Confidentiality and public interest in mixed international arbitration

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Abstract

Confidentiality is unanimously recognized to be one of the most characteristic and attractive features of international commercial arbitration. The confidential character of arbitral proceedings has often been presumed on the basis of the privacy of the hearings, but this presumption has proven ill-founded in arbitrations between private and public actors ("mixed arbitration"). National courts and international tribunals have come to recognize and to enforce a public interest exception to confidentiality based on the principle that the public has a right to be informed of the contents and outcome of the arbitral proceedings whenever the subject-matter of the dispute is of public concern. This thesis will assess the basis upon which and the limits within which the public interest exception to confidentiality might operate. The thesis will then provide an analysis of the benefits—the accommodation of moral and legal expectations of public participation—and risks—the politicization of the arbitrated dispute and disclosure of trade secrets—of greater transparency and openness in mixed arbitral proceedings. The thesis will show that the public interest exception to confidentiality is a valuable and important development along the path of democratic governance, but also that, in order to avoid the indiscriminate disclosure of information, the precise range of its application needs to be carefully defined and limited to only those cases wherein it appears to be fully justified.
Résumé

Le principe de confidentialité est reconnu unanimement comme étant un des traits le plus caractéristique et attirant de l’arbitrage commercial international. Le caractère confidentiel des procédures d’arbitrage a souvent été présumé du fait des audiences privées de ce processus, mais cette présomption a été démontrée comme étant non fondée dans le contexte de l’analyse des procédures d’arbitrage entre les acteurs privés et publiques (« arbitrage mixte »). Les tribunaux nationaux et internationaux reconnaissent et font respecter l’exception de l’intérêt public pour la notion de la confidentialité, une exception qui est fondée à partir de l’idée que le public a un droit à être informé du contenu et des décisions rendues des procédures d’arbitrage, surtout quand le sujet de l’arbitrage en question concerne le public. Cette thèse analysera le fondement de l’exception de l’intérêt public et en délimitera la portée. Ensuite, nous procèderons à une analyse des bénéfices - l’inclusion des attentes morales et légales de la participation du public - et les risques - la politisation de la dispute arbitrée et la divulgation des secrets commerciaux - et d’une plus grande transparence et ouverture des procédures de l’arbitrage mixte. Cette thèse démontrera que l’exception de l’intérêt public à la confidentialité est un développement valable et important qui concorde avec la gouvernance démocratique, mais aussi que, pour s’assurer que l’on évite la divulgation non contrôlée des informations, la portée particulière de l’application de l’exception doit être précisément définie et limitée aux cas dans lesquels il semblerait qu’une telle exception soit justifiée.
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Introduction

If polled, the users of arbitration[^1] and the laypersons devoid of any legal knowledge would both undoubtedly mention the process’s confidential and private character as one of the main advantages granted by arbitration over litigation. In fact, confidentiality and privacy of arbitral proceedings[^2] have been long and broadly held as fundamental principles governing international commercial arbitration.[^3] Often defined as the hallmark of arbitration, confidentiality—alongside its private and neutral dimensions—represents one of the most appealing reasons why businesspersons often prefer to submit their disputes to an arbitral tribunal rather than to the public proceedings of a national court.[^4]

[^1]: In 1992, the London Business School conducted for the London Court of International Arbitration (LCIA) a survey of US and European users of international commercial arbitration who listed confidentiality as the most important perceived benefit of arbitration. Hans Bagnier, “Confidentiality – A Fundamental Principle of International Commercial Arbitration?” (2001) 18 J. of Int’l Arb. 243. Similarly, Dr. Buhring-Uhle conducted a survey among ninety-one persons including arbitrators, attorneys and in-house counsels asking them to list the most important perceived advantages of international commercial arbitration. Out of a list of eleven, confidentiality was regarded by the respondents as the third most important advantage – after the neutrality of the forum and the avoidance of being subjected to the jurisdiction of the court of one of the parties. Michael Pryles, “Assessing Dispute Resolution Procedures” (1996) 7 Am. Rev. Int’l Arb. 267 (noting how confidentiality of arbitration contributes to the maintenance of the relationship).

[^2]: The term “confidentiality” refers to the obligation on the participants to arbitration not to divulge the information related to, or generated within, the arbitral proceedings. The term “privacy” leads to the expectation that the meetings and hearings are conducted in a private fashion allowing only for the presence of those who are directly involved. See Dr Julian Lew, “Expert Report of Dr. Julian D. M. Lew (in Esso/BHP v. Plowman)” (1995) 11 Arb. Int’l 283.

[^3]: Bagner, supra note 1.

As one handbook on arbitration suggests, “it is common wisdom that arbitration is a private tribunal for the settlement of disputes.”\(^5\) To some parties, confidentiality may be even more valuable and important than the speed and economy of the settlement. The former seems to be the strongest rationale for choosing arbitration, a process that enables them to solve their disputes privately, all the while avoiding undesired publicity and media attention.\(^6\) In these cases, the opposing parties might also have a strong interest in keeping secret the mere fact that arbitration has even arisen between them.

Although the generally accepted assumption that confidentiality is intrinsic to arbitration has been challenged and even rebutted in several recent judicial decisions,\(^7\) it is still true that “parties place the highest value upon confidentiality as a fundamental characteristic of international commercial arbitration”\(^8\) and continue to base their expectation of confidentiality on the “fact that [they] have agreed to submit to arbitration particular disputes arising between them and only between them.”\(^9\) Nevertheless, such expectation becomes particularly problematic when the arbitration is occurring between a private party and a public actor, such as a State, government or public agency (“mixed arbitration”).

