateral and multilateral treaties, including the North American Free Trade Agreement (NAFTA),¹⁵ and it acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).¹⁶ In 2017, the total claims in the cases filed with the international division of the American Arbitration Association, the International Centre for Dispute Resolution (ICDR), amounted to \$6.33 billion.¹⁷ In 2017 the Department of Commerce designated ICDR to administer the Annex I Binding Arbitration Program for the E.U.-U.S. Privacy Shield Framework, which is a compliance

connected; or (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country. *Id.*

8. BORN, *supra* note 6, at 4.

9. *Id.* at 27.

10. *Id.*

11. *Id.* at 28.

12. *See* UNCITRAL Model Law, *supra* note 7, at 1 n.2. The commercial nature of international commercial arbitration is given a wide interpretation to cover matters arising from all commercial relationships, including construction of works, trade transaction for goods or services, distribution agreement, exploitation agreement, and investment. *Id.*

13. BORN, *supra* note 6, at 41.

14. *Id.*

15. North America Free Trade Agreement (NAFTA) art. 1101-14, Can.-Mex.-U.S., Dec. 17, 1992, 107 Stat. 2006, 32 I.L.M. 289 & 605 [hereinafter NAFTA Investor-State Arbitrations] (entered into force Jan. 1, 1994).

16. Status Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Oct. 6, 1958, 330 U.N.T.S. 3 [hereinafter New York Convention] (entered into force June 7, 1959).

17. AM. ARBITRATION ASS'N, ANNUAL REPORT & FINANCIAL STATEMENTS 20 (2016), https://www.adr.org/sites/default/files/document_repository/AAA_AnnualReport_2017.pdf.

mechanism for protecting personal data that mandates international arbitration as the dispute resolution process.¹⁸

Confidentiality has traditionally been a central feature of international arbitration.¹⁹ Parties to the dispute generally view confidentiality and privacy as appealing features of international arbitration.²⁰ International arbitration affords parties privacy by precluding the public from observing and participating in the dispute resolution process, allowing only the disputing parties and the tribunal to access submissions and proceedings.²¹ Arbitral awards are generally not published.²² Confidentiality transcends privacy in that it precludes the disclosure of information pertaining to the arbitration proceedings.²³ Private parties may choose arbitration to protect their business secrets and public image.²⁴ States may choose arbitration to avoid liabilities from disclosing information about their administrative and regulatory structures.²⁵

18. *Id.* at 21.

19. KYRIAKI NOUSSIA, CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION: A COMPARATIVE ANALYSIS OF THE POSITION UNDER ENGLISH, US, & GERMAN LAW 21 (2010); Christina Knahr & August Reinisch, *Transparency Versus Confidentiality in International Investment Arbitration – The Bivater Gauß Compromise*, 6 LAW & PRAC. INT'L CTS. & TRIBUNALS 97, 109 (2007); *see also* U.N. Comm'n on Int'l Trade Law, Rep. of Working Group II on Its Fifty-Third Session, U.N. Doc. A/CN.9/WG.II/WP.159/Add.1, at 12 (2010) [hereinafter 2010 Int'l Trade Law Rep. I] (“Given the confidentiality of arbitration, we do not consider it appropriate to impose provisions of publicity and transparency on treaty-based settlement of investor-State investment disputes.”); *id.* at 3 (“The purpose of the principle of confidentiality, which is one of the basic procedural principles of arbitration, is to protect the parties’ trade secrets and business reputations.”).

20. 2010 Int'l Trade Law Rep. I, *supra* note 19, at 11 (2010) (“[I]t is common ground that confidentiality is one of the most appealing and advantageous traits of arbitral instances. This point of view is still very much present in relation to arbitration procedures.”); *accord* BORN, *supra* note 6, at 9, 15.

21. NOUSSIA, *supra* note 19, at 25.

22. BORN, *supra* note 6, at 15.

23. NOUSSIA, *supra* note 19, at 26. Privacy limits the public’s ability to access information relating to the arbitral dispute, whereas confidentiality prevents the parties and the tribunal from disclosing the information. Hence, confidentiality transcends privacy by imposing an element of secrecy. *Id.* at 25-26; *see also* U.N. Comm’n on Int’l Trade Law, Rep. of Working Group II on Its Fifty-Fifth Session, U.N. Doc. A/CN.9/WG.II/WP.166/Add.1, at 3 (2012) [hereinafter 2012 Int’l Trade Rep. I] (“[C]onfidential and sensitive information’ has been defined in general terms as ‘any sensitive factual information that is not available in the public domain.’”) (internal citation omitted).

24. Daniel Barstow Jr. Magraw & Niranjali Manel Amerasinghe, *Transparency and Public Participation in Investor-State Arbitration*, 15 ILSA J. INT’L & COMP. L. 337, 354 (2009); Knahr & Reinisch, *supra* note 19, at 109; NOUSSIA, *supra* note 19, at 25 (listing other advantages such as the control of procedures, ability to select arbitrator, finality of arbitral award, and costs).

25. Samuel Levander, *Resolving Dynamic Interpretation: An Empirical Analysis of the UNCITRAL Rules on Transparency*, 52 COLUM. J. TRANSNAT’L L. 506, 514 (2014).

By not being obligated to publicly comment on stages of the dispute, the parties avoid politicizing the dispute and may be more inclined to settle.²⁶

In the investor-state arbitration realm, there has been growing discussions in recent decades that reconsider the role of confidentiality, especially with respect to other interests such as transparency.²⁷ When most of the international investment agreements were concluded in the early 1990s, transparency was not a prevalent issue.²⁸ With the increase of investor-state disputes and the conclusion of NAFTA in 1992, discussions about procedural transparency in investor-state arbitration increased.²⁹ The 1995 landmark Australian decision, *Esso v. Plowman*, denied the previously unchallenged view that confidentiality is an “essential attribute” of arbitration.³⁰ NAFTA expressly allows the public disclosure of document submissions.³¹ The 2012 U.S. Model Bilateral Investment Treaty (U.S. Model BIT) requires public disclosure of submissions and of the arbitral award.³²

Concerns about the legitimacy of the investor-state arbitration regime was a primary motivation for implementing higher transparency standards in investor-state arbitration.³³ Since investor-state disputes involve the state and subject matter such as

26. Carmody, *supra* note 2, at 163; Knahr & Reinisch, *supra* note 19, at 109-10.

27. Alberto Malatesta, *Confidentiality in International Commercial Arbitration*, in *THE RISE OF TRANSPARENCY IN INTERNATIONAL ARBITRATION* 39, 42-43 (Alberto Malatesta & Rinaldo Salì eds., 2013).

28. U.N. Comm’n on Int’l Trade Law, Rep. of Working Group II on Its Fifty-Third Session, U.N. Doc. A/CN.9/WG.II/WP.160, at 4 ¶ 5 (2010) [hereinafter 2010 Int’l Trade Rep. II]

29. N. Jansen Calamita, *Dispute Settlement Transparency in Europe’s Evolving Investment Treaty Policy*, 15 J. WORLD INV. & TRADE 645, 653 (2014).

30. Malatesta, *supra* note 27, at 40 (internal citation omitted).

31. 2010 Int’l Trade Rep. II, *supra* note 28, at 8 ¶ 17 (“(a) Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration and, subject to the application of Article 1137 (4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal.”) (internal citation omitted).

32. U.S. TRADE REPRESENTATIVE, U.S. MODEL BILATERAL INVESTMENT Treaty art. 29(1) (2012) [hereinafter U.S. MODEL BIT] (“[S]ubject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Party and make them available to the public.”)

33. U.N. Comm’n on Int’l Trade Law, Rep. of Working Group II on Its Fifty-Fourth Session, U.N. Doc. A/CN.9/717, at 8-9 ¶ 25 (2011) [hereinafter 2011 Int’l Trade Rep. II] (“[T]ransparency was also seen as an important step to respond to the increasing challenges regarding the legitimacy of international investment law and arbitration as such.”); *see also* Levander, *supra* note 25, at 511 n.15, 512.

sustainable development, public governance, and public health,³⁴ they were seen to have public interest implications. Resolving disputes that involve public interests in private proceedings raised legitimacy concerns.³⁵ Transparency is a means to strengthen the legitimacy of the system by upholding the public's right to have input into matters of public interest.³⁶ Transparency promotes the rule of law, good governance, due process, and the right of access to information.³⁷ Transparency was seen as an important step to respond to the increasing challenges to the legitimacy of investor-state arbitration.³⁸

Despite the rise in transparency standards in investor-state arbitration, procedural rules governing international commercial arbitration at present generally do not expressly address transparency issues.³⁹ This is in part due to the view that while investor-state arbitration involves public interests, the private nature of the disputing parties in international commercial arbitration disputes precludes the involvement of public interests.⁴⁰

34. See U.N. Conference on Trade & Development, *Transparency – UNCTAD Series on Issues in International Investment Agreements II*, 8, U.N. Doc. UNCTAD/DIAE/IA/2011/6 (2012)

[hereinafter *2012 UNCTAD Series*]; Levander, *supra* note 25, at 513; Magraw & Amerasinghe, *supra* note 24, at 350.

35. See *2012 UNCTAD Series*, *supra* note 34, at 1-2, 8; Levander, *supra* note 25, at 513 (“The lack of transparency in international investment arbitration is especially problematic when disputes under BITs implicate vital public interests.”).

36. See *Methanex Corp. v. U.S.*, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae, NAFTA Chap. 11 Ad Hoc Tribunal (UNCITRAL), ¶ 49 (Jan. 15, 2001) (“[The] arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive.”); see also Magraw & Amerasinghe, *supra* note 24, at 348-50 (“By their very nature, investment agreements raise the types of environmental and developmental issues that states are beginning to make provisions for, in terms of transparency and public participation.... Transparency in arbitrations would alleviate some of these problems, because at the very least, the existence of a dispute would be public knowledge.”).

37. See U.N. Comm’n on Int’l Trade Law, Rep. of Working Group II on Its Fifty-Third Session, U.N. Doc. A/CN.9/712, at 7 ¶¶ 16-17, 8-9 ¶ 25, 21-22 ¶ 94 (2010) [hereinafter *2010 Int’l Trade Rep. III*].

38. *Id.*

39. Avinash Poorooye & Ronan Feehily, *Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance*, 22 HARV. NEGOT. L. REV. 275, 310 (2017); see also Magraw & Amerasinghe, *supra* note 24, at 342 (“[T]he private [arbitral] institutions tend to be less transparent and open to public participations. This is hardly surprising, since private institutions were created with private commercial disputes in mind...one of the major draws of arbitration in the commercial field was...the lack of transparency due to the ability of the parties to decide most aspects of the process.”).

40. See *2010 Int’l Trade Rep. I*, *supra* note 20, at 3 (“This principle [of confidentiality] takes on particular significance in investor-State arbitration, since cases often involve matters of public order and national interests of the State in which the investment was made.”); Carmody, *supra* note 2, at 137; Magraw & Amerasinghe, *supra* note 25, at 342

Discussions about implementing higher transparency standards in investor-state arbitration have distinguished investor-state arbitration from international commercial arbitration by focusing on the identity of the parties to the dispute rather than on the nature of the substance of the dispute.⁴¹ Past work that does discuss the substance of the dispute generally only considers the presence of public interests in the context of domestic courts' rulings of arbitrability or as a hypothetical possibility in international commercial arbitration.⁴²

This Article analyses specific past arbitral disputes in international commercial arbitration to show that international commercial arbitration does in fact involve some of the same public interests as those in investor-state arbitration. This Article also considers the recent developments of various sources of procedural law governing international arbitration to suggest that international commercial arbitration can incorporate transparency provisions into existing rules without compromising the parties' interests in protecting confidential information.

