

**CONFIDENTIALITY AND THIRD PARTY PARTICIPATION IN  
INTERNATIONAL INVESTOR- STATE ARBITRATION**

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**Research dissertation presented for the approval of Senate in partial fulfilment of the requirements for the degree of Master of Laws in Commercial Law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.**

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## DECLARATION

Research dissertation presented for the approval of Senate in partial fulfilment of the requirements for the degree of Master of Laws in Commercial Law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I do hereby declare that I have read and understood the regulations governing submission of a Master of Laws dissertation, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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Adeola Falilat Awojobi

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Date

DEDICATION

To my parents and Akeem Agbaje

## ACKNOWLEDGEMENT

A heartfelt gratitude to my supervisor Professor Lise Bosman for her inestimable dedication and thorough guidance through this research.

## ABSTRACT

The contractual nature of arbitration as a form of alternative dispute resolution in the context of cross-border/international disputes traditionally emphasises confidentiality as one of the fundamental characteristics of international arbitration. Confidentiality is often assumed to be a common feature and advantage of international commercial arbitration, and the privacy of arbitral proceedings has facilitated and encouraged recourse to arbitration. However, the issue of confidentiality has a different dimension and is limited in the context of international investment and trade disputes. The participation of States, State entities, sub-divisions and agencies in international disputes shifts the emphasis from privacy and confidentiality to transparency and accountability. This study analyses the role of confidentiality in investor-State arbitration, noting that confidentiality is not always preserved in many respects and stages throughout the arbitration proceedings. The paper considers the issues that challenge the legal effectiveness of confidentiality in international investor-State arbitration and the development towards transparency. In particular, the paper examines the participation of non-disputing/third parties in investor-State arbitration, the different approaches of major arbitral institutions towards the issue of confidentiality, and the arguments for and against confidentiality in relation to transparency. It concludes by making recommendations in the context of the development of investor-State arbitration.

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## LIST OF ABBREVIATIONS

AAA	American Arbitration Association
All E.R	All England Law Reports
BIT	Bilateral Investment Treaty
CAFTA-DR	Free Trade Agreement between the United States, Central America and Dominican Republic
CEITAC	China International Economic and Trade Arbitration Commission
CLR	Commonwealth Law Reports
DIAC	Dubai International Arbitration Centre
ECtHR	European Court of Human Rights
EU	European Union
EWCA Civ	England and Wales Court of Appeal civil division decisions
F.R.D	Federal Rules Decision
IACrtHR	Inter-American Court of Human Rights
ICSID	International Centre for Settlement of Investment Dispute
IISD	International Institute for Sustainable Development
ILSA	International Law Student Association
LCIA	London Court of International Arbitration
Lloyd's Rep	Lloyd's Law Reports
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organisation
NSWLR	New South Wales Law Reports
PCA	Permanent Court of Arbitration
QB	Queen's Bench
Rev Arb	Revue de l'arbitrage
SSC	Stockholm Chamber of Commerce
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
US	United States
WLR	The Weekly Law Reports
WTO	World Trade Organisation

## CHAPTER ONE

### I INTRODUCTION

Arbitration is widely regarded as the most efficient dispute resolution method in cross-border business transactions.<sup>1</sup> Investor-State arbitration as a method of dispute resolution is part of the framework developed for a stable, neutral and enforceable legal regime under multilateral and bilateral treaties/agreements frequently used for the resolution of cross-border disputes between foreign investors and host countries.<sup>2</sup> Investor-State arbitration provides a specialised dispute resolution mechanism which deals with a distinctive category of investment disputes, involving the application of substantive international law protections to governmental actions and regulatory measures and implicating complex international and domestic policies.<sup>3</sup>

Recourse to investor-State arbitration is basically motivated by the fact that it is significantly detached and autonomous from the domestic legal system of the host country, as well as the insistence on party autonomy in determining the rules of law that would govern the relationship between the disputing parties and the resolution of their disputes.<sup>4</sup>

One of the many reasons for the growing use of arbitration as a dispute resolution method alternative to regular court proceedings capitalises on its being less public, thereby creating a general perception of confidentiality in arbitration across national borders, in contrast to court proceedings. It is a general presumption that one of the fundamental bases for the submission by parties of their disputes to commercial arbitration rather than litigation is to preserve the privacy and confidentiality of the arbitral process to the extent possible.<sup>5</sup> The presumption of confidentiality of the arbitral process in the context of investor-State arbitration would ensure privacy of the

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<sup>1</sup> Lutz-Christian Wolff *The Law of Cross-Border Business Transactions: Principles, Concepts, Skills* (2013) 487. 'International arbitration has become the principal method of resolving disputes between States, individuals, and corporations in almost every aspect of international trade, commerce, and investment.' See Nigel Blackaby et al *Redfern and Hunter on international arbitration* 5ed (2009) 1.

<sup>2</sup> Gary B Born *International Arbitration: Law and Practice* (2012) 412.

<sup>3</sup> *Ibid.*

<sup>4</sup> Florentino P Feliciano 'The *Ordre Public* dimensions of Confidentiality and Transparency in International Arbitration: Examining Confidentiality in the light of Governance Requirements in International Investment and Trade Arbitration' in Junji Nakagawa (ed) *Transparency in International Trade and Investment Dispute Settlement* (2013) 15.

<sup>5</sup> Kyriaki Noussia *Confidentiality In International Commercial Transaction: A Comparative Analysis of the Position under English, US, German and French Law* (2010) 22.

proceedings and the protection of government documents as well as confidentiality of documents relating to the business of the investor.<sup>6</sup>

Investor-State arbitration differs from general commercial arbitration in that it involves claims against the State, which are often related to regulation of a public law nature. This form of arbitration involves public issues not only because it relates to the liability of a State, but also because it often deals with various policies that are traditionally perceived to be within the sovereign regulatory power of the State.<sup>7</sup> The concurrent and sometimes overriding public interest in arbitral process has in recent times shifted the emphasis from confidentiality to transparency and the development towards third-party participation in investor-State arbitration.

The interest of the host State is intensely involved in investor-State arbitration. Hence, the need for transparency and the scope of exceptions to the confidentiality of information and documents generated in the arbitral process tends to expand, and access to such documents or information and participation by third parties becomes enormously important.<sup>8</sup>

This recent development has resulted in States addressing issues related to procedural transparency in the investor-State dispute resolution provisions in regional and bilateral investment treaties/agreements,<sup>9</sup> and the amendment of the arbitration rules of international arbitral institutions.<sup>10</sup>

Against this background, the study examines the legal issues surrounding confidentiality in investor-State arbitration. Is the obligation of confidentiality absolute?

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<sup>6</sup> Mabel I Egonu 'Investor-State Arbitration under ICSID: A Case for Presumption against Confidentiality' (2007) 24(5) *Journal of International Arbitration* 479.

<sup>7</sup> Maciej Zachariasiewicz, 'Amicus Curiae in International Investment Arbitration: Can It Enhance the Transparency of Investment Dispute Resolution?' (2012) 29(2) *Journal of International Arbitration* 205 at 206.

<sup>8</sup> See Feliciano op cit note 4 at 25.

<sup>9</sup> See, for example, North American Free Trade Agreement (NAFTA) available at <https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement>, assessed on 5 August 2014; The Free Trade Agreement between the United States, Central America and Dominican Republic (CAFTA-DR) available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>, assessed on 5 August 2014; Japan-Mexico Foreign Trade Agreement, available at <http://www.mofa.go.jp/region/latin/mexico/agreement/agreement.pdf>, assessed on 5 August 2014 and Australia-Chile Free Trade Agreement available at <http://www.dfat.gov.au/trade/agreements/aclfta/Documents/Australia-Chile-Free-Trade-Agreement.pdf>, assessed on 5 August 2014.

<sup>10</sup> See ICSID Convention, Regulation and Rules, available at [https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/2006%20CRR\\_English-final.pdf](https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/2006%20CRR_English-final.pdf), assessed on 5 August 2014; UNCITRAL Arbitration Rules 2010 and the new UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration.html), assessed on 5 August 2014.

To what extent is confidentiality preserved in investor-State arbitration? Does the drive towards transparency in investor-State arbitration absolutely exclude the obligation of confidentiality? On what ground(s) and to what extent should transparency and third-party participation be employed in investor-State arbitration procedure? What standard, if any, is required to balance the demands for transparency against the need for confidentiality in investor-State arbitration?

The study considers the background to the concept of confidentiality and discusses the nature and scope of the confidentiality obligation in investor-State arbitration. Chapter Two evaluates the duty of confidentiality in arbitral proceedings, the differences between the common law and civil law approach to the notions of implied duties of confidentiality and exceptions to the duty of confidentiality in investor-State arbitration in comparison with the exceptions under commercial arbitration. Chapter Three analyses the participation of non-disputing parties/third parties in investor-State arbitration, the rationale for third-party participation, criteria for considering third-party participation and the use of amici curiae in investor-State arbitration. Chapter Four analyses confidentiality under major institutional arbitration rules, conventions, agreements and treaties. Chapter Five appraises the current trend in investment arbitration towards transparency and makes recommendations guiding a future approach to confidentiality in investment arbitration.

The study explores the current dimension of confidentiality in relation to transparency in investor-State arbitration due to the growing development in recent years towards increased transparency, and considers the effectiveness of the transparency standard in investor-State arbitration.

This introductory chapter introduces the concepts of confidentiality and privacy in arbitration, and identifies the particular features of these concepts in the context of investor-State arbitration.

## II THE CONCEPT OF CONFIDENTIALITY IN ARBITRATION

Confidentiality has been defined as a pure contractual creation born out of the parties' agreement.<sup>11</sup> Confidentiality may also arise through the choice of an arbitration instrument containing a clause or a provision explicitly providing for an obligation of confidentiality in the arbitration proceedings.<sup>12</sup> It has also been traditionally assumed, particularly in commercial arbitration, that 'confidentiality is implied in every agreement to arbitrate for reasons of business efficacy or as a matter of law'.<sup>13</sup>

The term confidentiality may be expressed as the obligation to protect and control the disclosure of information that is not generally known to the public.<sup>14</sup> It is the state of having the dissemination of certain information restricted,<sup>15</sup> between persons who are or have been in a relationship of 'confidence'<sup>16</sup> with each other.<sup>17</sup> Confidential information is usually described as information that is not generally known or accessible to the public and, if disclosed, would cause or threaten to cause prejudice to an essential interest of any individual or entity, or to the interest of a party, or would be contrary to personal privacy.<sup>18</sup> The confidentiality obligation not to disclose information that comes to one's knowledge will have its source in a law, rule or contract binding on the parties, arbitrators and others.<sup>19</sup>

Confidentiality is generally seen as an important advantage of arbitration over litigation in the context of the resolution of commercial disputes. It is perceived as encouraging efficient and dispassionate dispute resolution by reducing the damaging disclosure of commercially-sensitive information and facilitating settlement in an amicable and business-like manner.<sup>20</sup>

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<sup>11</sup>Ileana M Smeureanu *Confidentiality in International Commercial Arbitration* (2011) 9. See also Julian DM Lew, Loukas A Mistelis & Stefan M Kroll *Comparative International Commercial Arbitration* (2003) 177 and Noussia op cit note 5 at 23.

<sup>12</sup>Ibid.

<sup>13</sup>Ibid. See also Quentin Loh Sze On & Edwin Lee Peng Khoon *Confidentiality in Arbitration: How Far Does It Extend?* (2007) 10-16.

<sup>14</sup>Rosemary Pattenden *The Law of Professional-Client Confidentiality* (2003) 12.

<sup>15</sup>Blacks Law Dictionary 9ed (2009).

<sup>16</sup>Contractual relationship can give rise to variety of relationships between parties; some of which are of more private nature than others especially where there are no stipulations as to confidentiality.

<sup>17</sup>Paul Stanley *The Law of Confidentiality: A Restatement* (2008) 3.

<sup>18</sup>UNCITRAL Working Group II Document A/CN.9/WG.II/WP.160 - Settlement of commercial disputes: Preparation of rules of uniform law on transparency in treaty-based investor-State dispute settlement (5 August 2010) para 8, available at <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V10/556/20/PDF/V1055620.pdf?OpenElement>, assessed on 5 August, 2014.

<sup>19</sup>Julian DM Lew 'The Arbitrator and Confidentiality' in Yves Derains & Laurent Levy (eds) *Is Arbitration as Good as the Arbitrator* (2011) 107.

<sup>20</sup>Born op cit note 2 at 195.

Confidentiality in arbitration is typically used to refer to the obligation not to disclose information concerning the arbitration to third parties. This obligation extends not only to prohibiting third parties from attending the arbitral proceedings, but also to a party's disclosure to third parties of the existence of the arbitral proceedings and information emanating from the proceedings such as; hearing transcripts, written pleadings and submissions, evidence adduced in the arbitration, materials produced during disclosure and arbitral award.<sup>21</sup>

The private nature of arbitral proceedings has been intimately linked to confidentiality by proponents of confidentiality in international arbitration. It has been argued that the privacy of the arbitral process necessarily requires that it be confidential save contrary agreement by the parties.<sup>22</sup> Fortier commented that:

‘The private nature of arbitral proceedings is well established and the concept of privacy would have no meaning if participants were required to *arbitrate privately by day* while being free to *pontificate publicly by night*. The duty is not absolute, argue its proponents, but the qualifications or exceptions that attach to it are just that: *exceptions* to a general rule.’<sup>23</sup>

Critics of confidentiality, however, argue that the mere fact that arbitration is private does not import the obligation of confidentiality.<sup>24</sup> These commentators treat the concept of privacy narrowly, arguing that it does not necessarily entail or require broader confidentiality obligations.<sup>25</sup>

It is generally accepted that arbitrations are private, in the sense that no third party has a right to have input, interfere with or attend the hearings without requisite consent. On the other hand, there are no absolute guarantees of confidentiality over information disclosed or produced during arbitration.<sup>26</sup> It is therefore imperative to define the distinction between the concept of ‘privacy’ and ‘confidentiality’.

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<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> L Yves Fortier ‘The Occasionally Unwarranted Assumption of Confidentiality’ (1999) 15(2) *Arbitration International* 131 at 132.

<sup>24</sup> Born op cit note 2 at 195.

<sup>25</sup> Ibid.

<sup>26</sup> Lew op cit note 19 at 106.



### III DISTINCTION BETWEEN PRIVACY AND CONFIDENTIALITY

Privacy and confidentiality have varied meanings. In arbitration, privacy generally refers to the closed and non-public character of the arbitration process, which prevents public access to hearings. Confidentiality, however, refers to the secrecy of the existence of a dispute and information revealed during or in preparation of the arbitration process.<sup>27</sup>

Confidentiality and privacy are two instruments designed to control third parties' access to arbitral proceedings and to the information exchanged in that process.<sup>28</sup> The concept of privacy 'derives from the fact that parties have agreed to submit particular disputes arising between them to arbitration'.<sup>29</sup> It is concerned with the right of third parties to know about the arbitral proceedings and attend the hearings. It does not relate to the arbitral process as a whole, but to those cases where hearings actually take place and the participation of third parties is otherwise agreed upon by the parties.<sup>30</sup>

Consent to third party participation in arbitral proceedings is affected by the variations in privacy provisions in arbitration rules.<sup>31</sup> Certain arbitral institutions require the consent of the parties only,<sup>32</sup> while some other institutions require the consent of either the arbitrators or the parties.<sup>33</sup>

An arbitral tribunal may permit, subject to the consent of the parties, the attendance of other persons at the hearing.<sup>34</sup> This standard can be found in Rule 32(2) of the International Centre for Settlement of Investment Dispute (ICSID) Rules;

'Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony and officers of the Tribunal to attend or observe all or part of the hearings, subject to

<sup>27</sup> Noussia op cit note 5 at 38.

<sup>28</sup> Smeureanu op cit note 11 at 3.

<sup>29</sup> Peter Ramsden *The Law of Arbitration South African and International Arbitration* (2009) 122.

<sup>30</sup> Smeureanu op cit note 11 at 4.

<sup>31</sup> Ibid.

<sup>32</sup> Article 28(3) of UNCITRAL Arbitration Rules 2010 (as amended in 2013) provides that 'hearings shall be held in camera unless the parties agree otherwise'. See also Article 28(3) of PCA Arbitration Rules 2012 and Article 19(4) of LCIA Rules 2014 in contrast with the LCIA Rules 1998 which provides for the consent of the parties or the arbitral tribunal.

<sup>33</sup> See for example Article 28(3) of DIAC Rules 2007 available at <http://www.diac.ae/idias/rules/>, accessed on 27 July 2014 which states that 'all meetings and hearings shall be held in private unless the parties agree otherwise in writing or the Tribunal directs otherwise'.

<sup>34</sup> See Article 26(3) ICC Arbitration Rules 2012 and Article 33(1) of CEITAC Rules 2015 available at <http://www.cietac.org/index/rules.cms>, assessed on 15 January 2015.

appropriate logistical arrangements. The tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.’

Arbitration hearings are not open to the public without the parties’ consent. Where the parties and the tribunal agree to permit third parties to attend, the tribunal shall put in place appropriate procedures for the protection of proprietary or privileged information.<sup>35</sup>

Confidentiality, on the other hand, goes further than privacy, and connotes a certain amount of secrecy which precludes disclosure of evidence, communication or other information disclosed in arbitral proceeding.<sup>36</sup> Confidentiality is a state of secrecy attached to the materials created, presented and used in the context of the arbitral process,<sup>37</sup> and the obligation not to disclose information concerning the arbitration to third parties.<sup>38</sup>

Confidentiality transcends privacy, although both involve the element of secrecy.<sup>39</sup> Though the two concepts are correlated, they differ significantly in nature. Confidentiality is wider than privacy as it extends to the whole arbitral process and is not limited to the hearing phase of arbitration. Privacy and confidentiality may overlap in the context of arbitral hearings, but this does not necessarily mean that all information disclosed during a private hearing is confidential.<sup>40</sup>

#### IV NATURE AND SCOPE OF CONFIDENTIALITY IN INVESTOR – STATE ARBITRATION

As noted above, arbitration has traditionally been regarded as a private and confidential proceeding strictly focused on the resolution of disputes between two or more parties to an arbitration agreement.<sup>41</sup> Investor-State arbitration largely evolved based on the model of international commercial arbitration, as a private and confidential process for resolving disputes with its own peculiar process whereby private investors bring claims

<sup>35</sup> Georgios Petrochilos, Silvia Noury & Daniel Kaldermis ‘ICSID Rules of Procedure for Arbitration Proceedings 2006’ in *Concise International Arbitration* Loukas A Mistelis (ed) (2010) 267.

<sup>36</sup> Noussia op cit note 5 at 40.

<sup>37</sup> Smeureanu op cit note 11 at 5.

<sup>38</sup> Born op cit note 2 at 195.

<sup>39</sup> Noussia op cit note 5 at 26.

<sup>40</sup> Confidentiality will not apply to information already in the public domain or one that is not confidential in nature.

<sup>41</sup> Nigel Blackaby & Caroline Richard ‘Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration’ in Michael Waibel et al (eds) *The Backlash against Investment Arbitration: Perceptions and Reality* (2010) 254.

against sovereign States hosting their investment under dispute resolution provisions in investment treaties/agreements.<sup>42</sup> It is principally governed by ICSID Arbitration Rules or ICSID Arbitration (Additional Facility) Rules with proceedings being conducted under the auspices of International Centre for Settlement of Investment Dispute,<sup>43</sup> and UNCITRAL Arbitration Rules on an *ad hoc* basis.

