CONFIDENTIALITY VS TRANSPARENCY IN INTERNATIONAL ARBITRATION: NAVIGATING THE TENSION BETWEEN SECRECY AND ACCOUNTABILITY

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ABSTRACT

The purpose of this paper is to examine the interplay of confidentiality, privacy and transparency in international arbitration. Traditionally, confidentiality and privacy were considered most important attributes of the arbitral process, particularly in commercial arbitration. However, with the increasing involvement of States in arbitration and the growing public interest implicated in such disputes, there are mounting calls for greater transparency in investment arbitration. This paper examines a number of different arbitration decisions, including Amco v Indonesia,[1] Metalclad v Mexico,[2] SD Myers v Canada[3] and Biwater Gauff v Tanzania,[4] as well as the regulations governing institutions such as ICSID,[5] ICC[6] and UNCITRAL,[7] in order to argue that confidentiality is not automatically inherent in arbitration, but must arise from party agreement, institutional rules, or applicable law.[8] The paper also argues that the existence of multiple conflicting confidentiality norms across jurisdictions has resulted in considerable uncertainty regarding how and when confidentiality can be invoked; and that a uniform international framework for establishing confidentiality is urgently required. The ultimate conclusion of the paper is that for the legitimate functioning of international arbitration as an effective means of resolving disputes, a balance needs to be struck between secrecy and accountability.

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[1] Amco Asia Corp. v. Republic of Indonesia, ICSID Case No. ARB/81/1, Award (Nov. 20, 1984).
[2] Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000)
[3] S.D. Myers, Inc. v. Canada, UNCITRAL, Partial Award (Nov. 13, 2000).
[4] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award (July 24, 2008).
[5] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 48(5), Mar. 18, 1965, 575 U.N.T.S. 159. available at https://icsid.worldbank.org/sites/default/files/documents/ICSID_Convention.pdf
[6] ICC Arbitration Rules art. 22(3) (2021) available at https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/
[7] UNCITRAL Arbitration Rules (2013) available at https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration
[8] *UNCITRAL Model Law on International Commercial Arbitration* (1985, with 2006 amendments), U.N. Doc. A/40/17, available at https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration.

I. INTRODUCTION

Perhaps the most frequently debated aspect of contemporary arbitral practice is how to structure international arbitration so that it meaningfully upholds both confidentiality and transparency. This tension has real implications on the legitimacy and accountability of international arbitration as a dispute resolution mechanism.[9]

One of the primary benefits of arbitration is typically cited as confidentiality. By ensuring confidentiality over the contents of the proceedings, arbitration becomes more attractive than public court litigation for many parties. Moreover, confidentiality protects the parties' business dealings and sensitive commercial information from public disclosure.

On the other hand, the importance of transparency has increasingly emerged as a countervailing consideration, especially in investor-State disputes, where the decision of an arbitral tribunal may affect matters of public policy. When a government is sued for enacting laws concerning the environment, the general public, whose tax money will ultimately pay the damages awarded, has a legitimate interest in knowing how the proceeding was conducted and how it was concluded.[10]

This research paper aims to provide insight into three main research questions: (1) What is the difference between privacy and confidentiality in the context of international arbitration? (2) How have arbitrators treated confidentiality differently under their rules? Are there any particular principles that can be discerned from their case laws? (3) What reforms could be put in place to reconcile the relationship between confidentiality and transparency in international arbitration?

According this paper proposes a uniform opt-out model of transparency, with clearly defined exceptions to protect confidential business information and other sensitive data, while still preserving the public interest in accountability.

II. CONFIDENTIALITY AND PRIVACY: CONCEPTUAL DISTINCTIONS

An important analytical distinction that is often overlooked or misunderstood in both academia

[9] Andrea Bjorklund, "The Emerging Civilization of Investment Arbitration," 113 Penn. St. L. Rev. 1269, 1271 (2009), available at https://pennstatelawreview.org/articles/113%20Penn%20St.%20L.%20Rev.%201269.pdf
[10] UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (2014). Available at https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/rules-on-transparency-e.pdf

and practice is the difference between privacy and confidentiality. Privacy and confidentiality have an interdependent and mutually reinforcing relationship; however, they are conceptually and legally different from each other.