Part I analyses the value of introducing higher transparency standards in international commercial arbitration. First, this Part discusses the role of transparency in addressing democratic deficit in the investor-state arbitration context. In doing so, it shows that transparency serves to enhance the legitimacy of the system by upholding the public's right to access information in disputes involving public interests. Next, this Part reconsiders the traditional view that public interest issues are limited to investor-state arbitration. By analyzing specific international commercial

("Partly because [commercial disputes] were perceived as being purely private, public interest did not play a key role...").

41. 2011 Int'l Trade Rep. I, *supra* note 34, at 24 ¶ 110 ("[I]t was said that treaty-based investor-State arbitration involved, by nature, public interest because such arbitration implicated a State's exercise of discretionary powers."); Carmody, *supra* note 2, at 147.

42. See Robert D. Argen, *Ending Blind Spot Justice: Broadening the Transparency Trend in International Arbitration*, 40 BROOK. J. INT'L L. 207, 235 (2014) (citing a United States Supreme Court decision on the arbitrability of antitrust claims); GARY B. BORN, 2 INTERNATIONAL COMMERCIAL ARBITRATION 2828 (2009) (explaining that domestic courts may refuse to enforce arbitral awards for violation of public policy in the country where the court sits); Carmody, *supra* note 2, at 170 ("[I]nternational commercial arbitrations between private actors clearly have the *potential* to impact on issues of public interest...") (emphasis added); see also Krista Nadakavukaren Schefer, *Article 1 Scope of application*, in TRANSPARENCY IN INTERNATIONAL INVESTMENT ARBITRATION: A GUIDE TO THE UNICTRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION 28, 44 (Dimitrij Euler et al. eds., 2015) (pointing to the 2007 financial crisis as an example of the impact of high value transactions by private corporations on state policies); Poorooye & Feehily, *supra* note 39, at 312 (citing Argen, Carmody, and Born, *supra*, in referring to substantive areas that have the potential of raising public interest concerns).

arbitration disputes, it shows that international commercial arbitration involves some of the same types of public interest issues that are commonly perceived to be exclusive to investor-state arbitration. Part I suggests that transparency serves the same value of enhancing legitimacy in the international commercial arbitration context as it does in the investor-state arbitration context.

Part II considers the manner in which international commercial arbitration can incorporate transparency provisions by analyzing recent developments relating to transparency and confidentiality in existing sources of procedural law governing international arbitration. This Part compares the manner in which institutional rules, international investment agreements, states' model international investment agreements, and states' national legislation address specific aspects of procedural transparency.

Part III focuses on analyzing the role of one particular aspect of transparency, the publication of arbitral awards, in establishing higher transparency standards in international commercial arbitration. This Part considers the role of the publication of arbitral awards in facilitating consistent arbitral decisions, upholding the independence and impartiality of arbitrators, and enhancing the parties' experience in the dispute resolution process.

This Article proposes that international commercial arbitration adopt higher transparency standards similar to those of investor-state arbitration, most recently the UNCITRAL Rules on Transparency. The presence of public interests in international commercial arbitration disputes shows a similar need of addressing democratic deficit as that which motivated the adoption of higher transparency standards in investor-state arbitration. The balance between transparency and confidentiality in current sources of procedural law governing investor-state arbitration suggests a manner for incorporating transparency provisions into international commercial arbitration rules without compromising disputing parties' interests in protecting confidential information. Finally, this Article proposes the publication of arbitral awards as a concrete step towards establishing higher transparency standards that contributes to strengthening the legitimacy of the international commercial arbitration system.

II. THE VALUE OF TRANSPARENCY IN INTERNATIONAL COMMERCIAL ARBITRATION

This Part analyses the value of transparency in enhancing the legitimacy of the international commercial arbitration system. First,

Section A considers the discussions in the context of treaty-based investor-state arbitration about the role of transparency in addressing democratic deficit. Section A shows that transparency addresses democratic deficit concerns by upholding the public's right to access information involving public interest issues. Next, Section B reexamines the traditional view that public interest issues are limited to investor-state arbitration. Section B shows that public interest concerns are also present in international commercial arbitration disputes. Specifically, Section B details international commercial arbitration disputes involving three types of subject matter that implicate public interests: 1) public order and corruption, 2) bad faith actions endangering public health, and 3) the sale of harmful goods. In showing that international commercial arbitration also involves public interests, Section B also suggests that transparency serves to enhance the legitimacy of the international commercial arbitration system in a similar manner as it does in investor-state arbitration, by diminishing democratic deficit through the public disclosure of information concerning public interests.

A. Democratic Deficit in Disputes Involving Public Interests

Democratic deficit threatens the legitimacy of the system and was an important point of discussion in the process of adopting transparency standards in investor-state arbitration.⁴³ Legitimacy concerns center on the question whether an arbitral tribunal composed of private individuals can fairly adjudicate disputes involving public interests.⁴⁴ One of the ways in which a legitimacy crisis occurs is through democratic deficit, which is when a system “‘curtails democratic principles’ by making issues that directly impact citizens ‘structurally isolated from public input.’”⁴⁵ More

43. See Organisation for Economic Cooperation & Development [OECD], *Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures*, at 8 ¶ 28 (June 2005) [hereinafter OECD 2005] (“Canada and US recognized in their submissions that the closed nature of Chapter 11 proceedings was damaging to the public credibility of the process itself.”); Carmody, *supra* note 2, at 148 (explaining how the investor-state arbitration system creates democratic deficit and how transparency can address the deficit); Magraw & Amerasinghe, *supra* note 24, at 348, 351 (explaining the importance of democratic values and how transparency contributes to legitimizing systems by allowing the public to participate in the dispute resolution process).

44. Levander, *supra* note 25, at 512.

45. Carmody, *supra* note 2, at 135 (“[I]t is ‘often impossible’ for the public to learn about investor-state arbitrations, even those that impact basic human rights such as access to sanitary drinking water.”); Magraw & Amerasinghe, *supra* note 24, at 351 (“Transparency

fundamentally, democratic deficit jeopardizes the freedom of expression under international human rights law.⁴⁶ International law recognizes the public's right to access information pertaining to the public interest. For example, Principle 10 of the Rio Declaration on Environment and Development states that each individual must have access to information, the opportunity to participate in decision-making, and the access to remedy.⁴⁷ Similarly, Article 13 of the American Convention on Human Rights stipulates the right to "seek, receive and impart" information.⁴⁸

Transparency strengthens the legitimacy of the system by addressing the issue of democratic deficit.⁴⁹ Professor Stern commented that the system of international dispute settlement is now "in search of public legitimacy, which it is thought can be obtained from a certain degree of openness to civil society."⁵⁰ Transparency allows the public to learn about cases that involve important public policies, such as access to sanitary drinking water, and to monitor these policies.⁵¹ For example, public disclosure of the notice of arbitration allows the public to know about the existence of the dispute and to express their views.⁵² By heightening the public's awareness of these policies, transparency can be seen as

helps to legitimize systems as it increases awareness of the process and creates opportunities to improve problem areas...transparency reduces the secrecy..."⁵³

46. 2011 Int'l Trade Rep. I, *supra* note 33, at 7 ¶ 16; Magraw & Amerasinghe, *supra* note 24, at 349.

47. Magraw & Amerasinghe, *supra* note 24, at 348.

48. *Id.*

49. Stephan Schill, *Transparency as a Global Norm in International Investment Law*, KLUWER ARBITRATION BLOG (Sept. 15, 2014), <http://arbitrationblog.kluwerarbitration.com/2014/09/15/transparency-as-a-global-norm-in-international-investment-law/>; Carmody, *supra* note 2, at 148; Levander, *supra* note 26, at 511-12 ("[M]any NGOs have criticized the confidentiality regime in international investment arbitration, particularly with regard to disputes arising in areas of public concern...Increasing transparency in international investment arbitration can promote legitimacy..."). In fact, Levander argues, "[b]y their very nature, investment agreements raise the types of environmental and developmental issues that states are beginning to make provisions for, in terms of transparency and public participation...Transparency in arbitrations would alleviate some of these problems, because at the very least, the existence of a dispute would be public knowledge." *Id.* at 348-50.

50. Esmé Shirlow, *Dawn of a New Era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-Based Investor-State Arbitration*, 31 ICSID REV. 622, 648 (2016).

51. U.N. Comm'n on Int'l Trade Law, Rep. of Working Group II on Its Fifty-Fifth Session, U.N. Doc A/CN.9/736, at 11 ¶ 48 (2012) [hereinafter 2012 Int'l Trade Rep. II]; Carmody, *supra* note 2, at 133; Magraw & Amerasinghe, *supra* note 24, at 350-51.

52. 2012 Int'l Trade Rep. II, *supra* note 51, at 11 ¶ 48, 12 ¶ 51 (stating that disclosing the notice of arbitration at an early state of the proceedings does not impede amicable settlement).

an expression of human rights.⁵³ The United Nations Secretary-General's Special Representative on Business and Human Rights addressed UNCITRAL Working Group II (Arbitration and Conciliation) to speak about the importance of the public's awareness of public policy issues in upholding human rights.⁵⁴ Similarly, the Organisation for Economic Co-operation and Development (OECD) Investment Committee stated in 2005 that transparency, especially through the publication of arbitral awards, is desirable for "enhanc[ing] effectiveness and public acceptance of international investment arbitration, as well as contributing to the further development of a public body of jurisprudence."⁵⁵

The fact that the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (Transparency Rules) denies the disputing investor the power to reject the transparency standard incorporated into the treaty⁵⁶ reflects the value placed on transparency. Party autonomy is an established principle of arbitration, and parties have historically been allowed to amend their arbitration agreements.⁵⁷ UNCITRAL Working Group II (Arbitration and Conciliation) and the member states decided to prohibit the investor from varying the offer for transparency because transparency aims to benefit not only the investor and the host state, but also civil society.⁵⁸ As investor-state arbitration involves two levels of consent, one between the states and another between the disputing investor and the respondent state, the Working Group considered whether to include a provision allowing the investor to vary the transparency standard that is incorporated into the treaty between the two states.⁵⁹ For example, with respect to the issue of hearings, the Working Group considered three options that allowed the disputing investor varying degrees of

53. *Id.*; see also 2012 Int'l Trade Rep. II, *supra* note 51, at 7 ¶ 18 ("[T]ransparency and inclusiveness [are] expressions of core United Nations values such as human rights, good governance and the rule of law."); Levander, *supra* note 25, at 513; Magraw & Amerasinghe, *supra* note 24, at 349.

54. John Ruggie (Special Representative of the Secretary-General), *Protect, Respect and Remedy: A Framework for Business and Human Rights*, at 2, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

55. OECD 2005, *supra* note 42, at 1.

56. U.N. Comm'n on Int'l Trade Law, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration art. 1(3)(a) (2014) [hereinafter UNCITRAL Transparency Rules], <https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf>.

57. Shirlow, *supra* note 50, at 642.

58. 2011 Int'l Trade Rep. I, *supra* note 33, at 14 ¶¶ 49-50.

59. *Id.* at 24-25 ¶ 113.

power to veto public hearings.⁶⁰ The Working Group decided on the most restrictive option, granting the disputing parties permission only to exclude sensitive and confidential information.⁶¹

B. *Public Interests in International Commercial Arbitration*

While the existence of public interests is generally viewed as a defining feature of investor-state disputes,⁶² public interest concerns are not limited to investor-state disputes. National disclosure requirements for companies reflect the idea that the actions of private businesses can also have implications for the public.⁶³ For example, transparency in the private sector is important for corporate social responsibility.⁶⁴ Transparency helps to hold the parties in dispute accountable for their decisions and deters private parties from actions that may jeopardize the public's interest.⁶⁵

International commercial arbitration disputes involve some of the same public interests that are traditionally thought to be attributes of investor-state disputes.⁶⁶ In response to the request for comments on the UNCITRAL Transparency Rules in the Fifty-Fourth session of UNCITRAL Working Group II, the government of Bahrain commented that “contract-based arbitrations may also involve investor-State relations [. . .] This raises definitional issues of some complexity before one can even determine the scope of any proposed rules, depending on how individual States have chosen to organize the public sector.”⁶⁷ Implementing transparency rules for investor-state arbitration and not international commercial

60. *Id.* at 24-25 ¶ 114.