Generally, investor-State arbitrations are significantly more transparent and less confidential than commercial arbitrations considering the nature of their framework and the call for transparency.<sup>44</sup> The obligation of confidentiality primarily stems from the agreement between the parties, resulting directly from the arbitration agreement or indirectly from the rules of arbitration.<sup>45</sup> It is widely argued that ‘there is no general duty of confidentiality in investor-State arbitration’ based on the absence of general principle of confidentiality obligations in the principal procedural rules governing investor-State arbitration and the marked tendency towards transparency.<sup>46</sup>

This however, does not mean that investor-State arbitration is entirely transparent. The scope of confidentiality does not necessarily affect the existence of the arbitral process, but broadly affects disclosures made and evidence produced during arbitral proceedings, restrictions on publication of the contents of the award and deliberations of the arbitrators.<sup>47</sup>

(a) *Confidentiality of the Arbitral Proceedings*

The extent to which confidentiality covers the existence of arbitral proceedings in investor-State arbitration varies under the different provisions of the arbitration agreement and arbitration rules.<sup>48</sup> Arbitration rules seldom impose an obligation to

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<sup>42</sup> Ibid. See Loukas A Mistelis, ‘Confidentiality and Third Party Participation: UPS v. Canada and Methanex Corporation v. United States’ (2005) 21(2) *Arbitration International* 205 and Eugenia Levine, ‘Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation’ (2011) 29(1) *Berkeley Journal of International Law* 200 at 204: the ‘concept of privacy and confidentiality originates primarily from the foundational underpinnings of international commercial arbitration, but it has also to a considerable extent been translated into the investment context’.

<sup>43</sup> Investor-State arbitration may also be carried out under the auspices of other arbitral institution like the International Chamber of Commerce, Permanent Court of Arbitration, London Court of International Arbitration, Stockholm Chamber of Commerce and governed by its respective Arbitration Rules.

<sup>44</sup> Born op cit note 2 at 200.

<sup>45</sup> Valery Denoix de Saint Marc ‘Confidentiality of Arbitration and the Obligation to Disclose Information in Listed Companies or During Due Diligence Investigations’ 2003 20(2) *Journal of International Arbitration* 211.

<sup>46</sup> Born op cit note 2 at 200-1; Mistelis op cit note 42 at 213-14; and Levine op cit note 43 at 204.

<sup>47</sup> Denoix de Saint Marc op cit note 45 at 212.

<sup>48</sup> Smeureanu op cit note 11 at 75.

maintain the secrecy concerning the existence of the arbitration or the commencement of arbitration.<sup>49</sup> Information regarding the existence of arbitral proceedings is published under ICSID investment arbitration. Regulation 22 (1) of the ICSID Administrative and Financial Regulations provides that:

‘The Secretary-General shall appropriately publish information about the operation of the Centre, including the registration of all requests for conciliation or arbitration and in due course an indication of the date and method of the termination of each proceeding.’<sup>50</sup>

The information on all cases filed under the ICSID arbitral institution is accessible on the Centre’s website with the aim of furthering the development of international law in relation to investments.<sup>51</sup> A similar provision under Article 2 of the new UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration applicable to investor-State arbitration under treaties concluded after 1 April 2014,<sup>52</sup> stipulates the publication of information at the commencement of arbitration proceedings.

Furthermore, confidentiality of arbitral proceedings affects public access to procedural documents, oral hearings and publication of awards. Traditionally, arbitration rules relate to the conduct of arbitral proceedings, as generally private, to the exclusion of third parties subject to the agreement of parties.<sup>53</sup> Third parties with a significant interest are allowed to participate, with some limitations, in the dispute settlement proceedings in a manner analogous to a right to intervene.<sup>54</sup>

The increasing number of investor-State arbitrations and the development as a dispute resolution mechanism in recent years has resulted in the revision of the major

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<sup>49</sup> Ibid. UNCITRAL Arbitration Rules is generally silent on the confidentiality of the existence of arbitration proceedings.

<sup>50</sup> ICSID Administrative and Financial Regulations, available at [https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/2006%20CRR\\_English-final.pdf](https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/2006%20CRR_English-final.pdf), assessed on 22 August 2014.

<sup>51</sup> ICSID arbitration cases, available at <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx>, assessed on 22 August 2014.

<sup>52</sup> New Rules on transparency adopted by UNCITRAL in 2013. The Rules came into effect on 1 April 2014 and is applicable to investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant to treaty concluded on or after 1 April 2014 or by agreement in cases initiated pursuant to a treaty concluded before it came into effect.

<sup>53</sup> See Article 28(3) of UNCITRAL Arbitration Rules 2010 (as amended in 2013); Article 32(2) of ICSID Arbitration Rules 2006.

<sup>54</sup> Other participants in the arbitral process, mainly *amici curiae* are permitted to make submissions in the case, but often times have restricted access to the oral hearings. See Rule 37(2) of ICSID Arbitration Rules 2006 in contrast with the UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration 2014 which allows access to oral hearings and documents.

arbitration rules applicable to treaty-based investor-State dispute resolution and international investment treaties/agreements to contain provisions on matters of public access to procedural documents, hearings and publication of awards.<sup>55</sup>

The revised ICSID Arbitration Rules leaves the matter of public access to procedural documents, oral hearings and the publication of award(s), to the agreement of the parties, and in certain instances, such as third party participation as *amicus curiae*, to the arbitral tribunal's determination based on the relevant arbitration rules and law applicable to the arbitral procedure.<sup>56</sup> A similar approach founded on consent of the parties to public access to arbitral proceedings exists under the UNCITRAL Arbitration Rules.<sup>57</sup>

On the other hand, the UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration provide general public access to oral hearings, procedural documents and awards subject to the protection of confidential information.<sup>58</sup>

Further to the recent development, international investment agreements traditionally did not include transparency provisions. A majority of international investment agreements, particularly bilateral investment treaties, were concluded in the 1990s without the discussion of procedural transparency at that time.<sup>59</sup> Many international investment agreements refer to mechanisms inspired by international commercial arbitration as the main option for investor-State dispute resolution, which is by nature based on confidentiality of the proceedings.<sup>60</sup>

Increase of cases involving investor-State disputes under international investment agreement in the last two decades, raised the issue of public access to hearings, procedural documents and awards, which triggered the development of provisions for procedural transparency in the dispute resolution clauses of the new generation international investment treaties/agreement.<sup>61</sup>

This new dynamic has been considered desirable by States like the United States and Canada. Canada's Model Foreign Investment Promotion and Protection Agreement

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<sup>55</sup> UNCITRAL Working Group II Document A/CN.9/WG.II/WP.160 op cit note 18 para 5.

<sup>56</sup> Articles 32(2), 37(2) and 48(4) of ICSID Arbitration Rules 2006.

<sup>57</sup> Article 28(3) of the UNCITRAL Arbitration Rules 2010 (as amended in 2013).

<sup>58</sup> Articles 3, 4 and 7 of UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration 2014.

<sup>59</sup> UNCITRAL Working Group II Document A/CN.9/WG.II/WP.160 op cit note 18 para 5.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.* See Mistelis op cit note 42 at 214.

2004, for example, provide that ‘documents submitted to, or issued by, the arbitral tribunal shall be publicly available, unless the disputing parties otherwise agree, subject to the deletion of confidential information’.<sup>62</sup> It is, however, important to note that there is a great variation in international investment agreements and the position of States on the desirability of procedural transparency in investor-State dispute resolution.

The obligation of confidentiality also extends to the arbitration tribunal with regard to the information presented, used and created in the course of the arbitral proceedings.<sup>63</sup> Rule 6(2) of the ICSID Arbitration Rules binds arbitrators with a general confidentiality obligation wherein an arbitrator must sign an undertaking stating that:

‘I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the content of any awards made by the tribunal.’

This provision thus protects the privacy of the arbitration proceedings. The declaration complements the arbitrator’s attestation to his or her impartiality and the obligation to be just in the arbitration proceedings.

*(b) Confidentiality of Awards*

Generally, arbitral awards are confidential unless otherwise agreed by the parties. The orders and awards of arbitral tribunals may be published provided that the parties consent to the publication.<sup>64</sup> Rule 48(4) of the revised ICSID Arbitration Rules reads:

‘The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal.’

The additional requirement that the Centre shall promptly include in its publications, excerpts of the legal reasoning of awards mandatorily expands the scope of the publication of the awards and makes the reasons behind them more accessible to the public. If a party does not consent to the publication by the Centre, the Centre will,

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<sup>62</sup> Ibid para 13. See Article 38 (3) - (8) of Canada’s Model Foreign Investment Promotion and Protection Agreement 2004, available at <http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf>, assessed on 22 August 2014. See also Articles 4.6 and 15.20 of United States-Singapore Free Trade Agreement, available at [http://www.ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset\\_upload\\_file708\\_4036.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf), assessed on 22 August 2014.

<sup>63</sup> Smeureanu op cit note 11 at 96.

<sup>64</sup> See Article 48(5) of the ICSID Convention; Article 34 (5) of UNCITRAL Arbitration rules 2010 (as amended in 2013); and Regulation 22(2) of the ICSID Administrative and Financial Regulations.

however, publish the excerpts of the legal reasoning of the award and any decision deemed to be part of the award.<sup>65</sup>

(c) *Confidentiality of Arbitrators' Deliberations*

The deliberations of an arbitral tribunal are private, secret and to the exclusion of other persons.<sup>66</sup> The arbitrators are not allowed to indicate the individual positions taken during the deliberations and cannot reveal information shared or used during decision making.<sup>67</sup>

In the process of making an award, the members of the tribunal may express different views, which may result in dissenting opinions. Such separate opinions do not generally form part of the award,<sup>68</sup> but may be attached to the award under Rule 47(3) of the ICSID Arbitration Rules without revealing the content of deliberations.

## V CONCLUSION

Parties in investor-State arbitration are by agreement free to allow access to arbitration proceedings and to release information used in or connected to the arbitral process, including the award,<sup>69</sup> save where there is an express agreement to the contrary.<sup>70</sup> Arbitrators are bound by strict rules of confidentiality regarding the communications and exchange of information between the parties in the arbitration proceedings.

Though the existence of the arbitration proceedings is made known to the public, the information made available to the public by the arbitral institution under ICSID Arbitration Rules and practice is restricted to: the names of parties, subject matter of the

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<sup>65</sup>UNCITRAL Working Group II Document A/CN.9/WG.II/WP.167 - Settlement of commercial disputes: Transparency in treaty-based investor-State arbitration – Comments by the International Centre for Settlement of Investment Disputes (8 August 2010) para 11, available at <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V11/848/41/PDF/V1184841.pdf?OpenElement>, assessed on 5 August 2014.

<sup>66</sup> See Rule 15 of the ICSID Arbitration Rules and Rule 23(1) of ICSID Additional Facility Rules.

<sup>67</sup> Smeureanu op cit note 11 at 80.

<sup>68</sup>Ibid at 49. In occasions where one of the members of the tribunal disagrees with others, the signature of the dissenting arbitrator is not required on the award, provided that the reason for any omitted signature is stated.

<sup>69</sup>The award will in principle, be confidential where one of the parties wishes to keep the arbitration process private and opposes the publication of the award. See Mistelis op cit note 42 at 207.

<sup>70</sup> Blackaby & Richard op cit note 41 at 255.

dispute, date of registration, date of constitution of the tribunal, composition of the tribunal, parties' representatives and method of termination of the proceedings.<sup>71</sup>

However, the existence of arbitration proceedings is generally not made public under UNCITRAL Arbitration Rules as revised in 2010 except in proceedings where the UNCITRAL Rules on Transparency apply. They also, do not address the issue of public access to procedural documents, which therefore remains a matter to be agreed by parties or the arbitral tribunal, where such agreements do not exist.<sup>72</sup>

In addition, rules of international arbitration institutions which govern a low percentage of investor-State arbitration,<sup>73</sup> such as the LCIA Arbitration Rules, SSC Arbitration Rules and AAA International Arbitration Rules, express a duty of confidentiality on the parties and arbitral tribunal as regards matters relating to the arbitration, unless otherwise agreed to by the parties.<sup>74</sup> However, the ICC Arbitration Rules and PCA Arbitration Rules contain no specific provision on public disclosure of the existence of proceedings, or public access to procedural documents.<sup>75</sup>

As such, the applicable institutional rules in investor-State arbitration and the 'consent-based nature' of arbitration have basically provided disputing parties with the ability to fashion investor-State arbitration proceedings to preserve privacy and confidentiality.<sup>76</sup> The next Chapter evaluates the scope of the duty to maintain confidentiality and its limitations in investor-State arbitration.

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<sup>71</sup> ICSID website at <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx>, assessed on 22 August 2014.

<sup>72</sup> UNCITRAL Working Group II Document A/CN.9/WG.II/WP.160 op cit note 18 para 35.

<sup>73</sup> UNCTAD Recent Development in Investor-State Dispute Settlement (Issue 1 April, 2014) 4 available at [http://unctad.org/en/publicationslibrary/webdiaepcb2014d3\\_en.pdf](http://unctad.org/en/publicationslibrary/webdiaepcb2014d3_en.pdf), assessed on 22 August 2014.

<sup>74</sup> See Article 19 and 30 of LCIA Arbitration Rules, Article 46 of SCC Arbitration Rules, Article 27 and 34 of AAA International Arbitration Rules. See also, UNCITRAL Working Group II Document A/CN.9/WG.II/WP.160 op cit note 18 para 40-6.

<sup>75</sup> UNCITRAL Working Group II Document A/CN.9/WG.II/WP.160 op cit note 18 para 38 and 47.

<sup>76</sup> Levine op cit note 42 at 205.



## CHAPTER TWO

### I INTRODUCTION

This Chapter sets out the scope of the duty to maintain confidentiality and the actors bound by the duty of confidentiality in international arbitration. The study considers the difference between the common law and civil law approach to the notions of implied duties of confidentiality; exceptions to the duty of confidentiality in investor-State arbitration; and a comparison of the limitations to the duty of confidentiality between commercial arbitration and investor-State arbitration.

### II THE DUTY TO MAINTAIN THE CONFIDENTIALITY OBLIGATION IN INVESTOR-STATE ARBITRATION

An obligation of confidentiality signifies the duty not to disclose information coming into one's knowledge.<sup>77</sup> This obligation, as stated earlier in Chapter One, attaches basically to the arbitration proceedings, documents submitted or produced in the arbitral process and the award in investor-State arbitration.

The sources of the duty of confidentiality are derived from: the agreement of the parties, confidentiality obligations in the arbitration rules chosen to govern the arbitration, the law governing the arbitration, ethical and professional rules, and the generally accepted arbitral practice.<sup>78</sup> Each of these sources applies in varying degrees to all the actors in the arbitration process and the obligation imposed by the agreement. Laws and rules also attach in varying degrees to the type of information and document produced in the arbitration proceedings.

The participants bound by the duty of confidentiality in arbitration proceedings can be classified in five major categories: the parties, the representatives of the parties, the arbitral tribunal, the arbitral institution and third parties, such as lay and expert witnesses participating in the proceedings. The extent to which these actors are bound by the obligations of confidentiality is more widely defined under commercial arbitration than investor-State arbitration, and extensively discussed below.

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<sup>77</sup>Lew op cit note 19 at 107.

<sup>78</sup>Ibid at 108.

(a) *Parties*

Parties can expressly agree to be bound by the duty of confidentiality. The scope of the confidentiality obligations will depend on what they agreed, and generally cannot bind other participants in the arbitration proceedings.

The duty of confidentiality binds the parties either by express agreement or through the arbitration rules that provide for such obligation.<sup>79</sup> This duty is generally defined by the law governing their arbitration agreement, especially where the parties expressly address the subject of confidentiality in their arbitration agreement.<sup>80</sup> There is no general duty of confidentiality imposed on parties in the Law and Rules governing investor-State arbitration. In the case of *Giovanna a Beccara and Others v. The Argentine Republic*,<sup>81</sup> the tribunal held that:

‘In the absence of any agreement between the parties ..., there is no provision imposing a general duty of confidentiality in ICSID [International Centre for Settlement of Investment Dispute] arbitration, whether in the ICSID Convention, any of the applicable Rules or otherwise.’<sup>82</sup>

Most investor-State arbitrations arise under a Bilateral or a multilateral investment treaty/agreement, and as a consequence, the principal applicable law in almost all investment arbitrations will be the provisions of the underlying treaty and general principles of international law.<sup>83</sup>

Parties may however, expressly agree to be bound by the duty not to disclose confidential information. Absent an express agreement between the parties with respect to confidentiality, the duty of parties to maintain confidentiality may vary significantly depending upon the tribunal and the applicable law and procedures, as well as the type of information at issue and the way in which the information may be used.<sup>84</sup>

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<sup>79</sup> Smeureanu op cit note 11 at 134.

<sup>80</sup> Born op cit note 2 at 196.

<sup>81</sup> *Giovanna a Beccara and Others v. The Argentine Republic* ICSID Case No. ARB/07/05, Procedural Order no. 2 (27 January 2010) available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DCI390\\_En&caseId=C95](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DCI390_En&caseId=C95), assessed on 19 August 2014.

<sup>82</sup> Ibid para 67.

<sup>83</sup> Born op cit note 11 at 437. See also Article 42(1) of the ICSID Convention.

<sup>84</sup> Cindy G Buys ‘The Tension Between Confidentiality and Transparency in International Arbitration’ (2003) 14 *The American Review of International Arbitration* 121 at 124.

(b) *Representatives of the parties*

The duty of confidentiality that binds legal counsel involved in arbitration proceedings applies to the information disclosed by their client, the information and materials received from the opposing party, the tribunal and arbitral institution, as well as the information disclosed by witnesses and experts.<sup>85</sup> This particular obligation of confidence does not have its root in arbitration, but emanates from the nature of the legal profession, ethical and professional rules.<sup>86</sup>

(c) *Arbitral Tribunal*

Arbitrators' duty of confidentiality arises as part of the ethical obligations stemming from the role of a decision-maker and from the contractual nature of the relationship, arising from the arbitration agreement or the arbitration rules.<sup>87</sup>

Arbitrators, once appointed and confirmed, are bound to keep confidential: information known in the course of arbitration proceedings, their deliberations during decision making, and the contents of the award. The ICSID Arbitration Rules, for instance, expressly provide that each arbitrator must sign a confidentiality declaration before or at the end of the first session.<sup>88</sup>

(d) *Arbitral Institutions*

The arbitral institution's duty to maintain confidentiality in investor-State arbitration applies to documents submitted and produced in the arbitration process, orders and the award. Documents submitted by parties to the arbitral tribunal, minutes or records of proceedings are not published without the consent of both parties.<sup>89</sup> Likewise the award made in an arbitration proceeding.<sup>90</sup>

(e) *Third Parties*

It is generally accepted that third parties such as lay or expert witnesses are not bound by any duty of confidentiality, absent any specific contractual obligation.<sup>91</sup> This

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<sup>85</sup> Smeureanu op cit note 11 at 139.

<sup>86</sup> Mistelis op cit note 42 at 210-11.

<sup>87</sup> Ibid at 142-3. See Lew op cit note 19 at 117.

<sup>88</sup> See Rule 6(2) and 15 of ICSID Arbitration Rules 2006.

<sup>89</sup> UNCITRAL Working Group II Document A/CN.9/WG.II/WP.167 op cit note 65 para 9.

<sup>90</sup> See Rule 48(5) of ICSID Arbitration Rules 2006.

<sup>91</sup> Buys op cit note 84 at 124.

contractual obligation is often defined in the contractual relationship between the witness and the disputing party. Third parties may, be invited to enter into a confidentiality agreement and consent to be bound by it.

