Title: Confidentiality
An inherent element of arbitral agreements or not?

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Preface

I would like to express my heartfelt gratitude to my dear husband for his support during the study process and his invaluable help in proofreading this thesis.

I sincerely thank my supervisor Güneş Ünüvar for his valuable dedication and thorough guidance through this thesis.
## List of Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AAA</td>
<td>American Arbitration Association</td>
</tr>
<tr>
<td>BIT</td>
<td>Bilateral Investment Treaty</td>
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<td>CAFTADR</td>
<td>Free Trade Agreement between the United States, Central America and the Dominican Republic</td>
</tr>
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<td>CETA</td>
<td>Comprehensive Economic and Trade Agreement</td>
</tr>
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<td>DIAC</td>
<td>Dubai International Arbitration Centre</td>
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<tr>
<td>EUSFTA</td>
<td>EU-Singapore Free Trade Agreement</td>
</tr>
<tr>
<td>EVFTA</td>
<td>EU-Vietnam Free Trade Agreement</td>
</tr>
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<td>FTA</td>
<td>Free Trade Agreement</td>
</tr>
<tr>
<td>ICC</td>
<td>International Chamber of Commerce (in reference to the Arbitration Institute)</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>ICJ Statute</td>
<td>Statue of the International Court of Justice</td>
</tr>
<tr>
<td>ICSID</td>
<td>International Centre for Settlement of Investment Disputes</td>
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<tr>
<td>ICSID Convention</td>
<td>Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965</td>
</tr>
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<td>IIA</td>
<td>International Investment Agreement</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>LCIA</td>
<td>The London Court of International Arbitration</td>
</tr>
<tr>
<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
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<td>NGO</td>
<td>Non-Governmental Organization</td>
</tr>
<tr>
<td>PCA</td>
<td>Permanent Court of Arbitration</td>
</tr>
<tr>
<td>SCC</td>
<td>Stockholm Chamber of Commerce (in reference to the Arbitration Institute)</td>
</tr>
<tr>
<td>TTIP</td>
<td>Transatlantic Trade and Investment Partnership</td>
</tr>
<tr>
<td>UNCITRAL</td>
<td>The United Nations Commission on International Trade Law</td>
</tr>
<tr>
<td>UNCITRAL Arbitration</td>
<td>The United Nations Commission on International Trade Law Rules</td>
</tr>
<tr>
<td>UNCITRAL Model Law</td>
<td>The UNCITRAL Model Law on International Commercial Arbitration</td>
</tr>
<tr>
<td>UNCTAD</td>
<td>The United Nations Conference on Trade and Development</td>
</tr>
<tr>
<td>VCLT</td>
<td>The Vienna Convention on the Law of Treaties 1996</td>
</tr>
<tr>
<td>WBAT</td>
<td>World Bank Administrative Tribunal</td>
</tr>
</tbody>
</table>
Table of Contents

1. INTRODUCTION ........................................................................................................4
   1.1 Preamble ..................................................................................................................4
   1.2 Purpose and Aim ......................................................................................................6
   1.3 Methodology Materials, and Disposition .................................................................7
      1.3.1.1 De Lege Lata ...............................................................................................7
      1.3.1.2 De Lege Ferenda .........................................................................................7
   1.3.2 Materials .............................................................................................................8
   1.3.3 Disposition .........................................................................................................9
   1.4 Limitations .............................................................................................................9
   1.5 Clarifications .........................................................................................................10

2. THE ORIGIN OF THE PRESUMPTION OF CONFIDENTIALITY IN ARBITRAL AGREEMENTS .................................................................11
   2.1 Contextual and Material Development ....................................................................11
   2.2 The Legal Nature of Confidentiality: No Standard Approach ..................................13
      2.2.1 States and Case Law .......................................................................................13
      2.2.2 Institutional Rules ............................................................................................16
         Other Institutions ..................................................................................................20

3. CONFIDENTIALITY OF THE ARBITRAL PROCESS AT DIFFERENT PHASES ........................................................................................................22
   3.1 The hearing ............................................................................................................22
   3.2 The award .............................................................................................................22
   3.3 The documents prepared for the arbitration ............................................................23
   3.4 Third Parties .........................................................................................................23

4. DISCUSSION .............................................................................................................24
   4.1 An INHERENT Element or NOT? ...........................................................................24
   4.2 Proposition ...........................................................................................................30

5. CONCLUSION .........................................................................................................33
   5.1 Summary ................................................................................................................33
   5.2 Concluding remarks ..............................................................................................34

TABLE OF LITIGATIONS AND INSTITUTIONAL RULES ..................................35

BIBLIOGRAPHY ...........................................................................................................37
1. INTRODUCTION

1.1 Preamble

Confidentiality has been defined as a pure contractual creation born out of parties’ agreement.\(^1\) It has for a long time been considered to be one of the crucial features of arbitration, and the majority of scholars list it as the main advantages of arbitration over litigation.\(^2\) It prevents the disclosure of claims made by a party which may be upsetting or offensive to the other and allows parties to make arguments in private which they may hesitate to make in a forum open to public access.

Confidentiality is fundamentally associated with privacy in most cases. Even though both refer to the private process between the parties and the members of the tribunal, they are not identical. Confidentiality and privacy are two instruments designed to control third parties’ access to arbitral proceedings and to the information exchanged in that process.\(^3\) Whether privacy does or does not include a duty of confidentiality is an on-going discussion, a general conclusion among scholars, however, is that it depends on \textit{lex mercatoria}, the institutional regulation or \textit{lex loci arbitri}.\(^4\)

Confidentiality is also often seen as a component of transparency. The main difference between transparency and confidentiality centres on the nature of the interests protected. Confidentiality of investor-State arbitration gives priority to the specific interests of the disputing parties, while the transparency of investor-State arbitration gives priority to the broader interests of the several stakeholders in international investment law and arbitration.\(^5\)

As transparency crosses confidentiality, “\textit{the conflict between transparency and confidentiality cannot permit the victory of one over the other, and their settlement turns out necessary."}^6

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\(^2\) See Malatesta & Sali (2013), p. xxiv
\(^3\) Supra note 1, p.3
\(^4\) See Born (2012), p. 2252 – 2254
\(^6\) See Fages (2003), p. 5
It is critical to note that investor-state arbitrations are not commercial arbitrations. Investor-state arbitrations are governed by Public International Law and not the national law chosen by the parties. 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 frequently used for the settlement of cross-border disputes between foreign investors and host countries.\(^7\) Investor-State arbitration differs from general commercial arbitration in that it involves claims against the State, which are often related to regulation of public law. This form of arbitration involves public issues because it often deals with various policies that are traditionally perceived to be within the sovereign regulatory powers of States.\(^8\) In the recent past, the parallel public interest in the arbitral process has shifted the emphasis from confidentiality to transparency and the development towards third-party participation in investor-State arbitration.