61. *Id.* (giving the three options of allowing the disputing party to veto public hearings, leaving the discretion to the arbitral tribunal, and requiring public hearings subject only to exceptions on the grounds of logistical arrangements).

62. *Id.* at 24 ¶ 110 (“[T]reaty-based investor-State arbitration involved, by nature, public interest because such arbitration implicated a State’s exercise of discretionary powers.”).

63. Knahr & Reinisch, *supra* note 20, at 111.

64. *Id.* at 110.

65. Magraw & Amerasinghe, *supra* note 24, at 351.

66. While public interest concerns might not be an element of every international commercial arbitration dispute, public interest concerns are also not necessarily an element of every investor-state arbitration. *See* Knahr & Reinisch, *supra* note 20, at 111 (“Others said that the public interest in a case might not always be immediately apparent to the arbitral tribunal, which should not be burdened with the task of identifying whether or not matters were of public interest.”).

67. U.N. Comm’n on Int’l Trade Law, Rep. of Working Group II on Its Fifty-Third Session, U.N. Doc. A/CN.9/WG.II/WP.159, at 8-9 (2010) [hereinafter 2010 Int’l Trade Rep. IV].

arbitration may thus cause unpredictability due to differences in how individual states organize the public sector.⁶⁸

The subject matter of the dispute is a key factor in determining whether a dispute involves public interest.⁶⁹ The arbitral tribunal in the 2001 *Methanex* case, in reaching its groundbreaking decision allowing amici curiae submissions, stated that “the public interest in this arbitration arises from its subject-matter, as powerfully suggested in the Petitions.”⁷⁰ The *Methanex* case involved the ban of methanol in the United States, which the respondent state argued was contaminating drinking water supplies and risking human health.⁷¹ The United States NGO Institute for Sustainable Development raised the issue of public participation by submitting a petition for amicus curiae status, followed by a submission from the United States NGO Earthjustice on behalf of other environmental groups.⁷² The submissions sought permission for written submissions, open hearings, disclosure of all documents to the parties seeking amicus curiae status, and permission for oral arguments.⁷³ The tribunal granted the first three requests, with open hearings broadcast live in the World Bank headquarters.⁷⁴ Similarly, in *Suez/Vivendi*, the tribunal granted five NGOs amicus status because they had expertise in the disputed subject matter of metropolitan water distribution and sewage systems, which the tribunal found to be of public interest.⁷⁵

International commercial arbitration disputes involve some of the same types of subject matter as those that raise public interest concerns in investor-state arbitration. Tribunals in investor-state arbitration disputes have found disputes involving subject matter such as public health, environmental protection, corruption, public governance, and public companies to implicate public interests.⁷⁶ Given the wide range of matters arising from commercial relationships,⁷⁷ these types of issues can also be found in

68. *Id.*

69. *Methanex Corp. v. U.S.*, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae, 44 I.L.M. 1345, 22 ¶ 49 (NAFTA Chp. 11 Arb. Trib. 2001).

70. *Id.*

71. *Id.* at 1 ¶ 1.

72. *Id.* at 15 ¶ 26, 16 ¶ 28.

73. OECD 2005, *supra* note 42, at 7.

74. *Id.* at 7-8 ¶¶ 26, 29.

75. Magraw & Amerasinghe, *supra* note 24, at 347.

76. James D. Fry & Odysseas G. Repousis, *Towards a New World For Investor-State Arbitration Through Transparency*, 48 N.Y.U. J. INT'L L. & POL. 795, 804-05 (2016); Knieper, *supra* note 1, at 156.

77. See UNCITRAL Model Law, *supra* note 7 (defining “commercial nature”).

international commercial disputes. Specifically, this Section examines international commercial arbitration disputes involving the issues of 1) public order and corruption, 2) bad faith actions endangering public health, and 3) the sale of harmful goods.

1. *Public Order and Corruption*

International commercial arbitration disputes often involve public order issues. In particular, tribunals have considered these issues in the context of private parties' contracts to bribe government officials. In *ICC Award No. 1110*, the arbitrator, in concluding that he did not have jurisdiction, deemed the contract in dispute to be "condemned by public decency and morality."⁷⁸ The defendant, a British company, requested the claimant Argentinean engineer to use his political, commercial, and industrial influence to encourage Argentine government authorities to place an order for equipment with the defendant. The parties disputed over the amount of commission for the contracts that were placed over subsequent years. The dispute involved approximately £2 million of bribe money, which the Arbitrator described as "corruption...an international evil...contrary to good morals and to an international public policy common to the community of nations."⁷⁹ The arbitrator considered the jurisdiction question under Article 5 of the Amsterdam Resolution on L'Arbitrage en droit international privé, which states that the law governing the contract also governs the validity of the arbitration agreement. The arbitrator found that both Argentine and French law stipulated the contract to be contrary to good morals and public policy, rendering the contract invalid and preventing the arbitrator from having jurisdiction. The arbitrator also noted that a general principle of law renders contracts contrary to good morals or international public policy unenforceable.

In a 1982 International Chamber of Commerce (ICC) dispute, the tribunal followed the reasoning of the tribunal in *ICC Award No. 1110* and ruled that the contract in dispute was unenforceable for violating international public order and good morals, independent of the applicable national legal systems.⁸⁰ The claimant, an Iranian public functionary, and the defendant, a Greek company, had entered into a contract under which the claimant promised to assist the defendant to procure public contracts in Iran. The defendant was to pay a commission for all of the public contracts that it so

78. Case No. 1100 of 1963, Arb. Int'l 1994, 282 (ICC Int'l Ct. Arb.).

79. *Id.*

80. Case No. 3916 of 1982, Coll. Arb. Awards 1982, 507 (ICC Int'l Ct. Arb.).

obtained. The claims were for unpaid commissions. During the arbitration proceeding, the claimant refused to disclose the action that it took to procure the public contracts. Corruption in the Iranian government was prevalent during the time of the public contracts, despite persistent Iranian legislative and executive measures to prohibit corruption. The arbitrator concluded that one could presume that the claimant's actions to procure the public contracts resulted in unlawful influence because the claimant repeatedly refused to disclose the actions.

The state can be joined as a private party in an international commercial arbitration dispute, and tribunals may rule to restrict the application of the state's laws. For example, in considering the applicable substantive law governing a contract in dispute, the arbitral tribunal may rule that the state violated the *ordre public* by changing the state's laws to affect existing contractual obligations. In *ICC Award No. 1803*, the arbitrator opposed the Bangladeshi government's legislative measures affecting an existing gas pipeline contract between the claimant, a French company, and the defendant, East Pakistan Industrial Development Corporation (EPIDC).⁸¹ The contract provided for ICC arbitration in Geneva and Pakistani law as the applicable law. The claimant filed for arbitration to claim a sum of money from the defendant. The Bangladeshi government subsequently dissolved EPIDC, named the Bangladesh Industrial Development Corporation (BIDC) as EPIDC's successor, deemed that BIDC did not owe or consent to any current debts or arbitration proceedings, then dissolved BIDC and transferred all assets to the Bangladeshi government, and finally deemed all existing debts to be supplications for *ex gratia* payments. The arbitrator found the state's denial of BIDC's debts and existing arbitrations to be discriminatory measures that denied the claimant of legal rights and violated the Swiss *ordre public*. The arbitrator found the state's measures deeming the debts as supplications for *ex gratia* payment to be incompatible with Bangladesh's international obligations and also in violation of the *ordre public*. The Bangladeshi government was then joined as a party and did not have sovereign immunity, as it acted as holder of a private right in acquiring BIDC's assets.

2. *Bad Faith Actions Endangering Public Health*

81. Case No. 1803 of 1972, Coll. Arb. Awards 1974-75, 40 (ICC Int'l Ct. Arb.).

In several recent World Intellectual Property Organization (WIPO) Administrative Panel Decisions on domain name disputes, in concluding that the respondent acted in bad faith, the tribunal found that the respondent's actions endangered public health. In the 2006 decision *Lilly ICOS LLC v. Dylan Dupre*, the WIPO Administrative Panel found that the respondent's actions endangered public health and were in bad faith under paragraph 4(i) of the Policy and paragraph 15 of the Rules.⁸² The complainant owned the domain name `<cialis.com>`, which it used to advertise its pharmaceutical product Cialis. The drug required prescription, and the complainant sold it in several countries around the world. The complainant contended that the respondent's domain name `<cialiswonder.com>` was confusingly similar to the Cialis mark and that it lured consumers to a website advertising both Cialis brand product and generic product. The complainant argued that the respondent's use of the Cialis mark was potentially harmful to public health because "unsuspecting consumers may purchase unlawfully sold products advertised on Respondent's web site under the mistaken impression that they [were] dealing with Complainant and purchasing safe and effective government-approved drugs."

Similarly, in the 2008 decision *Sanofi-Aventis v. Privacyprotect.org decision*, the WIPO Administrative Panel found that by redirecting internet users to online pharmacies selling the claimant's drug and by not requiring prescription, the respondent endangered public health.⁸³ Claimant Sanofi-Aventis alleged that the respondent's domain name `<acompliapills.net>` was confusingly similar to *Acomplia*, the name of a well-known new drug that Claimant had developed for combatting obesity. The tribunal reasoned that the domain name may lead an Internet user to believe that Complainant's drug was available in that user's country when the drug had in fact not been launched or granted marketing approval in all countries. The drug could not be lawfully obtained without prescription. The WIPO Administrative Panel reasoned that the domain name was potentially harmful to public health by redirecting internet users to on-line pharmacies selling *Acomplia*, either genuine or counterfeit, without requiring prescription.

82. *Lilly ICOS LLC v. Dylan Dupre*, Case No. D2006-0331, Administrative Panel Decision (WIPO Arbitration & Mediation Cent.) (May 16, 2006), <https://www.wipo.int/amc/en/domains/decisions/html/2006/d2006-0331.html>.

83. *Sanofi-aventis v. Privacyprotect.org*, Case No. D2007-1776, Administrative Panel Decision (WIPO Arbitration & Mediation Cent.) (Jan. 28, 2008), <https://www.wipo.int/amc/en/domains/decisions/text/2010/d2010-1866.html>.

Most recently, in the 2014 decision *F. Hoffmann-La Roche AG v. Kelvin Pol*, the WIPO Administrative Panel found that the respondent acted in bad faith because it sold unauthorized pharmaceuticals that endangered the public's health and safety.⁸⁴ The complainant was a leading healthcare group in the fields of pharmaceutical and diagnostics, with operations in more than one hundred countries. Complainant held numerous trademark registrations for the drug Xenical and contended that Respondent's domain name `xenicalpharmacyjsv.com` was confusingly similar. The disputed domain name redirected users to an online pharmacy with links to Xenical products and other drugs. The WIPO Administrative Panel found that the respondent was intentionally misleading consumers by using the disputed domain name and that the respondent's actions endangered public health.

3. *Sale of Harmful Goods*

While arbitral tribunals may rule to prohibit a party from continuing to engage in harmful acts, it cannot instantaneously undo the party's past actions, which may continue to affect the public. Information about the subject matter of international commercial arbitration disputes allows the public to take actions to protect its own interests. Public disclosure of information about the substance of the dispute serves the functionalist role of educating the public and revealing current issues in the industry and research.⁸⁵

International disputes arising from private commercial contracts can pertain to harmful goods that have already been sold to the public. If the goods have not yet been recalled, knowledge about the existence of the dispute can prompt members of the public to discard the goods if they have purchased them. A case before the German Court of Appeal in Dresden, with the United Nations Convention on Contracts for the International Sale of Goods (CISG) as the substantive law, involved ice cream made using infested milk that was subsequently sold to consumers.⁸⁶ The claimant buyer from the Netherlands claimed damages against the

84. *F. Hoffmann-La Roche AG v. Kelvin Pol*, Case No. D2014-1806, Administrative Panel Decision (WIPO Arbitration & Mediation Cent.) (November 28, 2014), <https://www.wipo.int/amc/en/domains/decisions/text/2014/d2014-1806.html>.