When referring to privacy in the context of arbitration, one is referring to the absence of third parties at any stage of the arbitration process. The parties to a dispute have the right to conduct hearings and proceed without any third parties observing, unless they specifically consent to do so. Thus, privacy is a procedural characteristic of the arbitration process. According to Tweeddale and Tweeddale, the concept of privacy is mainly associated with the hearing stage of the arbitration; thus, privacy does not, by itself, impose upon either party or the tribunal an obligation not to disclose any information. [11]

In contrast to privacy, confidentiality is primarily an obligation not to disclose. As such, confidentiality reduces the information available to others associated with the arbitration by preventing the parties, the tribunal members, independent experts, and all others engaged in the arbitration from disclosing the information produced during the arbitration, whether it be written pleadings, testimony, transcripts, orders, potential awards, or anything else, to any person who is not a part of the arbitration.[12] This means that confidentiality is broader than privacy since it relates to the continued existence of an information once produced in the arbitration, and not merely how many persons were present when the information was created.[13]

So, the point is this: just because arbitral hearings are held in private doesn't mean that the information that comes out of them is confidential by law.[14] A party that reveals procedural documents or makes the existence of an award public is not necessarily violating a privacy obligation, as privacy does not pertain to post-proceeding disclosure.[15]

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[11] Andrew Tweeddale & Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* 301–302 (2005)

[12] Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* 56 (2005), available at https://share.google/C2CYyKLIupkllR2b7

[13] Richard Garnett, "Preserving Party Autonomy in International Arbitration: The Limit of Confidentiality," 35 J. Int'l Arb. 259, 261 (2018), https://law.unimelb.edu.au/__data/assets/pdf_file/0003/4805049/04-Garnett-154.pdf

[14] See Ali Shipping Corp. v. Shipyard Trogir, [1999] 1 W.L.R. 314, 326 (C.A.) (Eng.) (holding that an implied duty of confidentiality arises from the nature of the arbitration agreement); see also Emmott v. Michael Wilson & Partners Ltd., [2008] EWCA Civ 184, [2008] 2 All E.R. (Comm) 193 (Eng.).

[15] ICC Rules of Arbitration art. 22(3) (2021), available at https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/: see also London Court of International

III. FROM CONFIDENTIALITY TO TRANSPARENCY: THE INTERNATIONAL ARBITRATION TURN

If commercial arbitration has treated confidentiality as a presumption, investment arbitration has done the opposite. The fact that state parties are involved as respondents in disputes about investments creates a situation where the state is also subject to, public regulatory policies and the public interest. As such, there has been a sustained campaign for greater transparency in relation to investor-state arbitration and this trend has been growing steadily over the last three decades and, in fact has been one of the most important changes in the field during that time period.

A. Early Jurisprudence: The Rejection of Implied Confidentiality

When the ICSID proceedings commenced, the issue of confidentiality was already presented in the Amco Asia Corporation vs Republic of Indonesia (1983) case. In the Amco Asia Corporation (the claimant) case, the Respondent requested that the tribunal issue an order that required the Claimants maintain confidentiality regarding any procedural information regarding the case. The tribunal rejected the Respondent's application and determined that there are no restrictions on the ability of either party to speak publicly about the case under either the ICSID Convention or the Arbitration Rules. In fact, the tribunal stated explicitly that there is no general principle of confidentiality in investment arbitration and this precedent has been reaffirmed by subsequent tribunals.[16]

In the Metalclad Corporation vs United Mexican States (2000) investment arbitration based on Chapter 11 of NAFTA, the tribunal again declined to recognize a general principle of confidentiality in investment arbitration. Mexico requested that the tribunal provide a confidentiality order for all proceedings before it. The tribunal noted that neither NAFTA nor the ICSID Additional Facility Rules establish an express prohibition for either party speaking publicly about the arbitration. The tribunal acknowledged that while it was reasonable for both parties to limit the amount of public discussion regarding this arbitration to promote the orderly

Arbitration (LCIA) Arbitration Rules art. 30 (2020), https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx.