The interests of the host state are mainly involved in investor-State arbitration. Hence, there is a need for transparency and expansion of the scope of exceptions to the confidentiality of information and documents generated in the arbitral process. Access to such documents or information and participation by third parties also becomes enormously important.\(^9\) Because of this recent development, states are addressing issues related to procedural transparency in the investor-State dispute resolution provisions in BITs\(^10\) and amending the Arbitration rules of international arbitral institutions.\(^11\)

Against this background, this thesis challenges the idea that confidentiality is an inherent element or feature of arbitration, particularly investor-state arbitration. Firstly, it argues that confidentiality in investor-state disputes is not treated with the same strictness as other so-called inherent features of arbitration such as flexibility and

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\(^7\) See Born (2012), p. 412.


\(^9\) See Feliciano (2013), p. 25

\(^10\) See, for example, North American Free Trade Agreement (NAFTA), The Free Trade Agreement between the United States, Central America and Dominican Republic (CAFTADR), Japan-Mexico Foreign Trade Agreement and the Australia-Chile Free Trade Agreement

\(^11\) See ICSID Convention, Regulation and Rules
enforcement of arbitral awards. Instead, tribunals are split on the issue and in most cases, it is not added to the arbitration agreement, and some arbitration institutions and rules are silent on the issue. Secondly, confidentiality in investor-state arbitration is not given the same seriousness it is presented in commercial arbitrations. As will be shown herein, the recent calls for greater transparency in investor-state arbitration outweigh concerns for confidentiality. Confidentiality is, therefore, an overrated element of investor-state arbitration and has to be put in its place so that no parties are wrongly enticed into entering an investor-state arbitration agreement with the assurance that any dispute coming from the agreement will be dealt with in an entirely confidential manner.

Further, scholars and practitioners fail to examine exactly why confidentiality is important or whether the value placed on confidentiality in arbitration may differ depending on the context. It is precisely this lack of explicit authority that makes confidentiality and privacy issues problematic in international arbitration. As for jurisprudence on the subject, there has been no case, stating, or explaining why, even in the absence of express provision, arbitration was still considered confidential.

1.2 Purpose and Aim

The purpose of the paper is thus as follows: to investigate whether confidentiality is an integral or natural part of investment arbitral agreements or not and if it is, whether it should be an integral part of it. It will be evident that no clear and general answer can be said to prevail in this respect. The aim of this thesis is not to criticise the system of investment treaty arbitration instead merely to illuminate the perspective of possible misconstruing of so-called fundamental elements of the system. The paper, therefore, has a purpose containing a two-part aim and accordingly will be split into two parts. First, confidentiality will be covered and its origin and modern application introduced to establish how the presumption has been used in investment arbitration. Secondly, based on these findings, the final part will discuss the duty as it ought to be interpreted.
1.3 Methodology Materials, and Disposition

1.3.1 Methodology

The methodology used in this thesis is the traditional legal dogmatic approach, meaning that the appropriate laws and rules and their sources will be presented and analysed de lege lata and de lege ferenda. The purpose of this paper, as has been pointed out, contains two elements. The first is to devise how confidentiality has been applied in investment arbitration proceedings – the de lege lata aspect – and secondly, will attempt at explaining the duty’s ideal function – the de lege ferenda aspect.

1.3.1.1 De Lege Lata

Compared to other so-called inherent aspects of investment arbitration, the problem with confidentiality is that there is no explicit aim at uniformity. Numerous arbitral rules and institutions are dealing with the matter in different ways which have received approving as well as disapproving reviews by academics. Tribunals are principally required to solve the dispute at hand and have no duty to apply principles and rules according to previous, or subsequent tribunals’ interpretation.

This topic matters from a theoretical perspective as it exposes current lacunas and differences in the arbitral rules and institutions and dividing lines between the two aspects of international arbitration (Investment and Commercial Arbitration) that underlie the investment treaty universe. Knowing how confidential investment arbitration is of legal relevance especially for parties seeking to resolve an investor-state dispute and for the general scholarship of the topic to have precise knowledge of the integral elements of investor-state arbitration. It also matters for rationalising case law produced under different treaty models.

1.3.1.2 De Lege Ferenda

The purpose of this thesis is not only to establish that confidentiality is not an inherent element of investor-state arbitration but also to suggest, how the duty should be used in future instances so that it can be rightly quoted as a central aspect of investor-state arbitration. The topic matters from a normative perspective to promote the

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12 For example: Redfern and Hunter, Gary Born and Jan Paulsson
development of investment arbitration law and to inform legal methodology. New ideas can change arbitration institutions for the better, they draw attention to the power of arbitral institutions to produce better rules and create change which makes arbitration even more attractive as compared to litigation. This power, however, must be used responsibly and uniformly to show the order in this field of law. New ideas are always needed to introduce legal innovation.

1.3.2 Materials

One of the primary sources of international law is treaties, whether general or particular, establishing rules expressly recognised by different states. The Vienna Convention on the Law of Treaties (VCLT) is also a source of investment arbitration, especially regarding the interpretation of treaties. Investment treaty arbitration is a logically challenging area of law. The leading sources, if a BIT is silent on a subject matter, are primarily academic writers and arbitral awards. As will be shown in the paper, it is uncommon that confidentiality is explicitly included in BITs. In practice, there are two sources of the duty of confidentiality: From a larger point of view, applicable law, arbitration institutions and national legislation and from a smaller perspective, the participants themselves through the arbitration agreement can exercise control over the obligation by providing an express, specific confidentiality clause.

Besides these two sources, case law provides certain guidelines too. The case law presented in this thesis has been used to describe various positions in national legislations and is an articulation of confidentiality in international arbitration particularly, investor-state arbitration. It is essential because international arbitration develops through case law. It is primarily the two practical sources of confidentiality that justify a deeper methodological reflection since they are the peculiarities of this topic. Therefore, case law, academic writers and other sources of law will be used in articulating this issue.

Another important source is numerous reports and drafts, authored by international writers and organisations. These drafts, particularly those authored by the International

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14 The Vienna Convention on the Law of Treaties Concluded at Vienna on 23 May 1969
Law Commission (ILC), are not binding and sometimes advanced *de lege ferenda*.15 There is a vital interaction between these drafts and other sources of international law and as evidence of customary international law, they are therefore imperative.

1.3.3 Disposition
The disposition of this thesis is structured as follows. After the introductory chapter, the main subject of this thesis, confidentiality’s brief history is given in chapter 2. The aim is to draw a conclusion whether confidentiality in arbitration proceedings has been and is still expressly expected. If it is, the paper will attempt to draw overall conclusions as to whether it supports the parties’ expectations or it generates undesired obstacles. In section 2.2 of chapter 2, it will explain how different the scope of confidentiality is in various arbitration rules and how it is tackled in selected countries. The aim is to investigate if there is a general obligation of confidentiality and if there is, whether it is absolute.