Notions of confidentiality and privacy run counter to the standards of transparency and public accountability to which modern liberal States are increasingly called upon to conform by their citizens, rendering it difficult to conceive arbitration

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\(^7\) The most relevant judicial cases deciding on the issue of confidentiality will be discussed later.
\(^8\) Bond, *supra* note 4.
between private and public actors as simply a matter "arising between them and only
them". The frequent recourse to arbitration to solve disputes arising from international
business transactions involving States—most notably in the field of international trade
and international investment—poses the question as to what extent such private means of
dispute resolution is and should be shrouded in confidentiality and shielded from public
scrutiny, especially given the often political nature of such disputes and the widespread
domestic impact of their outcomes.\(^{10}\)

In modern liberal states, individuals now increasingly demand legitimate,
democratic governance and insist on having their voices heard by claiming the right to
participate in international organizations, institutions and processes that directly affect
them.\(^{11}\) Essential to the effectiveness of their contributions is the possibility of access
to the various fora where decisions are made, which calls for the transparency and
openness of their structures so as to facilitate public participation to the greatest
extent.\(^{12}\) Especially at the international level, the need for public accountability,
inclusiveness and access to relevant information has steadily led to the decline of the
diplomatic models of closed and secretive *modus operandi* among sovereign states, in
favour of rule-oriented regimes more apt to ensure the public’s understanding and
predictability of results.\(^{13}\)

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10 This is particularly the case in investor-state arbitrations such as the ones occurring under NAFTA chapter 11, which conferred investors the power to challenge states’ domestic policies in such areas as environmental protection and public health. Zachary M. Eastman, “NAFTA Chapter 11 – For Whose Benefit?” (1999) 16 J. of Int’l Arb. 105 (underlying one of the most common criticism to Chapter 11, through which the sovereignty of governments risks to be undermined).


It is exactly in the light of such modern trends seeking democratic governance that arbitration between states and private parties becomes vulnerable to intense criticisms. In fact, when mixed arbitration is scrutinized through the filter of these emerging principles of transparency and public participation, it becomes apparent that the parties' expectation of confidentiality and privacy of the arbitral proceedings stands in sharp contrast with the raised expectations of public scrutiny, accountability and responsiveness that are nurtured by democratic societies. This contrast is even more intensified by the type of disputes involving states that are brought before arbitral tribunals.

One of the most striking and characteristic differences between mixed arbitration and private commercial arbitration consists of the extent and scope of the public policy and monetary implications that the final awards entail for the constituencies of the involved governments. The more the issues being disputed are comprised of complex legal tradeoffs and have important public policy repercussions, the more the arbitration draws attention from the media and the general public. The notions of existence, extent and enforceability of an obligation of confidentiality in mixed arbitration are inevitably challenged by the increasingly acknowledged need for the public to be informed about the activities in which their governments engage.

The public importance and high profile nature of these types of disputes, along with the progressive recognition of claims of public participation and greater

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14 In the context of investment disputes, Chapter 11 of NAFTA, which provides for binding arbitration for investor-state disputes, has been repeatedly accused of lack of transparency and legitimacy. These accusations will be further analyzed below.
15 Fulvio Fracassi, "Confidentiality and NAFTA Chapter 11 Arbitrations" (2001) 2 Chi. J. Int'l L. 213 (analyzing the nature of the claims brought by private investors against States).
involvement in state governance, are factors that have impinged on the elaboration by national courts and international tribunals of a “public interest” exception to confidentiality.\textsuperscript{17} On the basis of such an exception, whenever arbitration involves a public actor and issues of interest to the constituencies represented by those actors, the level of confidentiality that would generally inform the arbitral proceedings will be restricted or entirely foregone in consideration of the public interest.

A further challenge to the degree of confidentiality permeating mixed arbitration is the increasing pressure exercised by non-governmental organizations (NGOs) to participate in the arbitral proceedings by means of \textit{amicus curiae} submissions, particularly in the context of disputes under NAFTA Chapter 11.\textsuperscript{18} According to the progressively more influential contributions made by the various NGOs on the international stage, international organizations, as well as national courts, have come to appreciate the benefits associated with accepting briefs by interested entities, and have developed innovative practices and procedural accommodations to this end.\textsuperscript{19}

The repeated efforts made by NGOs to obtain the right to file written submissions in cases that raise broad policy questions, while confirming the move towards a greater public participation, also represent an additional threat to the confidentiality of arbitral proceedings, especially if one considers that permission to make submissions is usually sought in conjunction with the request to access the

\textsuperscript{17} The public interest exception has been theorized in several decisions, which will all be discussed below.

\textsuperscript{18} Such was the case in the \textit{Methanex} and \textit{U.P.S.} cases, in which NGOs sought the right to file written submissions to the arbitral tribunal. Both cases will be analyzed below.

\textsuperscript{19} For instance, in 2000 the Appellate Body of the World Trade Organization issued on the official WTO website a communication setting out \textit{ad hoc} whereby interested NGOs could request a leave to file. World Trade Organization General Council, Minutes of Meeting Held in the Centre William Rappard on 22 November 2000, WT/GC/M/60, (Jan. 23, 2001).
material filed with the tribunal by the parties,\textsuperscript{20} if not to attend the hearings, which are typically held \textit{in camera}.

Although the jurisprudence on confidentiality is still young, it remains possible to contend that these rising trends have the potential, in the case of mixed arbitration, to significantly constrain the level of confidentiality that is either expected or agreed upon by the parties involved. Such level of confidentiality might be reduced either through disclosure of the information generated or produced during the proceedings, or through participation of third parties who may be authorized 1) to make submissions; 2) to access the material filed by the parties with the tribunal; 3) to attend hearings.

This thesis will seek to explore the question as to what extent a public actor’s participation in arbitration influences the confidentiality of the proceedings. It will also attempt to assess on what basis and within what limits the public interest exception to confidentiality should operate. The thesis will be divided into three principal sections. Section I will explain the concept of mixed arbitration, highlighting the reasons why states and private enterprises are inclined to submit their disputes to arbitration rather than to national courts. In particular will be illustrated those specific features that contribute to rendering international commercial arbitration an inherently useful method for the resolution of disputes involving states. The doctrine of state immunity and its application to arbitration will be discussed to show in what way arbitration prevents a state from raising claims of immunity from both jurisdiction and execution. Mention will also be made of ICSID, the international organization that provides facilities for the conduct of international arbitrations in which one of the parties is a state. This

\textsuperscript{20} Of such nature was the petition filed by a Canadian NGOs in the \textit{Methanex} case, as it will be described below.
introduction will serve the purpose of demonstrating the extent to which international arbitration is capable of protecting the private party’s interests from the privileges that their counter party derive from being a sovereign entity.

