NEED FOR IMPLIED TRANSPARENCY IN INVESTMENT ARBITRATION

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I. INTRODUCTION

Globalization has resulted in more business transactions, and thus, more cross-border disputes. Once governed by Friendship, Commerce and Navigation (FCN) treaties,[1] investment arbitration is now controlled by specialized treaties protecting investments of foreign investors. These specialized treaties—as well as customary international law—impose a duty upon States to maintain transparency in the measures they adopt relating to an investment.[2] The intention behind impos-

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1. FCN treaties predate bilateral investment treaties and were originally introduced to govern commercial matters. However, after World War II, developed countries started using these treaties to protect their investments in developing countries. FCN treaties coined some of the terms that are now regularly used in bilateral investment treaties, such as the obligation to accord fair and equitable treatment (FET). Wolfgang Alschner, *Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law*, 5 GOETTINGEN J. OF INT'L L. 455, 456 (2013).

2. Transparency is an important part of a state's obligation to accord FET to investors. *See* Silver Ridge Power BV v. It., ICSID Case No. ARB/15/37, Award, ¶413 (Feb. 26, 2021), https://www.italaw.com/sites/default/files/case-documents/italaw16138.pdf; Murphy Exploration & Prod. Co. Int'l v. Ecuador, PCA Case Repository No. 2012-16, Partial Final Award, ¶206

ing a duty of transparency is to protect foreign investors. However, this duty, which will require transparency in the dispute resolution process of investment disputes, will benefit the public at large, subsequent tribunals, and other investors in the State.

This commentary examines the feasibility of introducing an implied duty of transparency in the dispute resolution process. Such a duty is possible since there is no general presumption of confidentiality in arbitration. The duty is also desirable considering the public interest involved in investment arbitration. The burden of ensuring greater transparency will rest upon the parties as well as the tribunals. While this may marginally increase costs associated with the process of arbitration, it will enhance the credibility of investment arbitration as a dispute resolution mechanism.

II. Duty of Confidentiality

As part of a 2018 survey by the Queen Mary University of London analyzing the evolution of arbitration, eighty-seven percent of the respondents attached some importance to confidentiality as a characteristic of arbitration.[3] Fifty-seven percent of these respondents rated confidentiality as "very important."[4] This survey shows that parties value confidentiality even though there is no duty of confidentiality in any principal conventions governing international commercial and investment arbitration.[5]

(May 6, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7489_0.pdf (holding that transparency is a part of the obligation to accord FET under customary international law). However, the duty of transparency under customary international law is more controversial. Some scholars and tribunals have concluded that there is no such duty of transparency under customary international law. John Hanna Jr., *Is Transparency of Governmental Administration Customary International Law in Investor-Sovereign Arbitrations? - Courts and Arbitrators May Differ*, 21 Arb. Int'l 187, 196 (2005).

3. Queen Mary Univ. of London & White & Case, International Arbitration Survey: The Evolution of International Arbitration 27 (2018), http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey—The-Evolution-of-International-Arbitration-(2).PDF.

4. *Id.* Most of the respondents were in-house counsels of corporations.

5. Gary Born, International Commercial Arbitration 3001 (3rd ed. 2020); Queen Mary Univ. of London & White & Case, International Arbitration Survey: Choices in International Law 3 (2010), http://

In international commercial arbitration, neither the U.N. Convention on Recognition and Enforcement of Foreign Arbitral Awards nor the UNCITRAL Model Law on International Commercial Arbitration imposes a duty of confidentiality upon parties. Similarly, in investment treaty arbitration, the Convention on Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and its Rules, and the UNCITRAL Arbitration Rules (UNCITRAL Rules) do not create a general presumption of confidentiality.

There are, however, certain exceptions to this lack of a general presumption of confidentiality. First, the rules of several arbitral institutions regulate confidentiality. Arbitration institutions such as the Stockholm Chambers of Commerce (SCC), the London Court of International Arbitration (LCIA), and the Singapore International Arbitration Centre (SIAC) have explicitly included rules on confidentiality.[6] These rules make it mandatory to maintain confidentiality of the arbitration and the award.[7] On the other hand, the Rules of the International Chambers of Commerce (ICC) advance a "softer approach" to confidentiality. These rules set out that a tribunal "may make orders" for non-disclosure of information,[8] but they do not create a general presumption of confidentiality.