As discussed above, the legal bases from which the duty to maintain confidentiality are the express agreement of parties and arbitration law and rules. It is however, generally established in common law jurisdictions that an enforceable and implied duty of confidentiality arises out of the private nature of arbitration.<sup>92</sup> The question is: does the notion of implied duty of confidentiality exist in investor-State Arbitration?

### III IMPLIED DUTY OF CONFIDENTIALITY

Common and civil law jurisdictions treat the notions of implied duty of confidentiality differently. In many instances, the parties do not agree to confidentiality provisions in their arbitration agreements.<sup>93</sup> In these cases, the common law jurisdictions, through their national courts have reached a variety of conclusions with regard to the duty of confidentiality in arbitration (particularly commercial arbitration). Some courts have recognized confidentiality obligations, implied from the existence of an agreement to arbitrate. In contrast, other common law courts have rejected the notion of implied obligation of confidentiality, holding that such an agreement must be express.<sup>94</sup>

Certain countries, such as the United Kingdom, France and the Philippines, recognize a general duty of confidentiality in international arbitration. Other countries such as the United States, Australia, and New Zealand reject the notion of general duty of confidentiality, unless established by applicable law, the *lex arbitri*, or by common consent of the parties.<sup>95</sup> These dissenting jurisdictions are of the view that privacy of arbitration proceedings does not necessarily impose a duty of confidentiality and refuse to recognize an implied obligation of confidentiality as an attribute of arbitration seated in their respective jurisdictions.<sup>96</sup>

The notion of confidentiality emerged and developed along with the concept of privacy in arbitration proceedings, from which third parties are generally excluded.

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<sup>92</sup> Noussia note 5 at 17.

<sup>93</sup> Born op cit note 2 at 197.

<sup>94</sup> Ibid.

<sup>95</sup> Feliciano op cit note 4 at 16.

<sup>96</sup> Born op cit note 2 at 198. See *Esso Australia Resources Limited v. Plowman* (1995) 183 CLR 10; and *United States of America v. Panhandle Eastern Corporation* 118 F.R.D 346 (D. Del. 1988).

English courts have repeatedly held that arbitration agreements give rise to implied obligations of confidentiality. Leggatt, J (as he then was) in *Oxford Shipping Co. Ltd v. Nippon Yusen Kaisha*, reasoned that:

‘The concept of private arbitrations derives simply from the fact that the parties have agreed to submit to arbitration, particular disputes arising between them and only between them. It is implicit in this that strangers shall be excluded from the hearing and conduct of the arbitration...’<sup>97</sup>

The privacy of the arbitration proceedings is held to imply the confidentiality of information disclosed during proceedings, as an implied obligation derived from the arbitration agreement.<sup>98</sup> Parker, J in *Dolling Baker v. Merret* noted that in every arbitration agreement, it was implied that the documents created exclusively for the purpose of arbitration would remain confidential in the course of and after the closing of the proceedings, save the consent of parties, or pursuant to an order or leave of the court.<sup>99</sup>

Subsequent English decisions affirmed and developed the implied obligation of confidentiality, explaining it as a general principle implied by law,<sup>100</sup> and stating the guidelines regarding the nature of confidentiality obligation applicable to particular categories of information and documents.<sup>101</sup> Colman, J in *Hassneh Insurance Co. of Israel v. Mew* held that an implied contractual term of confidentiality in arbitration applied to: documents created for the arbitration and/or by the arbitral process such as transcripts and pleadings, and documents disclosed during the arbitral process such as documents produced in disclosure.<sup>102</sup> The court emphasized confidentiality of non-public materials submitted in arbitration proceedings while permitting more liberal disclosure of arbitral awards in order to protect a party’s legal rights.<sup>103</sup>

Conversely, decisions of other common law jurisdiction, particularly in Australia and United States, recognized the private nature of arbitration but rejected

<sup>97</sup> *Oxford Shipping Co. Ltd v. Nippon Yusen Kaisha* [1984] 3 All E.R. 835 at 842 cited in Loh & Lee op cit note 13 at 1. See also *Dolling-Baker v. Merrett* [1990] 1 WLR 1205; and *Hassneh Insurance Co. of Israel v. Mew* [1993] 2 Lloyd’s Rep. 243.

<sup>98</sup> See Born op cit note 2 at 198.

<sup>99</sup> *Dolling-Baker v. Merrett* supra note 97 at 1213.

<sup>100</sup> See *Ali Shipping Corp v. Shipyard Trogir* [1998] Lloyd’s Rep. 643 at 651.

<sup>101</sup> Born op cit note 2 at 198.

<sup>102</sup> *Hassneh Insurance Co. of Israel v. Mew* supra note 97 at 250. See also *Ali Shipping Corp v. Shipyard Trogir* supra note 100; *Associated Electric and Gas Insurance Services Ltd v. European Reinsurance Co. of Zurich* [2003] 1 WLR 1041; *Department of Economics, Policy and Development of the City of Moscow v. Bankers Trust Co* [2005] QB 207; and *Michael Wilson and Partners Limited v. Emmott* [2008] EWCA Civ. 184.

<sup>103</sup> *Ibid.* See; Loh & Lee op cit note 13 at 12.

claims of an implied obligation of confidentiality.<sup>104</sup> The court in *Esso Australia Resources Limited v. Plowman* held that the mere fact that parties agree to resolve their dispute through arbitration does not import any legal or equitable duty of confidentiality in the course of arbitration.<sup>105</sup> The court also held that parties are free to agree to express confidentiality obligations in an agreement.

This position tends to be followed in civil law jurisdictions, stating that the confidentiality obligation between parties in an arbitration proceeding could only arise as a contractual creation, through an express agreement by the parties. This approach has been upheld by courts of civil law jurisdiction, with the exception of the French courts.<sup>106</sup> For instance, the Swedish Supreme Court in *Bulgarian Foreign Trade Bank Ltd v. A.I. Trade Fin. Inc.* held that ‘a party to arbitration proceedings cannot be deemed to be bound by a duty of confidentiality, unless the parties have concluded an agreement concerning this’.<sup>107</sup>

The notion that arbitration proceedings are generally private but not confidential by virtue of an implied obligation arising from the parties’ agreement to arbitrate is most clearly adopted in investor-State arbitration. Parties are free to include express confidentiality provisions in their agreement to arbitrate.<sup>108</sup> The tribunal in *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*<sup>109</sup> held that:

‘Parties are free, of course, to conclude any agreements they choose concerning confidentiality. Any such agreements would give rise to rights that are susceptible of protection by way of provisional measures or other appropriate relief.’<sup>110</sup>

<sup>104</sup> Born op cit note 2 at 198.

<sup>105</sup> *Esso Australia Resources Limited v. Plowman* supra note 96 at 30.

<sup>106</sup> See *Aita v. Ojeh*, 1986 Rev. Arb. 583; and Born op cit note 2 at 198. However, French arbitration legislation was recently revised to include an express confidentiality obligation for domestic arbitration but not to international arbitration based on the trend towards transparency in investment arbitration. See Gary B Born *International Commercial Arbitration* Vol. II 2ed (2014) para 20.03 at 2799.

<sup>107</sup> *Bulgarian Foreign Trade Bank Ltd v. A.I. Trade Fin. Inc.* (2001) XXVI Y.B. Comm. Arb. 291 at 298 cited in Born op cit note 106 para 20.03 at 2798.

<sup>108</sup> See *Apotex Holdings Inc. and Apotex Inc. v. United States of America* ICSID Case No. ARB(AF)/12/1 Amended Confidentiality Agreement and Order (24 October 2013) available at: [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=D C3892\\_En&caseId=C2080](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=D C3892_En&caseId=C2080), assessed on 21 August 2014.

<sup>109</sup> *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* ICSID Case No. ARB/05/22 Procedural Order No. 3 (29 September 2006) available at [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=D C1583\\_En&caseId=C67](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=D C1583_En&caseId=C67), assessed on 21 August 2014.

<sup>110</sup> *Ibid* para 115.

Any confidentiality provisions in the parties' arbitration agreement are binding only on the parties themselves, and not on third parties.<sup>111</sup> There are however, circumstances where non-parties consent to be bound by confidentiality agreement and order.<sup>112</sup>

The reason why parties enter into confidentiality agreements is to ensure greater protection of the information disclosed in the arbitration proceedings. The sole fact that parties enter into such agreements, however, does not necessarily guarantee the observance of the confidentiality obligation stipulated in the agreement under all circumstances. These obligations are subject to exceptions which lift the duty to maintain confidentiality in number of circumstances.

#### IV EXCEPTIONS TO THE DUTY OF CONFIDENTIALITY

The private nature of arbitration and the obligation to maintain the duty of confidentiality is not absolute.<sup>113</sup> The principle of privacy and confidentiality are in certain circumstances subject to limitations under international commercial arbitration and investor-State arbitration respectively. Limitations on the duty of confidentiality, particularly the public interest exception, are more prominent in investor-State arbitration, due to the involvement of the State as party and the direct inquiry into its functions and policies.<sup>114</sup> In contrast, a minority of cases in commercial disputes may involve a State or state entity as a contracting party.<sup>115</sup>

Generally, the exceptions to the duty of confidentiality are justified by the element of public interest in the subject matter of the dispute, the parties' consent to disclosure and the existing obligation to disclose under the law.

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<sup>111</sup> Born op cit note 2 at 197.

<sup>112</sup> See for example, Clause 6 of the Amended Confidentiality Agreement and Order (24 October 2013) in *Apotex Holdings Inc. and Apotex Inc. v. United States of America* supra note 108 which states that 'all persons receiving material in this proceeding containing confidential information shall be bound by this Agreement and Order. Each disputing party shall have the obligation of notifying all persons receiving such material of the obligations under this Agreement and Order'. Appendix A of the agreement contains a non-party consent to be bound by confidentiality agreement and order form.

<sup>113</sup> Joyiyoti Misra & Roman Jordans 'Confidentiality in International Arbitration: An Introspection of the Public Interest Exception' (2006) 23(1) *Journal of International Arbitration* 39 at 39-40

<sup>114</sup> Ibid at 46.

<sup>115</sup> Born op cit note 2 at 417.

(a) *Consent of Parties*

This exception has a wider application in commercial arbitration. It is generally accepted that the obligation of confidentiality in commercial arbitration has a consensual nature and attaches through the parties' agreement, whether express or implied, or their chosen set of arbitration rules or applicable laws containing a provision to that effect.<sup>116</sup> Since arbitration is consensual, it must follow that both parties can waive the obligation of confidentiality.<sup>117</sup> The agreement to disclose may be express<sup>118</sup> or implied depending on the conduct of the parties.<sup>119</sup>

In investor-State arbitration, parties are generally free to speak publicly of the arbitration and are not precluded from providing public access to documents submitted or issued in the arbitration proceedings.<sup>120</sup> As discussed above, parties may expressly agree to keep certain information confidential. Arbitral tribunals have also identified a specific duty not to disclose specific documents filed in the arbitration.<sup>121</sup>

In their agreement parties can, however, provide that confidential information shall not be disclosed to any third party except with the prior consent of the disputing party. In the case of *Apotex Holdings Inc. and Apotex Inc. v. United States of America*<sup>122</sup> where the subject matter related to a pharmaceutical enterprise, the parties stated in clause 4 of the confidentiality agreement ordered by the tribunal, that 'confidential information shall not be disclosed to any third party, except with a prior written order of the disputing party that claimed confidentiality with respect to the information'.

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<sup>116</sup> Smeureanu op cit note 11 at 112.

<sup>117</sup> Loh & Lee op cit note 13 at 78.

<sup>118</sup> See for example, Article 30 of LCIA Rules 1998 in contrast with LCIA Rules 2014.

<sup>119</sup> See *Ali Shipping Corp v. Shipyard Trogir* supra note 100; and *Department of Economics, Policy and Development of the City of Moscow v. Bankers Trust Co* supra note 102.

<sup>120</sup> *Giovanna a Beccara and Others v. The Argentine Republic* supra note 81 para 70-1. See *Metalclad Corp v. United Mexican States* ICSID Case No. ARB(AF)/97/1 Award of the Tribunal (30 August 2000) available at

[https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=D C542\\_En&caseId=C155](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=D C542_En&caseId=C155), assessed on 21 August 2014.

<sup>121</sup> Arbitration is generally private and the freedom to disseminate information about the arbitration proceedings and publish documents produced in the proceedings is subject to the agreement of the opposing party. See *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania* supra note 109.

<sup>122</sup> *Apotex Holdings Inc. and Apotex Inc. v. United States of America* supra note 108 para 4.



(b) *Public Interest*

The application of the ‘public interest exception’ is not, however, limited to arbitration in which a State or State entity is involved, but also applicable to cases involving private contracting parties.<sup>123</sup> The level of public interest in arbitration proceedings is higher in investor-State arbitration compared to commercial arbitration.<sup>124</sup>

The public interest exception in commercial dispute involving a public actor was upheld in the case of *Esso Australia Resources Limited v Plowman*, where the public energy authorities were involved in arbitration proceedings with their suppliers and the minister responsible for the authorities applied to the courts for a declaration that the public authority was not subject to any confidentiality obligation and could disclose information regarding the arbitration. The court held that there may be circumstances in which third parties and the public have a legitimate interest in knowing what has transpired in an arbitration and this would give rise to a public interest exception.<sup>125</sup>

Investor-State disputes involve issues of public interest not only in the substantive and financial outcome of the arbitration, but also in the arguments and factual assertions exchanged during the process. The subject matter of the disputes affect the daily lives of the citizens, and impacts the cost and availability of public service. These cases penetrate deeply into domestic policy-making and affect policies that protect public health, safety and the environment.

The tribunal in *Methanex Corp. v United States of America* emphasized the public interest element inherent in disputes involving a State and importance of transparency in public interest arbitrations (investor-State arbitration). The tribunal reasoned that:

‘There is undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties. This is not merely because one of the disputing parties is a State... the public interest in this arbitration arises from its subject-matter, as powerfully suggested in the Petitions.’<sup>126</sup>

<sup>123</sup> Noussia op cit note 5 at 105. See also Misra & Jordans op cit note 113 at 46.

<sup>124</sup> Feliciano op cit note 4 at 20.

<sup>125</sup> *Esso Australia Resources Limited vs Plowman* supra note 96 at 33.

<sup>126</sup> *Methanex Corp. v. United States of America* UNCITRAL (NAFTA), Decision of the Tribunal on Petitions from Third Persons to intervene as ‘Amici Curiae’ (15 January, 2001) para 49, available at <http://www.naftaclaims.com/disputes/usa/Methanex/MethanexDecisionReAuthorityAmicus.pdf>, assessed on 4 September 2014.

Imminent in the subject matter of certain investment disputes are the environmental and public health issues, which can have serious economic and social impacts on the disputing state parties. This is not just because a State is the respondent to the claim and public money is at stake, but also because the dispute may concern, for instance, rights to the natural resources of that State, or maintenance of a public utility, such as the provision of water, electricity, or gas supply to a large population.<sup>127</sup>

In the *Methanex* case held under NAFTA Chapter 11 and UNCITRAL Arbitration Rules, the Canadian company, *Methanex* filed a claim against United States contending that the measures taken by the State of California to restrict the use of MTBE (methyl tertiary-butyl ether) constituted a trade and investment restriction intended to achieve the goal of promoting domestic ethanol industry through sham environmental regulations. *Methanex* was a producer of methanol, a liquid petro-chemical used in the production of MTBE and the use of MTBE in gasoline posed an environmental threat to California's ground waters, which is the State's main source of water, necessitating the measures imposing a ban on the use of MTBE in gasoline.

Considering the significant impact of the case on environment and public health, the International Institute for Sustainable Development (IISD) made an application for permission to file an amicus brief, and to have access to the claimant's memorial and the respondent's counter-memorial; permission to make oral submissions at the hearing; and permission to have observer status at the hearings.<sup>128</sup>

The NAFTA tribunal which was operating under the UNCITRAL Arbitration Rules held that it had the power to receive amicus submissions under Article 15 of the UNCITRAL Arbitration Rules and concluded that:

‘Allowing a third person to make an amicus submission could fall within its procedural powers over the conduct of the

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<sup>127</sup> Chester Brown ‘Bringing Sustainable Development Issues before Investment Treaty Tribunals’ in Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe (eds) *Sustainable Development in World Investment Law* (2011) 177.

<sup>128</sup> *Methanex Corp. v. United States of America* Petition to the Arbitral Tribunal – IISD (25 August 2000) para 5, available at <http://www.naftaclaims.com/disputes/usa/Methanex/MethanexAmicusStandingIISD.pdf>, assessed on 4 September 2014. See also Amended petition of Communities for a Better Environment, the Bluewater Network of Earth Island Institute, and the Centre for International Environmental Law to intervene jointly as Amici Curiae (13 October 2000) available at <http://www.naftaclaims.com/disputes/usa/Methanex/MethanexAmicusStandingEarth.pdf>, assessed on 4 September 2014.

arbitration within the general scope of Article 15(1) of the UNCITRAL Arbitration Rules.<sup>129</sup>

With regard to the petitioners' other applications to receive copies of materials filed by parties, attend hearings, and make oral submissions, the tribunal held that, in light of the provision of Article 25(4) of the UNCITRAL Arbitration Rules, and the terms of the Consent Order agreed upon between the disputing parties, it had 'no power to accept the Petitioners' request to receive materials generated within the arbitration or to attend oral hearings of the arbitration'.<sup>130</sup>

The public interest exception to confidentiality flowing from the protection of public health and environmental issues has also been established in arbitration between private entities, in which case disclosure of confidential information might be permitted. In the case of *Commonwealth of Australia v. Cockatoo Dockyard Property Ltd*,<sup>131</sup> a journalist requested release of information under the Freedom of Information Act 1982, in relation to an arbitration between the parties which essentially concerned the environmental conditions around the Cockatoo Island. The arbitrator in his award directed both parties to maintain confidentiality despite Australia's argument that an order of confidentiality would restrict the free flow of information and would also impinge upon governmental powers. On the application to court, Kirby, J held that it is both significant and urgent that information should be made available, for the protection of public health and the restoration of the environment, both to various governmental agencies or even to the public.<sup>132</sup>

Another contributing ground for public interest participation in arbitration proceedings is the use of public funds, as successful claimants (investors) generally receive monetary awards as compensation to the value of the loss caused by the host State, including the loss of future profits.<sup>133</sup> The size of these awards puts an enormous drain on State finances. These funds inevitably reduce the amount of money the State

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<sup>129</sup> *Methanex Corp. v. United States of America* supra note 126 para 31.

<sup>130</sup> Ibid para 47. See also *United Parcel Service of America v. Canada* Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae (17 October 2001) available at <http://www.naftaclaims.com/disputes/canada/ups/ups-23.pdf>, assessed on 4 September 2014.

<sup>131</sup> *Commonwealth of Australia v. Cockatoo Dockyard Property Limited* [1995] 36 NSWLR 662 (CA)

<sup>132</sup> Ibid at 680.