Section II will begin with a study of the concept of confidentiality in international arbitration and will provide an overview of the most relevant judicial decisions in order to assess the extent to which an obligation of confidentiality can be inferred by the private nature of the proceedings. It will then examine how national courts and international tribunals, in particular the ones convened under NAFTA, have dealt with the issue of confidentiality when a public actor was involved. This examination reveals that whenever the disputed issue is deemed to be of public interest, disclosure is favoured over confidentiality. Nonetheless, it still remains uncertain what kind of information is likely to be of public interest and what the exact parameters of a public interest exception currently are.

Section III will attempt to identify both the factors that support and those that disfavour the rule of confidentiality in mixed arbitration. In particular, it will be shown what benefits—the accommodation of moral and legal expectations of public participation—and risks—the politicization of the process and consequent defeat of its purpose—greater transparency and openness of the proceedings would entail. The thesis will show that the public interest exception to confidentiality is a valuable and important development along the path of democratic governance, but also that, in order to avoid the indiscriminate disclosure of information, the precise range of its application needs to be carefully defined and limited to only those cases wherein it appears to be fully justified.
Section I – Mixed Arbitration

A. Introduction

Two distinct categories of parties can be distinguished in the field of international arbitration.\(^{21}\) The first is generally called “private parties” and is comprised of natural persons as well as legal entities of private law, mostly enterprises. The second category can be designated as “state parties” and includes states, legal entities of public law controlled by the states and other public international law bodies, such as international organizations.\(^{22}\) Although the majority of international arbitrations occur between private parties, the international arbitral process has always been employed by states, a trend that has increased in recent years.\(^{23}\) The last decades have been marked by a significant shift from disputes between states alone to disputes involving states or state controlled-entities and private parties, the resolution of which is typically submitted to arbitration.

The well-established and long-standing institution of inter-state arbitration\(^{24}\) flourished at the end of the nineteenth century and was intensely and successfully used

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\(^{24}\) The institution of inter-state arbitration can be traced back to the fifth century BC and was included in the treaty with which Sparta and Athens promised not to go to war against each other. During the middle ages, the Pope and Heads of States had recourse to arbitration to settle disputes between other States. The modern version of the institution was elaborated in the so-called Jay Treaty of 1794 between the United States and Great Britain. Jacques Werner, “Interstate Political Arbitration: What Lies Next?” (1992) 9 J. of Int’l Arb. 69.
as a means to restore peaceful and constructive international relationships in those cases in which diplomacy had failed until the end of World War I.  

Then, after World War II and despite the tripling of the number of sovereign states since 1945, the frequency of recourse to inter-state arbitration slowly began to abate, the numbers falling from 178 cases between 1900 and 1945 to 43 cases during the period 1945-1990. This negative trend has been counter-balanced by the steadily intensifying resort to the institution of mixed arbitration, a process that is devoted to the resolution of disputes arising between states and private parties. It has been estimated recently that almost thirty percent of all International Chamber of Commerce (ICC) cases involve at least one party that is either an organ of the state, a public agency or an entity owned or controlled by the state.

The growing tendency of states to use arbitration for the settlement of their international disputes with private parties is the direct result of two concurrent factors:

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25 Inter-state arbitration was officially recognized as a useful means of dispute resolution during the two Peace Conferences that took place at The Hague in 1899 and 1907. The Convention for the Pacific Settlement of International Disputes, concluded in 1899 during the first Peace Conference, established the Permanent Court of Arbitration. The Conference, which was convened by Czar Nicolas II of Russia "with the object of seeking the most objective means of ensuring to all peoples the benefits of a real and lasting peace, and above all, of limiting the progressive development of existing armaments", recognized arbitration as "the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle". The first Conference was revised at the second Hague Peace Conference in 1907. James Brown Scott, The Hague Conventions and Declarations of 1899 and 1907, Accompanied by Tables of Signatures, Ratifications and Adhesions of the Various Powers, and Texts of Reservations (New York Oxford University Press American Branch, 1915). For general information on the Permanent Court of Arbitration, see the official website, available at <http://www.pca-cpa.org/ENGLISH/GI/#History>.


27 It has been estimated that in 1976, about one-third of the International Chamber of Commerce arbitrations fell under the category of mixed arbitration. Craig, Park and Paulsson cited in Redfern & Hunter, supra note 23.

the first being the progressive recognition of arbitration as the preferred method of
dispute resolution in international business transactions in general,\textsuperscript{29} and the second
being the greater involvement of states in specific economic areas which were once the
exclusive realm of private corporations.\textsuperscript{30}

\textbf{B. The Growing Involvement of States in International Business}

In recent years, there has been a heightened direct and indirect participation in
international business activities on behalf of the state from both developing and socialist
countries and, although to a lesser extent, industrialized countries.\textsuperscript{31} Nowadays, a wide
variety of business contracts that had been traditionally relegated to private entities,
ranging from economic development agreements to joint venture contracts or
exploitation of natural resources projects, are being concluded between states,
subdivisions of states and state controlled-corporations\textsuperscript{32} on one hand and foreign
private enterprises on the other hand.\textsuperscript{33}

\textsuperscript{29} "By the mid-1980s, at least, it had become recognized that arbitration was the normal way of
settlement of international commercial disputes". W. Laurence Craig, "Some Trends and Developments
Arb. 1.

\textsuperscript{30} Bockstiegel, "Legal Rules", supra note 23.

\textsuperscript{31} A. H. Herman, "Disputes Between States and Foreign Companies" in Contemporary Problems, supra
note 20. Gerald Aksen & Robert B. von Mehren, International Arbitration Between Private Parties and
Governments (Practising Law Institute, 1982) [Aksen & von Mehren].

\textsuperscript{32} The term "state-controlled corporation" is as broad as to include both corporations of public law and of
private law. The legal forms and relations of those organizations with the states vary from one state to
another, according to the national legal systems, the laws regulating state participation in the national
economy and the specific norms establishing the relationship between such entities and the state. The
nature and extent of control exercised by the state can range from direct and full influence to tangential
influence by virtue of choosing the management or imposing the need of authorization for specific
relevant decisions, to factual influence. Karl-Heinz Bockstiegel, Arbitration and State Enterprises:
[Bockstiegel, State Enterprises].