In Chapter 3, the thesis explains confidentiality in investment arbitration at different levels of the arbitration proceedings. Chapter 4 is a discussion of the primary focus of the thesis, namely: “an inherent element or not,” it aims to prove that even if arbitral hearings are kept private, and despite the fact that an explicit confidentiality clause may exist, the outcomes of many arbitration proceedings become public domain. It will explain why confidentiality is not an inherent feature of investment arbitration and give some propositions on how the issue can be handled in the future. Finally, the last chapter will then have a summary together with some final words about this subject.

1.4 Limitations
Confidentiality is considered an important virtue for any decision-making bodies and is insisted on in a range of contexts. This thesis, however, will limit the discussion on the concept to confidentiality associated with investor-state arbitration and will not examine the issue in other forms of dispute resolution. International commercial arbitration will be discussed shortly to develop the understanding of investment treaty arbitration and when it is needed for a better understanding of this work.

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1.5 Clarifications

The primary focus of this thesis is confidentiality as it stands today in investment (Investor-state) arbitration. As mentioned above, no deeper exposé of the substantive aspects of the rule will be conducted. In this context, “confidentiality,” refers to the right to know of the existence of an arbitration proceeding, its details and that the documents, testimonies and witnesses among others, from the arbitration proceedings, are available only to the parties, the arbitrators, and other persons allowed by mutual consent of the parties. An “inherent element” in this context means an element existing in ‘confidentiality’ as a permanent and inseparable element, quality or attribute. There are several ways of addressing this phrase, and some may be used alternatively, intended to be interchangeable. The different phrases include “essential element” and “integral element.” The variations to be used is purely for literary purposes.

Transparency in the discussion will be limited to the arbitration setting and will mean the complete availability of the rules that regulate an arbitration decision-making process to "interested parties." Public access, transparency, and disclosure, though being different principles will be used synonymously.

Additionally, due to the private and non-binding precedent system in most investment arbitral awards, it is hard to induce any general conclusions from the final awards. The awards and decisions of arbitral tribunals mentioned and cited in this thesis should therefore not be understood as representative of a general perception de lege lata. However, these awards, decisions and the legal reasoning cited therein, merely serves as an indication as to how some tribunals and committees perceive the extent of their mandate and their perception of the importance (or insignificance) of confidentiality.
2. THE ORIGIN OF THE PRESUMPTION OF CONFIDENTIALITY IN ARBITRAL AGREEMENTS

2.1 Contextual and Material Development

Arbitration is a long-established dispute settlement method with references found in Roman and ancient Greek law, such as Digesta, Codex Iustinianus and Novellae. Historically, arbitration proceedings, as well as arbitral awards have been considered entirely confidential. 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”.

The sources of the duty of confidentiality are mainly 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 commonly accepted arbitral practice.

Most scholars continue to argue that confidentiality is an integral aspect of arbitration and this notion is proved by some English case law, such as the English Court of Appeal's 1997 decision in *Alli Shipping v. Shipyard* 'Trogrir', which signalled a refreshed movement toward a judicially enforceable duty of confidentiality. Confidentiality was, however, deemed to be an essential attribute as well as a general rule of arbitration up until the High Court of Australia’s judgement in *Esso v Plowman*, where the principle of confidentiality as an essential rule of arbitration was rejected. This judgement was a starting point to debates on confidentiality in arbitration. Consequently, other common law jurisdictions, particularly the United States, also recognised the private nature of arbitration but rejected claims of an implied obligation of confidentiality.

This position was also adopted in civil law jurisdictions, stating that the duty of confidentiality between parties in an arbitration proceeding could only arise as a contractual creation, through an express agreement by the parties. This approach has

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16 Supra note 1
19 *Esso Australia Resources Ltd and Others v The Honourable Sidney James Plowman and others* (1995) 183 C.L.R.
been upheld by courts of civil law jurisdiction, except the French courts. 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.\textsuperscript{21} The private nature of arbitration is a settled matter. However, its confidentiality can be more uncertain and confusing. The question of confidentiality in international arbitral proceedings is still far from settled.

There has been no general and overall recognition of the duty of confidentiality in investment arbitration. It has been assumed to exist both as a fundamental feature of arbitration and a principal reason for arbitrating rather than litigating disputes and has existed for the comfort and convenience of the parties in an arbitral proceeding. It has been “assumed” because there is no arbitration statute world over, which provides for the confidentiality of arbitration and publication of arbitral awards, although possibly in amended and ambiguous form, is not known.\textsuperscript{22} It seems implied in an arbitration agreement even though no authority is cited for this proposition.

Investor-State arbitration mainly grew founded on the model of international commercial arbitration as a private and confidential process for resolving disputes with its own different process whereby private investors bring claims against sovereign host States under dispute resolution provisions in investment treaties or agreements.\textsuperscript{23} It is mainly governed by ICSID Arbitration Rules, or ICSID Arbitration (Additional Facility) Rules with proceedings conducted under the auspices of ICSID and UNCITRAL Arbitration Rules on an ad hoc basis. They may also be carried out under the aegis of other arbitral institution like the ICC, PCA, LCIA, SCC and governed by their respective Arbitration Rules.

Initially, international investment agreements traditionally did not include transparency provisions. The majority of international investment agreements, particularly Bits were concluded in the 1990s when there was no discussion of procedural transparency at that

\textsuperscript{21} Ibid para 20.03 at 2799
\textsuperscript{23} See Blackaby & Richard (2010), p. 254
time. Many international investment treaties, therefore, 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.\textsuperscript{24}

Investor-State arbitrations are significantly more transparent and less confidential than commercial arbitrations considering the nature of their framework and the call for transparency.\textsuperscript{25} It is widely argued that “there is no general duty of confidentiality in investor-State arbitration” based on the absence of the general principle of confidentiality obligations in the major procedural rules governing investor-State arbitration and the marked tendency towards transparency.\textsuperscript{26}

\textbf{2.2 The Legal Nature of Confidentiality: No Standard Approach}

The extent to which confidentiality in investor-State arbitration is covered in arbitral proceedings differs under the different provisions of the arbitration agreement and arbitration rules. Information regarding the existence of arbitral proceedings is published under ICSID investment arbitration in accordance with Regulation 22 (1) of the ICSID Administrative and Financial Regulations.

\textbf{2.2.1 States and Case Law}

Analysing states and case law is relevant in this topic despite it (the topic) dealing with international dispute settlement. This is because investor-state disputes deal with states and sometimes, national law is used to determine the confidentiality of a case especially in cases where confidentiality is not addressed in the arbitral agreement. Some countries incorporate confidentiality provisions into their national laws and sets of rules, while others choose not to. Leaving the question of confidentiality unsettled is risky because \textit{lex loci arbitri} will rule on confidentiality when the agreement and \textit{lex mercatoria} remain silent, and the national legislation might be unfamiliar to the parties if the tribunal has its seat in a foreign country.\textsuperscript{27} On the other hand, even if a confidentiality provision is included in an arbitration agreement, there might be

\textsuperscript{24} UNCITRAL Working Group II Document A/CN.9/WG.II/WP.160 op cit note 18 para 5
\textsuperscript{25} See Born (2014), p. 200.
\textsuperscript{26} ibid p. 200-1
unforeseen uncertainties, especially when the parties’ choice of the arbitral tribunal’s seat is a country with legislation unknown to both sides.