85. See David Ardia, *Court Transparency and the First Amendment*, 38 CARDOZO L. REV. 835, 898 (2017) ("Lawsuits over the safety of drugs, automobiles, and other products reveal the research behind these widely used products and allow the public to assess their societal costs and benefits.") (internal citation omitted).

86. Oberlandesgericht [OLG] [Higher Regional Court], Oct. 23, 2000, Powdered Milk Case, 2 U 1181/00 (Ger.).

seller, from Germany, for powdered milk that had acquired a rancid flavor in the course of processing into finished milk. The claimant buyer had, upon the seller's request, used the milk to produce ice cream that turned out to be rancid and that elicited customer complaints. The claimant stated that the powdered milk contained an insect, which the Health Agency discovered during its visit. By knowing about the details of the dispute, the public can know about the severity of the problem and take actions to protect itself.

Members of the public that have already purchased the goods in dispute can benefit from knowing about information revealed in the arbitration process, even if the tribunal finds only a portion of the goods to violate public health standards. A China International Economic and Trade Arbitration Commission (CIETAC) dispute in 1990 involved a contract on the sale of frozen crabs and salt shrimp.⁸⁷ Some of the claimant's customers had returned the crabs on the grounds that they were rotten. The claimant filed for arbitration, claiming that the goods were destroyed in total, and requested a full refund. The United States Food & Drug Administration (FDA) then conducted a routine public health inspection in the warehouse and confiscated a portion of the salted shrimp but none of the frozen crab. The FDA found that some of the confiscated salted shrimp violated public health standards. The claimant then applied to an external inspection agency to inspect the goods. The inspection certificate stated that some of both of the salt shrimp and the frozen crab were rotten. The tribunal ruled for the respondent to compensate the claimant for only the portion of the salted shrimp that the FDA found to have violated the public health standard, not any of the frozen crab. In this case, the public would benefit from the information about the results of the external inspection agency, which showed that at least some of the frozen crab were also rotten at the time of packaging. Members of the public that had purchased crab from the claimant could then decide whether to take cautionary measures.

Similarly, even if the claimant cannot prove that the disputed goods are defective, the public can nonetheless benefit from knowledge of the dispute and become alert to potential harms resulting from the private agreement between the disputing parties. For example, in a 2006 dispute under the CISG, the buyer claimed that "the products provided by the [Seller] were ranked as inappropriate for human health and detrimental to public interests and were destroyed for non-compliance with the mandatory law on

87. Case No. 26 of 1990 [133-139] (CIETAC) (PRC).

food hygiene of France.”⁸⁸ The disputed contract involved the sale and export of monkfish tail. The contract stipulated that the buyer would compensate for losses if it could not produce an official inspection report by SGS laboratories certifying non-compliance of the goods with E.U. standards. The seller filed for arbitration after the buyer failed to make a payment. The buyer submitted to the tribunal an inspection report from the company Chemiphar N.V. certifying that the goods were not in compliance with E.U. standards. Despite the inspection report, the tribunal ruled for the seller because the compliance report was not from SGS laboratories. In this case, by having access to the details of the dispute, the public can make its own decision about whether to believe the findings of the company Chemiphar N.V. and to take actions to protect itself from the potentially harmful goods.

III. BALANCING TRANSPARENCY AND CONFIDENTIALITY INTERESTS IN EXISTING PROCEDURAL RULES

A balanced approach to drafting transparency provisions in international commercial arbitration can allow the disputing parties and the public to benefit from both transparency and confidentiality.⁸⁹ Transparency and confidentiality do not have to be competing interests that are mutually exclusive.⁹⁰ For example, arbitration clauses can include public disclosure provisions that allow disputing parties to provide a public copy of all submissions with confidential and sensitive information redacted.⁹¹ In investor-state arbitration, NAFTA tribunals have allowed parties to protect confidential information while upholding a general duty of disclosure by requiring each party to file a public version of its submissions with all confidential information redacted.⁹² Canada

88. Case No. CISG/2006/12 of 2006 (Fr. v. PRC) (Monkfish case) (CIETAC).

89. See 2010 Trade Rep. III, *supra* note 33, at 10 ¶ 33 (discussing redacting information to protect confidential or sensitive information in publicizing the notice of arbitration); OECD 2005, *supra* note 42, at 11 ¶¶ 42-43 (explaining how transparency contributes to the effectiveness and acceptance of the investment arbitration system while also acknowledging the need to protect confidential information).

90. See OECD 2005, *supra* note 42, at 11 ¶¶ 42-43 (acknowledging the need to consider both interests).

91. U.N. Comm’n on Int’l Trade Law, Rep. of Working Group II on Its Fifty-Fourth Session, U.N. Doc. A/CN.9/WG.II/WP.162/Add.1, at 12 ¶ 40 (2011) [hereinafter 2011 Int’l Trade Rep. II] (citing the U.S. Model BIT’s provisions for considering confidentiality).

92. 2010 Int’l Trade Rep. I, *supra* note 19, at 4 ¶¶ 8-9, 5 ¶¶ 11-14 (describing the tribunal’s consideration of the burden to the parties in deciding whether to allow amicus curiae submissions in Merrill & Ring Forestry L.P. v. Canada, ICISD Case No.

stated in its comments to UNCITRAL Working Group II that its experience with NAFTA arbitrations shows that tribunals are increasingly adept at achieving transparency without endangering confidential or privileged information.⁹³ NAFTA arbitral tribunals have issued confidentiality orders that have consistently defined the scope of confidential information and the process for protecting such information.⁹⁴ The United States has adopted the similar approach of following a general duty of transparency in all of its investor-state arbitrations while simultaneously abiding by the NAFTA Chapter Eleven protection of confidential information.⁹⁵

This Part examines the manner in which different sources of procedural law governing international arbitration have evolved to incorporate transparency provisions in recent years and the ways in which some sources of law balance transparency with confidentiality interests. In particular, this Part focuses on the arbitral award, hearings, and third party participation aspects of transparency standards in a) institutional rules, b) international investment agreements, c) states' model international investment agreements, and d) states' national legislation. In doing so, this Part identifies two trends. First, investor-state arbitration rules across all four of the sources of law generally show an increase over recent years in the aspects of transparency that they address. Second, a general divide currently exists between the procedural rules specifically governing international investor-state arbitration and those governing international commercial arbitration, with the investor-state rules establishing disclosure of information as the default and the international commercial arbitration rules generally not expressly addressing transparency issues.

A. Institutional Rules

The development of institutional procedural rules for international arbitration in recent years reflects the growing international recognition of transparency.⁹⁶ As this Section details,

UNCT/07/1, Canada's Further Submission on Confidentiality (Jan. 29, 2008), 22 ICSID Rep. 518).

93. *Id.* at 4 ¶ 9.

94. U.N. Comm'n on Int'l Trade Law, Rep. of Working Group II on Its Fifty-Fourth Session, U.N. Doc. A/CN.9/WG.II/WP.163, at 6 (2011) [hereinafter 2011 Int'l Trade Rep. III].

95. 2010 Int'l Trade Rep. I, *supra* note 19, at 7-8.

96. Carmody, *supra* note 2, at 111 ("The ICSID Arbitration Rules were amended in 2006...above all in response to cries for increased transparency in ICSID arbitration.") (internal citation omitted); Press Release, ICC Begins Publishing Arbitrator

the manner in which institutional rules address arbitral awards, hearings, and third party participation shows a divide between investor-state arbitration rules and international commercial arbitration rules. Investor-state arbitration rules adopt the approach of establishing public disclosure as the default, with provisions allowing parties to exclude certain information from transparency obligations, while international commercial arbitration rules generally adopt confidentiality as the default absent the disputing parties' agreement otherwise. Even in the event that the parties agree to publicly disclose information, the rules governing international commercial arbitration simply grant the permission to disclose, rather than imposing an obligation of disclosure.

International Centre for Settlement of Investment Disputes (ICSID) designed its Arbitration Rules specifically for investor-state disputes, and the ICSID Arbitration Rules place particular weight on transparency.⁹⁷ In 2006, ICSID amended the 1966 version of the ICSID Arbitration Rules “in response to developments in investment treaty arbitration jurisprudence and above all in response to cries for increased transparency in ICSID arbitration.”⁹⁸ The amendments aim to make ICSID proceedings “more streamlined and transparent, while instilling greater confidence in the arbitral process.”⁹⁹

The ICSID Arbitration Rules adopt public disclosure as the default while incorporating rules that protect the parties' confidential information from disclosure. In particular, with respect to arbitral awards, the Secretary-General is obligated to publish arbitral awards if both parties consent to publication.¹⁰⁰ If one of the parties denies consent, ICSID Arbitration Rule 48(4) requires the Centre to publish excerpts of the tribunal's legal reasoning.¹⁰¹ At the same time, ICSID Arbitration Rule 48(4) prohibits the Centre from publishing the entirety of the arbitral award absent consent from the parties.¹⁰² With respect to hearings, Rule 32(2) grants the

Information in Drive for Improved Transparency, ICC News (June 27, 2016) [hereinafter ICC Arbitration Press Release], <https://iccwbo.org/media-wall/news-speeches/icc-begins-publishing-arbitrator-information-in-drive-for-improved-transparency/> (“The decision to make information available was taken as a direct response to increasing demand for transparency in international arbitration.”).

97. Carmody, *supra* note 2, at 111; Magraw & Amerasinghe, *supra* note 24, at 517.

98. Carmody, *supra* note 2, at 111.

99. *Id.*

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

101. *Id.* at 122 (Rule 48(4)).

102. *Id.*

tribunal discretionary power to allow third parties to attend hearings if none of the disputing parties object.¹⁰³ Rule 37(2) establishes the standard by which third parties can submit briefs, requiring the tribunal to consult with both parties before ruling on the amicus request.¹⁰⁴ If either or both parties object, the tribunal can still grant the request if it “does not disrupt the proceeding or unduly burden or unfairly prejudice either party.”¹⁰⁵

ICSID tribunals’ approach to the issue of unilateral disclosure reflect the ICSID Arbitration Rules’ balancing of transparency and confidentiality. ICSID tribunals have interpreted the absence of a provision in the ICSID Arbitration Rules addressing a disputing party’s unilateral public disclosure of information to mean that the ICSID Arbitration Rules impose no general duty of confidentiality.¹⁰⁶ ICSID tribunals have ruled that future tribunals should balance the interests of transparency in each dispute with the interests of the parties in procedural integrity. For example, in the 2000 *Metalclad* case, the tribunal award states that “though, it is frequently said that one of the reasons for recourse to arbitration is to avoid publicity, unless the agreement between the parties incorporates such a limitation, each of them is free to speak publicly of the arbitration.”¹⁰⁷ The tribunal qualified this general permission to disclose by stating that “it would be of the advantage of the orderly unfolding of the arbitral process” for the parties to publicly discuss the case only under external legal obligations of disclosure.¹⁰⁸ Similarly, the tribunal in the 2008 *Biwater Gauff* dispute agreed with the tribunal in *Metalclad*, finding that absent an agreement between the parties concerning confidentiality, each arbitral tribunal should find the appropriate balance between transparency and confidentiality.¹⁰⁹ The tribunal concluded that the parties could engage in general discussions publicly but, due to the

103. *Id.* at 115 (Rule 32(2)).