\textsuperscript{33} Leo J. Bouchez, "The Prospects for International Arbitration: Disputes Between States and Private
Enterprises" (1991) 8 J. of Int'l Arb. 81. See also Prof. Dr. Ivan Szasz, "Public Corporations as Parties to
Arbitration - Procedural Aspects" in 60 Years, supra note 23.
(i) Relevant Practice in Socialist and Developing Countries

The greatest direct state involvement in the domain of international commerce can be found in socialist and developing countries. Generally, socialist countries, such as those in Eastern Europe, have economic and legal systems that impose a state monopoly on foreign trade, a characteristic that establishes the state as the main actor in economic relations with foreign corporations. In these types of strict government-controlled economic systems, even in the case in which it does not appear directly as a trader, the state often controls or owns those specific enterprises that have been entitled to engage in economic operations with foreign commercial partners. Similarly, developing countries often have socialist economic systems. Even in developing countries with a private economic system, private corporations simply lack the resources and the necessary know-how to effectively engage in major international business projects, which de facto remain the prerogative of the state or the state controlled enterprises.

(ii) Relevant Practice in Developed Countries

By contrast, in industrialized countries business transactions and foreign trade are mainly reserved for private enterprises as a result of the ongoing trend towards privatization that has superseded the model of state’s monopoly over important economic sectors. In developed countries, the state is no longer deemed to be the most efficient and best qualified subject to run business transactions, a realization that

35 Bouchez, supra note 33.
36 The process of privatization in developed countries may explain the reduction of arbitrations involving states under the ICC rules from one-third in 1976 to one-sixth in 1986. Craig, Park and Paulsson, cited in Redfern & Hunter, supra note 23.
consequently led to the creation of other legal entities—specifically, public enterprises—
which are in charge of entering into international transactions.

Contracts with public enterprises are therefore replacing contracts with states, and the latter’s participation in commercial relations has become mostly indirect. Nevertheless, despite this movement towards privatization, western states continue to feature, either on their own or through public agencies, as “owners and operators of airlines, merchant shipping fleets, industrial plants and power stations, as well as active participants in the world of banking, investment and international trade.”

Therefore, although the degree of state participation in international commerce varies from less developed to developed countries, the number of contracts between private parties and states or their entities continues to grow. As this occurs, recourse to international arbitration accrues proportionately.

C. The Predominant Role of Arbitration in Disputes Involving State Parties

Most of the international contracts that involve both a state and a foreign company contain arbitration clauses within their provisions. In fact, international arbitration represents the most common method by which to settle disputes arising not only out of contracts between socialist countries and western enterprises, but also in the

37 The term “public enterprises” includes two different categories of organizations engaging in international commerce. The first category includes subdivisions or agencies of the state, which are of non-company type and belong to the state administration. The second category includes company-type organizations, provided with a separate legal personality as distinct from the state, which alone, or together with others, may make use of them or own them totally or partly. Szasz, supra note 33.
38 Doyen Ahmed Mahiou, “Reconciling Arbitration With the Need of Public Corporations While Preserving its Advantages” in 60 Years, supra note 23.
40 Aksen & von Mehren, supra note 31.
context of commercial relations involving developing countries. While in the past these countries have not looked upon the system of international arbitration favourably, they have progressively come to appreciate its benefits. Throughout the 1970s developing countries--principally located in Africa, Asia and Latin America--manifested their suspicion of the system of international arbitration, which they perceived as a product of western dominance, and were consequently reluctant to submit their disputes to tribunals other than their own. Today, developing countries' national legislation and commercial practice demonstrate that their attitude has changed and arbitration has increasingly become the preferred instrument for the settlement of disputes not only in developed countries but in third world countries as well.

For instance, it has been estimated that of the 11,143 parties that have participated in ICC arbitration during the 11 year period from 1989 – 1999, 2,531 (23%) were from developing countries. It is thus easy to deduce that it is now standard practice to include an arbitration agreement in international contracts between states or

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42 Particularly with respect to Latin-American countries, the traditional hostility shown towards international arbitration is largely justified by the implementation of the so called Calvo doctrine, which is inherently incompatible with arbitration. The role of this doctrine, which is still espoused by many Latin-American States, is to ensure that nationals and foreigners are treated equally and that private enterprises entering into commercial relations with these states are subjected to the jurisdiction of the involved state’s courts, without any reservation or right to diplomatic protection from the private enterprises’ home state. Therefore, international arbitration falls in conflict with the principles underlying the Calvo doctrine that does not allow for possible controversies to be removed from the jurisdiction of the national courts. Bouchez, supra note 33. Bernardo M. Cremades, “States and Public Enterprises as International Commercial Partners” in Contemporary Problems, supra note 21.
43 Georges R. Delaume, “The Finality of Arbitration Involving States: Recent Developments” (1989) 5 Arb. Int’l. 21. [Delaume, “Finality”] (noting how developing countries have come to appreciate the benefits of arbitration and have started to participate in arbitral proceedings, not only as defendants, but also as claimants).
44 Craig, Park & Paulsson, supra note 28.
their agencies and private parties. The factors that contribute to make arbitration an “obvious choice” on the part of both the state and private parties are:

- the features of international arbitration
- the different status of the contracting parties
- the distinctive nature of the contracts and of prospective disputes between states and private parties.

1. The Features of International Arbitration

International commercial arbitration is inherently a suitable method of resolving disputes involving states. While the speed of the proceedings and their reduced costs are both characteristics highly valued in the domestic context and are often perceived as some of the main benefits of arbitration, they are still only of secondary importance in the choice of arbitration of this type of disputes. Indeed, given the complexity and the great volume of evidence that can characterize international disputes involving state parties, such perceived advantages of speedy resolution and economy are often illusory. The primary features of international arbitration that attract both private and state parties are of another kind. We shall now proceed to an analysis of these features.