Second, some countries impose an implied duty of confidentiality upon parties through their domestic laws. For example, under English law, parties have an implied duty to main-

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www.arbitration.qmul.ac.uk/media/arbitration/docs/2010_International ArbitrationSurveyReport.pdf (revealing that that several respondents erroneously believed that confidentiality was implied even when there was no specific clause adopted in the arbitration agreements or rules within which they were operating).

6. Arbitration Rules of the Arbitration Institute of the Stockholm Chambers of Commerce Art. 3 (2017); London Court of International Arbitration Rules Art. 30 (2020); Arbitration Rules of the Singapore International Arbitration Centre, Rule 39 (2016) [hereinafter SIAC Rules]; Investment Arbitration Rules of the Singapore International Arbitration Centre, Rule 37 (2017).

7. While the SCC Rules only make this duty mandatory upon the institution and the tribunal, the LCIA Rules and SIAC Rules also impose a duty of confidentiality upon the parties or third parties to the arbitration. The SIAC Rules explicitly set out that an arbitration tribunal may impose sanctions or costs upon a party that breaches this duty of confidentiality. *See* SIAC Rules, *supra* note 6, at art. 39.4.

8. ICC Rules of Arbitration art. 22.3 (2021).

tain confidentiality of arbitration proceedings which extends to the hearing, documents, submissions, and award.[9] However, parties may expressly agree to limit or dispense with this obligation, and disclosure may also be allowed if it is required in the interests of justice or to protect the rights of a party.[10]

In Singapore, confidentiality is considered an implied feature of arbitration.[11] However, the arbitration tribunal may exercise its discretion to evaluate the extent of confidentiality required in a matter based on the particular facts of the case.[12] Unlike English law, Singaporean law does not require the leave of the court for a tribunal to disclose information necessary to protect the interests of a party.[13] Conversely, in India and Hong Kong, parties are required to maintain confidentiality by an express provision in their domestic legislations.[14]

In the United States, arbitration is generally not considered confidential.[15] However, some arbitration institutions,

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9. The English Arbitration Act is silent on confidentiality. *See* Arbitration Act 1996 (UK), https://www.legislation.gov.uk/ukpga/1996/23/contents. However, English case law has developed to include confidentiality as an implied feature of arbitration. *See, e.g.*, Dolling-Baker v. Merrett [1990] 1 WLR 1205; Hassneh Ins. v. Mew [1993] 2 Lloyd's Rep 243; Ali Shipping Corp. v. Shipyard Trogir [1997] EWCA (Civ) 3054, [1998], 1 Lloyds Rep 643, [1999] 1 WLR 314; Emmott v. Michael Wilson & Partners Ltd. [2008] EWCA (Civ) 184, [2008] 1 Lloyd's Rep 616.

10. *See Dolling-Baker*, 1 W.L.R. 1205, *supra* note 9; *Hassneh Ins.*, 2 Lloyd's Rep 243, *supra* note 9; *Ali Shipping Corp.*, [1997] EWCA (Civ) 3054, *supra* note 9; *Emmott*, [2008] EWCA (Civ) 184, *supra* note 9.

11. Int'l Coal Pte Ltd. v. Kristle Trading Ltd. [2008] SGHC 182.

12. *Id.*

13. Myanma Yaung Chi Oo Co. Ltd. v. Win Win Nu [2003] SGHC 124.

14. The Indian Arbitration Act requires parties to maintain confidentiality unless disclosure is required for the purpose of implementation and enforcement. Arbitration and Conciliation Act, 1996, §42A. The Hong Kong arbitration law prohibits disclosure of any information relating to the proceedings or the award by the parties to the arbitration. Arbitration Ordinance (2021) Cap. 609, §18(1).

15. Some states in the United States do contain an implied duty of confidentiality in arbitration, *see e.g.*, *Delaware Rapid Arbitration Rules*, Rule 5 (2015), https://courts.delaware.gov/rules/pdf/DeRapidArbitraion.pdf, or regard arbitration as confidential, *see e.g.*, *Rules of Civil Procedure for the Superior Court of the State of Delaware*, Rule 139(b) (2016), https://courts.delaware.gov/rules/pdf/superior_civil_rules_2016.pdf. Moreover, California deems any "request for arbitration, a reply, a State Bar file, an exhibit, an award, and any other record of an arbitration proceeding" as confidential and requires a court order for disclosure. *Rules of the State Bar of*

such as the International Institute for Conflict Prevention & Resolution (CPR), mandate confidentiality for all parties involved in the proceedings.[16] Similarly, the International Center for Dispute Resolution (ICDR) requires parties to treat the documents and award in the arbitration as confidential. However, the center is allowed to publish select redacted awards and orders unless the parties submit a written objection within six months of the award.[17]