In England, The English Arbitration Act 1996 does not contain any express provision concerning confidentiality. Its basic point of view is widely perceived as, that the parties to the arbitration are subject to an implied duty of confidentiality. The Court of Appeal in the leading English case of *Ali Shipping Corporation v. Shipyard Trogir* stated that confidentiality should be kept in the arbitration proceedings and documents and other information produced during the process. The duty of confidentiality, however, proved not to be definite, as the Court, in this case, determined five exceptions to the duty. One of which, ‘information and material from a case may be exposed due to mandatory legislation in the applicable law.’ Another example, ‘disclosure can be a result of a legitimate request or interest’ as was seen in *Tournier v Bank of England*. This case introduced four principles known as the “Tournier principles,” on which exceptions to the duty of confidentiality were legitimised. It is, therefore, important for parties to note that the duty of confidentiality arising from an agreement in England may not be absolute.

In Australia, in rejecting an implied duty of confidentiality, it was held by the High Court of Australia in *Esso Australia Res. V. Plowman* using the ‘tournier principles’ that a third party that was not a party to the arbitration proceedings is allowed to discover information and documents concerning the said arbitration.

In Sweden, The Swedish Arbitration Act does not provide any regulation on confidentiality between the parties. The Swedish perspective on the duty of confidentiality is therefore based upon case law. This position is articulated well in the *Bulbank Case*. The Supreme Court and Svea Court of Appeal found that confidentiality was not a general principle of arbitration and therefore not part of the

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28 The Department Advisory Committee on Arbitration Law Reports on the Arbitration Bill (Feb 1996) para 10-17.
29 See Born (2012), p. 198
31 Tournier v National Provincial and Union Bank of England [1924] 1 KB 461
32 See Born (2012), p. 198
arbitration agreement. It held that according to Swedish law, the arbitration proceedings are not confidential unless the parties explicitly agree to such an obligation, or when an arbitration set of rules which apply confidentiality has been adopted.

New Zealand is an exceptional example of a country that codified an express duty of arbitration confidentiality. However, Section 14(2) of New Zealand's Arbitration Act (1996) provides two minor exemptions to the duty. One of which such disclosure is "contemplated by this Act"; or when disclosure is made; "to a professional or other advisor of any of the parties". Therefore, the express duty of confidentiality is not absolute even in such a clear Arbitration Act.

In the U.S.A., the law that governs arbitration is the Federal Arbitration Act ("FAA") and rules of American Arbitration Association ("AAA"). In many rulings, the tendency is to reject an implied duty of confidentiality concerning investment arbitration. In United States v. Panhandle E Corp, the Federal government asked Panhandle to provide it with some documents from an ICC arbitration which Panhandle was party to and Panhandle raised the duty of confidentiality. The court rejected Panhandle's claim, holding that there is no implied duty of confidentiality and that the parties must expressly agree to uphold confidentiality. The court also held that the ICC Rules do not apply the duty of confidentiality and further mentioned that the disclosure was necessary due to the public interest. In the case of American Cent E Tex Gas Co. v. Union Pac. Res. Group, the Federal District Court ruled that the principle of confidentiality is inferior to that of public interest.

Canadian courts are yet to decide on the issue of confidentiality, and the law is therefore unsettled. Similar to most countries, Canada and its provinces do not have

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34 New Zealand's Arbitration Act (1996)
35 The United States of America
legislation that explains and regulates the scope of confidentiality in both domestic and international arbitration.

The cases mentioned above essentially hold that confidential information in arbitration is only protected when exceptional circumstances warrant a finding that the parties intended to keep specific information private. Most of the decided cases are based on unusual factual situations that make general principles on this subject difficult to determine. This difficulty is further demonstrated in the recent English Privy Council case **AEGIS**, in which, the Privy Council in its analysis seemed to place more importance on the purposes of arbitration to determine disputes and declare the rights and duties of the parties, instead of on the principle of confidentiality. The **AEGIS** case proves that general principles of confidentiality are difficult to discern and confidentiality agreements will be evaluated based on the circumstances in which they are made and the basic principles and purposes of arbitration.

In summary, the above-mentioned dissenting jurisdictions can be summarised as having the view that privacy of arbitration proceedings does not necessarily impose a duty of confidentiality and refuse to recognise an implied obligation of confidentiality as an attribute of arbitration in their respective jurisdictions.

### 2.2.2 Institutional Rules

Some arbitral institutions have enacted rules dealing with confidentiality. In general, the rules are intended to guarantee the privacy and confidentiality of arbitral proceedings. However, these rules are subject to the consent of the parties and the application of any overriding legal duty of disclosure. If parties have agreed on means of using institutional regulation in their arbitration agreement, confidentiality might be protected depending on which institutional regulation they are referring. Below are the main institutional rules.

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38 Associated Electric & Gas Insurance Services Ltd. (AEGIS) v. European Reinsurance Company of Zurich (Bermuda) UK PC 11 (Jan. 29, 2003)

2.2.2.1 The ICSID Arbitration Rules

The ICSID Convention was established in 1966 under the World Bank to resolve investment disputes between States and foreign investors.\(^{40}\) The ICSID Arbitration Rules are one of the procedural arbitration rules regularly used in investor-State Arbitration. The revised ICSID Arbitration Rules, as well as the ICSID Arbitration (Additional Facility Rules), contain a mixture of both confidentiality and transparency provisions. The recent amendments to the ICSID Arbitration Rules incorporate greater transparency and public involvement in ICSID arbitration, unlike the old Rules.\(^{41}\) The revised ICSID Rules also give more power to the tribunal to decide whether to open the proceedings to the public or not and the Rules also explicitly incorporate the practice of *amicus curiae* submissions into arbitration procedures.\(^{42}\)

The amendments further 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 regarding the application for amicus submissions are met.\(^{43}\) Although the ICSID Convention and Rules contain clear obligations on the Centre to maintain confidentiality, it is silent on whether parties have a duty to keep it or disclose information or documents to the public during or after the arbitral proceedings. The arbitrators are therefore under the obligation to keep confidential the contents of the award,\(^{44}\) but the parties are not obliged to keep the awards confidential under the wordings of the ICSID Rules. Some of the awards are published by parties unilaterally on non-ICSID websites. ICSID tribunals have further, frequently held that there is no general obligation of confidentiality in ICSID arbitrations as was seen in the *Biwater v. Tanzania*\(^{45}\) case.

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\(^{40}\) See Reed, Paulsson & Blackaby (2010) p. 480

\(^{41}\) The original Arbitration Rules came into effect in 1968 and were subsequently amended in September 1984 and April 2006.

\(^{42}\) Rule 37(2) of ICSID Arbitration Rules 2006. See also Article 39 of ICSID Arbitration (Additional Facility) Rules.