(i) No Submission to the Jurisdiction of a National Court

Generally, neither states nor private parties are willing to bring a dispute that arises from their contractual relations before their respective national courts, which are

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48 Aksen & von Mehren, supra note 31.
all too often the object of mutual distrust.\textsuperscript{49} Private enterprises often fear that the courts of the state party may not always hold completely impartial attitudes and that the courts could also be influenced by their own governments—a situation that would result in the rendering of biased decisions in favour of the state.\textsuperscript{50} In addition, even if it was the case that the private enterprise fully trusted a particular state's national courts they would still face the practical difficulty of being unfamiliar with the national laws governing legal proceedings.\textsuperscript{51}

States, on the other hand, are even more reluctant to subject themselves to the jurisdiction of the foreign national court where the private enterprise finds its base, or, for that matter, of any other state. Subjection to the courts of a foreign state is perceived by many states as being contrary to their sovereign dignity and international prestige, values that could be challenged if the state consented to put forth its claims before the courts of another state.\textsuperscript{52} Even if the parties had agreed that the disputes between them be settled by the courts of a third country, they would still need to overcome numerous obstacles.\textsuperscript{53}

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{49}] “The general preference for arbitration in international transactions has nothing to do with the advantages of speed and cost-saving… The main reason why we see arbitration clauses in international commercial contracts is that corporations and governmental entities engaged in international trade are simply not willing to litigate in the other party's "home" court”. Martin Hunter, “International Commercial Dispute Resolution: The Challenge of the Twenty-first Century” (2000) 16 Arb. Int’l 379.
\item[\textsuperscript{52}] Bouchez, \textit{supra} note 33.
\item[\textsuperscript{53}] Aksen & von Mehren, \textit{supra} note 31.
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It may firstly be difficult to reach a consensus between the parties for the selection of a neutral third state. The contracting parties may be not familiar with the laws applied to the proceedings by the entrusted courts, whose language may be foreign to both parties, further affecting them. Costs may consequently be increased by the need to translate documents and the necessity of retaining legal counsel in addition to the parties’ standing counsel. Furthermore, the courts of the selected state may simply refuse to accept jurisdiction and devote their judicial resources to resolve a dispute whose parties and subject-matter have no connection to the chosen state. Even if the jurisdiction of a court has been initially agreed upon by the parties, it remains vulnerable nonetheless, since it could still be challenged by one of the parties on the grounds of *forum non conveniens*. All of these considerations make recourse to national courts for the settlement of disputes between states and private enterprises quite problematic and, therefore, highly unlikely.

(ii) Technical Expertise

The second attractive feature of international arbitration is the ability of the parties to directly affect the composition of the arbitral tribunal by nominating the arbitrators—persons who not only are perceived as being inherently neutral as compared to national judges but who also carry the specific knowledge and technical expertise

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55 *Rawding*, *supra* note 39.  
56 *Bouchez*, *supra* note 33.  
57 The doctrine of *forum non conveniens* that originated in the mixed system of Scotland, allows courts to refuse to hear an action when it deems it to be more convenient or efficient to proceed in a different forum indicated by the requirement of justice. Such principle is based on the need to avoid phenomena such as forum shopping or courts congestion. The defendant may raise the exception of *forum non conveniens* when the plaintiff has brought suit in the forum contractually chosen by the parties. Avril D. Haines, “Choice of Court Agreements in International Litigation: Their Use and Legal Problems to Which They Give Rise in the Context of the Interim Text” submitted for the Permanent Bureau of the Hague Conference on Private International Law, February 2002.
required by the often scientifically and technically complex international transactions running between states and private enterprises.\textsuperscript{58} The presence of arbitrators who are specifically selected for the breadth and depth of their legal background facilitates efficient determinations of disputes and promotes a feeling of confidence in the deciding forum.\textsuperscript{59}

(iii) Confidentiality

Another beneficial aspect of international arbitration is the confidentiality of the proceedings. Both private and state parties may have a strong interest in keeping the arbitration as well as the information produced thereto confidential. Private parties may wish to protect trade secrets and company records, maintain the secrecy of commercial plans and financial information or simply preserve their business reputation. For their part, states often find the confidential character of arbitration equally beneficial, especially given the highly sensitive nature of some disputes that may involve political and even national security issues.\textsuperscript{60} Moreover, the confidentiality of arbitral proceedings shields the states from a potential loss of prestige in both national and international contexts that broadly publicized adverse resolutions may prompt.\textsuperscript{61} Although an implied rule of confidentiality in international arbitration is neither uniformly recognized nor absolute, information generated in arbitration remains less likely to fall into the public domain than in litigation.

\textsuperscript{58} Robert B. von Mehren, “An International Arbitrator’s Point of View” (1999) 10 Am. Rev. Int'l Arb. 203. (noticing how the \textit{ad hoc} composition of arbitral tribunal composed by arbitrators who come from many different legal background contributes to the sophistication of solutions that combine different experiences and points of view).

\textsuperscript{59} Knull & Rubins, \textit{supra} note 47.

\textsuperscript{60} Rawding, \textit{supra} note 39.

In particular, the *New York Convention for the Recognition and Enforcement of Foreign Awards*,\(^6^8\) which entered into effect in 1958, established a system that compels courts in member states to recognize and enforce arbitration agreements and arbitral awards rendered abroad while excluding judicial review of their merits. The Convention is now recognized by more than 100 signatory countries around the world, including most of the major trading countries.\(^6^9\) This ensures the parties engaged in cross-border disputes that a validly rendered award will circulate around the world better than would national judgments and that it will be enforced internationally.\(^7^0\) In the absence of a compulsory neutral adjudicatory system at the international level,\(^7^1\) the system of international arbitration thus constitutes the most efficient instrument available to participants in international commerce.

With respect to disputes between private and state parties, the effectiveness of the enforcement mechanism put into place by the New York Convention is greatly accountable for the favour increasingly manifested by such parties towards international arbitration.\(^7^2\) The aspect of enforcement is of even greater interest to private parties, whose primary concern when entering into a contractual relation with a state or state-controlled agency is the possibility to effectively enforce a favorable award against the state, all the while avoiding possible claims of sovereign immunity which might be raised.\(^7^3\)

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\(^6^9\) Hunter, *supra* note 49 (reporting how as of 2000, 121 countries had ratified the New York Convention).