<sup>133</sup> Jorge Daniel Taillant & Jonathan Bonnitcha 'International Investment Law and Human Rights' in Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe (eds) *Sustainable Development in World Investment Law* (2011) 69.

can use to fund ongoing economic and social projects for the overall benefit of its citizens.<sup>134</sup>

(c) *Compulsion by Law*

This exception largely rests on the provisions of legislation.<sup>135</sup> There are diverse statutes imposing the obligation to disclose confidential information, and giving power to various government or semi-government agencies to require the production of documents and information.<sup>136</sup>

Legal and regulatory provisions may require companies and financial institutions to disclose information about disputes submitted to arbitration, which would incidentally affect the activities of such companies or institutions.<sup>137</sup> The duty of disclosure might arise when there is a legal or ethical duty to provide information to auditors, shareholders, public regulators, or specified third parties.<sup>138</sup> This obligation may also arise in a due diligence investigation into the processes of a sale of a company, where the seller is bound by the duty of good faith to disclose the existence of an arbitration proceeding.<sup>139</sup>

In the case of *Metalclad Corp. v. United Mexican States* held under the ICSID Additional Facility Rules and NAFTA, *Metalclad* provided information about the arbitration to shareholders, analysts and other members of the public who were interested in their activities. Mexico, however, sought an order from the tribunal securing confidentiality, arguing that the guarantee of confidentiality is implicit in arbitration. The tribunal rejected the Mexican argument and pointed out that none of the provisions of NAFTA and Additional Facility Rules imposed any confidentiality requirement on the parties. The tribunal held that ‘unless the agreement between the parties incorporates such a limitation, each of them is still free to speak publicly of the arbitration’.<sup>140</sup> It noted that there was a duty on *Metalclad*, which is a publicly listed company under the laws of United States, to provide shareholders with information that can affect share price.

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<sup>134</sup> Ibid.

<sup>135</sup> Smeureanu op cit note 11 at 126.

<sup>136</sup> Loh & Lee op cit note 13 at 80.

<sup>137</sup> Denoix de Saint Marc op cit note 45 at 211.

<sup>138</sup> Ibid.

<sup>139</sup> Ibid at 215.

<sup>140</sup> *Metalclad Corp. v. United Mexican States* supra note 120 Para 13.

The tribunal, however, urged the parties to keep disclosure to a minimum by holding that:

‘[I]t still appears to the Arbitral Tribunal that it would be of advantage to the orderly unfolding of the arbitral process and conducive to the tenance of working relations between the Parties if during the proceedings they were both to limit public discussion of the case to a minimum, subject to any externally imposed obligation of disclosure by which either of them may be legally bound.’<sup>141</sup>

Finally, issues involving criminal elements such as bribery, corruption, money laundering, fraud and the like in arbitration have been pointed out to be a limitation on the principle of confidentiality.<sup>142</sup>

## V CONCLUSION

The scope of the duty to maintain confidentiality in investor-State arbitrations is different from that in the commercial context. Arbitration proceedings and submissions in investor-State arbitrations as established above are significantly more transparent and less confidential. The tribunal in *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* noted that ‘considerations of confidentiality and privacy have not played the same role in the field of investment arbitration as they have in international commercial arbitration and that there is now a marked tendency towards transparency in treaty arbitration’.<sup>143</sup>

At the same time, arbitral tribunals have displayed reservations concerning the publication of materials from arbitration proceedings. They have, while acknowledging a trend towards transparency in investor-State arbitrations, shown concerns for procedural integrity and non-aggravation of the parties’ dispute. The ICSID tribunal emphasized in *The Loewen Group v. United States of America* that:

‘It would be of advantage to the orderly unfolding of the arbitral process if during the proceedings [parties] were to limit public discussion of the case to what is considered necessary.’<sup>144</sup>

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<sup>141</sup> *Ibid.*

<sup>142</sup> Feliciano op cit note 4 at 20-1; Lew op cit note 19 at 120-3.

<sup>143</sup> *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* supra note 109 para 114.

<sup>144</sup> *The Loewen Group v. United States of America* ICSID Case No. ARB(AF)/98/3 Decision on Competence and Jurisdiction (5 January 2001) para 26, available at <http://www.italaw.com/sites/default/files/case-documents/ita0469.pdf>, assessed 4 September 2014. See also *Metalclad Corp v. United Mexican States* supra note 120.

The tribunal in *Biwater Gauff* further emphasized that its mandate and responsibility includes ensuring that the proceedings will be conducted in a regular, fair and orderly manner, ensuring that potential inhibitions and unfairness do not arise and attempting to reduce the risk of ‘future aggravation and exacerbation’ of the dispute.<sup>145</sup>

It is, however, clear from the above that transparency of arbitration proceedings and the disclosure of information and documents produced in the arbitration process are subject to the overriding public interest and the legal and regulatory requirements of disclosure. These factors, constituting exceptions to the duty of confidentiality, form the legal basis for the participation of non-disputing/third parties in the arbitration process. The next Chapter analyses the participation of non-disputing parties/third parties and its implications for investor-State arbitration.

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<sup>145</sup> *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* supra note 109 para 145.

## CHAPTER THREE

### I INTRODUCTION

This Chapter analyses the participation of non-disputing parties/third parties in investor-State arbitration. In recent years, there has been a shift in investor-State arbitration towards third-party participation,<sup>146</sup> as investment disputes raise public interest issues traditionally absent from international commercial arbitration.<sup>147</sup>

The rapid development of investor-State arbitration as a form of dispute settlement has been accompanied by the fundamental tension between the consensual nature of arbitration and the increasing demand to offer transparent proceedings where a public interest is involved.<sup>148</sup> The development towards openness and transparency has led to demands from individuals and interest groups for participation in investor-State arbitration.<sup>149</sup> The Chapter considers the rationale for third-party participation, criteria for considering third-party participation and the use of *amici curiae* in investor-State arbitration.

### II THIRD PARTY PARTICIPATION IN INVESTOR-STATE ARBITRATION

Arbitration proceedings generally involve the disputing parties to the arbitration agreement, their legal representatives, witnesses and the arbitration tribunal. As established in previous Chapters, arbitration proceedings are generally private and third/non-disputing parties are not allowed to participate in the arbitral process without the clear consent of the disputing parties.

The increase in the number of investment disputes between foreign investors and host States is particularly significant because of the increasing number of cases involving matters of public policy, such as environmental regulation, protection of

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<sup>146</sup> Levine op cit note 42 at 208.

<sup>147</sup> Zachariasiewicz op cit note 7 at 206. See also Magraw Jr, Daniel Barstow & Niranjali Manel Amerasinghe 'Transparency and Public Participation in Investor-State Arbitration.' (2008) 15 *ILSA Journal of International and Comparative Law* 337. The role of public participation has become an important and evolving issue in investor-State arbitrations over the last few years.

<sup>148</sup> Ibid at 205.

<sup>149</sup> kaj Hober 'Arbitration Involving States' in Lawrence Newman & Richard Hill (eds), *Leading Arbitrators' Guide to International Arbitration* (2004) 154.

public health and safety, and the provision of public services, in which the public clearly has a legitimate interest.<sup>150</sup>

Given the profound impact international investment arbitration can have on the rights and welfare of the people and communities, some commentators have argued that international investment dispute settlement processes leading to important public policy decisions should be transparent and allow public input.<sup>151</sup>

Also, developments in investor-State arbitration over the last decade show the significant efforts made by non-governmental organizations and non-profit institutions aimed at ensuring that arbitration under investment treaties/agreements should not be as private as international commercial arbitration.<sup>152</sup>

Against this background, third/non-disputing parties have successfully drawn upon the public character of trade and foreign investment disputes to gain access to the proceedings as *amici curiae*.<sup>153</sup> Interested parties such as civil society groups, non-governmental organizations, academic institutions, and other form of non-profit organizations now rely on participation as *amicus curiae* (or third party intervention) as an avenue to include broader interests in investor-State arbitration.<sup>154</sup> These non-governmental institutions further indicate their intention to attend arbitration proceedings as observers, possibly with the right to access disputing parties' arbitration documents and the potential right to submit briefs on the subject matter of the dispute as *amicus curiae*.<sup>155</sup>

Although investor-State arbitration is generally assumed to be semi-public, based largely on the public interest nature of the subject matter of the dispute, the participation of third/non-disputing parties does not necessarily imply the suspension of privacy and confidentiality of documents in investor-State arbitration.<sup>156</sup>

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<sup>150</sup> Nathalie Bernasconi-Osterwalder 'Transparency and Amicus Curiae in ICSID Arbitrations' in Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe (eds) *Sustainable Development in World Investment Law* (2011) 191.

<sup>151</sup> Ibid.

<sup>152</sup> Mistelis op cit note 42 at 216.

<sup>153</sup> Jorge E Viñuales 'Amicus Intervention in Investor-State Arbitration' (2006) 61(4) *Dispute Resolution Journal* 72 at 73.

<sup>154</sup> Levine op cit note 42 at 201.

<sup>155</sup> Mistelis op cit note 42 at 216. See also *Methanex Corp. v. United States of America* supra note 126.

<sup>156</sup> Ibid.



### III THE CONCEPT OF *AMICUS CURIAE* IN INVESTOR-STATE ARBITRATION

Third parties, or non-disputing parties,<sup>157</sup> often participate in investment dispute resolution mechanisms as *amicus curiae*.<sup>158</sup> An *amicus curiae* (literally ‘friend of the court’) is a party likely to assist the court or tribunal in arriving at its decision.<sup>159</sup> The purpose of *amicus curiae* submissions is to enlighten the arbitral tribunal in its decision-making process,<sup>160</sup> by providing it with ‘arguments, expertise, and perspectives that the parties may not have provided’.<sup>161</sup>

The *amicus curiae* brief is an ancient legal instrument of Roman law origin with early and frequent application in the common law tradition.<sup>162</sup> The concept of *amicus curiae* is accepted in a number of domestic legal systems and has recently gained recognition in international proceedings as well.<sup>163</sup>

The contemporary concept of *amicus curiae* was developed by the courts of England in the seventeenth century with its subsequent recognition in United States, where it has enjoyed great application.<sup>164</sup> The purpose and form of *amicus curiae* brief across jurisdictions is, however, not a uniform one.<sup>165</sup> An *amicus curiae* under English law is an independent advocate appointed by the court to address an issue of law on

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<sup>157</sup> ‘Parties not bound by the arbitration agreement and directly affected by the outcome of a particular arbitration are referred to as third parties/non-disputing parties.’ See Mistelis op cit note 42 at 206. The term third parties and non-disputing parties are used interchangeably. However, these two terms are given different meaning and consideration under the new UNCITRAL Rules on Transparency in Treaty-based investor-State arbitration 2014. The difference in the capacity of third ‘persons’ and non-disputing party under the transparency rules is discussed in detail in the next Chapter.

<sup>158</sup> Levine op cit note 42 at 206. See also John Bellhouse & Anthony Lavers ‘The Modern Amicus Curiae: A Role in Arbitration?’ (2004) 23 *Civil Justice Quarterly* 187.

<sup>159</sup> Zachariasiewicz op cit note 7 at 208.

<sup>160</sup> UNCITRAL Working Group II Document A/CN.9/712 - Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-third session (20 October 2010) para 47, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V10/572/07/PDF/V1057207.pdf?OpenElement>, accessed on 6 October 2014.

<sup>161</sup> See *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic*, ICSID Case No. ARB/03/19 Order in Response to a Petition for Transparency and Participation as Amicus Curiae (19 May 2005) Para 24, available at [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=D516\\_En&caseId=C19](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=D516_En&caseId=C19), accessed on 9 October 2014.

<sup>162</sup> Steven Kochevar ‘Amici Curiae in Civil Law Jurisdictions’ (2013) 122 *Yale Law Journal* 1653.

<sup>163</sup> Levine op cit note 42 at 207; and Kochevar op cit at 1657. Many international courts and adjudicatory bodies, such as the Inter-American Court of Human Rights (IACrHR) and the European Court of Human Rights (ECtHR) accept *amicus curiae* briefs.

<sup>164</sup> Blackaby & Richard op cit note 41 at 257-8; and Kochevar op cit at 1659. The concept of *amicus curiae* was largely alien to civil law jurisdictions but has in recent decades become established and recognized formally or informally in Civil law courts.

<sup>165</sup> *Ibid.* See Kochevar op cit at 1654.

which it lacks assistance.<sup>166</sup> Conversely, in the United States, the role of *amicus curiae* has shifted to include advocacy for a third party interest, which the court might consider.<sup>167</sup>

While the concept of *amicus curiae* developed as a legal instrument primarily used in courts, it has recently gained attention in international investment arbitration.<sup>168</sup> The arbitral tribunal in *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*<sup>169</sup> stated that the role of *amicus curiae* is similar to that of a friend of the court recognized in certain legal systems and more recently in a number of international proceedings.<sup>170</sup> The tribunal further stated that ‘an *amicus curiae*, as the Latin words indicate, a “friend of the court,” is not a party to the proceeding’ and the traditional role of an *amicus curiae* in an adversarial proceeding is to help the decision maker arrive at its decision.<sup>171</sup>

Third-party participation in the form of *amicus curiae* ordinarily takes the form of written submissions under the applicable arbitration rules in investor-State arbitration and is justified on the basis that the *amicus curiae* is in a position to provide the tribunal its special perspective or expertise in relation to the dispute.<sup>172</sup>

#### IV THE DEVELOPMENT OF *AMICUS CURIAE* IN INVESTOR-STATE ARBITRATION

The first recognition of third/non-disputing party participation as *amicus curiae* was by the arbitral tribunal in *Methanex Corp. v United States of America*,<sup>173</sup> being the first tribunal to consider the issue of *amicus curiae* with no guidance from the NAFTA treaty or the arbitration rules (UNCITRAL Arbitration Rules 1976) which governed the dispute.<sup>174</sup>

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<sup>166</sup> Ibid.

<sup>167</sup> Ibid.

<sup>168</sup> Bellhouse & Lavers op cit note 158 at 194. The obvious parallels, both in function and to some extent, in procedure between litigation and arbitration presuppose that the features of the former would likely appear in the latter.

<sup>169</sup> *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic* ICSID Case No. ARB/03/17 Order in Response to a Petition for Participation as Amicus Curiae (17 March 2006) available at [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=D C512\\_En&caselId=C18](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=D C512_En&caselId=C18), accessed on 14 October 2014.

<sup>170</sup> Ibid para 9.

<sup>171</sup> Ibid para 13.

<sup>172</sup> Levine op cit note 42 at 207.

<sup>173</sup> *Methanex Corp. v. United States of America* supra note 126.

<sup>174</sup> Levine op cit note 42 at 209.

There were no express powers in either NAFTA Chapter Eleven or the UNCITRAL Arbitration Rules that allowed or prohibited the tribunal to accept amicus briefs.<sup>175</sup> The tribunal, examining the provision of UNCITRAL Arbitration Rules (1976) examined among other issues whether the acceptance of *amicus curiae* submissions fell within the general scope of article 15(1) of the UNCITRAL Rules and whether it could affect the equal treatment of the parties or their opportunity to present their case.<sup>176</sup>

The tribunal pointed out that although article 15(1) confers wide procedural powers on the tribunal, it has no power to add third parties to the proceedings without the parties' consent. It further noted that an amicus petition is not adding a third party, but merely allows receipt of submissions by non-disputing parties and hence leaves the parties' procedural and substantive rights unaltered.<sup>177</sup>

Accordingly, the tribunal held that the admissibility of an *amicus curiae* submission fell within the procedural powers of the tribunal and importantly noted that 'the receipt of written submissions from a non-party third person does not necessarily offend the philosophy of international arbitration involving States and non-State parties'.<sup>178</sup>

The tribunal also concluded it had power to accept *amicus curiae* submissions but had no power to accept the request of the petitioner to receive materials generated within the arbitration or to attend oral hearings.<sup>179</sup> It commented that the petitioners' submissions could assist the tribunal,<sup>180</sup> and conceded that there may be an additional burden placed upon one of the parties. In an effort to prevent the occurrence of additional burden, the tribunal committed itself by offering whatever procedural protection might be necessary.<sup>181</sup>

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<sup>175</sup> *Methanex Corp. v. United States of America* supra note 126 para 24.

<sup>176</sup> Ibid para 28.

<sup>177</sup> Ibid para 29-30. See also Mistelis op cit note 42 at 219.

<sup>178</sup> Ibid para 32-3. The tribunal drew its decision from the past decisions of World Trade Organisation (WTO) and the Iran-US Claims tribunal which had allowed amicus briefs. See also Blackaby & Richard op cit note 41 at 259-260.

<sup>179</sup> Ibid para 47. The tribunal noted that 'such materials may however be derived from the public domain or disclosed into the public domain within the terms of the Consent Order regarding Disclosure and Confidentiality or otherwise lawfully'.

<sup>180</sup> Ibid para 49.

<sup>181</sup> Ibid para 35-7.

The next case to consider the issue of *amicus curiae* submission was *United Parcel Service of America v. Canada*,<sup>182</sup> a case brought against Canada for alleged illegal monopolistic practices, wherein the arbitral tribunal considered a request to intervene by the Canadian Union of Postal Workers as *amicus curiae* whose members would allegedly be gravely affected by the tribunal's decision.

Drawing upon the decision in *Methanex* case, the tribunal determined that the scope of article 15(1) is procedural in nature, indicating that no formal right of participation exists for non-disputing parties.<sup>183</sup> The tribunal decided that article 15(1) grants the tribunal the power to conduct the arbitration in such manner as it considers appropriate,<sup>184</sup> but initially refused to exercise it and noted that it was inappropriate to allow *amicus curiae* briefs with respect to jurisdictional issues.<sup>185</sup>

The tribunal, however, ultimately granted leave to file an *amicus curiae* submission and further clarified in the Procedural Order made on 1 August 2003<sup>186</sup> that the tribunal would accept written submissions from third/non-disputing parties, no new issues might be raised by the third/non-disputing parties, third/non-disputing parties would not have access to confidential information protected under the confidentiality order of 4 April 2003 and the ability to respond to all *amici curiae* submissions remained with all the parties involved.

In 2003, the first ICSID tribunal to consider the issue of *amicus curiae* participation denied a petition made by an NGO to intervene in the case of *Aguas del Tunari v. The Republic of Bolivia*.<sup>187</sup> The tribunal found that 'the interplay of the ICSID Convention, the BIT, and the consensual nature of arbitration left the decision as regards *amicus curiae* participation in the parties to the arbitration'. It therefore, concluded that it had no jurisdiction to admit *amicus curiae* briefs over the objections of a party to a dispute.<sup>188</sup>

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<sup>182</sup> *United Parcel Service of America v. Canada* supra note 130.

<sup>183</sup> Ibid para 38 – 41.

<sup>184</sup> Ibid para 61.

<sup>185</sup> Ibid para 70-1.

<sup>186</sup> *United Parcel Service of America v. Canada* Direction of the Arbitral Tribunal on the Participation of Amicus Curiae (1 August 2003) available at <http://www.naftaclaims.com/disputes/canada/ups/ups-52.pdf>, accessed on 24 September 2014.

<sup>187</sup> *Aguas del Tunari v. The Republic of Bolivia* ICSID case no. ARB/03/02 Decision on Respondent's Objections to Jurisdiction (21 October 2005) available at [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=D C629\\_En&caseId=C210](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=D C629_En&caseId=C210), accessed on 13 November 2014.

<sup>188</sup> Ibid para 15-18. See Levine op cit note 42 at 208; and Blackaby & Richard op cit note 41 at 262.

The ICSID tribunal in *Suez, Sociedad de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*<sup>189</sup> espoused a different approach and confirmed the power of the tribunal to accept *amicus curiae* briefs pursuant to article 44 of the ICSID Convention,<sup>190</sup> which states that ‘[I]f any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question’.

The tribunal stated that the admission of an *amicus curiae* submission was a procedural question over which Article 44 of the ICSID Convention grants it the power to admit *amicus curiae* submissions from suitable non-disputing parties in appropriate cases.<sup>191</sup>

The tribunal set out three criteria for admitting *amicus curiae* submissions, namely: the appropriateness of the subject-matter,<sup>192</sup> the suitability of a given non-party to act as *amicus curiae* in the case,<sup>193</sup> and the procedure by which the *amicus* submission is made and considered, which led to the tribunal’s decision that third/non-disputing parties seeking to file *amicus* submission must first make an application to act as *amicus curiae*.<sup>194</sup> The tribunal granted an opportunity to Petitioners to apply for leave to make *amicus curiae* submissions in accordance with the conditions stated above.<sup>195</sup>

In the subsequent Order made in 2007 on *amicus curiae* submissions,<sup>196</sup> the tribunal, acknowledging the new provision of the ICSID Arbitration Rules on

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<sup>189</sup> *Suez et al v. Argentine Republic* ICSID Case No. ARB/03/19 supra note 161.