[16] Amco Asia Corp. v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Jurisdiction (Sept. 25, 1983), available at https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/81/1.

proceeding, there was no binding legal obligation for either party to do so.[17]

In the case of SD Myers Inc. v. Canada, pursuant to the UNCITRAL Rules, the parties could not agree upon the aspects of a confidentiality regime applicable to the production of documents in the arbitration; as a result, the tribunal made a number of procedural orders addressing the confidentiality issue.[18] In Procedural Order No. 16, the tribunal stated that, regardless of the position in private consensual commercial arbitrations, it had not been shown that there is any general principle of confidentiality associated with an arbitration under an international treaty, because it drew a distinct doctrinal differentiation of treaty-based investment arbitration from contractual commercial arbitration with no presumption of confidentiality.[19]

B. The Biwater Gauff Compromise: Transparency Qualified by Procedural Integrity

The most intricate approach to resolve the tension between confidentiality and transparency in investment arbitration occurred in Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania (2006). Biwater Gauff, a company involved in establishing water infrastructure, brought an ICSID claim against the Republic of Tanzania, asserting that the Republic had violated its obligations under a bilateral investment treaty. While the case was pending, the Republic unilaterally disclosed certain orders from the tribunal to a third party and this information was placed on the Internet. Biwater Gauff requested that the tribunal impose provisional measures that would require both parties to refrain from disclosing any procedural documents or information to anyone other than each other.[20]

The tribunal responded with a sophisticated analysis of all competing interests. It acknowledged that investment arbitration, particularly proceedings before the ICSID, is conducted under a system that provides for transparency, and that the need to keep the public informed of developments that affect how a country conducts itself as a regulator and uses

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[17] Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), ¶¶ 121–125, available at https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB(AF)/97/1

[18] Charles Brower & Lee Steven, "Who Then Should Judge? Developing the International Rule of Law under NAFTA Chapter 11," available at https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1126&context=cjil

[19] S.D. Myers, Inc. v. Government of Canada, UNCITRAL (NAFTA) Arbitration, Procedural Order No. 16 (May 13, 2000), available at https://www.italaw.com/cases/969.

[20] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Procedural Order No. 3 (Sept. 29, 2006), available at https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/05/22.

publicly owned resources must be given significant weight. The tribunal also recognized that disclosing information without limit during the course of a proceeding could have the effect of impacting upon the document discovery process and therefore the overall integrity of the arbitration process.[21]

The Tribunal imposed a limited confidentiality order, which only applied to documents produced by a party for the purposes of the arbitration proceeding. It reasoned that the production of documents for the purpose of settling a dispute has an implied limitation on their use. That is, documents produced in the course of arbitration should only be used for the purpose for which they were disclosed, resolving the parties' dispute and should not be used by the opposing party for any other purpose. However, it is important to note that this limitation was intended to be temporary and procedural in nature.[22] Once the arbitration proceedings were completed, the interests of transparency would prevail, in principle.

The Biwater Gauff framework is illustrative, because it shows that transparency and procedural integrity can coexist, rather than being opposed. It is possible for transparency to be the rule, while buffering it with limited, time-sensitive, and purpose-defined restrictions to accommodate the arbitral process's functional needs. The issue is not with transparency itself, but with the earlier or inappropriate disclosures which distort the arbitration proceedings.

C. Institutional Reform: UNCITRAL Transparency Rules and the Mauritius Convention

The trajectory traced in the case law has been reinforced and institutionalised through successive rounds of rule-making. The UNCITRAL Transparency Rules adopted in 2013 has been the most significant codification of transparency principles in the area of investment arbitration. The UNCITRAL Transparency Rules are applicable by default to investor-State arbitral proceedings conducted in accordance to the UNCITRAL Rules that arise under investment treaties concluded since April 1, 2014. In this light, the rules require, amongst other things, the publication of notices of arbitration, all pleadings, evidence relied upon, hearing transcripts and awards.[23]

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[21] Biwater Gauff, *supra* note 13, Procedural Order No. 3, ¶¶ 135–152

[22] *See* Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award ¶¶ 136–156 (July 24, 2008), *available at* https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/05/22.

[23] UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration, U.N. Doc. A/RES/68/109 (2013), arts. 2–8, available at https://uncitral.un.org/en/texts/arbitration/contractualtexts/transparency; see also

The 2014 Mauritius Convention on Transparency extended the applicability of UNCITRAL Rules on Transparency to pre-existing investment treaties entered into by States that ratified the Mauritius Convention.[24] By doing so, the Mauritius Convention on Transparency addressed the time limitation of UNCITRAL Rules on Transparency and established a new means by which States may prospectively adopt transparency principles throughout the entirety of the investment treaty network of States.