\(^{43}\) See Johnsson & Bernasconi-Osterwalder (Issue 4, September 2013) p. 4

\(^{44}\) Rule 6(2) of ICSID Arbitration Rules 2006. See also Article 13(2) of ICSID Arbitration (Additional Facility) Rules.

\(^{45}\) *Biwater Gauff (Tanzania) Limited v. The United Republic of Tanzania*, ICSID case no. ARB/05/22 Award (July 24, 2008)
2.2.2.2 The UNCITRAL Model Law and Rules

The UNCITRAL Arbitration Rules are the second most commonly used set of arbitration rules for settlement of investment disputes. Arbitration under these Rules is by far the most commonly chosen ad hoc arbitral system. The UNCITRAL Model Law does not say anything about the confidentiality of the proceedings. The UNCITRAL Arbitration Rules are the only international text to refer to the issue. The UNCITRAL Arbitration Rules 1976 apply a duty of confidentiality concerning an arbitral award, by stating that “the award may be made public only with the consent of both parties.” The Travaux Preparatoires of the said Rules, however, mentions that an award could be made public under the national legislation of some countries.

The 2014 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (UNCITRAL Transparency Rules) is aimed at including the public interest in investment disputes and disclosure at the very outset of proceedings of some information which allows the public to be aware of proceedings and also request for some detailed information. The Rules establish rights of third persons and non-disputing States to submit their views, and the hearings are generally held in public. UNCITRAL Rules standing alone do not impose a general duty of confidentiality.

A further initiative to broaden the scope of the UNCITRAL Transparency Rules has been the Mauritius Convention. The Convention, signed so far by eighteen States, shall enter into force upon the completion of the ratification processes by three signatories, after which, it will require the signatories to have the UNCITRAL Transparency Rules applied in all cases including proceedings which are not conducted under the UNICTRAL Rules, commenced under all investment treaties to

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46 The United Nations Commission on International Trade Law International Arbitration Rules
48 See Binder, (2005) para. 11-005
49 Article 32(5) of the UNCITRAL Rules
50 Gehring & Euler (2015) pp. 7 – 27
which they are party, and predating April 2014. The UNCITRAL Transparency Rules form the backbone of many new-wave FTAs.

2.2.2.3 The SCC Rules
In the SCC Arbitration Rules\(^{53}\) governed procedures, confidentiality does not protect arbitral proceedings. The SCC Arbitration Rules only places a duty of confidentiality on the arbitrators and the SCC itself does not include other participants in the arbitral proceeding.\(^{54}\)

2.2.2.4 The ICC Rules
The Arbitration Rules of the ICC\(^{55}\) which is the most established and prominent arbitration institute say nothing about confidentiality. There are some provisions in the ICC Rules, however, that to a limited extent address privacy and confidentiality. For example, Article 21(3) of the ICC Rules provides that “arbitration hearings shall be held in private” and also allows the Arbitral Tribunal to “take measures for protecting trade secrets and confidential information.”\(^{56}\) The Rules, unlike most other laws and institutional rules, however, are silent on the matter of confidentiality of the award and does not specifically deal with the material produced during the arbitration proceedings.

2.2.2.5 The LCIA Rules
The LCIA Arbitration Rules\(^{57}\) oblige a general duty of confidentiality of the award and the “materials in the proceedings created for the purpose of the arbitration, and all other documents produced by another party in the proceedings not otherwise in the public domain”\(^{58}\) unless the parties expressly agree otherwise in writing. The said obligation shall be exempt in the case of a “legal duty to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority,” according to Rule 30.1.

\(^{53}\) The Rules of the Arbitration Institute of the Stockholm Chamber of Commerce;
\(^{54}\) Section 46 SCC-Arb Rules
\(^{55}\) International Chamber of Commerce
\(^{56}\) Article 21(3) of the ICC Rules
\(^{57}\) London Court of International Arbitration Rules. Rule. 17 (amended 2005), (March 21, 2011)
\(^{58}\) Ibid Rule 30
Other Institutions

Institutions that include confidentiality include; The AAA International Arbitration Rules in Article 34;\textsuperscript{59} WIPO Arbitration Rules, Articles 73-76;\textsuperscript{60} The Swiss Rules of International Arbitration in Article 43;\textsuperscript{61} Arbitration Rules of the Singapore International Arbitration Centre, Rule 34.6; Arbitration Rules of the German Institution of Arbitration (DIS), Section 43; Hong Kong International Arbitration Centre Domestic Arbitration Rules, Article 26; Rules of the International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Article 11 and ACICA Arbitration Rules, Article 18.\textsuperscript{62}

Several other institutions have rules that do not refer to confidentiality. For instance: ICSID\textsuperscript{63}; The ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules); The International Arbitral Centre of the Austrian Federal Economic Chamber’s Rules of Arbitration (Vienna Rules); and the CIETAC\textsuperscript{64} Arbitration Rules.\textsuperscript{65} NAFTA (The NAFTA mechanisms for investor-state arbitrations originally did not address the topics of confidentiality and transparency. However, Chapter 11 has over the years incorporated transparency as a critical part of investor-State arbitration involving State parties.\textsuperscript{66} NAFTA Chapter 11 expressly addresses the issue of public access to documents, third-party participation and open hearings. Moreover, a statement by the NAFTA parties interpreting Chapter 11 provisions declared that “nothing in NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter 11 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.”\textsuperscript{67}

\textsuperscript{59} The International Centre for Dispute Resolution (American Arbitration Association)
\textsuperscript{60} The World International Property Organization
\textsuperscript{61} adopted by the Chamber of Commerce and Industry of Zurich in 2004
\textsuperscript{62} Australian Centre for International Commercial Arbitration
\textsuperscript{63} The Arbitration Rules of the International Centre for Settlement Investment Disputes
\textsuperscript{64} The China International Economic and Trade Arbitration Commission
\textsuperscript{65} See Claude R. and Annie Finn, (May-July 2007) p.4
\textsuperscript{66} Article 1127, 1129 and 1137 of NAFTA
\textsuperscript{67} NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (31 July 2001) para A.1, available at
Summary

In summary, ICSID arbitration is more transparent than UNCITRAL arbitration. Disputes before ICSID tribunals often involve matters of public interest which one would argue that public interests were probably not foreseen by the drafters of UNCITRAL Arbitration Rules because they originate from commercial arbitration. Additionally, not all arbitration rules of the major institutions incorporate confidentiality provisions. While the majority provides for some degree of confidentiality, -even in the case that these rules expressly lay down confidentiality obligations,- often they relate only to some issues to which the duty of confidentiality can apply. For example, most arbitration institutions have provisions dealing only with the privacy of hearings and not the confidentiality of awards, nor the evidence and submissions that are distributed between the parties.