\(^7^1\) Hazel Fox, “States and the Undertaking to Arbitrate” (1988) 37 I.C.L.Q 1[Fox, “Undertaking”].

\(^7^2\) Aksen & von Mehren, *supra* note 31.

\(^7^3\) Ibid.
International commercial arbitration has proven to be particularly appealing to private parties because it is an efficient instrument by which they can be protected from claims that may originate from the different legal status which states enjoy. This difference in status between a state and a private party further motivates the latter to prefer international arbitration as the method of settlement of possible disputes because of its ability to “level the playing field” in a way that litigation might not be able to accomplish.  

2. Different Status of the Contracting Parties in Mixed Arbitration: Sovereign Immunity

The presence of sovereign states or their government agencies in international contractual relations with private parties has the potential to frustrate the private parties’ legitimate expectations. In fact, one of the most concrete risks run by private parties engaged in contractual relations with states is exposure to a plea of sovereign immunity. Such a plea is based on the doctrine of sovereign immunity originated in England several centuries ago and was originally based on the principle that “the king can do no wrong”. According to this principle the sovereign, as the highest political authority within a nation, could not therefore be judged by any other sovereign. In its modern version, the doctrine of sovereign immunity has evolved into a rule of absolute

immunity that entails that a state cannot be subjected to the jurisdiction of its own courts or of those of another state without its consent.\textsuperscript{77}

State sovereignty has traditionally raised a bar to courts’ jurisdiction to adjudicate a claim or to enforce a judgment.\textsuperscript{78} Similarly, with respect to arbitral proceedings, states have claimed immunity from suit as a bar to either the enforcement of arbitration agreements or to proceedings for the execution of provisional measures and final awards made by the tribunal.\textsuperscript{79} Nevertheless, over the last few decades, the traditional rule of absolute immunity has been modified as a result of the states’ growing involvement in business transactions, which has gradually led many states to acknowledge the necessity of divesting themselves from their sovereign quality whenever they engaged in transactions that were of commercial nature.\textsuperscript{80}

In the 1960’s, a growing number of civil and common law countries\textsuperscript{81} began to endorse a restrictive interpretation of sovereign immunity, according to which a state is entitled to claim immunity only in relation to \textit{acta iure imperii}, acts, that is, of public authority that are carried out by the state in its capacity as sovereign.\textsuperscript{82} Conversely, the same claim of immunity cannot be raised by the state for its \textit{acta iure gestionis}, which are commercial in character.\textsuperscript{83} The distinction between \textit{acta iure imperii} and \textit{acta iure

\textsuperscript{77} Fox, "Undertaking", \textit{supra} note 71.
\textsuperscript{78} Craig, Park & Paulsson, \textit{supra} note 28.
\textsuperscript{80} Fox, “Undertaking”, \textit{supra} note 71.
\textsuperscript{81} A. H. Hermann, “Disputes between States and Foreign Companies” in \textit{Contemporary Problems, supra} note 21 (noting how common law countries have been more reluctant than civil law countries to abandon the doctrine of absolute sovereignty).
\textsuperscript{83} \textit{Ibid}. 

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gestionis lies in the nature (sovereign or commercial) of the state’s acts rather than in their purpose, and is determined through the so called “nature-of-the-activity test”. 84

The majority of western states have formally adopted the restrictive doctrine of immunity 85 through legislations that have restricted the immunity of the state, 86 on the one hand by identifying the categories of acts for which the state may not invoke immunity and, on the other hand, by defining the conditions on which the submission by the state to the jurisdiction of national courts automatically excludes its immunity from the judicial process. 87 The absolute doctrine of immunity has not been completely dismissed as it continues to be followed in socialist countries, whereas the situation remains more unclear in developing countries, whose immunity rules are mostly uncodified, the exceptions being only a few that have expressly endorsed the restrictive doctrine of immunity, 88 such as Pakistan and Singapore. 89

Although developed countries have consistently moved towards surrendering immunity in commercial matters, their national laws are not completely homogeneous. 90 Nevertheless, it is possible to state that in most countries the restrictive doctrine of

84 Ibid. The authors emphasize how the qualification of the activities of a state as either acta iure imperii or acta iure gestionis must depend on the so called “nature-of-the-activity test” that assesses the intrinsic nature of the act and not its purpose to determine whether an act qualifies as iure imperii or iure gestionis.


86 Legislations on sovereign immunity have been enacted in countries such as Canada, South Africa (South Africa Foreign States Immunity Act 1981), United States (US Foreign Sovereign Immunities Act 1976), Great Britain (UK State Immunity Act 1978) and Australia (Australian Foreign States Immunities Act 1985). Fox, “Undertaking”, supra note 71. Along with these statutory enactments, the restrictive interpretation of sovereign immunity gained ground also through treaty developments, such as bilateral treaties and the European Convention on State Immunity (1972). Delaume, “Transnational Contracts”, supra note 85.

87 For instance, the UK State Immunities Act at section 2 (1)(2) denies immunity from a judicial process when a state has submitted to the national courts “after the dispute... has arisen of by a prior written agreement”.


immunity generally produces the result that a state can only claim immunity for *acta iure imperii* and may waive its immunity either explicitly or by implication even as to non-commercial acts.  

The majority of western legal systems distinguish between immunity from jurisdiction and immunity from execution, generally limiting the application of the restrictive doctrine of immunity to only immunity from jurisdiction. The rationale for such a limited application of restrictive immunity rests on the perception that, in the context of immunity from execution, the prestige of the state is even more at stake than in the case of immunity from jurisdiction. This is because enforcement is usually interpreted as a more intense interference with the rights of the state. With respect to arbitration, the widely accepted distinction between *acta iure imperii* and *acta iure gestionis*, in which the doctrine of restrictive immunity is founded, loses much of its weight. The issue of immunity in arbitration will be separately analyzed as to first distinguish immunity from jurisdiction and then immunity from enforcement.