<sup>190</sup> *Ibid* para 10-11.

<sup>191</sup> *Ibid* para 14-15; the tribunal relied heavily on the *Methanex* tribunal’s analysis of its procedural powers under a similar provision of the UNCITRAL Arbitration Rules and finds further support for the admission of *amicus curiae* submissions in international arbitral proceedings in the practices of NAFTA, the Iran-US Claims Tribunal, and the World Trade Organisation (WTO).

<sup>192</sup> *Ibid* para 17-23; the tribunal concluded that ‘the subject matter of the case does involve matters of public interest, of such a nature that have traditionally led courts and other tribunals to receive *amicus* submissions from suitable non-parties’. This conclusion was made, considering the public interest factor that the investment dispute centres on water distribution and sewage system providing basic public services to millions of people in the metropolitan area, city of Buenos Aires and surrounding municipalities.

<sup>193</sup> *Ibid* para 24; the *amicus curiae* must establish to the Tribunal’s satisfaction it has the expertise, experience, and independence to be of assistance in arriving at a correct decision.

<sup>194</sup> *Ibid* para 25-29; the tribunal pointed out that ‘the goal of such procedure will be to enable an approved *amicus curiae* to present its views and at the same time to protect the substantive and procedural rights of the parties’.

<sup>195</sup> *Ibid* para 33.

<sup>196</sup> *Suez et al v. Argentine Republic* ICSID Case No. ARB/03/19 Order in Response To a Petition by Five Non-Governmental Organizations for Permission to make an *Amicus Curiae* Submission (12 February 2007) available at [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=D C519\\_En&caseId=C19](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=D C519_En&caseId=C19), accessed on 14 October 2014.

submissions of non-disputing parties,<sup>197</sup> determined that the Petitioners may file single joint *amicus curiae* submission. However, the tribunal denied access to the parties' written pleadings and evidence, on the basis that 'the role of the *amicus curiae* is not to challenge arguments or evidence put forward by the parties' but rather to provide the tribunal with 'their perspective, expertise and arguments' likely to be of assistance in making a good decision.<sup>198</sup>

In a parallel case, *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*,<sup>199</sup> the same arbitral tribunal confirmed its power to allow the filing of *amicus curiae* submissions but denied the application on the basis that the criteria for amicus submission had not been met.<sup>200</sup> The tribunal concluded that 'amicus submissions on jurisdictional issues would not be appropriate, under the standards set by the tribunal, as they would not assist the Tribunal in its task of assessing jurisdiction'.<sup>201</sup>

Following these developments, the ICSID Arbitration Rules were amended in April 2006 expressly to regulate the submission of amicus briefs.<sup>202</sup> The ICSID Rules were silent with respect to *amicus curiae* questions until the 2006 revisions, although the practice had already emerged for tribunals to accept such briefs.<sup>203</sup>

The revised ICSID Rules explicitly include a provision relating to the submission of *amicus curiae* briefs. The revised Rules integrate the outcome of *Suez et al v. Argentine Republic* in an explicit provision, Rule 37(2), allowing tribunals to accept *amicus curiae* briefs, with or without the consent of the parties,<sup>204</sup> and sets out the tests to be applied by an arbitral tribunal in exercising its discretion to accept or otherwise, any particular petition for *amicus curiae* submission.

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<sup>197</sup> Ibid para 14-15. The tribunal stated that 'while the formulation of the new rules may be partly different from the wording used in the Tribunal's decision of 19 May 2005, the amendment of the ICSID Arbitration Rules is in accord with the three criteria previously identified by the Tribunal'.

<sup>198</sup> Ibid -para 24-25.

<sup>199</sup> *Suez et al v Argentine Republic* ICSID Case No. ARB/03/17 Supra note 169.

<sup>200</sup> Ibid para 11-16, 27 and 34.

<sup>201</sup> Ibid para 27.

<sup>202</sup> Blackaby & Richard op cit note 41 at 264. See Rule 37(2) of the ICSID Arbitration Rules 2006.

<sup>203</sup> Bernasconi-Osterwalder op cit note 150 at 197.

<sup>204</sup> Ibid at 197-8. The requirement under the Rules is for the tribunal to consult both parties and the acceptance of *amicus curiae* briefs despite the opposition of a disputing party is at the discretion of the tribunal.

The new ICSID Arbitration Rule was applied for the first time in *Biwater Gauff (Tanzania) Limited v. The United Republic of Tanzania*,<sup>205</sup> a case on the termination of a water concession, which, according to the Claimant constituted expropriation of the Claimant's investment and a breach of the Respondent's obligations under international and domestic law.<sup>206</sup>

Five Non-Governmental Organizations (NGOs) specializing in environmental, human rights, and sustainable development issues filed an application for *amicus curiae* status, contending that the 'arbitration raises issues of vital concern to the local community in Tanzania and developing countries that have privatized or are contemplating a possible privatization of, water or other infrastructure services'.<sup>207</sup>

The Petitioners pointed out that the amended ICSID Arbitration Rules have explicitly given tribunals the power to allow for submissions of non-disputing parties.<sup>208</sup> The Petitioners argued that:

'Rule 37(2) establishes the right of third parties to apply for *amicus curiae* status. This right does not extend to a right to have such submissions accepted by the tribunal, or for them to form a basis for the final award if they are so accepted. On the other hand, it does establish a right to make a full presentation to the tribunal in order to be able to meet the test for acceptance as an *amicus curiae*.'<sup>209</sup>

The Petitioners highlighted that the right to apply for *amicus curiae* submissions is now explicit and that not only does the tribunal have the jurisdiction to accept such submissions, but may do so without the approval of one or both of the disputing parties.<sup>210</sup>

The tribunal, adopting the decisions in *Methanex* case and *Suez et al v Argentine Republic* (ARB/03/19) case, granted the Petitioners the opportunity to file a written submission pursuant to the satisfaction of the requirements in Rule 37(2) of the ICSID

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<sup>205</sup> *Biwater Gauff (Tanzania) Limited v. The United Republic of Tanzania* ICSID Case No. ARB/05/22 Award (July 24 2008) available at [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1589\\_En&caseId=C67](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1589_En&caseId=C67), accessed on 14 November 2014.

<sup>206</sup> *Ibid* para 15-16.

<sup>207</sup> *Biwater Gauff (Tanzania) Limited v. The United Republic of Tanzania* ICSID Case No. ARB/05/22 Procedural Order No. 5 (2 February 2007) Para 12, available at [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1584\\_En&caseId=C67](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1584_En&caseId=C67), accessed on 14 November 2014.

<sup>208</sup> *Ibid* para 17.

<sup>209</sup> *Ibid*.

<sup>210</sup> *Ibid*.

Arbitration Rules.<sup>211</sup> It however denied the Petitioners access to the oral hearings in the absence of both parties' consent in accordance with Article 32(2) of the ICSID Arbitration Rules<sup>212</sup> and parties' written pleadings, on the basis that *amicus curiae* did not require access to such arbitration documents in order to 'address broad policy issues concerning sustainable development, environment, human rights and governmental policy', which are in the public domain.<sup>213</sup>

A similar amendment was made to the ICSID Arbitration (Additional Facility) Rules, which provide for submission of *amicus curiae* briefs in Rule 41(3) and was relied upon by the Petitioners in *Piero Foresti, Laura de Carli and others v. Republic of South Africa*.<sup>214</sup> The arbitral tribunal equally allowed the Petitioners to file *amici curiae* submissions.<sup>215</sup>

Following the amendments made to the ICSID Arbitration Rules and the development towards the need to incorporate transparency standards in UNCITRAL Arbitration Rules, the UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration were adopted, effective on 1 April 2014. The Rules were established bearing in mind, the wide use of arbitration rules for the settlement of investment disputes and the need for transparency in the settlement of such dispute, taking account of the public interest involved in investor-State arbitration.<sup>216</sup>

## V THE STANDARD FOR THIRD-PARTY PARTICIPATION AS *AMICUS CURIAE*

In the context of investor-State arbitration, the admissions of *amicus* briefs resulted from initiatives taken by arbitral tribunals in the exercise of their procedural discretion, which were later endorsed through amendments to the applicable procedural rules. The

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<sup>211</sup> *Ibid* para 55.

<sup>212</sup> *Ibid* para 69-71.

<sup>213</sup> *Ibid* para 64-5.

<sup>214</sup> *Piero Foresti, Laura de Carli and others v. Republic of South Africa*, ICSID Case No. ARB (AF)/07/1 Petition for Limited Participation as Non-Disputing Parties (17 July 2009) available at <http://www.italaw.com/sites/default/files/case-documents/ita0333.pdf>, accessed on 14 November 2014.

<sup>215</sup> *Piero Foresti, Laura de Carli and others v. Republic of South Africa*, ICSID Case No. ARB (AF)/07/1 Award of the Tribunal (4 August 2010) para 27, available at [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DCI651\\_En&caseId=C90](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DCI651_En&caseId=C90), accessed on 14 November 2014.

<sup>216</sup> General Assembly Resolution A/RES/68/109 - UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration and Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013) available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N13/445/99/PDF/N1344599.pdf?OpenElement>, accessed on 5 November 2014.



admission of these briefs was justified on the basis that they assist tribunals by providing them with perspectives and expertise different from those provided by the parties, they increase transparency in investment arbitration by providing the public with insights into the investment arbitration process, and they cure the democratic deficit by fostering public participation in the decision making process.<sup>217</sup>

The original provisions of the principal procedural rules governing investor-State arbitration – the UNCITRAL Arbitration Rules and the ICSID Arbitration Rules – do not provide for third party participation in the arbitral process or for public access to the proceedings.<sup>218</sup>

As established above, recent developments in investor-State arbitration and the outstanding decisions made by arbitral tribunals with regards to *amicus curiae* submission have contributed to the amendments made to the legal framework of investor-State arbitration.<sup>219</sup>

The authority of the arbitral tribunal to consider the participation of *amicus curiae* and the criteria to be applied in considering third/non-disputing parties participation shall be analysed by considering: the capacity to apply as an *amicus curiae*, written submissions by *amicus curiae*, participation in oral hearings and access to disputing parties' arbitration documents.

(a) *Capacity to Apply as an Amicus Curiae*

The early cases granting third/non-disputing party intervention in investor-State arbitration overwhelmingly involved NGOs and civil society groups.<sup>220</sup> NGOs have intervened in high-profile arbitrations, in order to provide expertise on thematic issues of public policy implicated in the dispute.<sup>221</sup>

The essential question is whether any natural or legal person, irrespective of legal form and type of activity, may participate in investor-State arbitration as *amicus curiae*, or whether participation is reserved for NGOs and civil society groups serving

<sup>217</sup> Blackaby & Richard op cit note 41 at 253-4.

<sup>218</sup> Ibid at 254-5.

<sup>219</sup> See ICSID Arbitration Rules in 2006, UNCITRAL Arbitration Rules 2010 (as amended in 2013), UNCITRAL Rules on transparency in Treaty-based investor-State Arbitration 2014 and the recent United Nations Convention on Transparency in Treaty-based investor-State Arbitration.

<sup>220</sup> Levine op cit note 42 at 209.

<sup>221</sup> Ibid at 201.

the general public interest.<sup>222</sup> Third/non-disputing party intervention has more recently expanded beyond NGOs and civil society groups to other types of legal entities, recognized by arbitral tribunals to act as *amicus curiae* in investor-State arbitration.<sup>223</sup>

In *Glamis Gold Ltd v. United States of America*,<sup>224</sup> a dispute concerning reclamation requirements for open-pit mines in California, the Quechan Indian Nation, a federally recognized American Indian tribe successfully petitioned the tribunal to submit an amicus brief. The tribunal accepted amicus briefs from the Quechan Indian Nation, which made submissions regarding the government's alleged duty under international law to preserve sacred lands on which the mines were located.<sup>225</sup> Following the tribunal's decision to accept submissions from Quechan Nation, the NGO Friends of the Earth and the National Mining Associations also successfully petitioned the tribunal to submit amicus briefs.<sup>226</sup>

Also apparent is the increased willingness of individual *amici curiae* to request intervention in multiple investor-State arbitrations.<sup>227</sup> In *Apotex Holdings Inc. and Apotex Inc. v. United States of America*,<sup>228</sup> Mr Barry Appleton sought participation rights as a non-disputing party. The petitioner argued that he could provide expertise and knowledge not provided by the disputing parties with respect to the consequences

<sup>222</sup> Zachariasiewicz op cit note 7 at 219.

<sup>223</sup> Levine op cit note 42 at 201.

<sup>224</sup> *Glamis Gold Ltd v. United States of America* Decision on Application and Submission by Quechan Indian Nation (16 September 2005) available at <http://www.naftaclaims.com/disputes/usa/Glamis/Glamis-Amicus-Decision--16-09-05.pdf>, accessed on 21 November 2014.

<sup>225</sup> Ibid para 10-13. See Levine op cit note 42 at 213.

<sup>226</sup> *Glamis Gold Ltd v. United States of America* Amicus Curiae Application of Friends of The Earth Canada and Friends of The Earth United States (30 September 2005) available at <http://www.naftaclaims.com/disputes/usa/Glamis/Glamis-Amicus-FOE-01A--30-09-05.pdf>, accessed on 21 November 2014; and Application for Leave to File a Non-Disputing Party Submission by The National Mining Association (31 October 2006) available at <http://www.naftaclaims.com/disputes/usa/Glamis/Glamis-USA-Amicus-NMA-Application.pdf>, accessed on 21 November 2014.

The extension of *amici curiae* status to industry bodies and indigenous populations was also granted in the latter case of *Merrill & Ring Forestry LP v. Canada*, (UNCITRAL (NAFTA) Award (31 March 2010) para 22-25 available at <http://italaw.com/documents/MerrillAward.pdf>, assessed on 21 November 2014. Three Canadian labour unions requested participation rights and were granted leave to file a joint written *amici curiae* submission. Labour unions were equally *amici curiae* in *United Parcel Service of America v. Canada* supra note 130.

<sup>227</sup> Lucas Bastin 'Amici Curiae in Investor-State Arbitration: Eight Recent Trends' (2014) 30 (1) *Arbitration International* 125 at 128.

<sup>228</sup> *Apotex Holdings Inc. and Apotex Inc. v. United States of America* ICSID Case No. ARB(AF)/12/1 Procedural Order on the Participation of Applicant Mr Barry Appleton as a Non-Disputing Party (4 March 2013) available at [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=D C3437\\_En&caseId=C2080](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=D C3437_En&caseId=C2080), accessed on 20 November 2014.

of conduct that can distort international trade and investment flows and undermine market access benefits.<sup>229</sup> The tribunal, however, stated that it had no doubt that the petitioner has the experience and expertise in investment treaty obligations and the analysis of governments' regulatory conduct, but did not consider that the perspective and insight of the petitioner would be any different from that of the counsel to the disputing parties.<sup>230</sup>

Furthermore, in the case of *AES Summit Generation Limited and AES-Tisza Erözü Kft. v. Hungary*,<sup>231</sup> a case brought against the Republic of Hungary by investors pursuant to the effects of new regulations introduced in order to comply with the EU competition law, the European Commission (a supranational organization) sought to submit *amicus curiae* briefs and succeeded.<sup>232</sup> The European Commission made an application to file *amicus curiae* brief in order to secure and enforce EU competition law and influence the arbitral tribunal's decision on the merits.<sup>233</sup> This third/non-disputing party participation is a striking example of *amicus curiae* representing a direct legal interest in the outcome of a dispute as opposed to defending public interest.<sup>234</sup>

Also in *Eureko v. Slovak Republic*,<sup>235</sup> the tribunal itself requested *amici curiae* submissions from two entities. The first entity was the EU Commission, on the basis

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<sup>229</sup> Ibid para 11.

<sup>230</sup> Ibid para 32-33. A management consultancy also sought to participate as *amicus curiae* in the same case and the tribunal refused permission on the basis that it did not fulfil the requirements to file *amicus curiae* submission. See *Apotex Holdings Inc. and Apotex Inc. v. United States of America* ICSID Case No. ARB(AF)/12/1 Procedural Order on the Participation of Applicant BNM as a Non-Disputing Party (4 March 2013) available at [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=D C3438\\_En&caseId=C2080](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=D C3438_En&caseId=C2080), accessed on 20 November 2014.

<sup>231</sup> *AES Summit Generation Limited and AES-Tisza Erözü Kft. v. Hungary* ICSID Case No. ARB/07/22 Award (23 October 2010) available at [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=D C1730\\_En&caseId=C114](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=D C1730_En&caseId=C114), accessed on 21 November 2014.

<sup>232</sup> Ibid at para 3.18 and 3.22. The Commission filed an application to participate as *amicus curiae* pursuant to Rule 37(2) of ICSID Arbitration Rules in September 2008 and the tribunal issued a procedural order ruling in favour of the Commission. See also *Electrabel SA v. Republic of Hungary* ICSID Case No. ARB/07/19 Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) para 1.18, available at

[https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=D C2853\\_En&caseId=C111](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=D C2853_En&caseId=C111), accessed on 21 November 2014.

<sup>233</sup> See Luke Eric Peterson, 'European Commission seeks to Intervene as Amicus Curiae in ICSID Arbitrations to Argue that Long-term Power Purchase Agreements Between Hungary and Foreign Investors are Contrary to European Community Law' *Investment Arbitration Reporter*, 17 September 2008 cited in Levine op cit note 42 at 201 and 213.

<sup>234</sup> Levine op cit note 42 at 213.

<sup>235</sup> *Eureko v. Slovak Republic* UNCITRAL- PCA Case No. 2008-13 Award on Jurisdiction, Arbitrability and Suspension (26 October 2010) available at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1414](http://www.pca-cpa.org/showpage.asp?pag_id=1414), accessed on 2 December 2014.

that its views would assist the tribunal in a context where the claimant was invoking protections under a BIT concluded by two EU Member States.<sup>236</sup> The second entity was the Kingdom of the Netherlands, from which the tribunal sought input on certain issues of interpretation, given that it was the other State party to the BIT invoked by the claimant.<sup>237</sup> In doing so, the tribunal became not only the first investor-State tribunal to request *amici curiae* submission on its own initiative, but also the first to receive such a submission from a State.<sup>238</sup>

From this survey, one may conclude that *amicus curiae* participation (in other words, third/non-disputing party intervention) is not limited to public interest advocacy groups, as various types of legal entities may be admitted as *amicus curiae*. The ICSID Arbitration Rules and UNCITRAL Rules on Transparency do not create any requirements or limitations as to the nature of the entity or individual that can apply for *amicus curiae*.<sup>239</sup>

However, the UNCITRAL Rules on Transparency provides as one of the criteria for making an *amicus curiae* submission, a concise written statement containing the general description of the third party, disclosure as to any connection with a disputing party, and comprehensive information on any financial or other assistance in preparing the submission.<sup>240</sup>

Ultimately, the requirement as to who can take part in investor-State arbitration as a third/non-disputing party refer rather to the valuable contribution a given entity or individual is able to add to the arbitration proceedings, its neutrality and independence from the disputing parties.<sup>241</sup>

(b) *Written Submissions by Amicus Curiae*

Third/non-disputing party intervention in investor-State arbitration is primarily by *amicus curiae* submissions. The process of *amicus curiae* submission is generally

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<sup>236</sup> Ibid part V para 154.