Furthermore, Parties often enter arbitration agreements using institutional model clauses, and most of these model clauses seldom include confidentiality but rather refer to institutional regulations, and these regulations also do not normally include confidentiality. Practitioners have, therefore, in the absence of statutory direction, struggled to determine whether the applicable law imposes an implied duty of confidentiality when parties agree to submit their dispute to arbitration without mentioning confidentiality and, if so, precisely what is confidential and what exceptions to the rule must be recognised. This is unfortunate because, for an element which is said to be an integral aspect of investment arbitration, confidentiality as an, it surely does not appear that way.


3. CONFIDENTIALITY OF THE ARBITRAL PROCESS AT DIFFERENT PHASES

A brief look at confidentiality at different phases of the arbitral process helps to understand the topic in detail as it assesses the topic from the grassroots. This chapter focuses on the main stages in arbitral procedures. The extent to which these actors are bound by the duty of confidentiality is better defined under commercial arbitration than investor-State arbitration and therefore will not be discussed in depth.

3.1 The hearing

Most Investor-State arbitrations arise under a Bit or Mit, therefore, the primary applicable law will be the provisions of the underlying treaty and general principles of international law and these do not have a general duty of confidentiality. There is, therefore, no general duty of confidentiality imposed on parties in the Law and Rules governing investor-State arbitrations. In the case of Giovanna v. Argentine Republic, 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 arbitration, whether in the ICSID Convention, any of the applicable Rules or otherwise.”

Arbitrators and legal councils are, nevertheless, under strict obligations not to divulge any information or material received by the client or the arbitration institution including information obtained by participating witnesses or experts.

3.2 The award

Arbitral awards are generally confidential unless agreed otherwise by the parties in accordance with Rule 48(4) of the revised ICSID Arbitration Rules and depending on what the applicable institutional rules provide. However, these rules and laws are hardly likely to have any express provision governing confidentiality.

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69 See Born (2014) p. 437. See also Article 42(1) of the ICSID Convention.
70 Giovanna a Beccara and Others v. Argentine Republic ICSID Case No. ARB/07/05 (27 January 2010)
71 Ibid para 67
73 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.
74 For example, Singapore International Arbitration Act (Cap. 143A) ss. 22–23 and Hong Kong Arbitration Ordinance (Cap. 341), ss. 2D–2E.
3.3 The documents prepared for the arbitration

Strictly confidential documents (for example; those containing proprietary commercial information), will within arbitration, attract the same protection as they do outside it because they will not depend on any doctrine of arbitral confidentiality for that protection.75 The documents disclosed by the parties will have the protection afforded to similar documents in litigation, meaning, they may not be disclosed without the consent of the other party or the tribunal.

3.4 Third Parties

The ICSID Arbitration Rules and UNCITRAL Rules on Transparency do not have any requirements or limitations as to the nature of the entity or individual that can apply for amicus curiae.76 Third parties are not bound by any obligation of confidentiality if there are no such agreement.77 If such an agreement exits, these obligations are subject to exceptions to the duty of confidentiality in circumstances such as public interest.

For example, in the Methanex Case,78 the IISD,79 considering the significant impact of the case on the environment and public health, made an application for permission to file an amicus brief and to make oral submissions at the hearings among other things. The NAFTA tribunal operating under the UNCITRAL Arbitration Rules held that it had the power to receive amicus submissions under Article 15 of the UNCITRAL Arbitration Rules.80 But, regarding the petitioners’ other applications, it held that, in light 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.”81

76 Rule 37(2) ICSID Arbitration Rules 2006 and Article 4(1) UNCITRAL Rules on transparency 2014
77 See Buys (2003) p. 124
78 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)
79 International Institute for Sustainable Development
80 Ibid, Petition to the Arbitral Tribunal – IISD (25 August 2000) para 5
81 Ibid, Para 47
4. DISCUSSION

4.1 An INHERENT Element or NOT?

Arbitration is promoted as a “private” or “confidential” procedure, resulting in an ethical duty on the part of the profession, to be honest with consumers as to the true meaning and limitations of confidentiality in investor-state arbitration. The ease with which parties can hold closed-door arbitration proceedings may provide a false sense of security regarding the confidentiality of investor-state arbitral proceedings as compared to commercial arbitration where confidentiality is an essential feature. Treaty-based investor-state arbitrations are not commercial arbitrations. They are governed by Public International Law and not the national law chosen by the parties. Recently, the pressure towards increased transparency in investment arbitration coupled with an amplified call to publish awards has shaken the grounds of confidentiality and changed it from a common assumption to one of the most undecided matters in international arbitration.

Awards are now being voluntarily published with greater frequency, and arbitral institutions have pushed for increasing publication, with some institutions even shifting to a presumption for redacted awards in the absence of party objection. Additionally, there is a notable trend in recent EU trade and investment agreements towards the introduction of permanent adjudicatory mechanisms instead of arbitration. This is forwarded by the European Commission in the TTIP, in response to existing criticism towards investment treaty arbitration as an obscure method of dispute resolution, not allowing for sufficient representation and recognition of public interest in disputes which can have profound effects on the environment, public health and security.

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83 See Buys (2003), p. 121
84 See Lew (12th September 1912-1982), p. 223
85 See Dora Gruner (2003), p. 923, 959
86 American Arbitration Association, International Dispute Resolution Procedures Art. 27(8), "Unless otherwise agreed by the parties, the administrator may publish or otherwise make publicly available selected awards, decisions and rulings that have been edited to conceal the names of the parties and other identifying details or that have been made publicly available during enforcement or otherwise."
87 See Jemielniak & Ünüvar (2016), p. 4
Transparency concerns and the issue of procedural safeguards for non-party participation have been addressed by introducing the right to intervention for third parties with an existing, direct interest in the outcome of the dispute. *Amici curiae* briefs have been explicitly admitted, along with open hearings and comments available online.\(^8^8\) The first successfully implemented initiative of this kind was the EU-Vietnam Free Trade Agreement (EVFTA), the negotiations of which have been successfully concluded and the text was published on February 2016.\(^8^9\) A similar stance regarding investment dispute resolution was adopted in the Canada-EU Comprehensive Economic and Trade Agreement (CETA) concluded in July 2016.

The need for further transparency in new FTAs with investment protection provisions has repeatedly been emphasised. Several of the newly negotiated FTAs include in-depth provisions on transparency, for instance, Article 8.36 of the final CETA text, titled ‘Transparency of Proceedings’ begins by stating that “the UNCITRAL Transparency Rules, shall apply in connection with proceedings under this Section.”\(^9^0\) The subsequent paragraphs outline procedural transparency requirements for future disputes and the documents to be made public specified under Article 3(1) of the UNCITRAL Transparency Rules.\(^9^1\)

Article 8.36(5) notes that the hearings “shall be open to the public.”\(^9^2\) As for confidential or protected information, the elaborations under Article 7 of the


\(^{9^1}\) Ibid, Article 8.36(2). Pursuant to UNCITRAL Transparency Rules Article 3(1), the following documents must be made public: “the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence and any further written statements or written submissions by any disputing party; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves; any written submissions by the non-disputing Party (or Parties) to the treaty and by third persons, transcripts of hearings, where available; and orders, decisions and awards of the arbitral tribunal.”