104. *Id.* at 117 (Rule 37(2)).

105. *Id.*

106. *Metalclad Corp. v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Final Award, ¶ 13 (Aug. 2, 2000).

107. *Id.*

108. *Id.*

109. *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Final Award, ¶¶ 50-51 (July 24, 2008). The claimant, investor Biwater Gauff Tanzania (BGT), complained about the unilateral public disclosure of meeting minutes and of a procedural order by the respondent state Tanzania. The claimant requested the tribunal to issue an order of confidentiality for the documents in the proceeding. *Id.*

significant media coverage of the case, should not disclose minutes or documents to avoid exacerbating the dispute.¹¹⁰

The UNCITRAL Arbitration Rules, as revised in 2010, were originally designed primarily for international commercial arbitration and did not address transparency prior to the adoption of Article 1(4) in 2013.¹¹¹ The UNCITRAL Arbitration Rules as revised in 2010 state that an award may be published if all parties consent.¹¹² They do not impose an obligation to publish the award, contrary to the ICSID Rules. With respect to hearings, the UNCITRAL Arbitration Rules as revised in 2010 state that all hearings shall be *in camera* unless the parties agree otherwise.¹¹³ In 2001 in *Metbanex Corp.*, a NAFTA case governed by the 1976 UNCITRAL Arbitration Rules, the tribunal ruled that the agreement of the disputing parties was to be the deciding factor with respect to disclosure and that “either party was at liberty to disclose the major pleadings, orders and awards of the Tribunal into the public domain (subject to deletion of trade secret information).”¹¹⁴

For investor-state treaties concluded under the UNCITRAL Arbitration Rules on or after April 1, 2014, the UNCITRAL Transparency Rules apply to the treaty through UNCITRAL Arbitration Rule Article 1(4), unless the parties have agreed otherwise.¹¹⁵ For investment treaties concluded before April 1, 2014, the Mauritius Convention serves as a means for parties to apply the UNCITRAL Transparency Rules to the treaties.¹¹⁶ By ratifying the Mauritius Convention, a state expresses its consent to abide by the UNCITRAL Transparency Rules.¹¹⁷ The Mauritius Convention applies to arbitrations commenced after the date that it comes into force for the respondent state.¹¹⁸

As with the ICSID Rules, the UNCITRAL Transparency Rules were designed specifically for investor-state arbitration and are

110. *Id.* (“[T]he parties may engage in general discussion about the case in public, provided that any such public discussion is restricted to what is necessary.”).

111. Knieper, *supra* note 1, at 156.

112. G.A. Res. 31/98 (Dec. 15, 1976), revised in U.N. GAOR 65th Sess., 57th plen. mtg., at art. 34(5), U.N. Doc. A/RES/65/22 (Jan. 10, 2011) [hereinafter UNCITRAL Arbitration Rules].

113. *Id.* at art. 28(3).

114. *See Metbanex Corp.*, 44 I.L.M. 1345 at ¶ 46.

115. UNCITRAL Arbitration Rules, *supra* note 112, at art. 1(4); *see also* Knieper, *supra* note 1, at 161.

116. *See* Mauritius Convention on Transparency, *supra* note 1, at art. 1(1)-2(1)2.

117. Knieper, *supra* note 1, at 162.

118. Mauritius Convention on Transparency, *supra* note 1, at art. 5.

comprehensive in their approach to addressing transparency.¹¹⁹ The UNCITRAL Transparency Rules embody Working Group II and the member states' aim to achieve a balance between transparency and the parties' interest in a fair and efficient dispute resolution.¹²⁰ Article 1(3)(a) reflects the great value placed on transparency by restricting parties from derogating from the UNCITRAL Transparency Rules unless permitted to do so by the underlying investment treaty.¹²¹ At the same time, Article 1(3)(b) acknowledges the need to balance transparency with other interests by granting tribunals the discretion to, after consulting with the disputing parties, adapt the requirements of any provision in the UNCITRAL Transparency Rules to the particular circumstances of the case.¹²² The tribunal is required to consider both the public's interest in transparency and the disputing parties' interest in procedural integrity.¹²³ In considering whether to require all documents to be published, Working Group II supported allowing certain information to be excluded from the transparency requirements because it would provide "a good balance between the principles of transparency and necessary exceptions thereto."¹²⁴

The UNCITRAL Transparency Rules address four major aspects of transparency: the notification of new arbitrations, disclosure of documents, third party submissions, and open hearings.¹²⁵ Article 2 requires parties to submit a notice of arbitration to the UNCITRAL Transparency Registry, which ensures that information on the disputes are available to the public.¹²⁶ The Registry publishes promptly the name of the parties, the economic sector, and the treaty involved.¹²⁷ Article 3 establishes three categories of disclosure requirements with respect to documents. Article 3(1) requires the tribunal to submit the arbitral award, among other documents, to the Registry to be available to the public.¹²⁸ Articles 3(2) and 3(3), respectively, require certain documents to be disclosed upon request and, for other documents,

119. See UNCITRAL Transparency Rules, *supra* note 56, at art. 1(1); Knieper, *supra* note 1, at 158 (stating that the UNCITRAL Transparency Rule define the core matters of transparency).

120. Knieper, *supra* note 1, at 158.

121. UNCITRAL Transparency Rules, *supra* note 56, at art. 1(3)(a).

122. *Id.* at art. 1(3)(b).

123. Carmody, *supra* note 2, at 121.

124. 2011 Int'l Trade Rep., *supra* note 33, at 18 ¶ 75, 20 ¶ 84.

125. Carmody, *supra* note 2, at 122-23.

126. *Id.* at 123.

127. *Id.*; see also UNCITRAL Transparency Rules, *supra* note 56, at art. 3(4).

128. UNCITRAL Transparency Rules, *supra* note 56, at art. 3(1).

grant the tribunal discretion after consulting with the disputing parties.¹²⁹ Articles 4 and 5 grant the tribunal permission to accept third party submissions, provided that the submissions do not “disrupt or unduly burden the arbitral process or unfairly prejudice a disputing party.”¹³⁰ As with the ICSID Arbitration Rules, the UNCITRAL Transparency Rules establish open hearings as the default, subject to the exceptions under Article 7 to protect confidential information and the integrity of the proceedings.¹³¹

To protect the parties’ confidential information, all of the disclosure requirements under Article 3 are subject to the exceptions of Article 7. Article 7 excludes two types of information from disclosure: (1) confidential or protected information,¹³² and (2) information that would jeopardize the procedural integrity if disclosed.¹³³ Article 7(3) grants the tribunal the power to determine, after consulting the parties, whether the information in question qualifies as confidential or protected information. Article 7(7) grants the tribunal permission to restrain or delay the publication of information that would jeopardize the procedural integrity.

In contrast to the ICSID Arbitration Rules and the UNCITRAL Transparency Rules, the ICC Arbitration Rules of 2012 are not limited to governing investor-state disputes.¹³⁴ The ICC Rules as amended in 2017 do not impose a duty to publish awards or submissions.¹³⁵ Articles 1(1) and (2) of the ICC Court’s internal rules stipulate that hearings are confidential and that third parties can attend only by invitation from the Chairman.¹³⁶ The Secretariat has the power to select *amicus curiae* documents.¹³⁷

The 2017 amendments to the 2012 ICC Rules represent a step towards transparency.¹³⁸ The amendments require the ICC to publish information pertaining to the composition of ICC tribunals for cases registered on or after 1 January 2016.¹³⁹ Information includes the arbitrators’ names, nationality, and whether the party

129. *Id.* at art. 3(2)-3(3) (requiring expert reports and witness statements to be made available to the public upon request by any person to the arbitral tribunal).

130. Carmody, *supra* note 2, at 125-26.

131. UNCITRAL Transparency Rules, *supra* note 56, at art. 6(2).

132. *Id.* at art. 7(1).

133. *Id.* at art. 7(6).

134. Int’l Ct. Arb., *ICC Arbitration Rules* (Mar. 1, 2017).

135. ICC Arbitration Press Release, *supra* note 95 (stating that amendments require the publication of information relating to the composition of arbitral tribunals).

136. NOUSSIA, *supra* note 20, at 121.

137. *Id.*

138. ICC Arbitration Press Release, *supra* note 95.

139. *Id.*

or the Court appointed the arbitrator.¹⁴⁰ Parties can use the information to determine whether an arbitrator is suitable for a dispute, as the information remains on the website after a dispute is terminated.¹⁴¹ To protect expectations of confidentiality, the ICC does not publish the case reference number or the names of the parties, and parties can agree to opt out of disclosing the information.¹⁴²

Other institutional rules governing international commercial arbitration impose a duty of confidentiality as the default with respect to arbitral decisions. The London Court of International Arbitration (LCIA) Rules Article 30.3 prohibits the LCIA Court from publishing arbitral awards without the consent of all parties and of the arbitral tribunal.¹⁴³ With respect to unilateral disclosure by a disputing party, the LCIA Rules state that unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards in their arbitration.¹⁴⁴ Similarly, the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Arbitration Rules) state that “[u]nless otherwise agreed by the parties, the SCC Institute and the Arbitral Tribunal shall maintain the confidentiality of the arbitration and the award.”¹⁴⁵ The Arbitration Rules of the Permanent Court of Arbitration include similar provisions that establish confidentiality as the default, allowing arbitral awards and other documents to be published only with the consent of the parties.¹⁴⁶

B. *International Investment Agreements*

As with the institutional rules governing international arbitration, international investment agreements in recent years reflect the growing discussions about transparency. Earlier

140. *Id.*

141. Press Release, ICC Court Announces New Policies to Foster Transparency and Ensure Greater Efficiency, ICC Press Release (Jan. 5, 2016) [hereinafter ICC Press Release], <https://iccwbo.org/media-wall/news-speeches/icc-court-announces-new-policies-to-foster-transparency-and-ensure-greater-efficiency/>.

142. *Id.*

143. London Ct. Int’l Arb. [LCIA], *Arbitration Rules* art. 30.3 (Oct. 1, 2014) [hereinafter LCIA Rules].

144. *Id.* at art. 30.1.

145. Stockholm Chamber of Commerce [SCC], *Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce* art. 46 (Jan. 1, 2010) [hereinafter SCC Rules] (amended in 2015 and 2017).

146. Permanent Court of Arbitration [PCA], *PCA Arbitration Rules 2012* art. 34 ¶ 5 (Dec. 17, 2012).

international investment agreements, such as the 1994 Energy Charter Treaty, do not contain provisions that address transparency issues.¹⁴⁷ Article 26 of the Energy Charter Treaty provides options for settling disputes using international arbitration, but it does not address the public disclosure of the proceedings or any other aspects of the arbitration process.¹⁴⁸ The Model Host Government Agreement that was presented at the Energy Charter Conference in 2007 contains a provision, Article 19(11), that requires a copy of the award to be deposited with the Energy Charter Secretariat and made available to the public.¹⁴⁹

The conclusion of NAFTA represents a shift in international focus away from confidentiality and towards transparency.¹⁵⁰ In 2001, the NAFTA Free Trade Commission issued an Interpretation stating that “nothing in the NAFTA [. . .] apart from the limited specific exceptions set forth expressly in the relevant arbitral rules” imposes on parties a general duty of confidentiality that prevents them from publicly disclosing submissions.¹⁵¹ The *Methanex* and *Metalclad* tribunals have upheld the view that NAFTA does not impose a general duty of confidentiality.¹⁵²

Similar to the institutional rules governing investor-state arbitration, NAFTA addresses transparency issues while allowing protections for confidential information.¹⁵³ Article 1128 permits a non-disputing party to make submissions on questions of the agreement’s interpretation, and Article 1129 permits non-disputing parties access to evidence. Chapter 11 states that non-disputing parties shall receive written notice of arbitration¹⁵⁴ and that, for disputes involving Canada and the United States, either one of the states or the investor may make the award public.¹⁵⁵ With regard to Mexico, the applicable arbitration rules govern the publication of an

147. 2010 Int’l Trade Rep. II, *supra* note 28, at 6 ¶ 12; *see also* Shirlow, *supra* note 51, at 625.