<sup>237</sup> Ibid.

<sup>238</sup> Bastin op cit note 227 at 130.

<sup>239</sup> See Rule 37(2) ICSID Arbitration Rules 2006 and Article 4(1) UNCITRAL Rules on transparency in Treaty-based investor-State Arbitration 2014.

<sup>240</sup> See Article 4(2) UNCITRAL Rules on transparency in Treaty-based investor-State Arbitration 2014.

<sup>241</sup> Zachariasiewicz op cit note 7 at 220: ‘An *amicus curiae* have to be neutral, independent and possess necessary expertise and resources to make valuable contribution to the case at hand. It is particularly important that *amicus curiae* does not receive any financial or other material support from any of the parties, and that it lacks a financial interest in the decision of the tribunal’.

divided into two stages; an application to the tribunal for leave to file a brief under the conditions described above; and the actual submission, if the tribunal has granted the non-disputing party's application.<sup>242</sup>

The criteria to be applied when considering the participation of *amicus curiae* are generally provided under the ICSID Arbitration Rules and the new UNCITRAL Rules on Transparency.<sup>243</sup> Rule 37(2) of the ICSID Arbitration Rules sets out the test the arbitral tribunal is to apply in exercising its discretion to accept or otherwise any particular application for *amicus curiae* submission. Rule 37(2) reads:

‘(2) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the “non-disputing party”) to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

- (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
- (b) the non-disputing party submission would address matter within the scope of the dispute;
- (c) the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.’

The first condition concentrates on the non-disputing party's position to provide assistance to the tribunal. The tribunal will examine whether an applying *amicus curiae* has the expertise, experience and independence to provide valuable and relevant input to the case.<sup>244</sup> The *amicus curiae* has to be both sufficiently knowledgeable on the issues within the scope of the dispute and possess the resources necessary to be able to present its submissions to the tribunal.<sup>245</sup>

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<sup>242</sup> UNCITRAL Working Group II Document A/CN.9/WG.II/WP.167 op cit note 65 para 22.

<sup>243</sup> The criteria formulated under these Arbitration Rules are not exhaustive, but set a general standard an arbitral tribunal must consider among other factors.

<sup>244</sup> See *Suez et al v. Argentine Republic* ICSID Case No. ARB/03/19 supra note 161; and Zachariasiewicz op cit note 7 at 213.

<sup>245</sup> Zachariasiewicz op cit note 7 at 213.

The second condition, which requires the *amicus curiae* to make submissions within the scope of the dispute, seeks to ensure that arbitration proceedings focus on the settlement of dispute between the disputing parties. This standard has been held to be satisfied by arbitral tribunal through a declaration by the applying *amicus curiae* that it will address a matter within the scope of the dispute.<sup>246</sup>

The third condition presupposes the requirement of a significant public interest, although the wording suggests a wider interpretation.<sup>247</sup> Virtually all investor-State arbitrations contain some element of public interest, since such an arbitration relates to the responsibility of a sovereign State and often involves claims for significant compensation, which ultimately will be paid by tax payers.<sup>248</sup>

However, it follows that such a public interest flowing from the involvement of a State and use of public funds would normally not be sufficient to allow *amicus curiae* submission. Such public interest exists where the decision of the arbitral tribunal would have an impact on a large group of people, society as whole, or raises important concerns of public international law and human right.<sup>249</sup> The basic factors a tribunal often considers in this regard are, whether there exists a public interest or as seen in recent development, a legal interest,<sup>250</sup> which plays an important role in a given dispute, and whether the *amicus curiae* seeks to justify that interest by its participation in the dispute.<sup>251</sup>

Furthermore, when considering whether to allow an *amicus curiae* submission, an arbitral tribunal has to take into account the interests of the disputing parties and the procedural efficacy of the arbitration proceedings itself.<sup>252</sup> The arbitral tribunal sometimes establishes requirements or guidelines for the non-disputing party's submission after agreeing to the application. Procedural safeguards are also put in place

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<sup>246</sup> Ibid at 214. The second criterion defined in 37(2) of the ICSID Arbitration Rules should rather be seen as a requirement for amici submissions, and not a condition for admitting the non-disputing parties' applications. See also *Biwater Gauff (Tanzania) Limited v. The United Republic of Tanzania* supra note 207 at para 50 wherein the tribunal was satisfied with a declaration.

<sup>247</sup> Ibid.

<sup>248</sup> Ibid.

<sup>249</sup> See *Methanex Corp. v. United States of America* supra note 126; *United Parcel Service of America v. Canada* supra note 130; *Suez et al v. Argentine Republic* ICSID Case No. ARB/03/19 supra note 161; and *Biwater Gauff (Tanzania) Limited v. The United Republic of Tanzania* supra note 205.

<sup>250</sup> See *AES Summit Generation Limited and AES-Tisza Erömi Kft. v. Hungary* supra note 231; *Electrabel SA v. Republic of Hungary* supra note 232; and *Eureko v. Slovak Republic* supra note 235.

<sup>251</sup> Zachariasiewicz op cit note 7 at 214.

<sup>252</sup> Ibid.

by tribunals in order to preserve the integrity of the proceedings.<sup>253</sup> Similarly, disputing parties are usually allowed to provide observations on the non-disputing parties' applications and submissions.<sup>254</sup>

Unlike the ICSID Arbitration Rules, the UNCITRAL Rules on Transparency differentiate between submissions made by third persons and those made by a non-disputing party to the treaty, and basically expand on the criteria provided under the ICSID Arbitration Rules.<sup>255</sup> The UNCITRAL Rules on Transparency leave the modalities and criteria for *amicus curiae* submission to the discretion of the arbitral tribunal, and lay down more detailed provision setting out specific requirements to be met by the third person and the form of the *amicus curiae* submission itself.<sup>256</sup>

(c) *Participation in Oral Hearings*

Participation of third/non-disputing parties at the oral hearings held during arbitration proceedings generally depends on the consent of the parties.<sup>257</sup> The provisions of the Arbitration Rules as regards the participation of other persons besides the parties and their legal representatives establish the privacy of oral hearings of the arbitration.<sup>258</sup> It has been held by arbitral tribunals that Article 28(3) of the UNCITRAL Arbitration Rules (old Article 25(4) of the Rules) as well as Article 32(2) of the ICSID Arbitration Rules were intended to exclude members of the public from the hearings, including third/non-disputing parties seeking participation in the arbitration proceedings.<sup>259</sup>

<sup>253</sup> UNCITRAL Working Group II Document A/CN.9/WG.II/WP.167 op cit note 65 para 22. See *Piero Foresti, Laura de Carli and others v. Republic of South Africa* supra note 215 para 28 'the tribunal must ensure that the non-disputing party participation is both effective and compatible with the rights of the parties and the fairness and efficiency of the arbitral process'.

<sup>254</sup> See *Biwater Gauff (Tanzania) Limited v. The United Republic of Tanzania* supra note 207 para 60-1; and *Piero Foresti, Laura de Carli and others v. Republic of South Africa* supra note 215 para 29 where the Tribunal decided to invite the parties and the non-disputing parties to offer brief comments on the fairness and effectiveness of the procedures adopted for non-disputing party participation in this case.

<sup>255</sup> The approach of UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration 2014 is extensively discussed in Chapter Four.

<sup>256</sup> Julia Salasky & Corinne Montineri 'UNCITRAL Rules on Transparency in Treaty Based Investor-State Arbitration' (2013) 31(4) *ASA Bulletin* 774 at 789. See Article 4 and 5 of the UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration 2014.

<sup>257</sup> *Zachariasiewicz* op cit note 7 at 215; and Nigel Blackaby & Caroline Richard op cit note 41 at 267. See Rule 32(2) ICSID Arbitration Rules 2006 and Article 28(3) of UNCITRAL Arbitration Rules 2010 (as amended in 2013).

<sup>258</sup> *Ibid* at 216.

<sup>259</sup> *Methanex Corp. v. United States of America* supra note 126 para 41; *Suez et al v. Argentine Republic* ICSID Case No. ARB/03/19 supra note 161 para 5-7; and *Suez et al v. Argentine Republic* ICSID Case No. ARB/03/17 supra note 169 para 6-9.

These provisions can only be overridden if there is consent from both parties for the participation of *amicus curiae* in the oral proceedings.<sup>260</sup> Non-disputing parties were allowed to participate in the oral phase of the arbitration proceedings through consent of both parties in the *Methanex* and *UPS v. Canada* cases at the later stage of the proceedings, but not at the moment the *amicus curiae* petition was considered. Parts of the hearings were closed to the public for the reasons of commercial confidentiality.<sup>261</sup>

However, oral hearings are generally open to the public under the new UNCITRAL Rules on Transparency subject to the protection of confidential information and the integrity of the arbitral process.<sup>262</sup> The public access to hearings under the Rules applies to substantive hearings for the presentation of evidence and oral arguments rather than hearings dealing with procedural matters only.<sup>263</sup> Public hearings in this regard can be described as a fundamental feature of transparency and essential to the enhancement of awareness and public confidence in investor-State arbitration, but do not grant a procedural right to a third/non-disputing party to make oral submissions directly in relation to the dispute between disputing parties. Participation of *amicus curiae* in hearings is particularly important in certain instances where further explanation on written submission is imminent.<sup>264</sup>

(d) *Access to Documents*

The issue of third/non-disputing parties having access to the documents in arbitration proceedings is not covered by the ICSID Arbitration Rules and the UNCITRAL Arbitration Rules.<sup>265</sup> Arbitral tribunals in investor-State arbitration (under ICSID and UNCITRAL Arbitration Rules) have considered this issue in several cases and mostly disallowed access to documents in arbitration proceedings where *amicus curiae*

<sup>260</sup> Zachariasiewicz op cit note 7 at 216.

<sup>261</sup> See *Methanex Corp. v. United States of America* Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005) para 8, available at [http://www.naftaclaims.com/disputes/usa/Methanex/Methanex\\_Final\\_Award.pdf](http://www.naftaclaims.com/disputes/usa/Methanex/Methanex_Final_Award.pdf), accessed on 27 November 2014; and *United Parcel Service of America v. Canada* Award on the Merit (24 May 2007) para 4, available at <http://italaw.com/sites/default/files/case-documents/ita0885.pdf>, accessed on 27 November 2014.

<sup>262</sup> Article 6 of the UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration 2014.

<sup>263</sup> Salasky & Montineri op cit note 256 at 788.

<sup>264</sup> Arbitral tribunal may ask a third/non-disputing party specific questions in relation to its written submissions and request for further submissions, documents or evidence, which might assist in better understanding of the non-disputing party's position. See *Biwater Gauff (Tanzania) Limited v. The United Republic of Tanzania* supra note 207 para 72; and UNCITRAL Working Group II Document A/CN.9/712 op cit note 160 para 60.

<sup>265</sup> Zachariasiewicz op cit note 7 at 217.



submissions were accepted.<sup>266</sup> These arbitral tribunals' decisions emphasized that the third/non-disputing party's submission is to address broad policy issues in which the *amici* are specialized and to that effect, they do not need to obtain access to the record and documents of arbitration.<sup>267</sup>

However, the tribunal in *Piero Foresti* case asked the parties to provide the *amici curiae* with redacted versions of documents filed in the arbitration.<sup>268</sup> The tribunal stated that its decision in this regard was to focus their submissions on the issue arising in the case and to show them what position the parties had taken on those issues.<sup>269</sup> The tribunal's decision was motivated by two basic principles:

'(1) Non-disputing party participation is intended to enable non-disputing parties to give useful information and accompanying submissions to the Tribunal, but is not intended to be a mechanism for enabling non-disputing parties to obtain information from the Parties; and

(2) Where there is non-disputing party participation, the Tribunal must ensure that it is both effective and compatible with the rights of the Parties and the fairness and efficiency of the arbitral process.'<sup>270</sup>

The competence to decide on the question of access by *amici curiae* to the documents submitted in the arbitration, particularly without the need to obtain the consent of the parties to the dispute, is generally at the discretion of the arbitral tribunal, which must be exercised in accordance with the tribunal's general procedural powers under the governing Arbitration Rules.<sup>271</sup> The decision of the tribunal is not subject to the consent of the parties, unless there already exists a confidentiality order made earlier in the proceedings, which would provide such a requirement.<sup>272</sup>

On the other hand, the new UNCITRAL Rules on Transparency set out a clear and comprehensive regime for submissions by third persons and access to documents in the arbitration proceedings.<sup>273</sup> A determination by the arbitral tribunal as to whether to grant rights of access to documents to a third/non-disputing party is generally not

<sup>266</sup> *Suez et al v. Argentine Republic* ICSID Case No. ARB/03/17 supra note 169 para 25; and *Biwater Gauff (Tanzania) Limited v. The United Republic of Tanzania* supra note 207 para 64-5.

<sup>267</sup> Zachariasiewicz op cit note 7 at 218.

<sup>268</sup> *Piero Foresti, Laura de Carli and others v. Republic of South Africa* supra note 215 para 28.

<sup>269</sup> Ibid.

<sup>270</sup> Ibid.

<sup>271</sup> Zachariasiewicz op cit note 7 at 218. See Article 44 of the ICSID Convention and Article 17(1) of the UNCITRAL Arbitration Rules 2010 (as amended in 2013).

<sup>272</sup> Ibid. See *Biwater Gauff (Tanzania) Limited v. The United Republic of Tanzania* supra note 207 para 62 and 66; and *Methanex Corp. v. United States of America* supra note 126 para 46.

<sup>273</sup> Salasky & Montineri op cit note 256 at 786.

applicable, as documents in the arbitration proceedings are made available to the public.<sup>274</sup>

Article 3 of the UNCITRAL Rules on Transparency reflects a hierarchy of publication of documents. The following documents: ‘notice of arbitration and the response to the notice, the statements of claim, statement of defence and any further written statements or written submissions by any disputing party, a table listing all exhibits to all the aforementioned documents and to expert reports and witness statements (but not the exhibits themselves), any written submissions by non-disputing treaty Parties and by third parties, transcripts of hearings where available, and orders, decisions and awards’ of the arbitral tribunal are made available to the public, subject to the provisions on confidentiality, without the need for a request to be made or discretion to be exercised.<sup>275</sup>

Secondly, expert reports and witness statements, exclusive of their exhibits, are made available to the public upon request of any person to the arbitral tribunal, therefore reflecting the need for the arbitral tribunal to exercise its discretion.<sup>276</sup>

Lastly, exhibits and documents not captured by article 3(1) and (2) can be made available to the public either by the arbitral tribunal on its own initiative or, upon request by any member of the public, and after consultation with the disputing parties, at the discretion of the arbitral tribunal.<sup>277</sup> The Rules create a new legal regime for *amicus curiae* intervention as third/non-disputing parties accordingly have access to documents in arbitration proceedings subject to the protection of confidential and protected information.<sup>278</sup>

## VI CONCLUSION

Third party participation through the admission of *amicus curiae* briefs in investor-State arbitration emanated from the initiative taken by arbitral tribunals in the exercise of the broad procedural discretion granted by the applicable arbitration rules.<sup>279</sup> Significant

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<sup>274</sup> Ibid. See Article 3 of UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration 2014.

<sup>275</sup> Article 3(1) of UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration 2014.

<sup>276</sup> Article 3(2) of UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration 2014.

<sup>277</sup> Article 3(3) of UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration 2014.

<sup>278</sup> Article 3(4) and 7 of UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration 2014.

<sup>279</sup> Blackaby & Richard op cit note 41 at 256.

efforts have been made in investor-State arbitration to address public concerns by the participation of third/non-disputing party in arbitral process. A review of the institutional and tribunals' approach to *amicus curiae* participation certainly highlights the promotion of third party participation in arbitral proceedings.<sup>280</sup>

Nevertheless, concerns remain as to the preservation of confidential and protected information and privacy of arbitral proceedings on one hand and transparency and accountability on the other hand. The notion of third party (*amicus curiae*) participation challenges the basic assumption about the private and consensual foundations of the arbitration process.<sup>281</sup> Third party participation is increasingly present in investor-State arbitration and the extent of its intervention has recently been expanded to include access to hearings and documents of arbitration, subject to the protection of protected and confidential information.<sup>282</sup> As established above, the degree of privacy and confidentiality varies depending on the applicable arbitration rules agreed to by parties and/or designated in the investment treaty or contract.

Both the International Centre for Settlement of Investment Disputes (ICSID) and the Working Group on Arbitration and Conciliation of United Nations Commission on Trade Law (UNCITRAL) have recently implemented reforms as regards the standards for third party participation in the settlement of investment dispute in their respective arbitration rules to facilitate greater transparency in investor-State arbitrations. These reforms directly impact on the degree of confidentiality and privacy of arbitration in investor-State arbitration. The next Chapter evaluates the extent to which the investor-State arbitration regime recognizes disputing parties' rights to privacy and confidentiality under major institutional arbitration rules, conventions, and treaties.

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<sup>280</sup> Levine op cit note 42 at 214.

<sup>281</sup> Amokura Kawharu 'Participation of Non-governmental Organizations in Investment Arbitration as Amici Curiae' in Michael Waibel et al (eds) *The Backlash against Investment Arbitration: Perceptions and Reality* (2010) 276.

<sup>282</sup> See UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration 2014.

## CHAPTER FOUR

### I INTRODUCTION

This Chapter analyses privacy and confidentiality under the various arbitral frameworks used most commonly in investor-State arbitration. The analysis considers the existing provisions on confidentiality in major institutional arbitration rules, treaties and investment agreements featuring recent revisions and developments incorporating legal standards of transparency.

### II CONFIDENTIALITY IN ICSID ARBITRATION

The Convention on the Settlement of Disputes between States and Nationals of other States (ICSID Convention) was established in 1966 under the World Bank to resolve investment disputes between States and foreign investors.<sup>283</sup> ICSID conduct arbitration under two set of rules: ICSID Arbitration Rules for disputes between parties to the ICSID Convention and Additional Facility Rules for disputes in which only either the State of the investor or the respondent State is a party to the ICSID Convention.<sup>284</sup>

The ICSID Arbitration Rules are one of the procedural arbitration rules regularly used in investor-State Arbitration. In April 2006, ICSID implemented a series of significant changes to its Arbitration Rules.<sup>285</sup> Unlike the old ICSID Rules, the recent amendments to the ICSID Arbitration Rules incorporate greater transparency and public involvement in ICSID arbitration.<sup>286</sup> The revised ICSID Arbitration Rules as well as the ICSID Arbitration (Additional Facility Rules) contain a mixture of both confidentiality and transparency provisions.<sup>287</sup>

The existence of ICSID arbitration and information on the institution, conduct and disposition of each case is made publicly available in the ICSID Annual Report and on the ICSID website.<sup>288</sup> ICSID's revised Arbitration Rules allow for increased

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<sup>283</sup> Lucy Reed, Jan Paulsson & Nigel Blackaby *Guide to ICSID Arbitration* 2ed (2011) 1-2; and Egonu op cit note 6 at 480.

<sup>284</sup> Ibid at 123.

<sup>285</sup> The original Arbitration Rules came into effect in 1968 and were subsequently amended in September 1984 and April 2006.

<sup>286</sup> Egonu op cit note 6 at 482.

<sup>287</sup> Ibid at 482 and 484.