Thus, while some countries and arbitration institutions do contain obligations of confidentiality, confidentiality is not an intrinsic or presumed feature of arbitration. Even where confidentiality is required, differences exist between the standards of confidentiality across countries and institutions. While most tribunals treat hearings as private, countries and institutions differ on the extent of confidentiality required for documents or awards. Complete confidentiality, even if justifiable in commercial arbitration, is not desirable for investment arbitration because of the public nature of investment disputes. As will be explained in the next Section, countries and arbitration institutions have started moving towards incorporating greater transparency in the investment arbitration system by recognizing this need in investment arbitration.

III. Moving Towards an Implied Duty of Transparency

There is a greater need for transparency in international investment arbitration, unlike international commercial arbitration, since the subject matter of those disputes frequently entail questions of public interest.[18] Moreover, disputes involv-

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California, Rule 3.512 (2013), https://www.calbar.ca.gov/Portals/0/documents/mfa/2013_RulesofProcedure20130701.pdf.

16. CPR, *Administered Arbitration Rules*, Rule 20, (2019), https://www.cpradr.org/resource-center/rules/arbitration/administered-arbitration-rules-2019.

17. ICDR, *International Dispute Resolution Procedures*, Art. 40 (2021), https://www.icdr.org/sites/default/files/document_repository/ICDR_Rules_1.pdf?utm_source=icdr-website&utm_medium=rules-page&utm_campaign=rules-intl-update-1mar.

18. Emily Hay, *Winds of Change? Confidentiality and in International Commercial Arbitration*, *in* 40 UNDER 40 INTERNATIONAL ARBITRATION, 211, 211 (Carlos Gonzalez-Bueno ed., 2018); Biwater Gauff Ltd. v. Tanzania, ICSID Case No. ARB/05/22, Award, ¶9 (Jul. 24, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0095.pdf (involving a dispute surrounding water services); Metalclad Corp. v. United Mexican States, ICSID Case No.

ing a State will naturally generate public interest since any liability imposed upon the State will be paid from the public treasury.

A. *Trend Towards Greater Transparency in Investment Arbitration*

One of the first attempts to promote and harmonize transparency across States was the introduction of the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration in 2014 (UNCITRAL Transparency Rules).[19] These rules not only allow for publication of party details,[20] submissions of parties and third parties, witness statements, expert reports, transcripts, and all decisions of the tribunal,[21] but also provide for public hearings.[22] In making transparency the default, these rules also provide for exceptions when confidentiality may be required, such as for purposes of law enforcement and protection of the integrity of the proceedings.[23]

The UNCITRAL Transparency Rules, however, only apply to arbitrations operating under the UNCITRAL Rules.[24] More-

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ARB(AF)/97/1, Award, ¶110 (Aug. 30, 2000), https://www.italaw.com/sites/default/files/case-documents/ita0510.pdf (involving preservation of a rare cacti species); Methanex Corp. v. United States, Final Award on Merits and Jurisdiction, ¶30 (Aug. 3, 2005), https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf (involving operation of hazardous land waste).

19. *UNCITRAL, Rules on Transparency in Treaty-based Investor-State Arbitration* [hereinafter UNCITRAL Transparency Rules], G.A. Res. 68/109, (Dec. 16, 2013).

20. UNCITRAL Transparency Rules, at Art. 2.

21. *Id.* at art. 3.

22. *Id.* at art. 6.

23. *Id.* at art. 7.2.

24. *Id.* at art. 1.1. However, some recent investment treaties have included an express clause which applies the UNCITRAL Transparency Rules even for arbitrations not commenced under the UNCITRAL Rules. *See, e.g.*, Agreement on Reciprocal Promotion and Protection of Investments, Czech-Iran, art 11.7, Dec. 18, 2017, https://jusmundi.com/en/document/pdf/treaty/en-agreement-on-reciprocal-promotion-and-protection-of-investments-between-the-government-of-the-czech-republic-and-the-government-of-the-islamic-republic-of-iran-czech-republic-iran-islamic-republic-of-bit-2017-monday-18th-december-2017; Agreement on the Promotion and Protection of Investments, Austl.-Uru., art. 14.19, Apr. 5, 2019, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5853/download; Agreement on the Promotion and Reciprocal Protection of Investments (with protocol), Geor.-Switz., art. 10.3, June 3, 2014, https://

over, their application is limited to treaties concluded on or after 2014, unless parties to an earlier treaty consent to the application of these rules.[25] Since one party may, and frequently does, unilaterally benefit from confidentiality, it is unlikely that both parties will agree to apply these rules to treaties concluded before 2014. Moreover, even for treaties concluded on or after 2014, parties may decide to opt out of the UNCITRAL Transparency Rules.[26] These concessions in the UNCITRAL Transparency Rules prevent them from ensuring transparency in investment arbitration generally.