148. 2010 Int’l Trade Rep. II, *supra* note 28, at 6 ¶ 12.

149. *Id.*

150. *See* Carmody, *supra* note 2, at 114 (“Under the NAFTA, the trend towards transparency in international arbitration dates back to at least 2001.”).

151. 2010 Int’l Trade Rep. II, *supra* note 28, at 8 ¶ 17.

152. *Metalclad Corp.*, ARB(AF)/97/1 at ¶ 13; *Methanex Corp.*, 44 I.L.M. 1345 at ¶ 46.

153. *See* 2010 Int’l Trade Rep. I, *supra* note 19, at 2-5 (giving examples of tribunals in NAFTA cases involving Canada and the U.S. that have allowed parties to take measures such as redacting confidential information from the public version of submissions and allowing exceptions to public hearings).

154. NAFTA Investor-State Arbitrations, *supra* note 15, at art. 1128-1129.

155. *Bivater Gauff (Tanzania) Ltd.*, *supra* note 109, at ¶¶ 50-51 (“[T]he parties may engage in general discussion about the case in public, provided that any such public discussion is restricted to what is necessary.”).

award.¹⁵⁶ NAFTA hearings have been open to the public via closed-circuit television feed, such as in the World Bank building in Washington, D.C., for the *Glamis* dispute.¹⁵⁷ The television feed is cut for portions of a hearing that involve protected information.¹⁵⁸

Recent international investment agreements in other regions also embrace the growing international recognition of transparency. The 2007 Investment Agreement of the Common Market for Eastern and Southern Africa (COMESA) Common Investment Area includes provisions governing all aspects of transparency.¹⁵⁹ Article 28(5) establishes public disclosure as the default by requiring all documents be made available to the public subject to the redaction of confidential business information.¹⁶⁰ The COMESA Agreement states that all oral hearings are public, and Article 28(8) allows amicus curiae submissions.¹⁶¹ Similarly, the 2004 Free Trade Agreement between the United States, Central America, and the Dominican Republic (CAFTA-DR) includes detailed provisions on transparency.¹⁶² Chapter 10, Article 10.21, imposes a general duty of disclosure for documents, including the arbitral award.¹⁶³

C. *States' Model International Investment Agreements*

As with the institutional investor-state arbitration rules and the more recent international investment agreements following NAFTA, the 2012 U.S. Model BIT and the 2004 Canadian Model Foreign Investment Promotion and Protection Agreement (Canadian Model FIPA) establish public disclosure as the default, subject to measures that exclude certain information from disclosure.¹⁶⁴ The 2012 U.S. Model BIT imposes a general duty of disclosure in Article 29 for documents such as pleadings, briefs, arbitral awards, and amicus submissions.¹⁶⁵ Article 29(4) requires

156. NAFTA Investor-State Arbitrations, *supra* note 15, at art. 1137(4).

157. 2010 Int'l Trade Rep. I, *supra* note 19, at 8.

158. *Id.* at 8 n.4.

159. Calamita, *supra* note 29, at 660.

160. *Id.*

161. *Id.*

162. *Id.* at 662.

163. Dominican Republic-Central America-FTA [CAFTA-DR] chp. 10 art. 10.21, May 28, 2004, 43 I.L.M. 514 (entered into force July 28, 2005) [hereinafter CAFTA-DR]; *see also* 2010 Int'l Trade Rep. I, *supra* note 19, at 2-3 (giving comments from the Dominican Republic and El Salvador on the transparency provisions in CAFTA-DR).

164. U.S. MODEL BIT, *supra* note 32, at art. 29(1); DEP'T OF FOREIGN AFFAIRS, TRADE & DEVELOPMENT, CANADIAN MODEL FOREIGN INVESTMENT PROMOTION AND PROTECTION AGREEMENT art. 19 (2004) [hereinafter CANADIAN MODEL BIT].

165. U.S. MODEL BIT, *supra* note 32, at art. 29.

the disputing party to submit a redacted version of the documents, with the tribunal determining whether the information is confidential in the case of disagreement between the parties.¹⁶⁶ As with NAFTA, hearings must be open to the public, subject to appropriate arrangements for the non-disclosure of protected information.¹⁶⁷

The 2004 Canadian Model FIPA similarly provides detailed provisions addressing transparency. Article 38 requires all document submissions to be available to the public, subject to the redaction of confidential information.¹⁶⁸ As with the U.S. Model BIT, the Canadian Model FIPA requires open hearings, subject to closure for confidential information.¹⁶⁹ With respect to third party participation, Article 39 of the Canadian Model BIT follows the 2004 NAFTA provisions on the issue and allows third party submissions with the permission of the tribunal.¹⁷⁰ Article 39 sets forth the factors for the tribunal to consider when determining whether to grant permission, including whether the third party can bring a different perspective to the issue in dispute and whether it has significant interest in the arbitration.¹⁷¹

D. National Legislation

Although national legislations across states have generally shifted away from the traditional homogenous view of confidentiality being a defining feature of international arbitration,¹⁷² many national legislations still have no provisions that specifically address transparency in arbitral proceedings.¹⁷³ The national legislation that does address confidentiality often contains many limitations.¹⁷⁴ For example, the 1981 French Code of Civil Procedure, Book IV, Article 1469 only includes a statute providing

166. *Id.* at art. 29(4).

167. *Id.* at art. 29(2).

168. CANADIAN MODEL BIT, *supra* note 164, at art. 38.

169. Calamita, *supra* note 29, at 657 n. 31.

170. Fry & Repousis, *supra* note 76, at 821.

171. Calamita, *supra* note 29, at 659.

172. Malatesta, *supra* note 27, at Appendix I; *see also* 2010 Int'l Trade Rep. I, *supra* note 19, at 2 ¶ 3 (“Canada is committed to ensuring that any treaty-based investor-State arbitration in which it is involved is as transparent and open to the public as possible.”); *id.* at 7 (“The United States is committed to ensuring the transparency of its investor-State arbitrations.”).

173. Carmody, *supra* note 2, at 159 (“[V]ery few national arbitration statutes encompass provisions outlining general standards on the subject of confidentiality in international arbitration.”); Malatesta, *supra* note 27, at Appendix I.

174. Malatesta, *supra* note 27, at Appendix I.

for the secrecy of arbitrator deliberations but does not address other aspects of procedural transparency.¹⁷⁵ Similarly, the Hong Kong Ordinance 1997 Section 2 addresses the issue of privacy in court proceedings but does not cover other procedural aspects of arbitration.¹⁷⁶

In the civil law system, Singapore's national legislation adopts a statutory regulation approach that establishes confidentiality as the general rule while acknowledging the need to build a case law of arbitral awards.¹⁷⁷ The Singapore Arbitration Act, Section 57(3), revised in 2002, provides that the disclosure of confidential information is only allowed with the parties' consent or when the court finds that the publication of the information would not reveal the identity of any party.¹⁷⁸ If the court considers the judgement to be of major legal interest and gives legal reasoning in the decision, then notwithstanding Section 57(3), Section 57(4) stipulates that the court shall publish reports of the judgement in law reports and professional publications.¹⁷⁹ When a party has indicated the wish to conceal its identity in such cases, and actions cannot be taken to achieve this, the court may direct to delay the publication of the report for a maximum of ten years.¹⁸⁰

In the common law system, the national laws in the United States and England do not specifically address transparency, leaving it to the courts to address as it arises in disputes. In the United States, state arbitration law covers international arbitrations proceedings.¹⁸¹ Fewer than half of states address transparency, and most state laws that do address it are limited to specific subject matters.¹⁸² In the United Kingdom, the 1996 Arbitration Act regulates arbitration. The Arbitration Act was mostly based on the 1985 UNCITRAL Model Law and does not address the issues of confidentiality or transparency.¹⁸³ The Departmental Advisory Committee took the position that given the myriad of exceptions, the courts should examine the duty of confidentiality on a case-by-case basis.¹⁸⁴

The courts in England recognize an implied duty of confidentiality in the arbitration agreement and the existence of

175. *Id.*

176. *Id.*

177. Poorooye & Feehily, *supra* note 40, at 296.

178. Act 37 of 2001, Arbitration Act (Chp. 10), § 57(3) (revised Mar. 1, 2002) (Sing.).

179. Poorooye & Feehily, *supra* note 40, at 296.

180. *Id.* at 297.

181. *Id.*

182. *Id.* at 59.

183. NOUSSIA, *supra* note 19, at 58.

184. *Id.*

exceptions to that duty.¹⁸⁵ The 1991 English Court of Appeal's decision *Dolling-Baker v. Merrett* reflects the traditional view that the arbitration agreement includes an implied confidentiality element.¹⁸⁶ In ruling that the duty of confidentiality applies to all documents in the arbitration proceedings, the Court reasoned that a breach of this duty would damage the efficacy of the proceedings and acknowledged that certain exceptions to this duty exist for the "fair disposal of the action."¹⁸⁷ The plaintiff had filed for arbitration against the defendants for money under a policy of reinsurance.¹⁸⁸ The judge, after the plaintiff's request, ordered the publication of a list of all documents relating to a similar policy in which the defendants were in the same roles as they were in the *Dolling-Baker v. Merrett* dispute.¹⁸⁹ The defendant filed for an injunction, and the Court then denied the publication order, stating that the documents were not relevant to the issues in dispute or for fairly disposing of the case.¹⁹⁰

The High Court of Australia issued a landmark decision in 1993, *Esso v. Plowman*, that distinguished confidentiality from privacy and marks a shift away from the traditional view that confidentiality is an essential attribute of arbitration.¹⁹¹ The company Esso filed for arbitration against two Australian public utility companies. The Australian Minister for Energy and Minerals contended that his public duty included the right to inspect documents produced for the arbitration.¹⁹² The High Court ruled that an implied right of privacy in arbitration does not include a duty of confidentiality and that confidentiality is not an inherent nature of the arbitration contract.¹⁹³ The High Court stated that even in a case where a duty of confidentiality exists, it is subject to public interest exceptions.¹⁹⁴ In Australia, following the *Esso v. Plowman* decision, parties must expressly refer to Australian International Arbitration Act Section 23C (amended 2010), a provision prohibiting parties and the tribunal from disclosing confidential information, for the provision to be applicable.¹⁹⁵

185. NOUSSIA, *supra* note 19, at 77.

186. *Id.* at 78.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. NOUSSIA, *supra* note 19, at 81; *see also* Malatesta, *supra* note 27, at 42.

192. NOUSSIA, *supra* note 19, at 81.

193. *Id.*

194. *Id.*

195. Carmody, *supra* note 2, at 160-61.

Some jurisdictions have followed the *Esso v. Plowman* decision's view that confidentiality is not an essential attribute of arbitration. In 2000 in *Bulgarian Foreign Trade Bank Ltd.*, the Swedish Supreme Court stated that, in arbitration proceedings under Swedish law, a party does not have an obligation of confidentiality unless the parties have entered into a specific agreement otherwise.¹⁹⁶ As with the Court in *Esso v. Plowman*, the Swedish Supreme Court emphasized the distinction between the private character of arbitration and the duty of confidentiality.¹⁹⁷ The dispute arose out of an agreement between an Austrian creditor and a Bulgarian bank, after the creditor transferred debt to a company.¹⁹⁸ The bank had not consented to the transfer, and the company filed for arbitration after the bank refused to pay for the debt.¹⁹⁹ The tribunal's chairman disclosed information about the decision after he found out that a company representative had already disclosed the information to a third party.²⁰⁰ The bank then claimed revocation of the arbitration agreement and disqualification of the chairman.²⁰¹ The Swedish Supreme Court held that the bank did not have the right to revoke the arbitration agreement because Swedish law did not establish a general duty of confidentiality in arbitration.²⁰² In reaching this decision, the Court acknowledged that the nature of the information varies significantly across different arbitration disputes and that a disclosure may constitute a breach in some circumstances.²⁰³

While some jurisdictions have followed the *Esso v. Plowman* decision, the English Court of Appeal in *Ali Shipping Corp. v. Shipyard Trogir* followed the reasoning in *Dolling-Baker v. Merrett* and ruled that a duty of confidentiality exists as a matter of law.²⁰⁴ The Court acknowledged that exceptions to the broad application of confidentiality exists in individual cases.²⁰⁵ In *Ali Shipping Corp.*, a dispute arose out of a shipbuilding contract between the claimants and defendants, with an award in favor of the claimants.²⁰⁶ A

196. *Bulgarian Foreign Trade Bank Ltd. v. A.I. Trade Finance Inc.*, T 1881-99, at 10 (Swed. Sup. Ct. 2000).