<sup>288</sup> Ibid at 482.

participation in the arbitral procedures by persons other than the parties to the dispute.<sup>289</sup>

The oral procedure was amended to expand the category of persons that can attend hearings subject to the consent of parties and the existence of appropriate measure to secure proprietary or privileged information.<sup>290</sup> The revised ICSID Rules give more power to the tribunal to decide whether or not to open the proceedings to the public.<sup>291</sup>

The revised ICSID Rules explicitly incorporate the practice of *amicus curiae* submission into arbitration procedure.<sup>292</sup> The ICSID Rules were silent with respect to *amicus curiae* questions until the 2006 revisions, although the practice had already emerged for tribunals to accept *amici curiae* briefs.<sup>293</sup> The amendments empower the arbitral tribunal to accept amicus submissions by third parties even if both parties object, provided that the disputing parties were consulted and that stipulated conditions as regards application for amicus submissions are met.<sup>294</sup>

The arbitrators are under the duty to keep confidential the contents of the award.<sup>295</sup> The ICSID Centre has a duty to promptly publish excerpts of the legal reasoning of the tribunal and will only publish the award as a whole if the parties consent.<sup>296</sup> These publications are made in the ICSID Review-Foreign Investment Law Journal and on the ICSID website.

However, parties themselves are not obliged to keep the awards confidential under the wordings of the ICSID Rules.<sup>297</sup> Some of the ICSID orders and awards are

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<sup>289</sup> Ibid at 483.

<sup>290</sup> Rule 32 of ICSID Arbitration Rules 2006. See also Article 39 of ICSID Arbitration (Additional Facility) Rules.

<sup>291</sup> Although the revised ICSID Rules seem slightly more favourable towards public hearing, arbitral tribunal for example in *Biwater Gauff* case did not permit open hearings because the investor had opposed. See *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania* supra note 207 para 70-1.

<sup>292</sup> Rule 37(2) of ICSID Arbitration Rules 2006. See also Article 39 of ICSID Arbitration (Additional Facility) Rules.

<sup>293</sup> Bernasconi-Osterwalder op cit note 150 at 197.

<sup>294</sup> Ibid at 198.

<sup>295</sup> Rule 6(2) of ICSID Arbitration Rules 2006. See also Article 13(2) of ICSID Arbitration (Additional Facility) Rules.

<sup>296</sup> Rule 48(4) of ICSID Arbitration Rules 2006. See also Article 53 of ICSID Arbitration (Additional Facility) Rules.

<sup>297</sup> Egonu op cit note 6 at 484.

published by parties unilaterally on non-ICSID websites dedicated to the subject of investment treaty arbitration.<sup>298</sup>

Although the ICSID Convention and Rules contain specific duties on the Centre to maintain confidentiality, it is silent on whether parties have a duty to maintain confidentiality in arbitral proceedings.<sup>299</sup> It is not clear from the ICSID Rules or Regulations whether parties are allowed to disclose any information or documents to the public during or after the arbitral proceedings.<sup>300</sup>

ICSID tribunals have frequently held that there is no general obligation of confidentiality in ICSID arbitrations.<sup>301</sup> The tribunal in *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania* held that ‘in the absence of any agreement between the parties, there is no provision in the ICSID Arbitration Rules imposing a general duty of confidentiality in ICSID arbitration’.<sup>302</sup>

The tribunal, however, highlighted the need to protect procedural integrity and prevent exacerbation of the dispute. The tribunal balanced the need for transparency in the proceedings against the need to protect the procedural integrity of the arbitration by evaluating the weight that should be accorded to procedural integrity and noted that just like there was no guarantee or general rule imposing confidentiality, there was also no general rule of transparency even though the revised ICSID Rules reflected a clear trend towards increasing transparency of process.<sup>303</sup>

### III CONFIDENTIALITY IN UNCITRAL ARBITRATION

The UNCITRAL Arbitration Rules, adopted by the United Nations General Assembly in 1976 and revised in 2010, are the second most commonly used set of arbitration rules

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<sup>298</sup> Bernasconi-Osterwalder op cit note 150 at 197. See International Treaty Arbitration website available at <http://italaw.com/>, accessed on 18 December 2014.

<sup>299</sup> Egonu op cit note 6 at 485. See Christina Knahr & August Reinisch ‘Transparency versus Confidentiality in International Investment Arbitration – The *Biwater Gauff* Compromise’ (2007) 6 *The Law and Practice of International Courts and Tribunals* 97 at 105.

<sup>300</sup> Feliciano op cit note 4 at 18.

<sup>301</sup> Egonu op cit note 6 at 485-6.

<sup>302</sup> *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania* supra note 109 para 121. See also *The Loewen Group v. United States of America* supra note 144; and *Metalclad v. United Mexican States* supra note 120.

<sup>303</sup> *Ibid.* See Bernasconi-Osterwalder op cit note 150 at 200.

for settlement of investment disputes.<sup>304</sup> Arbitration under these Rules is by far the most commonly selected *ad hoc* arbitral system.<sup>305</sup>

The revised UNCITRAL Arbitration Rules 2010 expressly provide for the privacy of oral hearings<sup>306</sup> and confidentiality of award. Hearings are held in camera unless the parties agree otherwise. In that capacity, investor-State arbitration hearings under the UNCITRAL Rules were opened to the public after the disputing parties had consented.<sup>307</sup>

An award may be made public not only upon the consent of the parties, but also ‘where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority’.<sup>308</sup>

The UNCITRAL Arbitration Rules are silent on the issue of publication of documents of arbitration proceedings such as, the minutes of meetings, the pleadings of disputing parties, and the orders of the arbitral tribunal.<sup>309</sup> The absence of provisions here could imply that the matter of their publication is to be decided by the parties or to be determined by the discretion of the tribunal in a particular case.<sup>310</sup>

Furthermore, there is no express mechanism under the UNCITRAL Arbitration Rules for third-party submissions, although it has been held that the broad discretion bestowed on arbitral tribunals to conduct proceedings as it considers appropriate under Article 17 encompasses the power to admit *amicus curiae* briefs.<sup>311</sup>

#### IV COMPARISON OF CONFIDENTIALITY UNDER ICSID AND UNCITRAL ARBITRATION RULES

ICSID arbitration is, generally more transparent than UNCITRAL arbitration. Disputes before ICSID tribunals by their nature often involve issues of public interest which were traditionally not envisaged by the drafters of UNCITRAL Arbitration Rules, as they

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<sup>304</sup> Brown op cit note 127 at 181.

<sup>305</sup> Christopher F Dugan et al, *Investor-State Arbitration* (2008) 80.

<sup>306</sup> Article 28(3) of UNCITRAL Arbitration Rules 2010 (as amended in 2013).

<sup>307</sup> See *Methanex Corp. v. United States of America* Final Award supra note 261 para 8 where oral hearings were broadcasted via closed-circuit TV.

<sup>308</sup> Article 34(5) of UNCITRAL Arbitration Rules (as amended in 2013). See Feliciano op cit note 4 at 17

<sup>309</sup> *Ibid* at 18.

<sup>310</sup> *Ibid*.

<sup>311</sup> *Ibid*. See *Glamis Gold Ltd v. United States of America* supra note 224; *United Parcel Service of America v. Canada* supra note 130; and *Methanex Corp. v. United States of America* supra note 126.

have their origin in commercial arbitration.<sup>312</sup> The ICSID Rule on non-disputing party submissions demonstrates a level of transparency not currently found in the UNCITRAL Arbitration Rules.<sup>313</sup>

The UNCITRAL Rules are characterized by a higher level of confidentiality than ICSID arbitrations, in which the arbitral process is administered and publications made by the ICSID Centre. The *ad hoc* nature of UNCITRAL arbitration means there may be no institution comparable to the ICSID Centre to support the arbitral process.<sup>314</sup> UNCITRAL Rules standing alone do not impose a general duty of confidentiality.<sup>315</sup> Any additional confidentiality protection beyond privacy of arbitral proceedings and confidentiality of award, vary depending on the applicable law or the agreement of parties.<sup>316</sup>

As increasing numbers of investor-State disputes are arbitrated under the UNCITRAL Arbitration Rules, the issue of transparency as against confidentiality was given greater attention due to the public interest in such proceedings.<sup>317</sup> The revision of the UNCITRAL Rules to provide for greater transparency in investor-State arbitration was therefore undertaken by UNCITRAL Working Group II, leading ultimately to the adoption of UNCITRAL Rules on Transparency in Treaty-based Investor State Arbitration in December 2013.<sup>318</sup>

## V UNCITRAL LEGAL STANDARD FOR TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION

UNCITRAL deliberations on whether and how to tackle transparency in treaty-based arbitrations took place in the wake of the amendments to the ICSID Rules in 2006,

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<sup>312</sup> Stephen Jagusch & Jeffrey Sullivan 'A Comparison of ICSID and UNCITRAL Arbitration: Areas of Divergence and Concern' in Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe (eds) *Sustainable Development in World Investment Law* (2011) 93-4.

<sup>313</sup> *Ibid* at 93.

<sup>314</sup> *Ibid* at 94-5. The parties may appoint an arbitral institution such as the PCA to support an arbitration under the UNCITRAL Rules.

<sup>315</sup> Jagusch & Sullivan *op cit* note 312 at 95.

<sup>316</sup> *Ibid*.

<sup>317</sup> *Ibid*.

<sup>318</sup> The Working Group II first considered the issue of transparency in investor-State arbitration at its 41<sup>st</sup> session in September 2008 where it decided to consider the issue after the revision of the UNCITRAL Rules in the generic form leading to the discussion on the legal standard of transparency in 2010 and subsequent adoption in 2013. See UNCITRAL Working Group II document A/CN.9/712 *op cit* note 158; and General Assembly Resolution A/RES/68/109 *op cit* note 216.



which had incorporated greater transparency and opportunity for public access to investment arbitration.<sup>319</sup>

The UNCITRAL Rules on transparency came into force on 1 April 2014. The Rules apply to investor-State arbitration under a treaty referring to the UNCITRAL Arbitration Rules and concluded after the coming into force of the rules on transparency, unless parties to the treaty by agreement expressly opted out of the application of the Rules on Transparency.<sup>320</sup> The reference to the resolution of disputes under UNCITRAL Arbitration Rules in such treaties would import the application of the Rules on Transparency pursuant to the addition made to the UNCITRAL Arbitration Rules as adopted in 2013.<sup>321</sup>

The UNCITRAL Rules on Transparency may apply to investor-State arbitration arising under treaties concluded before its coming into effect where parties to the arbitration or contracting parties to the relevant treaty agree explicitly to the application of the Rules.<sup>322</sup> This approach was adopted to avoid the dynamic treaty interpretation in determining the application of the Rules on Transparency to existing treaties that explicitly referred to the UNCITRAL Arbitration Rules particularly those containing ‘as amended’, ‘as revised’, ‘as in force at the time a claim is submitted’ or words with similar meaning and effect.<sup>323</sup>

The Rules on Transparency could be used together with arbitration rules other than the UNCITRAL Arbitration Rules or in ad hoc proceedings if parties to a treaty or dispute expressly agreed to incorporate the Rules on Transparency in to its arbitration

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<sup>319</sup> Salasky & Montineri op cit note 256 at 776.

<sup>320</sup> Article 1(1) of UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration 2014. See Salasky & Montineri op cit note 256 at 782-3; UNCITRAL Working Group II document A/CN.9/741-Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-sixth session (16 February 2012) Para 54, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V12/509/60/PDF/V1250960.pdf?OpenElement> assessed on 18 December 2014; and UNCITRAL Working Group II document A/CN.9/765-Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-eighth session (13 February 2013) para 17, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V13/808/19/PDF/V1380819.pdf?OpenElement>, assessed on 18 December 2014.

<sup>321</sup> Article 1(4) UNCITRAL Arbitration Rules 2010 (as amended in 2013). The amendment expressly articulates the link of UNCITRAL Arbitration Rules with the Rules on Transparency. See UNCITRAL Working Group II document A/CN.9/741 op cit note 320 para 17.

<sup>322</sup> Article 1(2) UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration 2014.

<sup>323</sup> UNCITRAL Working Group II document A/CN.9/760-Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-seventh session (12 October 2012) para 133, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V12/565/20/PDF/V1256520.pdf?OpenElement>, assessed on 18 December 2014; and UNCITRAL Working Group II document A/CN.9/765 op cit note 320 para 21-2.

proceedings.<sup>324</sup> This flows from the mandate of UNCITRAL to prepare a legal standard on transparency, which could be applied universally without limiting its application to arbitration under UNCITRAL Arbitration Rules.<sup>325</sup> In promoting a uniform standard for transparency in investor-State arbitration, the Commission prepared and adopted a Convention on Transparency in Treaty-based Investor-State Arbitration in order that States can multilaterally agree to apply the Rules on Transparency to their existing treaties.<sup>326</sup>

The UNCITRAL Rules on Transparency address the publication of arbitration documents, the standard for *amicus curiae* submission and mandatory open hearings.<sup>327</sup> The Rules on Transparency differentiate between *amicus submission* made by ‘third persons’, who are neither parties to the dispute nor parties to the treaty under which the dispute is brought from ‘non-disputing party to the treaty’ who are not part of the dispute, but are parties to the treaty within the scope of the dispute.<sup>328</sup>

The Rules on Transparency creates a default rule for open oral hearings and publication of key arbitration documents including all decisions and awards.<sup>329</sup> Unlike the UNCITRAL Arbitration Rules, the Rules on Transparency require a permanent implementation mechanism in the form of a neutral repository to make public information pursuant to the requirement of the Rules.<sup>330</sup>

Striking a balance between the public interest in transparency and the interest of the parties in resolving their dispute fairly and efficiently is a critical component of the Rules on Transparency.<sup>331</sup> The Rules explicitly provide that the arbitral tribunal shall always in the exercise of its discretion take into account both the public interest in

<sup>324</sup> Article 1(9) UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration 2014.

<sup>325</sup> Report of the United Nations Commission on International Trade Law Forty-sixth session (A/68/17) Para 18-22, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V13/858/38/PDF/V1385838.pdf?OpenElement>, assessed on 20 December 2014.

<sup>326</sup> General Assembly Resolution A/RES/69/116 - United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (10 December 2014) available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N14/686/64/PDF/N1468664.pdf?OpenElement>, assessed on 20 December 2014.

<sup>327</sup> See Article 3, 4, 5 and 6 of UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration 2014; and Samuel Levander ‘Resolving Dynamic Interpretation: An Empirical Analysis of the UNCITRAL Rules on Transparency’, (2014) 52 *Columbia Journal of Transnational Law* 506 at 524.

<sup>328</sup> Article 4 and 5 of UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration 2014.

<sup>329</sup> Article 3 and 6 of UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration 2014.

<sup>330</sup> Article 2, 3 and 8 UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration 2014. See Salasky & Montineri op cit note 256 at 795.

<sup>331</sup> *Ibid* at 785.

transparency and the disputing parties' interest in a fair and efficient resolution of their dispute.<sup>332</sup>

The UNCITRAL Rules on Transparency made the legal standard of transparency the general rule with the protection of confidential information and integrity of the arbitral process as an exception. The Rules defined confidential or protected information as:

- '(a) Confidential business information;
- (b) Information that is protected against being made available to the public under the treaty;
- (c) Information that is protected against being made available to the public, in the case of the information of the respondent State, under the law of the respondent State, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; or
- (d) Information the disclosure of which would impede law enforcement.'<sup>333</sup>

The Rules on Transparency take a flexible and simplified approach to the definition of confidential or protected information. The arbitral tribunal determines what is confidential or protected information after consultation with the parties and makes arrangement for the protection of such information from the public.<sup>334</sup> A disputing party, non-disputing party to the treaty or third person could withdraw from the record of proceedings all or part of a voluntarily introduced document, which the arbitral tribunal held not to be in a redacted form or prevented from being made public.<sup>335</sup>

Certain information shall equally not be made public where the integrity of the arbitral process may be jeopardized resulting in the intimidation of witnesses, legal representative of disputing parties and members of the tribunal or hinder the collection and production of evidence.<sup>336</sup>

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<sup>332</sup> Article 1(4) of UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration 2014. See Article 4(5) and 5(4) in relation to submissions by third persons and non-disputing parties to the treaty, where the tribunal is directed to ensure that such submissions do not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party; and Article 7 in relation to protection of information where disclosure would jeopardize the integrity of the arbitral process.

<sup>333</sup> Article 7(2) of UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration 2014.

<sup>334</sup> Article 7(3) of UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration 2014.

<sup>335</sup> Article 7(4) of UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration 2014.

<sup>336</sup> Article 7(6) and (7) of UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration 2014.

The UNCITRAL Rules on Transparency provide a robust regime of transparency in investor-State arbitration while giving comfort to disputing parties that confidential and protected information will be adequately protected.<sup>337</sup>

## VI CONFIDENTIALITY UNDER INVESTMENT TREATIES AND AGREEMENTS

This past decade shows development and changes in procedural rules and bilateral investment treaties (BITs) to facilitate public participation in investor-State arbitration proceedings.<sup>338</sup> Dispute resolution clauses in recent BITs and investment agreements dealing with public participation typically provide for public access to arbitration documents, oral hearings and third party participation subject to the protection of confidential information.<sup>339</sup>

The US Model BIT adopted in 2012<sup>340</sup> contains in its section B provisions on transparency of arbitral proceedings. Article 29 stipulates the types of documents to be made available to the public, conduct of open hearings and the procedural mechanism for protecting confidential information.<sup>341</sup> Identical provisions with peculiar variations are adopted in other recent international investment agreements.<sup>342</sup>

Similarly, regional investment agreements particularly the North American Free Trade Agreement (NAFTA) as well as Free Trade Agreement between United States, Central America and the Dominican Republic (CAFTA-DR) make provisions for a transparency regime.<sup>343</sup> Chapter Eleven of NAFTA sets forth standards for treatment by

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<sup>337</sup> Salasky & Montineri op cit note 256 at 794.

<sup>338</sup> Campbell McLachan Preface to 'Bringing Sustainable Development Issues before Investment Treaty Tribunal' in Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe (eds) *Sustainable Development in World Investment Law* (2011) 172.

<sup>339</sup> UNCITRAL Working Group II Document A/CN.9/WG.II/WP.160 op cit note 18 para 8.

<sup>340</sup> US Model Bilateral Investment Treaty 2012, available at <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>, assessed on 22 December 2014.

<sup>341</sup> See also Article 18 and 19 of Norway Model BIT adopted in 2007, available at <http://italaw.com/sites/default/files/archive/ita1031.pdf>, assessed on 22 December 2014; and Brown op cit note 127 at 179-180.

<sup>342</sup> See Article 38 Canada's Model Foreign Investment Promotion and Protection Agreement 2004 op cit note 62; and Australia-Chile Free Trade Agreement (30 July 2008) op cit note 9 para 10.20-10.22.

<sup>343</sup> North American Free Trade Agreement op cit note 9; and Free Trade Agreement between United States, Central America and the Dominican Republic 2004 op cit note 9. Chapter 10 of the 2004 CAFTA-DR contains extensive transparency provisions applicable to its investor-State dispute settlement mechanism. See also UNCITRAL Working Group II Document A/CN.9/WG.II/WP.160 op cit note 18 para 16-19 and 27.

each NAFTA State of investors from other NAFTA States, as well as a mechanism for arbitrating investment disputes under those standards.<sup>344</sup>

The NAFTA mechanisms for investor-state arbitrations did not originally address the topics of confidentiality and transparency.<sup>345</sup> However, NAFTA Chapter Eleven arbitration regime has over the years incorporated transparency as a critical part of investor-State arbitration involving State parties.<sup>346</sup> These developments under NAFTA Chapter Eleven arbitration seemed to have stimulated other forums for investor-State arbitration to take steps towards transparency.<sup>347</sup>

NAFTA Chapter Eleven favourably addresses the issue of public access to documents, third-party participation and open hearings.<sup>348</sup> NAFTA Chapter Eleven contains details on access on non-disputing parties to procedural documents and awards.<sup>349</sup> Significantly, a joint statement of the NAFTA parties interpreting Chapter Eleven provisions declared that ‘nothing in 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’.<sup>350</sup> It further stated that:

‘NAFTA Parties agree to make available to the public in timely manner all documents submitted to or issued by the tribunal subject to the redaction of (a) confidential business information; (b) information which is privileged or otherwise protected from disclosure under the Party’s domestic law; and (c) information which the Party must withhold pursuant to the relevant arbitral rules, as applied.’<sup>351</sup>

The Statement endorses public access to documents generated during investor-State arbitration under NAFTA. Arbitral hearings are equally open to the public (via

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<sup>344</sup> Born op cit note 2 at 413.