To address the gaps of the UNCITRAL Transparency Rules, States introduced the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration in 2017 (Mauritius Convention).[27] The Mauritius Convention is broader than the UNCITRAL Transparency Rules because: (1) it applies the UNCITRAL Transparency Rules to treaties entered before 2014[28] and (2) it extends application of the UNCITRAL Transparency Rules to arbitrations not commenced under the UNCITRAL Rules.[29] However, the application of the Mauritius Convention is limited to its signatories. As of to-

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investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4814/download; Agreement on the Promotion and Reciprocal Protection of Investments, Cape Verde-Hung., art. 11, Mar. 28, 2019, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5916/download; Agreement on the Promotion and Reciprocal Protection of Investments, Iran-Slovk., art. 14.4, Jan. 19, 2016, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3601/download.

25. UNCITRAL Transparency Rules, *supra* note 19, at art. 1.2; *see also* UNCITRAL, *Status: UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective date: 1 April 2014)*, https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status.

26. UNCITRAL Transparency Rules, *supra* note 19, at art. 1.1. Examples of treaties that have opted out of these rules include the Agreement for the Reciprocal Promotion and Protection of Investments, Uzb.-Kor., art. 2(c), Apr. 19, 2019, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6007/download; and the Agreement for the Promotion and Reciprocal Protection of Investments, Arm.-Kor., art. 2(b)(iii), Oct. 3, 2018, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5892/download.

27. United Nations Convention on Transparency in Treaty-based Investor-State Arbitration [hereinafter Mauritius Convention], G.A. Res. 69/116 (Dec. 10, 2014).

28. Mauritius Convention, at art. 1.1.

29. *Id.* at art. 2.1.

day, only twenty-three states have signed—and only eight have ratified—the Mauritius Convention.[30]

The ICSID Convention, though it does not create a presumption of transparency, has been revised to include provisions which foster increased transparency. For example, Rule 48(4) and Article 53(3) were added, respectively, to the ICSID Rules of Procedure for Arbitration Proceedings (ICSID Rules) and Arbitration (Additional Facility) Rules. These rules require the Centre and the Secretariat to promptly publish excerpts of the tribunal's legal reasoning even when the parties do not consent to publish the award.[31] Moreover, the ICSID Rules and the Additional Facility Rules were revised to allow non-parties to make submissions to and attend hearings.[32]

These amendments and additions demonstrate the growing trend towards incorporating transparency in investment arbitration proceedings. However, their limitations prevent transparency from becoming an intrinsic feature of investment arbitration. These additions, while useful, do not completely address the concerns of critics surrounding legitimacy of investment arbitration as a dispute resolution mechanism. Scholars continue to cite lack of transparency as one of the main reasons causing a "legitimacy crisis" in investment arbitration.[33]

B. *Implied Duty of Transparency*

Creating an implied duty of transparency is a more effective method of ensuring greater transparency in investment treaty arbitration. An implied duty of transparency will allow

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30. UNCITRAL, *Status: United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014)*, https://uncitral.un.org/en/texts/arbitration/conventions/transparency/status.

31. ICSID, *ICSID Convention Arbitration Rules* [hereinafter ICSID Rules], art. 48(4) (2004); ICSID, *ICSID Additional Facility Rules* [hereinafter Additional Facility Rules], art. 53(3) (2006).

32. ICSID Rules, *supra* note 31, at arts. 32(3), 37; Additional Facility Rules, *supra* note 31, at arts. 13(2), 41(3).

33. Thomas Dietz et al., *The Legitimacy Crisis of Investor-State Arbitration and the New EU Investment Court System*, 26:4 REV. OF INT'L POL. ECON. 749, 757 (2019); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1524 (2005); Gabrielle Kaufmann-Kohler, *In Search of Transparency and Consistency: ICSID Reform Proposal*, 2 TRANSNAT'L DISP. MGMT. 1, 1 (2005).

parties to make the documents in the proceedings, such as submissions, expert reports, and awards, publicly available unless a tribunal orders otherwise.[34] Additionally, hearings in investment arbitrations will be open to the public. Such an implied duty will overcome the challenges of the UNCITRAL Transparency Rules and the Mauritius Convention which necessarily require the consent of parties or States to ensure transparency.