197. *Id.* at 6-7.

198. *Id.* at 2-3.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Bulgarian Foreign Trade Bank Ltd.*, T 1881-99 at 9.

203. *Id.* at 9-10.

204. *Ali Shipping Corp. v. Shipyard Trogir* [1999], 1 W.L.R. 314, at ¶ 33 (App. Ct. 1997) (Eng.).

205. *Id.* ¶ 36.

206. *Id.* ¶ 6.

subsequent dispute arose between the defendants and three other companies in the same corporate group as the claimant from the first arbitration.²⁰⁷ The defendants wished to use materials from the first arbitration to support an estoppel plea.²⁰⁸ The claimant obtained an injunction on the grounds that the use of the material would breach defendant's implied duty of confidentiality with respect to the first arbitration.²⁰⁹

The United States courts take a middle ground between the Australian and the U.K. courts, rejecting the presence of a general duty of confidentiality and placing an emphasis on the will of the parties. In the 1988 *Panhandle* decision, the U.S. District Court for Delaware concluded that arbitration proceedings are not necessarily confidential absent an express agreement by the parties or institutional rules on the point.²¹⁰ In *Panhandle*, the United States government requested the production of documents from a previous arbitral proceeding that occurred in Geneva, under ICC rules.²¹¹ The Court rejected a general principle of confidentiality and found that the arbitration agreement in question and the applicable arbitration rule did not provide for confidentiality.²¹² The Court specifically rejected the argument that a "general understanding" of confidentiality existed and that assertions of economic harm might result from disclosure.²¹³ The Court emphasized the requirement for the contract to expressly address the issue of confidentiality.²¹⁴

IV. THE SYSTEMATIC PUBLICATION OF ARBITRAL AWARDS

The discussions leading to the adoption of higher transparency standards in investor-state arbitration suggest that the publication of arbitral awards will be an important step for international commercial arbitration in establishing higher transparency standards.²¹⁵ Scholars and interest groups specifically focused on

207. *Id.* ¶¶ 7-8.

208. *Id.* ¶ 11.

209. *Id.* ¶ 12.

210. NOUSSIA, *supra* note 19, at 95.

211. *Id.*

212. *Id.*

213. *Id.*

214. Poorooye & Feehily, *supra* note 40, at 295.

215. See 2010 Int'l Trade Rep. III, *supra* note 37, at 16 ¶ 62 ("Even if no other documents were published, it was said that the publication of awards would be a decisive step towards enhancing the legitimacy of the process and collecting accessible and consistent jurisprudence."); OECD 2005, *supra* note 43, at 1 ("[A]dditional transparency, in particular in relation to the publication of arbitral awards [. . .] is desirable to enhance

the publication of arbitral awards during discussions about adopting transparency standards for investor-state arbitration.²¹⁶ UNCITRAL Working Group II, in drafting the UNCITRAL Transparency Rules, considered drafting a separate article within the UNCITRAL Transparency Rules to specifically address arbitral awards.²¹⁷ The OECD Investment Committee noted that the public pressed for access to arbitral awards in investor-state arbitration due to the principle of public hearings in national laws and the issues of public interest.²¹⁸ This Part will show that the systematic publication of arbitral awards enhances the legitimacy of the international commercial arbitration system by a) facilitating consistent arbitral decisions on similar legal issues, b) upholding the independence and impartiality requirement for arbitrators, and c) allowing parties to select arbitrators with specialised subject matter knowledge.

A. Consistent Decisions on Similar Legal Issues

The publication of arbitral awards is particularly important in disputes involving law that is vague and that can result in inconsistent interpretations.²¹⁹ Inconsistencies in arbitral awards threaten the legitimacy of the system.²²⁰ In international arbitration, the arbitral tribunal is often responsible for interpreting vague and general laws governing a dispute.²²¹ With respect to treaty-based investor-state arbitration, scholars have pointed to the applicability of the Most Favoured Nation clause and the reasoning of the doctrine of necessity as examples of treaty provisions that are vague and open-ended legal standards.²²² For example, the tribunals in the *CMS* and *LG&E* disputes against Argentina following the Argentine financial crisis interpreted the necessity clause differently.

effectiveness and public acceptance of international investment arbitration, as well as contributing to the further development of a public body of jurisprudence.”).

216. See sources cited *supra* note 215.

217. See U.N. Comm’n on Int’l Trade Law, Rep. of Working Group II on Its Fifty-Sixth Session, U.N. Doc. A/CN.9/WG.II/WP.169, at 11 ¶ 33 (2011) [hereinafter 2011 Int’l Trade Rep. IV] (setting forth the draft article specifically governing arbitral awards).

218. OECD 2005, *supra* note 43, at 4.

219. See Knahr & Reinisch, *supra* note 20, at 111 (“The publication of judicial and arbitral decisions is a precondition for the evolution of a consistent case-law which creates legal certainty...[which will] in turn increase the confidence in the system of dispute settlement.”).

220. Cf. Monde Marshall, *Investor-State Dispute Settlement Reconceptualized: Regulation of Disputes: Standards and Mediation*, 17 PEPP. DISP. RESOL. L.J. 233, 243 (2017) (addressing the issue of inconsistency in the context of investor-state arbitration).

221. Knahr & Reinisch, *supra* note 19, at 111-12 (pointing to laws governing fair and equitable treatment, expropriation, and full protection and security).

222. Marshall, *supra* note 220, at 244-45.

The *CMS* tribunal concluded that emergency influences do not exempt the state from liability, while the *LG&E* tribunal concluded that Argentina's financial crisis constituted a state of necessity resulting in exemption from damages.²²³

International commercial arbitration also involves areas of law that are subject to varying interpretations that can lead to inconsistencies. For examples, recent tribunal and court decisions differ in their approach to the question of which law governs the substantive validity of an arbitration agreement when the parties have agreed on the governing law for the contract but have not expressly indicated the law for the arbitration agreement.²²⁴ In an unpublished ICC award, which the Swiss Supreme Court reviewed in *X Sa v. Z. Ltd.*, the arbitral tribunal concluded that the governing law for the arbitration agreement is the same as the substantive law governing the contract.²²⁵ In the dispute, the British claimant had filed arbitration to request damages for the amount that it had to pay during proceedings before a Greek court in violation of the arbitration agreement.²²⁶ The ICC tribunal, seated in Switzerland, applied the law governing the contract, English law, in finding that the costs incurred during the court proceedings constituted part of the damages that the respondent owed to the claimant.²²⁷ In contrast, in *FirstLink Investments Corp. Ltd.*, the Singapore Court ruled on the same issue and found that the law of the seat of arbitration, rather than the law governing the contract, governed the arbitration agreement.²²⁸

Systematically publishing arbitral awards facilitates the development of consistent interpretations on points of law that are vague or in dispute.²²⁹ König's empirical study of citations of international arbitration awards suggests that publishing awards may aid in developing a system of precedent.²³⁰ A consistent jurisprudence promotes the fairness of the system by facilitating

223. *CMS Gas Transmission Co. v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, ¶ 381 (May 12, 2005); *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, ¶ 262 (July 25, 2007).

224. *FirstLink Investments Corp. Ltd. v. GT Payment Pte Ltd.*, SGHCR 11, ¶¶ 13, 16-17 (High Ct. 2014) (Sing.); *X SA v. Z. Ltd.*, 4A_232/2013, 5 ¶ 3.3.2 (First Civ. Ct. 2013) (Swed.).

225. *X SA*, 4A_232/2013 at 5 ¶ 3.3.2.

226. *Id.* at 2 A.c., ¶ 4.2.

227. *Id.* at 1, 5 ¶ 3.3.2.

228. *FirstLink Investments Corp. Ltd.*, SGHCR 11 at ¶¶ 13, 16-17 (noting that the law governing disputes arising out of the contract only applies when the former contractual relationship between the parties have deteriorated).

229. Knahr & Reinisch, *supra* note 19, at 111.

230. Shirlow, *supra* note 51, at 637.

equality in the way that tribunals decide similar cases.²³¹ Arbitrators who are unfamiliar with the issues in dispute can review past awards on the issue to make more informed decisions.²³² Since both investor-state arbitration and international commercial arbitration value finality and allow limited appeal, the accuracy of arbitral awards is particularly important.²³³ In decreasing the element of unpredictability through consistent interpretations of the law, the publication of arbitral awards contributes to building public confidence in the international commercial arbitration system.²³⁴

In areas of the law in which arbitral tribunals have applied different interpretations, publishing arbitral awards allows scholars and the public to be aware of arising inconsistencies.²³⁵ Interested persons can review the arbitral awards and discuss issues that may aid in developing more consistent interpretations in future disputes.²³⁶ Scholars have posited that transparency can also facilitate reform in institutions and in areas of the law because it allows the public and institutions to observe the wider implications of tribunal awards.²³⁷

B. Independence and Impartiality of Arbitrators

The corruption of arbitrators is a recent concern that has raised questions about the legitimacy of the international arbitration system.²³⁸ At its Forty-Eight session in 2015, in parallel with discussions of transparency standards, the UNCITRAL Commission considered the Secretariat's note on the topic of arbitrator ethics in international arbitration.²³⁹ The Commission requested the Secretariat to continue exploring the topic and to report to the Commission at a future session on possible approaches. Recent codes of conduct for arbitrators reflect the idea of implementing higher transparency standards as a manner of

231. Knahr & Reinisch, *supra* note 19, at 111 n.82.

232. Magraw & Amerasinghe, *supra* note 24, at 345.

233. *Id.*

234. 2012 UNCTAD *Series*, *supra* note 33, at 1-2; Knahr & Reinisch, *supra* note 19, at 111.

235. Knahr & Reinisch, *supra* note 19, at 115; Magraw & Amerasinghe, *supra* note 24, at 350.

236. Magraw & Amerasinghe, *supra* note 24, at 346, 352.

237. *Id.* at 352.

238. Malatesta, *supra* note 27, at 45.

239. U.N. Comm'n on Int'l Trade Law, Rep. of Its Forty-Eight Session, U.N. Doc. A/70/17, at 26 ¶ 148 (2015) [hereinafter 2015 Int'l Trade Rep. I].

addressing the issue of corruption in arbitrators.²⁴⁰ The third section of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) Annex 29-B Code, for example, requires candidate arbitrators to disclose any relationship that would likely affect their independence or impartiality or that might reasonably create an appearance of impropriety.²⁴¹

In light of the increasing focus on arbitrator corruption, scholars have advocated for institutions to systematically publish the anonymized version of all individual cases pertaining to the challenge of arbitrators.²⁴² A number of arbitral tribunals, based on various governing laws, have presided over disputes in which parties have challenged arbitrators based on the arbitrators' past or existing experience as arbitrator or counsel.²⁴³ The LCIA published a set of anonymized decisions on challenges to arbitrators, which included extracts and commentaries on twenty-eight cases decided between 1996 and 2010.²⁴⁴

The publication of arbitral awards can serve as an additional mechanism, in addition to decisions of challenges to arbitrators, for upholding the independence and impartiality requirement. The systematic publication of arbitral awards allows the public, in addition to the disputing parties, to monitor the arbitrators' conduct by reviewing the legal reasoning in the arbitral awards.²⁴⁵ By knowing that the public can review their decisions in detail, arbitrators will be less likely to engage in conduct that violates the

240. Comprehensive Economic & Trade Agreement [CETA] art. 8.30, Can.-E.U., Oct. 30, 2016, 60 J. Eur. Un. L 238 [hereinafter CETA]; EU-Singapore Free Trade and Investment Agreements [EUSFTA], Oct. 19, 2018; Malatesta, *supra* note 27, at 45; LCIA Rules, *supra* note 143.