\(^{9^2}\) CETA, Article 8.36(5)
UNCITRAL Rules on “exceptions to transparency” apply. Article 7 further notes that the determination of whether the information is confidential or protected rests with the tribunal tasked to resolve the dispute, it includes a self-judging ESI provision which bears the risk of critically reducing the arbitral discretion in assessment of such information. Under the EVFTA, Section 3 Article 20, similar to CETA Article 3.36, states that the UNCITRAL Transparency Rules shall apply to disputes under this treaty. The subsequent paragraphs are therefore read in connection with these rules. Article 25 of EVFTA concerns the non-disputing parties and the documents to be made available to them. Similar to CETA, EVFTA distinguishes the documents to be made available automatically and on request.

Article 18(3) of the TTIP Proposal, titled ‘Transparency’ mostly contains similar language to that of CETA and EVFTA. It, however, adopts the UNCITRAL Transparency Rules, and similarly qualifies and modifies its provisions in line with its paragraphs. The EU-Singapore FTA (EUSFTA), adopts full transparency in ISDS disputes: all documents (submissions by the parties, decisions of the tribunal, expert reports, and the like) are publicly available on a website administered by the United Nations and financed by the EU. All hearings are open to the public. The Transparency Rules, which provide a framework for publication of information regarding investment arbitrations, were approved at the Commission’s 46th Session. In the context of the Transparency Rules, Singapore has consistently supported the publication of all awards and decisions of an arbitral tribunal.”

What is immediately noticeable for all the four new generation FTAs examined above is the adoption of the UNCITRAL Transparency Rules as the basis for principles of

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93 CETA, Article 8.36(1); UNCITRAL Transparency Rules, Article 7.
94 UNCITRAL Transparency Rules, Article 7(5): “Nothing in these Rules requires a respondent State to make available to the public information the disclosure of which it considers to be contrary to its essential security interests.”
95 Resolution of Investment Disputes
96 EVFTA, Article 20.
97 TTIP Proposal, Article 18.
98 Article 8.24-8.48 EU-Singapore FTA
transparency and third-party participation. The adoption, modification or extension of
these rules, compared to earlier generation FTAs such as the NAFTA or most BITs
which form the instrumental core of international investment arbitration, allow for
substantial flexibility for the realisation of objectives to encourage transparency and
promote third-party participation. One would ask if such steps towards transparency
undermine confidentiality, the textbook answer is no. All the rules on transparency
referred to in this thesis provide express safeguards for the protection of confidential
information. Most institutions have clear rules of confidentiality that bind both the
institution and the arbitral tribunal, and these institutions are very careful not to
undermine those fundamental rules.

However, in reality, the answer is YES. The extent of third party participation’s
intervention has recently been expanded to include access to hearings and documents
of arbitration, subject to the protection of confidential information, in the name of
increased transparency. The Rules on Transparency also creates a default rule for open
oral hearings and publication of key arbitration documents including all decisions and
awards. 100 Confidentiality is designed to reduce the possibility of external influences
on arbitral proceedings and allow for effective resolution of the dispute between
parties. Therefore, increased transparency can produce real challenges for the
arbitration and successful confidential resolution of the investor-state dispute. These
challenges include the destruction and interference that inevitably results from the
publication of statements, press releases and similar actions. Transparency during the
pendency of the arbitral process poses the danger of bringing confidential information
of the case to a wider audience.101

The concept of third party (amicus curiae) participation challenges the very basic
assumption about the private and consensual foundations of the arbitration process.
Further, in promoting a uniform standard for transparency in investor-State arbitration,
States can multilaterally agree to apply the Rules on Transparency to their existing

treaties meaning, not only will confidentiality be compromised in the new FTAs, it will be in the old treaties too.

Moreover, as stated in chapter 2, some institutions are silent on confidentiality. Even in jurisdictions where there is an implied obligation of confidentiality, such obligations are generally subject to exceptions. Further, while one party has strategic reasons to maintain an award as confidential, in many cases, the opposing party may have tactical reasons to disclose it. Thus, while international arbitration generally takes place in private, increased transparency and third party participation mean that the outcomes of many arbitration proceedings become public domain, even if the hearings were kept private and even though an express confidentiality clause exists. It also seems clear that confidentiality tends to be a “wasting asset” and may be of declining utility. 103

Further, 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 a party and the direct inquiry into its functions and policies. 104 The subject matter of the disputes affect the daily lives of the citizens and impacts the cost and availability of public services as was emphasised in the Methanex Case. 105

The scope of the duty to maintain confidentiality in investor-State arbitrations is clearly different from that in the commercial context. Although not sufficient to maintain that tribunals think this way, the tribunal in Biwater v Tanzania 106 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.” Arbitration

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104 See Misra & Jordans (2006), p. 46
105 The tribunal in Methanex Corp. v United States of America (UNCITRAL (NAFTA)), emphasized the public interest element inherent in disputes involving a State and importance of transparency in public interest arbitrations (investor-State arbitration). Decision of the Tribunal on Petitions from Third Persons to intervene as “Amici Curiae” (15 January 2001) para 49,
106 Biwater Gauff (Tanzania) Limited v. The United Republic of Tanzania, ICSID case no. ARB/05/22 Award (July 24, 2008)
proceedings and submissions in investor-State arbitrations as established above are significantly more transparent and less confidential.

The participation of States, State entities, subdivisions and agencies in international disputes shifts the emphasis from privacy and confidentiality to transparency and accountability. This clearly points out that confidentiality is not an inherent feature of investment arbitration and if it were, it is slowly becoming extinct as seen above in the new generation FTAs. If parties and arbitral institutions and rules still considered confidentiality as an inherent feature of the arbitration process and one of the main reasons they chose arbitration over litigation, they would put more effort into making sure participants maintain it as they do other inherent features of arbitration like the flexibility of the proceedings and the enforceability of awards.

Further, in the Bulbank, 107 Brown criticizes the general view of arbitration practitioners and academics on remedies of breaches of confidentiality: “It thus seems that arbitration practitioners and scholars want the best of both worlds – an implied duty of confidentiality, which gives arbitration proceedings integrity and genteel nature, but no serious negative consequences for parties who breach this duty.” 108

Brown goes on to state that if confidentiality should be pictured as an essential element of an arbitration agreement, as some practitioners and scholars state, then a breach of such a duty should also be treated as any other breaches of important contractual provisions. 109 Müller 110 also argues that confidentiality is pointless if breaches may occur without being penalised. He argued that it would be meaningless to obtain a duty of confidentiality if a breach of the duty goes unpunished but that waiving an award if too far-reaching. 111 A conclusion that can be drawn from scholars’ inferences is that confidentiality is not such an important part of an investor-state arbitration agreement that a breach of such a clause could waive the BIT and thereby also the award.