Implied transparency will be regulated by arbitral tribunals that may consider whether circumstances necessarily require confidentiality. Considering that most arbitration laws do not contain a general presumption of confidentiality, arbitral tribunals may exercise their discretion under the relevant laws to assume a duty of transparency unless circumstances demand otherwise. For example, a tribunal constituted under the ICSID Convention may adopt greater transparency by exercising its discretion under Article 44, which allows the tribunal to decide on any question of procedure that is not covered by the ICSID Convention or an agreement by the parties.

Tribunals have exercised their discretion under the ICSID Convention to create varying degrees of confidentiality for different types of documents. Prime examples of this are the cases of *Biwater Gauff Ltd. v. Tanzania*[35] and *Giovanna v. Argentina*.[36] In *Biwater*, the tribunal held that parties may generally discuss the case in public so long as they do not disclose: (i) the minutes of the proceedings, (ii) any pleadings or written submissions made by parties; (iii) any documents submitted by the opposite party; and (iv) any correspondences between the parties and/or the tribunal.[37] The tribunal also held that the parties may disclose any decisions, orders, or awards made by the tribunal with prior permission of the tribunal.[38] In *Giovanna*, the tribunal mentioned the same category of docu-

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34. Such duty may not extend to procedural correspondences between the parties and the tribunal that do not serve any substantive purpose.

35. ICSID Case No. ARB/05/22, Procedural Order No. 3, ¶148-161 (Sep. 29, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0089.pdf.

36. ICSID Case No. ARB/07/5, Procedural Order No. 3, ¶¶121-152 (Jan. 27, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0002.pdf.

37. Biwater, Procedural Order No. 3 at ¶163.

38. *Id.*

ments as in *Biwater* and largely followed the same confidentiality standards.[39] However, the tribunal found that prior permission of the tribunal is not required to disclose the arbitral award.[40] Similarly, such discretion may be used to create an implied duty of transparency for all relevant documents in the proceedings.

Additionally, countries and arbitration institutions that espouse a general obligation of confidentiality may amend their rules to incorporate greater transparency in resolution of investment disputes. Such amendments may help bring uniformity in the investment arbitration mechanism, thereby reinforcing its credibility for resolution of investor-State disputes.

C. *Benefits and Challenges of Implied Transparency*

There are several benefits to incorporating an implied duty of transparency. First, it allows disclosure to citizens of a State who may be affected by the decision, either directly because it concerns a national resource such as water, or indirectly because an award imposed on the State will be paid out from the public treasury. Such a duty will ensure accountability of States in front of their citizens and, consequently, may discourage future wrongful conduct.

Second, implied transparency will reduce inconsistency in decision-making across tribunals. Consistency in international commercial arbitration may not be as instrumental since such arbitrations usually concern one-off contracts.[41] However, the cause of action in several investment arbitrations may often be similar, if not identical. As witnessed in the cases stemming from the enactment of Argentine Emergency Law, despite identical facts being in controversy in all cases, some tribunals found that Argentina was in compliance with the ILC Draft Articles on State Responsibility while others did not.[42] Such

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39. Giovanna, Procedural Order No. 3 at ¶ 153.

40. *Id.*

41. Kaufmann-Kohler, *supra* note 33, at 2.

42. Tribunals in arbitrations of CMS, Enron, and Sempra found that Argentina was not in a position to claim the defense of necessity. *See* CMS Gas Transmission v. Arg., ICSID Case No. ARB/01/8, Award, ¶ 217 (May 12, 2005), https://www.italaw.com/sites/default/files/case-documents/ita0184.pdf; Enron Corp. v. Arg., ICSID Case No. ARB/01/3, Award, ¶ 313 (May 22, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0293.pdf; Sempra Energy Int'l. v. Arg., ICSID Case No. ARB/02/

inconsistency in decision-making increases concerns about the legitimacy of investment arbitration. Incorporating an implied duty of transparency will make all decisions and submissions available across tribunals, thereby ensuring greater consistency.