(i) Immunity from Jurisdiction

In regards to the aspect of an arbitral tribunal’s jurisdiction, the restrictive doctrine of immunity implies that a state cannot claim immunity from arbitral proceedings as to *acta iure gestionis*, which are the activities usually at stake in international contracts with private parties. Of course, the same exclusion of immunity would derive in any case from an express waiver of immunity included

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91 Bockstiegel, “Legal Rules”, supra note 23. For instance, the *US Foreign Immunities Act* provides in section 1605 (a) that immunity is denied when a foreign State has “waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver”.

92 Bernini & Van den Berg, supra note 82.

93 Bockstiegel, *State Enterprises*, supra note 32.

94 Ibid. (pointing out how in the majority of international contracts between private parties and states or state corporation, the activity carried out by the states is of commercial nature).
within the contract. As far as *acta iure imperii* are concerned, the state cannot invoke immunity if it has previously waived it in a contractual agreement.\(^95\) Even in the absence of an express waiver, it is generally held by arbitral tribunals and domestic courts,\(^96\) as well as supported by treaty and statutory provisions,\(^97\) that a state's consent to submit to arbitration, whether granted in an arbitration agreement or in an arbitration clause, constitutes an implicit waiver of immunity not only to *acta iure gestionis* but to *acta iure imperii* as well.\(^98\)

By agreeing to arbitration, the state is normally assumed to have waived its right to claim immunity from jurisdiction for both commercial and sovereign activities\(^99\)--the waiver of immunity deemed to be implicit within the agreement to arbitrate.\(^100\) Therefore, once the state has agreed to arbitration, the distinction between *acta iure imperii* and *acta iure gestionis* consequently fades and it is superseded by the general

\(^95\) Paulsson, *supra* note 70.

\(^96\) See Delaume, “State Contracts”, *supra* note 45, citing at note 20 and 26 a series of cases in which the agreement to arbitrate has been interpreted as in implicit waiver of immunity.

\(^97\) Art. 12(1) of the *European Convention on State Immunity* provides:

1. Where a Contracting State has agreed in writing to submit to arbitration a dispute which has arisen or may arise out of a civil or commercial matter, that State may not claim immunity from the jurisdiction of a court of another Contracting State on the territory or according to the law of which the arbitration has taken or will take place in respect of any proceeding relating to:
   (a) the validity or interpretation of the arbitration agreement;
   (b) the arbitration procedures;
   (c) the setting aside of the awards, unless the arbitration agreement otherwise provides.

The *UK State Immunity Act* provides at 9(1) that “Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration.” The *US Foreign Sovereign Act* goes even further by excluding immunity when the state has waived it either explicitly or by implication. Section 1605 (a), *supra* note 91.

\(^98\) This approach is uniformly supported by Delaume, “Sovereign Immunity” *supra* note 78 and Bockstiegel, “Legal Rules”, *supra* note 23. This principle, although generally applied, has given rise to some controversy. See also Bernini & Van den Berg, *supra* note 82, who go even further and argue that the distinction between *acta iure imperii* and *acta iure gestionis* should not be held valid in the field of arbitration.


\(^100\) Rubino-Sammartano, *supra* note 75.
principle of *pacta sunt servanda*, the traditional precept that agreements freely entered into must be observed in good faith. As a preliminary ICC award has concluded:

I must admit that I have found some difficulties to follow a line of reasoning that a state, just because of its supreme position and qualities, should be unable to give a binding promise. The principle of *pacta sunt servanda* is generally acknowledged in international law and it is difficult to see any reason why it should not apply here. A sovereign state must be sovereign enough to make a binding promise both under international law and municipal law... The issue whether the subject-matter of the present dispute is a matter *iure gestionis* or *iure imperii* has also been argued by the parties on each side. From what I have said above it follows that this distinction is of no relevance once the parties have agreed to arbitration.

The state’s consent to arbitrate gives rise to a binding promise that the state, subject to specific circumstances, has the duty to respect regardless of the nature of the activity carried out in the legal relationship with a private party.

**(ii) Immunity from Execution**

The aspect of immunity from execution of arbitral awards is less uniformly settled. In fact, as regards the immunity from execution, the distinction between *acta iure imperii* and *acta iure gestionis* reappears, rendering the issue of the enforcement of an arbitral award against state property rather complex. As a preliminary observation, it may be useful to note that, quite naturally, the question of immunity

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101 *Pacta sunt servanda* is a principle of international law and a general rule that applies to treaty law and, in some legal systems, to the contractual relationship between private parties. There is a lack of generalized consensus over whether and to what extent this principle applies also to contracts between a state and a private party. Some scholars are in favour of an affirmative answer, others stress how an absolute rule of *pacta sunt servanda* should not apply, since it would allow for private interests to prevail over public interest, precluding the state from making actions for the public good. Nonetheless, it is possible to state that the principles of *pacta sunt servanda* and of sanctity of contracts do not operate in an absolute fashion in the major legal systems. A. F. M. Maniruzzaman, “State Contracts With Aliens – The Question of Unilateral Change by the State in Contemporary International Law” (1992) 9 J. of Int’l Arb. 141. See also, Somarajah, *supra* note 41.

102 Preliminary award in the ICC Case No. 2321 (1974), reported in 1 Yearbook: Commercial Arbitration 133 (1976), at 135.

103 “The rules regarding sovereign immunity from execution are in greater disarray than those concerning immunity from suit”. Delaume, “State Contracts”, *supra* note 45.

from execution arises only in those cases in which the arbitral tribunal or the national court has not granted immunity from jurisdiction to the state or in which the state has not contested the jurisdiction in the first place. If the state invokes immunity from execution of an arbitral award against it, the claim of immunity, although normally rejected, may be accepted or the enforcement may be subject to specific requirements due to the existence of the two following factors.\footnote{Ibid.}

First of all, in most legal systems, even if the state has waived its right to immunity from jurisdiction this act does not imply a waiver of immunity from execution.\footnote{Socialist countries usually adhere to an absolute principle of immunity also with respect to immunity from execution, allowing for some exceptions. Bernini & Van den Berg, supra note 82.} Similarly, the submission to arbitration is usually interpreted as an implicit waiver of immunity from the arbitral proceedings and not necessarily from enforcement of the final award.\footnote{Although many legal systems do not recognize that an agreement to arbitrate constitutes an implicit waiver of immunity from execution, there are some others that apply the same approach to the issues of immunity from jurisdiction and immunity from execution. For instance, Swiss courts consistently hold that an arbitration agreement implies a waiver of immunity from jurisdiction as well as a waiver of immunity from execution. Bernini & Van den Berg, supra note 82.} While clearly the private party’s ability to enforce an award against the state would be greatly enhanced if an express waiver of immunity with respect to enforcement was included in the arbitration agreement or arbitration clause, quite surprisingly such waivers of immunity from execution are not commonly found in international commercial transactions. This is attributable to both the possible lack of the necessary bargaining power on the private party’s side and to considerations of prestige on behalf of the state, since negotiating such a waiver of immunity might be
perceived as doubting the willingness of the state to respect its contractual obligations or to abide by an award rendered against it.  