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109 Ibid
110 See Müller (2005), pp. 231 – 232
111 Ibid
Confidentiality is frequently believed to be an important advantage of arbitration. However, because of the legal inconsistencies across jurisdictions and different treatment by institutional arbitration rules, parties to investor-state arbitration should not assume that the existence of arbitration, the evidence and the award would be kept confidential. Paulsson and Rawing\textsuperscript{112} gave a taciturn verdict: “When tested, the rule of confidentiality was in fact “not that reliable” since the emperor of arbitration may have clothes, yet his regiments of secrecy could be torn with surprising ease.” For them, a general obligation of confidentiality could “be said to have existed de lege lata. At best, it was a duty in statu nascendi.”\textsuperscript{113}

Confidentiality is necessary to preserve the dispute settlement nature of investment arbitration, but it has been killed off by transparency because of the more the transparency and the disclosure, the less the confidentiality. The outcome is that parties' expectations about the privacy and confidentiality of their arbitral proceedings are often disappointed. Confidentiality has been questioned as a general principle of arbitration since Esso v Plowman\textsuperscript{114} and Bulbank\textsuperscript{115} finally settled the matter; confidentiality is not an inherent element or principle of investor-state arbitration.

\textbf{4.2 Proposition}
There is a need for a proper balance between the competing interest in preserving confidentiality while ensuring transparency and accountability in investor-State arbitration. This can be achieved through uniformity of confidentiality, not only in the arbitral proceedings but also after a pronounced award since that is when it is needed the most. There is a need for guidance on the extent of intervention regarding public access and the exercise of party autonomy by an arbitral tribunal in the arbitration process and the extent of the tribunal’s discretion to disclose certain information to the public in order to maintain confidentiality.

This balanced approach can firstly be achieved through amendments to the rules which govern most investment arbitrations, The UNCITRAL and ICSID. The new

\textsuperscript{112} See Paulsson & Rawding (1995), p.303
\textsuperscript{113} Ibid, see also Smeureanu (2011), at P. 17
\textsuperscript{114} Supra note 19
\textsuperscript{115} Supra note 107
UNCITRAL Rules on Transparency in treaty-based investor-State arbitration have adopted a balanced approach in this regard. ICSID, on the other hand, could also consider a comprehensive amendment of its Arbitration Rules particularly in relation to public access to procedural documents, oral hearings, orders and awards. This amendment could include the UNCITRAL Rules on Transparency and expand on its standard, mainly on publication, differentiating and accessibility of procedural documents, public access to oral hearings and a procedural regime and review of the provision on submissions made by amicus curiae. An explicit provision could be made in the arbitration rules to limit amicus curiae briefs even if arbitration tribunals have in practice done this as elaborated in the cases above.

In addition, leaving the issue of confidentiality unsettled is risky for the parties when entering an arbitration agreement due to the uncertain outcome if publication would occur. Arbitration parties should, therefore, consider being explicit about the consequences of breaches of confidentiality in the confidentiality agreement that should, for instance, holds the party who calls a third party to the arbitration responsible for the third party’s actions and disclosures. By being very precise in the agreement, the party that discloses information and material to the third party could be held responsible even if the other party gave its consent. An alternative solution would be that the parties enter confidentiality agreements with all third parties to the proceedings.

To ensure confidentiality of the entire proceedings, it is advisable to rely on an express provision of the relevant rules (for instance of the UNCITRAL or AAA) or to enter into a specific confidentiality agreement (even though this may be overridden in some jurisdictions if the relevant court or arbitral tribunal considers it to be in the public interest).

Demands for transparency and public interest have to respect the procedural integrity and the interest of the disputing parties that certain information should remain confidential. Further, already existing investment treaties and agreements could also be reviewed to provide a comprehensive provision on a balanced approach to confidentiality and transparency in dispute settlement procedures.

\[^{116}\text{Redfern and Hunter (2009), p. 33-36}\]
Finally, unauthorised publications and disclosures should be penalised. The investment arbitration forum should establish a unified system of penalising such breaches. If such a unified system cannot be established regarding punishments of breaches of confidentiality, the current inconsistency will continue to govern the duty of confidentiality in investor-state arbitration. Arbitration is an international procedure and is formed by its own case law and institutional regulations. Thus, the arbitration community has the possibility to create uniform rules and wipe out such uncertainties.
5. CONCLUSION

5.1 Summary

This thesis’ purpose was to establish whether confidentiality is an inherent element of arbitration, particularly investor-state arbitration. It has determined that confidentiality has a distinctive character in investor-State arbitration, and differs considerably from the standards under traditional commercial arbitration. The recent trend in investor-State arbitration has taken a more nuanced approach to confidentiality and allowed more transparency in arbitral proceedings. The relationship between the investor and the State on the one hand and public interest on the other is the reason for the different approach to confidentiality in the framework of investor-State arbitration.

Confidentiality, as mentioned above is a major component of commercial arbitration unlike in investor-state arbitration, in both spheres, it is subject to certain exceptions such as the public interest exception. There are a myriad number of exceptions to the obligation of confidentiality, some of which have been expressly recognised by arbitral tribunals and the courts. These exceptions to confidentiality, especially public interest as established in the paper, strip down confidentiality to its bone and in most cases, leave it inapplicable in the arbitral proceedings.

The call for greater transparency and the adoption of the Transparency Rules and other similar provisions constitute a significant change in international arbitration practice and reflects an evolution in the field of investment arbitration. This evolution unfortunately may be the beginning of the extinction of confidentiality in investor-state arbitrations and result in a decrease in the confidentiality of business information and State secrets. In addition, transparency of proceedings might increase the cost of arbitration, extend the length of arbitration proceedings and might erode other important aspects of investment arbitration such as party autonomy and flexibility which are the inherent aspects of investor-State arbitration and arbitration as an alternative dispute resolution mechanism. Transparency of arbitration proceedings and the disclosure of information override the interests of confidentiality.

Finally, if confidentiality is considered an inherent element of arbitration, then there should be an established suit for damages for breach, but damages for breach of
confidentiality (whether nominal or substantial) are difficult to establish (unless a liquidated damages clause is used) and even if established, it is difficult to prefigure if the breach of confidentiality would result in awarded damages. Most parties, therefore, do not venture to challenge such a breach. Further, if successfully filed for breach of the duty of confidentiality, an injured party can claim repudiatory breach of contract and terminate the arbitration proceedings. Unfortunately, this is rare in practice because the consequence would be that the case would have to be tried in court with no confidentiality at all.

5.2 Concluding remarks
Due to the shift towards greater transparency and the concern for legitimacy and accountability in investor-State arbitration, confidentiality in investor-State arbitration has evolved from protecting the existence of the arbitration proceedings, confidentiality of procedural documents, privacy of oral hearings, and awards to the current practice of merely protecting confidential information and the integrity of arbitral proceedings. This paper, therefore, recommends the establishment of uniform guidelines within all frameworks of investor-State arbitration for the protection of confidentiality just as there are uniform guidelines for other so-called inherent features of arbitration such as flexibility and party autonomy.
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