The newly adopted ICSID Arbitration Rules, which entered into force July 1, 2022, also make significant advancements in terms of transparency. Rule 62 now provides for the publication of the names of the parties and arbitrators, procedural orders, decisions and awards, subject to redaction of confidential business information, upon request by the parties.[25]

IV. THE CASE FOR A UNIFORM INTERNATIONAL FRAMEWORK

The level of confidentiality in commercial arbitration varies greatly between the different national legal systems that exist.[26] Different legal cultures (i.e. English law, Australian law, US law, French law, etc.) have reached different decisions about whether to provide or not to provide some form of confidentiality and where the basis for that obligation to provide confidentiality lies. When it comes to investment arbitration, while the movement in this area has been towards having greater levels of transparency over the last five years, implementation of the new trend toward transparency has been implemented at different rates by different institutions with different institutional rules. The result has been a lack of regulatory consistency in this area of commercial and investment arbitration and a result, both the parties involved in these proceedings and ultimately the general public have become more confused than ever before.

This paper submits that it is necessary for the global community to create an overall model framework that would govern confidentiality and transparency with respect to international

Nathalie Bernasconi-Osterwalder, "Transparency and Amicus Curiae in ICSID Arbitrations," in *Investment Treaty Law: Current Issues I* 191 (2006).

[24] United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (Mauritius Convention on Transparency), opened for signature Mar. 17, 2015, U.N. Doc. A/RES/69/116, available at https://uncitral.un.org/en/texts/arbitration/conventions/transparency.

[25] ICSID Arbitration Rules r. 62 (2022), available at https://icsid.worldbank.org/sites/default/files/ICSID%20Arbitration%20Rules%202022%20ENG.pdf

[26] *See* Esso Australia Resources Ltd. v. Plowman, (1995) 183 C.L.R. 10 (Austl.) (rejecting an implied duty of confidentiality in arbitration); *compare* Ali Shipping Corp. v. Shipyard Trogir, [1999] 1 W.L.R. 314 (C.A.) (Eng.) (affirming implied duty under English law)

arbitration. The model/framework that this paper is proposing must have a number of essential elements. First, the distinction should be drawn between commercial arbitration and investment arbitration as they are fundamentally different in nature. Transparency should be the norm in investment arbitration with the existence of confidentiality as an exception and only permitted when parties agree to it and when certain types of information (e.g., trade secrets, business sensitive data of a commercially sensitive nature and/or information relating to national security) require that confidentiality be maintained. In the case of commercial arbitration, the framework would make it clear that there is no implied duty of confidentiality in respect of the arbitration proceedings, and would also provide a detailed arbitration model confidentiality clause that parties may use.

The second element of the framework is to clearly identify and delineate the types of information that may benefit from confidentiality protection and the conditions to be satisfied to establish entitlement to such protections.[27] A mere blanket claim of confidentiality without demonstrating a real risk of harm from being made public does not suffice. The party requesting that information be protected as confidential must show that the requested information is, in fact, sensitive and that its disclosure would expose them to significant and unfair prejudice.[28]

Third, the framework must define the timeframes in which confidentiality obligations exist. The Biwater Gauff tribunal recognised that a limit on disclosing information may be necessary throughout the hearings in order to protect the integrity or fairness of the proceeding; however, this restriction would not remain in effect once the hearings concluded. The public has a vested interest in obtaining information related to how arbitral tribunals adjudicate matters involving States and the use of public resources. When a final award is rendered, the public has an even stronger interest in obtaining that information.

The fourth element of the framework is to address the role of institutional rules governing the confidentiality of arbitral proceedings.[29] There are significant differences between many major arbitral institutions regarding how they treat issues of confidentiality, and consequently there

[27] Queen Mary University of London, *2021 International Arbitration Survey: Adapting Arbitration to a Changing World* 6–8 (2021), available at https://www.whitecase.com/sites/default/files/2021-03/2021-international-arbitration-survey.pdf.
[28] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Procedural Order No. 3, ¶ 149, 46 I.L.M. at 32 (Sept. 29, 2006) (requiring demonstration of actual harm before imposing confidentiality restrictions).
[29] International Bar Association (IBA), *IBA Guidelines on Conflict of Interest in International Arbitration* (2014), available at https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918

is a great deal of uncertainty in the field regarding confidentiality obligations in arbitration today. At present, ICSID, ICC, UNCITRAL, LCIA and other arbitral institutions have very different approaches to confidentiality as it applies to arbitration, with many of them providing that confidentiality shall be a default in their institutional rules, others providing for confidentiality only if an agreement is made by the parties to the arbitration, and others having no provisions whatsoever regarding confidentiality in their rules.[30] A model framework that sets minimum standards for institutional rules governing confidentiality would help to promote convergence and reduce the great deal of uncertainty that exists in the area of confidentiality in arbitration today.