<sup>345</sup> Ibid at 200.

<sup>346</sup> Julie Lee ‘UNCITRAL’s Unclear Transparency Instrument: Fashioning the Form and Application of a Legal Standard Ensuring Greater Disclosure in Investor-State Arbitrations’ (2013) 33 *Northwestern Journal of International Law and Business* 439 at 450.

<sup>347</sup> Junji Nakagawa & Daniel Magraw ‘Introduction: Transparency in international trade and investment dispute settlement’ in Junji Nakagawa (ed) *Transparency in International Trade and Investment Dispute Settlement* (2013) 4.

<sup>348</sup> Lee op cit note 346 at 450.

<sup>349</sup> Article 1127, 1129 and 1137 of NAFTA. See also Article 10.21 of CATFA-DR.

<sup>350</sup> NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (31 July 2001) para A.1, available at [http://www.sice.oas.org/tpd/nafta/Commission/CHI1understanding\\_e.asp](http://www.sice.oas.org/tpd/nafta/Commission/CHI1understanding_e.asp), assessed on 24 December 2014. See Born op cit note 2 at 200.

<sup>351</sup> Ibid para A.2 (b). See Salasky & Montineri op cit note 256 at 793.

closed circuit television and online webcasting) unless there is need for the protection of confidential information.<sup>352</sup>

The practice of allowing non-disputing parties to file written submissions gained substantial ground in NAFTA Chapter Eleven arbitrations.<sup>353</sup> The NAFTA Free Trade Commission issued a Statement of the Free Trade Commission on Non-disputing Party Participation in 2003,<sup>354</sup> noting that a tribunal has the discretion to determine the participation of a non-disputing party as *amicus curiae* upon consideration of a number of factors designed to help determine whether or not the amicus submission will be helpful to the tribunal. The Statement contains detailed guidelines for evaluating *amicus curiae* petitions and non-disputing parties only have access to publicly available documents while preparing its submission.<sup>355</sup>

Accordingly, it would appear that despite the trend towards transparency of arbitration proceedings in recent investment treaties and agreements, disclosure of confidential information is protected and various measures for this protection depend on the provisions under the investment treaty/agreement and the applicable arbitration rules.

## VII THE VALUES OF CONFIDENTIALITY AND TRANSPARENCY IN INVESTOR-STATE ARBITRATION

Confidentiality and transparency are both important and competing values in investor-State arbitration, and the degree of application of each value depends on differing factors.<sup>356</sup>

The crucial difference between transparency and confidentiality centres on the nature of the interests protected. A regime of confidentiality of investor-State arbitration

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<sup>352</sup> Statement on Open Hearings in NAFTA Chapter Eleven Arbitrations (7 October 2003) available at [http://www.ustr.gov/archive/assets/Trade\\_Agreements/Regional/NAFTA/asset\\_upload\\_file143\\_3602.pdf](http://www.ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file143_3602.pdf), assessed on 24 December 2014. See *Glamis Gold Ltd v. United States* Procedural Order No. 11 (9 July 2007) para 15, available at [http://www.naftaclaims.com/disputes/usa/Glamis/Glamis-USA-Tribunal-Order\\_11.pdf](http://www.naftaclaims.com/disputes/usa/Glamis/Glamis-USA-Tribunal-Order_11.pdf), assessed on 24 December 2014.

<sup>353</sup> UNCITRAL Working Group II Document A/CN.9/WG.II/WP.163-Comments of the Governments of Canada and of the United States of America on transparency in treaty-based investor-State arbitration under Chapter Eleven of the North American Free Trade Agreement (NAFTA) para 1(III) at 4, available at <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V10/583/32/PDF/V1058332.pdf?OpenElement>, assessed 18 December 2014.

<sup>354</sup> Statement of the Free Trade Commission on Non-disputing Party Participation (27 October 2003) available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Nondisputing-en.pdf>, assessed on 24 December 2014.

<sup>355</sup> *Ibid.*

<sup>356</sup> Feliciano op cit note 4 at 20; and Knahr & Reinisch op cit note 299 at 109.

gives priority to the specific interests of the disputing parties, while a regime of transparency of investor-State arbitration give priority to the broader interests of the several stakeholders in international investment law and arbitration.<sup>357</sup> This is inherent in the very notion of the two concepts based on accessibility to a limited number of authorized persons against public access.<sup>358</sup>

(a) *Argument for confidentiality*

Confidentiality reinforces the notion of party autonomy, whereby parties are ideally given a choice of the applicable law and rules to govern their relationship.<sup>359</sup> It is traditionally up to the parties to determine the parameters of the arbitration proceedings, which is reflected by the arbitration agreement and rules.<sup>360</sup>

Confidentiality obviously reduces the possibility of external influences on arbitral proceedings and allows for effective resolution of the dispute between parties.<sup>361</sup> Confidentiality is necessary to preserve the pure dispute settlement nature of investment arbitration. Public participation may have a negative effect on the proceedings such as escalating the dispute between the parties or imposing on the arbitral tribunal the obligation to establish a coherent body of law, instead of simply resolving the dispute at hand.<sup>362</sup>

Privacy of arbitral proceedings also safeguard the integrity of the disputing parties by preventing the exposure of related matters to arbitral proceeding to the wider public. It protects the parties' public image and may contribute to a reduction of tension between the parties.<sup>363</sup> The confidential nature of arbitral proceedings averts alarming other foreign investors, who may be thinking of investing in the host State, as well as current or potential shareholders in the company instituting the arbitration.<sup>364</sup>

Privacy of arbitral proceedings also reduces direct and indirect external influences on the proceedings, which increases flexibility in parties' arbitration

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<sup>357</sup> Federico Ortino 'Transparency of Investment Award' in Junji Nakagawa (ed) *Transparency in International Trade and Investment Dispute Settlement* (2013) 134.

<sup>358</sup> *Ibid.*

<sup>359</sup> Feliciano op cit note 4 at 24.

<sup>360</sup> Egonu op cit note 6 at 487.

<sup>361</sup> *Ibid.*

<sup>362</sup> Ortino op cit note 357 at 133.

<sup>363</sup> Knahr & Reinisch op cit note 299 at 109.

<sup>364</sup> Ortino op cit note 357 at 132.

strategies including greater potential for amicable resolution.<sup>365</sup> Similarly, confidentiality contributes to the de-politicization of investment disputes, which may facilitate moves towards negotiated settlement in view of a long term relationship between an investor and a host State.<sup>366</sup>

In addition, confidentiality of arbitral proceedings protects proprietary information such as trademarks, patents, investment strategies, sensitive business information that could harm future business as well as government sensitive information.<sup>367</sup>

*(b) Arguments for transparency*

The increasing level of recognition of the importance of good governance and accountability has brought about more insistent calls for transparency in investor-State arbitration.<sup>368</sup> Transparency in investor-State arbitration has received significant traction over recent years as evidenced by the application of transparency standards by arbitral institutions, arbitration rules and investment treaty/agreements.<sup>369</sup>

Transparency of arbitral decisions leads to the development and consistency in international law on foreign investment.<sup>370</sup> It improves the clarity, certainty and predictability of investment law. The quality of decisions is increased and case-law becomes more consistent as tribunals and parties build on the experience and wisdom of past decisions.<sup>371</sup> This in turn, increases participation and confidence in the system as it increases compliance with investment law, the establishment of generally accepted rules which will contribute to the avoidance of unnecessary dispute<sup>372</sup> and increases pressure on parties to implement awards.<sup>373</sup>

Potential disputing parties may benefit from transparency of arbitral process and awards by referring to arguments of parties and the conclusions of arbitral tribunals in

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<sup>365</sup> Ibid.

<sup>366</sup> Knahr & Reinisch op cit note 299 at 110.

<sup>367</sup> Egonu op cit note 6 at 487.

<sup>368</sup> Feliciano op cit note 4 at 19; and Knahr & Reinisch op cit note 299 at 110.

<sup>369</sup> Lee op cit note 346 at 448.

<sup>370</sup> Egonu op cit note 6 at 488.

<sup>371</sup> Ortino op cit note 357 at 133.

<sup>372</sup> Knahr & Reinisch op cit note 299 at 112 ‘Parties will be less likely to resort to investment arbitration, or at least raise particular claims or defenses where they have to argue against a well-settled body of law.’

<sup>373</sup> Ortino op cit note 357 at 133.



previous arbitrations when making their case.<sup>374</sup> They might find support for their own case in earlier cases brought under comparable circumstances.<sup>375</sup> Similarly, transparency fosters scholarly debate on particular controversial issues in the findings of arbitral tribunals, which in turn might be considered by arbitral tribunals in their decisions in subsequent cases.<sup>376</sup>

Transparency in investor-State arbitration promotes good governance as it allows the broader public to observe and evaluate the conduct of the host State with regard to the exercise of its public functions. This applies equally to the conduct of the investor as its corporate governance is subject to increasing scrutiny.<sup>377</sup>

One commentator has argued that while it is reasonable for investors to expect a transparent decision-making process in host countries, it is equally reasonable for the public to expect that disputes arising out of this process will be resolved in an equally open and transparent fashion.<sup>378</sup>

Proponents of transparency in investor-State arbitration argue that transparency promotes consistency, furthers democratic principles, decreases party uncertainty and increases external legitimacy.

## VII CONCLUSION

Regardless of the degree of transparency in the investor-State arbitration regime, it should be noted that both private investors and governments have important reasons to oppose unfettered public access.<sup>379</sup> Investors may fear the disclosure of confidential business information, while governments are often reluctant to expose to public view the extent to which narrow interest groups have captured administrative and regulatory structures, fearful of gaining an exaggerated reputation as a poor host for foreign investment.<sup>380</sup>

Confidentiality emphasizes the pure dispute settlement nature of investor-State arbitration, the aim simply being that of resolving dispute between two parties.

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<sup>374</sup> Knahr & Reinisch op cit note 299 at 115.

<sup>375</sup> Ibid.

<sup>376</sup> Ibid.

<sup>377</sup> Ortino op cit note 357 at 133-4.

<sup>378</sup> Luke Eric Peterson 'Challenges Under Bilateral Investment Treaties Give Weight to Calls for Multilateral Rules' *World Trade Agenda* (21 October, 2001) cited in Levander op cit note 327 at 511.

<sup>379</sup> Dugan et al op cit note 305 at 707.

<sup>380</sup> Ibid.

However, at the normative level, there seems to be a growing consensus on the need to favour transparency over confidentiality in arbitration proceedings which is principally premised on the public nature of the subject matter in investor-State arbitration.<sup>381</sup>

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<sup>381</sup> Ortino op cit note 357 at 134.

## CHAPTER FIVE

## I SUMMARY

This paper establishes that privacy and confidentiality are of a peculiar character in investor-State arbitration, and differ considerably from the standards under traditional commercial arbitration. The principles of privacy and confidentiality are a major component of commercial arbitration, subject to certain exceptions (one of which is the public interest exception).

In general, applicable arbitration rules in investor-State arbitration and the consent-based nature of arbitration provide disputing parties with the ability to fashion arbitral proceedings to preserve a degree of privacy and confidentiality. It is, however, established above that transparency of arbitration proceedings and the disclosure of information are subject to the overriding interest of the public and the legal and regulatory requirement of disclosure.

The concurrent relationship between the investor and the State on one hand, and the public interest on the other hand is the core basis for the different approach to confidentiality in the framework of investor-State arbitration. The presence of these dual interests arises from the presence of public interest in almost every case, since a common element of investment dispute settlement is the liability of the State for breaches of a public international law undertaking.<sup>382</sup>

The move towards transparency in investment arbitration was driven by demands from individuals and interest groups for participation in arbitral proceedings. The approach of arbitral tribunals and the institutional reactions in this regard have now embedded the participation of non-disputing parties as *amicus curiae* in investment arbitration.

Public participation is increasingly present in investor-State arbitration as it develops, and the extent of public access has recently been expanded to include access to oral hearings and procedural documents and awards, subject to the protection of confidential and protected information. Concerns remain as to the preservation of confidential information in arbitral proceedings, and the parameters of protected

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<sup>382</sup> Zachariasiewicz op cit note 7 at 221-2.

information are left largely to the parties to agree and for the tribunal to make appropriate procedural arrangements for its protection.

The existing arbitration framework shows the recognition of transparency in different legal texts, such as the dispute settlement provision contained in recent BITs and investment agreement, designated arbitration rules and arbitral tribunals' decisions.<sup>383</sup> Indeed the call for greater transparency in investor-State arbitration prompted the revision of institutional arbitration rules to incorporate the standards of transparency. A significant development is the revision of the ICSID and UNCITRAL Arbitration Rules and the adoption of the UNCITRAL Rules on Transparency in treaty-based investor-State Arbitration.

The ICSID and UNCITRAL Arbitration Rules, which govern the vast majority of investment arbitration, provide for varying level of transparency and confidentiality as outlined above. On the other hand, the new 2014 UNCITRAL Rules on Transparency are currently the most comprehensive set of procedural rules governing transparency in treaty-bases investor-State arbitration.<sup>384</sup>

The field of investment arbitration is evolving and the current investment dispute settlement framework reflects that evolution.<sup>385</sup> The adoption of the Transparency Rules and other similar provisions constitute an important change in international arbitration practice and reflects an attempt to balance the conflicting interests of disclosing essential information and protecting confidential information.

## II RECOMMENDATION

Rules and principles governing public participation and procedural transparency in investment arbitration have developed over the years and have to some extent been codified in recent Rules revision. Nevertheless, concerns remain as to the proper balance between the competing interest in preserving confidentiality while ensuring transparency and accountability in investor-State arbitration.

In order to achieve greater coherence in the approach taken to reconcile these competing interests, a uniform practice as regards confidentiality and transparency in investment dispute resolution framework is recommended. There is need for guidance

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<sup>383</sup> UNCITRAL Working Group II Document A/CN.9/WG.II/WP.160 op cit note 18 para 6.

<sup>384</sup> Salasky & Montineri op cit note 256 at 795.

<sup>385</sup> Ibid.

on the degree of intervention by an arbitral tribunal in the arbitration process as regard public access and the exercise of party autonomy and the extent of the tribunal's discretion to disclose certain information to the public or retain confidentiality.

Enhanced transparency might erode party autonomy and flexibility in investment arbitration.<sup>386</sup> In addition, transparency of proceedings might increase the cost of arbitration, extend the lifespan of arbitration proceedings and result in a decrease in the confidentiality of business information and State secrets. While these limitations can be compensated by logistical arrangements during arbitration proceedings, the effect on party autonomy deserves special consideration, as it touches upon the intrinsic value of investor-State arbitration.<sup>387</sup>

It seems advisable to take a balanced approach according to which the degree of confidentiality and transparency is adapted to the different stages of the arbitral process. Proceedings should be shaped in accordance with the particular needs and interests in each procedural phase. The new UNCITRAL Rules on Transparency in treaty-based investor-State arbitration have adopted a balanced approach in this regard.

Since ICSID arbitration is a self-contained system which governs the majority of investment arbitration, ICSID could consider a comprehensive amendment of its Arbitration Rules particularly in relation to public access to oral hearings and procedural documents, orders and awards. This amendment could incorporate and expand on the standard under the UNCITRAL Rules on Transparency, particularly on publication of procedural documents, the procedure of differentiating between the types of documents and the mechanism for its accessibility, general public access to oral hearings and a procedural regime for submissions made by non-disputing party to the treaty.

Furthermore, a review of the provision on submissions by non-disputing party under the ICSID Rules is recommended. There may be a risk of conflict of interest on the part of non-disputing parties seeking to submit *amicus curiae* briefs in the case of an existing relationship with any of the disputing parties. Even though arbitral tribunals have in practice limited such submissions, it is suggested that an explicit provision be made in the arbitration rules. The review should consider the description of a prospective non-disputing party, its connection with the disputing parties as well as

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<sup>386</sup> Nakagawa op cit note 344 at 6.

<sup>387</sup> Ibid.

members of the arbitral tribunal and the source of its financial or other assistance in making a submission.

A further possible review consideration is the creation of a protocol as regards the form and timelines for the submission of *amicus curiae* briefs. This will mitigate the drawback that transparency increases costs and creates delay in arbitral proceedings.

There is no clear definition of confidential and protected information under either the ICSID or the UNCITRAL Arbitration Rules. However, setting out a regime enumerating confidential or protected information may be detrimental to the effectiveness of the legal framework of investment arbitration. It is therefore suggested that ICSID Arbitration Rules provide for a general definition of confidential information and the mechanism for its protection. A regime guiding the scope of the duty to maintain confidentiality of protected and confidential information after the conclusion of arbitration should also be considered.

It is important to note that the comprehensive transparency regime under the UNCITRAL Rules on Transparency will not be adequately utilised without its uniform application to arbitration under UNCITRAL Rules pursuant to a treaty concluded before its coming into force and perhaps in arbitration under other arbitration rules. Therefore, in my view State parties to existing investment treaties should become contracting parties to the recently adopted United Nations Convention on Transparency in Treaty-based Investor-State Arbitration in order to promote a uniform standard. Subject to the agreement of the parties, arbitral tribunals should also adopt the use of the UNCITRAL Rules on Transparency where arbitration rules other than UNCITRAL and ICSID Arbitration Rules apply.

In addition, existing investment treaties and agreements could be reviewed to provide a comprehensive provision on a balanced approach to confidentiality and transparency in dispute settlement procedure.

The challenge of the current legal framework in investor-State arbitration relates to the particular nature of investment arbitration and the reconciliation of the fundamental characteristics of arbitral process with legitimacy and accountability flowing from public nature of the subject matter of dispute. Transparency should be upheld in moderation while confidentiality should not be completely disregarded in order to ensure the integrity, viability and neutrality of investor-State arbitration.

### III CONCLUSION

The recent trend in investor-State arbitration has taken a more nuanced approach to confidentiality and allowed a greater degree of transparency in arbitral proceedings. The question of how to balance the demands for transparency against the need for confidentiality touches on a core aspect of arbitral proceedings.<sup>388</sup> Demands for transparency have to respect procedural integrity and the interest of the disputing parties that certain information remained confidential.<sup>389</sup>

The need to protect business or governmental secrets seems to be largely acknowledged, as is the need to protect the integrity of arbitral proceedings from any external pressure on the parties or on the arbitral tribunals. Confidentiality may at least ultimately contribute to the efficiency of investment arbitration as a dispute settlement mechanism.

The concern for legitimacy and accountability has led to the erosion of the principle of confidentiality in arbitral proceedings and the ground has certainly shifted towards greater transparency in investor-State arbitration. Confidentiality in investor-State arbitration has evolved from protecting the existence of the arbitration proceedings, privacy of oral hearings, confidentiality of procedural documents and awards to the current practice of simply protecting confidential information and the integrity of arbitral proceedings. In this context, this paper recommends the establishment of consistent guidelines within all frameworks for investor-State arbitration for the participation of third/non-disputing parties and the protection of confidential information.

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<sup>388</sup> Knahr & Reinisch *op cit* note 299 at 98.

<sup>389</sup> *Ibid* at 105.

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