241. CETA, *supra* note 240, at Annex 29-B ¶ 2.

242. Malatesta, *supra* note 27, at 81.

243. In *ICS v. Argentina*, Argentina challenged the arbitrator on the basis that he was representing a party in another dispute against Argentina, giving rise to justifiable doubt about the arbitrator's independence and impartiality. *See ICS Inspection and Control Services Ltd. (U.K.) v. The Republic of Argentina*, PCA Case No. 2010-9, Decision on Challenge to Arbitrator (Perm. Ct. Arb. 1990). In *CEMEX v. Venezuela*, Venezuela challenged one of the arbitrators on the basis that the arbitrator's former law firm was involved in a separate dispute against Venezuela. *See CEMEX Caracas Investments B.V. & CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on the Respondent's Proposal to Disqualify a Member of the Tribunal (Nov. 6, 2009). In *Ghana v. Telekom Malaysia*, Ghana challenged one of the arbitrators on the basis of concurrently serving as counsel in a dispute seeking to annul an award that Ghana was relying on in the pending dispute. *See Republic of Ghana v. Telekom Malaysia Berhad*, HA/RK 2004, 667, 788 (Dist. Ct. of the Hague Nov. 5, 2004).

244. Malatesta, *supra* note 27, at 80.

245. Magraw & Amerasinghe, *supra* note 24, at 346 (“[P]ublic disclosure of final awards discourage improper behavior.”).

independence and impartiality requirement.²⁴⁶ Attaching the names of the arbitrators to the awards may also promote greater care for drafting the awards.²⁴⁷ In this way, the public disclosure of arbitral awards allows parties to perceive arbitration as a true alternative to litigation.²⁴⁸

Arbitral awards can alert the public to possible corrupt conduct in cases where the disputing party does not take actions to address arbitrator corruption during the arbitral proceedings. If the disputing parties refrain from challenging the arbitrator, they might waive their right to an impartial and independent arbitrator.²⁴⁹ In the 1999 dispute *Suovaniemi and Others v. Finland*, for example, the Helsinki District Court ruled that since the applicants had failed to raise the challenge during the arbitral proceedings in question, they had lost their right to raise the issue at a later time.²⁵⁰ During the arbitral proceedings, the applicants had submitted to the tribunal a letter challenging one of the arbitrators on the grounds that he had acted as legal counsel for one of the opposing parties. The arbitrator denied the accusation and announced that he would, however, be willing to leave the tribunal if his impartiality was questioned. The applicants then explicitly approved the arbitrator to continue his duties. Later, the applicants found a letter that stated that the opposing party had acted on the basis of legal advice from the arbitrator in question, but the applicants did not raise the question of impartiality again during the proceedings. The Helsinki District Court denied the applicants' request to overturn the arbitral award on the basis of arbitrator impartiality.

Publishing arbitral decisions would also serve to protect the reputation of arbitrators who are wrongfully accused by parties. Some decisions have underlined that there should be objective circumstances that give rise to justifiable doubts as to the impartiality or independence of the arbitrator for a challenge to be successful.²⁵¹ However, even if disputing parties do not file a challenge, the losing party to the arbitral dispute may include unstated bias in expressing their view of the arbitrator when

246. *Id.*; see also Malatesta, *supra* note 27, § 4.4.3.

247. Knahr & Reinisch, *supra* note 19, at 112; Magraw & Amerasinghe, *supra* note 24, at 346.

248. Knahr & Reinisch, *supra* note 19, at 111.

249. *Suovaniemi & Others v. Finland*, App. No. 31737/96 Eur. Ct. H.R. (1999).

250. *Id.*

251. U.N. Comm'n on Int'l Trade Law, UNCITRAL Digest of Case Law on the Model Law on International Commercial Arbitration 64, art. 12 (2012).

communicating with other parties in the sector.²⁵² Parties have raised concerns that arbitrators' fear of being challenged and being perceived as unjust have caused arbitrators to be "pleasant to parties" rather than reaching a merited decision.²⁵³ Publishing arbitral awards contributes to diminishing the weight of unstated bias in such accounts.²⁵⁴

C. Selection of Arbitrators with Specialized Knowledge

The role of the arbitrator in managing the proceedings is an important concern for parties when considering whether to choose international commercial arbitration over judicial litigation for resolving disputes.²⁵⁵ For example, when asked how international commercial arbitration could become more appealing to users, the respondents of a survey conducted by Queen Mary University on parties in the Technology, Media and Telecommunication sector replied that a primary consideration is to have lower costs.²⁵⁶ One way to decrease costs is to improve the efficiency of the system. Arbitral institutions acknowledge the important role that arbitrators have in enhancing the efficiency of the proceedings.²⁵⁷ Given the important role of the arbitrator, having access to past disputes in which the arbitrator presided is appealing to users because it allows them to better assess the cost of arbitrating their own disputes.²⁵⁸

One factor that deters potential users from choosing international commercial arbitration is difficulty in selecting arbitrators with specialization in the subject matter of the dispute. The results of the Queen Mary University Survey shows that one of the primary demands of international commercial arbitration users

252. Malatesta, *supra* note 27, at 102 ("Arbitrators are understandably concerned that parties or lawyers who lose an arbitration will inevitably give them bad marks."); OECD 2005, *supra* note 44, at 11.

253. Malatesta, *supra* note 27, at 90; Queen Mary Univ., Pre-empting and Resolving Technology, Media and Telecoms Disputes 32 (2016) [hereinafter 'TMT Survey].

254. OECD 2005, *supra* note 44, at 11.

255. TMT Survey, *supra* note 253, at 28; *see also* Luis M. Martinez, Am. Arb. Ass'n, Time and Costs – Taking Control of Your International Arbitration (2013) ("The purpose of these guidelines is to make it clear to arbitrators that they have the authority, the responsibility and, in certain jurisdictions, the mandatory duty to manage arbitration proceedings so as to achieve the goal of providing a simpler, less expensive, and more expeditious process.").

256. TMT survey, *supra* note 253, at 28.

257. Sing. Int'l Arb. Ctr., SIAC Arbitration Rules 13.3 (2016); Martinez, *supra* note 255.

258. *See* ICC Press Release, *supra* note 141 ("By releasing this new note, we send a clear signal to tribunals that unjustified delays will not be tolerated, and we provide transparency on the consequences that the Court will draw from such situations.").

was for more specialised arbitrators.²⁵⁹ The survey shows that although telecommunication and technology companies generally prefer arbitration, they more commonly choose litigation in practice.²⁶⁰ This discrepancy between preference and practice may be due to the dearth of arbitrators with specialized experience in the area.²⁶¹ Respondents of the survey emphasized the need for more public disclosure of arbitrators' previous experience in similar matters.²⁶²

The systematic publication of arbitral awards aids parties in selecting arbitrators that are best suited for the subject matter of the dispute.²⁶³ Access to past arbitral awards can give potential users information such as the origin of the parties in the past disputes, amount in dispute, general nature of claims, and awards that have been challenged.²⁶⁴ Parties can also review past decisions to determine which arbitrators can manage the processes efficiently without concern of challenge.²⁶⁵

Arbitral institutions can protect the parties' confidential information by publishing arbitral awards with the names of the arbitrators attached while redacting the parties' identity. For example, Article 8.1 of the Rules of the Milan Chamber of Arbitration guarantees parties confidentiality, stating that "The Chamber of Arbitration, the parties, the Arbitral Tribunal and the experts shall keep the proceedings and the arbitral awards confidential, except in case it has to be used to protect one's rights."²⁶⁶ At the same time, Article 8.2 allows the Chamber to publish the arbitral award in an anonymous format, unless the parties object during the proceedings.²⁶⁷

A systematic compilation of past arbitral awards can help potential users become more familiar with the system.²⁶⁸ Parties

259. TMT survey, *supra* note 253, at 28 ("The second most important group of suggestions was those connected to arbitrators' abilities, with a focus on increased specialisation.").

260. Steven Pong, *Recent Improvements to ICC Transparency Make Arbitration a More Attractive Option for Technology and Telecom Disputes*, INT'L ARB. LAW (Jan. 18, 2017), <http://internationalarbitrationlaw.com/blog/recent-improvements-to-icc-transparency-make-arbitration-a-more-attractive-option-for-technology-and-telecom-disputes/>

261. *Id.*

262. *Id.*

263. *Id.*; see also Malatesta, *supra* note 27, at 102; OECD 2005, *supra* note 44, at 83.

264. Malatesta, *supra* note 27, at 102.

265. TMT survey, *supra* note 253, at 28.

266. *Id.* at 47.

267. *Id.*

268. See Malatesta, *supra* note 27, at 102; OECD 2005, *supra* note 44, at 102 ("Creating public access to [information on arbitrator performance] would go a long way toward

have commented on a sense of unfamiliarity that some potential users have towards arbitral institutions.²⁶⁹ Since users have generally relied on personal ties to choose arbitrators, publishing past arbitral awards with the names of the arbitrators attached will encourage potential users from sectors with less arbitration experience to choose international commercial arbitration.²⁷⁰ With a systematic compilation of past awards, parties that are unfamiliar with international commercial arbitration can read the awards themselves and make decisions.²⁷¹ Past arbitral awards can also help parties to understand how agreements are interpreted and provide guidance on factors to consider in negotiating future agreements.²⁷²

V. CONCLUSION

This Article proposes that international commercial arbitration adopt higher transparency standards similar to those of investor-state arbitration. The issue of democratic deficit that was an important concern motivating the adoption of transparency standards in investor-state arbitration is also present in international commercial arbitration. In analyzing specific disputes, this Article shows that international commercial arbitration does in fact involve some of the same types of public interest issues that are commonly attributed to investor-state arbitration.

International commercial arbitration can adopt transparency standards that balance the public's interests in transparency with the disputing parties' interests in protecting confidential information. The present sources of procedural law governing investor-state arbitration, such as the UNCITRAL Transparency Rules, suggest a manner for balancing transparency with confidentiality. Transparency standards that establish public disclosure of information as a general rule while setting forth specific exclusions for confidential information allow the public and the disputing parties to benefit from both interests. As a concrete step to establish

overcoming the inadequacies of the current situation in which the most valuable information is available only anecdotally and is not cost effective to obtain.”); Calamita, *supra* note 30, at 652 (“[T]he lack of transparency in investor-state arbitration promotes information asymmetries between parties in arbitration.”).

269. TMT survey, *supra* note 253, at 28.

270. Calamita, *supra* note 29, at 652; Pong, *supra* note 260.

271. See OECD 2005, *supra* note 45, at 102-03; Malatesta, *supra* note 27, at 102 (“[C]urrent word-of-mouth feedback can be rife with unstated biases, expectations and experiences.”);

272. See Calamita, *supra* note 29, at 653 (stating that states increasingly take into consideration past awards when drafting treaty texts).

higher transparency standards, this Article suggests the publication of arbitral awards. A publicly accessible compilation of arbitral awards will enhance the legitimacy of international commercial arbitration as a dispute resolution system for resolving international disputes.