The fifth element of the framework is to address confidentiality in multi-party arbitration, which is where the greatest difficulty arises in establishing confidentiality obligations. As the number of claimants and respondents involved in commercial and investment arbitration increases, the challenge of creating an enforceable confidentiality regime that encompasses all of the parties to the arbitration is heightened. Consequently, the framework should provide guidance to practitioners on the best way to structure confidentiality agreements in multi-party arbitration and on the consequences for breaching any such agreements.

The pressing need for reform is emphasized by the current legitimacy crisis in investment arbitration. Various critics have argued that the lack of transparency of investment arbitration proceedings (no access to public hearings, reference to important documents, inconsistencies in multiple arbitral awards) has led to a perception that the system serves multinational corporations to the detriment of States and their citizens. Although increased transparency alone will not solve the legitimacy crisis, it is nevertheless a fundamental ingredient to resolving it.[31]

V. CONCLUSION

The emphasis of this study is that tension between confidentiality & transparency does not

[30] *Compare* ICC Arbitration Rules art. 22(3) (2021), *available at* https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/ (empowering tribunal to protect confidential information on request), *with* London Court of International Arbitration Arbitration Rules art. 30 (2020), *available at* https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx (imposing default confidentiality obligation on parties), *and* UNCITRAL Arbitration Rules art. 17(1) (2013) (containing no express confidentiality provision).

[31] Susan Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 Fordham L. Rev. 1521, 1545–48 (2005). Available at https://ir.lawnet.fordham.edu/flr/vol73/iss4/10/

produce a zero-sum competition in arbitration, but instead provides an opportunity to balance both via calibrating the level of transparency based on substantive factors. Those factors include: type of arbitration proceeding; type of dispute; identity of the parties; public interest involved; requirements of the international arbitral process.

Investment arbitration raises a strong case in support of transparency as the default principle for public purposes; the case laws from Amco through Biwater Gauff illustrate that strong development has occurred towards making transparency the basis for public policy. Other factors suggest that transparent public awards must be established & maintained for State-owned stakeholders, because derivative rights exist for the awards through public treaty obligations as well as consistency in award outcomes. Institutional developments such as The UNCITRAL Transparency Rules, Mauritius Convention & ICSID 2022 have been significant developments promoting transparency. Efforts remain ongoing to promote broader acceptance & enforceability of these rules.[32]

Reforming commercial arbitration presents different challenges, although they are just as urgent in nature.[33] Confidentiality is generally seen as an automatic or implied element of any arbitration agreement when considered analytically; however, this approach is not only incorrect but also does not reflect the varying legal systems around the World. To ensure that their arbitration will be confidential, parties need to specifically state that it will be so. In addition, parties relying on institutional rules regarding confidentiality are often misguided because they may provide no or ambiguous guidance on this issue and therefore provide false comfort. Because attorney client privilege and confidentiality within the context of commercial arbitration provides very little guidance to anyone, the majority of nations lack sufficient legal guidance regarding the expectations of confidential document and/or information protection in the context of commercial arbitration. Therefore, an internationally accepted standard framework of default rules for commercial arbitration that can be adopted, adapted, or disregarded by parties and institutions would eliminate much of the uncertainty that currently exists with respect to the norm of confidentiality in commercial arbitration. Such a uniform standard would advance the interests of all parties involved in establishing clear and predictable

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[32] UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (2014), *supra* note 23; United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (Mauritius Convention),; ICSID Arbitration Rules rr. 62–65 (2022)

[33] Azhaham Perumal Perumal Saravanan, Subramanian Ramamurthy Subramanian, "Transparency and Confidentiality in Treaty-Based Investment Arbitration: The Need for a Global Standard," *6 TDM* (2009), https://www.bricslawjournal.com/jour/article/view/196

parameters for resolving disputes through international arbitration. Furthermore, it would assist in establishing the long-term legitimacy of international arbitration as a system, not simply as one of the means by which private commercial disputes are settled, but also as an important element of establishing the overall international legal order. Without more openness and consistency in the rules, the legitimacy of the system will still be questioned because, as Justice Brandeis famously said, "sunlight is said to be the best of disinfectants".[34]

[34] Louis D. Brandeis, "What Publicity Can Do" available at http://archives.cpajournal.com/2003/1203/nv/nv2.htm

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