Admittedly, consolidation or coordination may be a more direct method of reducing inconsistent decisions for identical matters.[43] However, tribunals do not always permit consolidation, even when dealing with the same facts. Rather, consolidation is often only permitted upon both parties' consent.[44] This creates the same problem as in the UNCITRAL Transparency Rules or the Mauritius Convention, wherein parties may have asymmetrical motivations to consent to such a request. Even where matters do not directly relate to the same event, allowing for implied transparency will help ensure greater consistency in interpretations of obligations under international law, particularly with controversial provisions such as umbrella clauses.[45]

Third, access to more awards due to implied transparency will contribute to a clearer understanding of international law and investment treaty arbitration law. Article 38(d) of the Statute of the International Court of Justice requires tribunals to consider "judicial decisions" and "teachings of . . . qualified publicists" as a subsidiary means for determination of rules of

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16, Award, ¶ 355 (Sept. 28, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0770.pdf. Conversely, the tribunal in arbitration of LG&E found that Argentina could claim necessity and therefore exempted Argentina from paying indemnity for the period of such necessity. *See* LG&E Energy Corp. v. Arg., ICSID Case No. ARB/02/1, Decision on Liability, ¶ 259 (Oct. 3, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0460.pdf.

43. Cairn Energy Plc. v. India, PCA Case Repository 2016-17, Procedural Order No. 2, ¶ 55 (Aug. 12, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw10453.pdf.

44. Pan American Energy LLC v. Arg., ICSID Case No. ARB/03/13, Decision on Preliminary Objections, ¶ 4 (Jul. 27, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0616.pdf.

45. Tribunals under international law are not bound to follow decisions of other tribunals. Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2 J. OF INT'L DISPUTE SETTLEMENT 5, 8 (2011). Therefore, it is possible that despite greater access to awards, there may be inconsistent decisions. However, allowing access to reasoning of other tribunals will help reduce the inconsistency which may occur if such awards were not available at all.

laws. Implied transparency will, therefore, allow tribunals to access more awards and opinions of experts in investment arbitration law while interpreting and developing international law or investment arbitration law.

However, there are also certain challenges associated with implied transparency. First, disclosure, especially in highly-charged matters, may pose a threat to the speed and efficaciousness of the proceedings. Disclosure at a preliminary stage may expose the public to a more one-sided impression of the facts and may further fuel charged emotions.[46] Second, experts or witnesses may not accurately provide their assessments or opinions if such information is accessible to the public at large. Third, the public may pressure the tribunals to decide in a particular way.

All these challenges may be addressed by granting tribunals the discretion to make orders mandating confidentiality of certain information when required.[47] Not all matters are highly-charged, and enabling tribunals to mandate confidentiality when required will ensure benefits of transparency are materialized at little cost. Further, ensuring that documents or submissions of both parties are published will address concerns surrounding dissemination of one-sided information. In any event, certain types of documents, which may trigger an emotional reaction pending the proceedings may be disclosed when such proceedings are concluded. This will ensure that interests of procedural integrity are balanced with the public interest of disclosure.

A duty of implied transparency may impose a greater burden upon the parties to redact sensitive information from documents, when appropriate, prior to publication. While such a process increases the burden on parties, the increased burden will likely only be marginal in the majority of cases and is heavily outweighed by the public interest in disclosure. Therefore, an implied duty of transparency, when tribunals have discretion to decide if certain information should necessarily be confidential, will help address the legitimacy concerns surrounding investment treaty arbitration.

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46. Cairn, Procedural Order No. 2 at ¶ 55.

47. Including, but not limited to, situations wherein a tribunal believes that disclosure may have adverse consequences for law enforcement or may implicate national security concerns.

IV. Conclusion

The private nature of arbitration creates a misconception that confidentiality is an inherent and unchangeable aspect of the process. However, no duty of confidentiality exists in the principal international conventions governing international commercial or investment arbitration. To the contrary, recent trends in investment treaty arbitration show an increasing desire to incorporate greater transparency in proceedings. This trend should be supported and accelerated.

Introduction of the UNCITRAL Transparency Rules and the Mauritius Convention are initial steps towards ensuring greater transparency. However, their restricted application and need for party consent impact their ability to establish the level of transparency necessary in the long-term in investment treaty arbitration. To remedy this, tribunals should exercise their discretion under the relevant arbitration rules to interpret an implied duty of transparency. In doing so, they should consider exceptional circumstances wherein non-disclosure may outweigh the duty of transparency. Creating a default presumption of transparency will bolster the credibility of investment arbitration as a legitimate and effective mechanism for resolution of investor-State disputes.