Secondly, even when it has adhered to the doctrine of restrictive immunity in relation to immunity from execution, the state will generally permit execution only against that property of state designated for commercial activities and prohibit execution against those properties used for public functions or sovereign purposes. Therefore at the level of execution in most states, the distinction between *iure imperii* and *iure gestionis* becomes relevant once again, which calls for the so called “nature-of-funds-test” to assess the nature of the property to be executed. On the basis of this test, execution will be subsequently limited solely to those property rights of the state that belong to commercial activities. In these states applying the doctrine of restrictive immunity to execution, the nature-of-funds-test will generally be relied upon either cumulative with or alternatively to the nature-of-the-activity test to determine as to what extent a claim of immunity from execution can be accepted.

In addition to these obstacles, it is important to underline that the private party’s expectations of actually executing an award against the state may be ultimately

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109 Among the states that apply the restrictive doctrine of immunity to execution, limiting execution only to commercial property, there are some that require the additional requisite of the connection between the underlying legal relationship and the territory of the state where enforcement is sought. Such is the case of Switzerland and United States. Bernini & Van den Berg, supra note 82.

110 For instance, Austrian courts apply the nature-of-funds-test to determine whether immunity from execution can be invoked. The US Foreign Sovereign Immunity Act also applies the criterion of *iure imperii/iure gestionis* in the context of the nature-of-funds-test, requiring that the property to be executed “is or was used for the commercial activity upon which the claim is based”, section 1610(a)(1). And so does the UK State Immunity Act at section 13(4) that provides that the property must be “in use or intended for use for commercial purposes”.

111 For instance, the double criterion of the nature of the property and of the activity is applied by the United States, Belgium and Germany, which all require a connection between the property to be executed and the state’s commercial activity to the effect that execution is permitted only on the property used for the commercial activity upon which the claims is based. Bernini & Van den Berg, supra note 82.
frustrated by a general lack of sanctions in those cases wherein a state does not voluntarily comply with the award rendered against it. For instance, the New York Convention, while providing that a state party to the Convention must recognize and enforce the foreign awards complying with its requirements, remains silent on the possible means of execution that could be used in the event of the state's non-compliance. In conclusion, although the enforcement of an award against the state may be problematic or subject to specific requirements or limitations, as one commentator has stated:

Just as foreign courts enforce against a private party an arbitral award more readily than a judgment obtained in his home court, so by the State's consent to arbitration foreign courts are enabled to enforce awards in circumstances where they would by reason of immunity refuse or be unable to enforce judgments obtained in their courts.

For private parties the risk of the plea of sovereign immunity may certainly represent an additional motivation for recourse to arbitration. Indeed, international arbitration may “be the only practical method of dispute resolution” for private parties because, as was previously discussed, it is suitable to confer them a certain degree of protection from those peculiar rights that the state enjoys as a litigant because of its public character.

112 In contrast with the general lack of means of enforcement, the International Centre for the Settlement of Investment Disputes (ICSID) provides for a sanction to which the state is exposed in case it does not voluntarily comply by an award rendered against it. Article 27(1) establishes that failure to comply restores the right of the private party's state to exercise diplomatic protection, a right that is suspended during the ICSID arbitration. Delaume, “Impact on Arbitration”, supra note 108.

113 Fox, “Undertaking”, supra note 71.

114 Aksen & von Mehren, supra note 31.
3. The Distinctive Nature of the Contracts and of Prospective Disputes between States and Private Parties

Another factor that has contributed to increase the willingness showed by private and state parties to sign agreements calling for arbitration is the distinctive character of the commercial relations in which they engage. The intrinsic characteristics of international contracts make the possible disputes arising out of them inherently apt to be solved by arbitration, a fact that is true both for contracts between private parties and for those involving states or state agencies. The numerous complications concerning enforcement that generally derive from the judicial resolution of international disputes are aggravated by the presence of a state as a litigant and induce both states and private parties to prefer arbitration for the resolution of those disputes that arise in the context of international trade contracts as well as from international investment contracts.

(i) International Trade Disputes

The majority of cases of mixed arbitration can be found in the field of international commerce, which is a direct result of the greater number of contracts concluded in that field as compared to the field of international investment. As discussed above, most of these contracts originate in socialist and developing countries, because of the monopolistic role vested by the state in major economic sectors. Nonetheless, even in industrialized countries where foreign trade is normally conducted by concurring private enterprises, the state remains involved in international business, mostly through divisions of the state without separate legal personality or corporations.

115 Goldner, supra note 23. See also Bockstiegel, “Legal Rules”, supra note 23.
of public law created on the basis of the constitutional and administrative laws of the state.

The role played by national courts in resolving international trade disputes between state and private parties is marginal and usually remains limited to those cases in which the contracting parties failed to expressly choose a forum in their contract. National courts have become a default forum for all those practical and substantive reasons previously discussed. Some of these reasons are peculiar to the parties and are linked to their different legal status, such as, for the private parties, the need to avoid possible claims of sovereign immunity raised by the state and, for the states, the desire not to be judged by the courts of another country so as to preserve their sovereign dignity. Other reasons shared by both private and state parties can be summarized as follows:

- the lack of a neutral international court for the settlement of commercial disputes.
- the risk of being exposed to a potentially unknown legal system of law and procedure, as well as possible bias and influence.
- the reduced ability to have court judgments recognized and enforced abroad.

Finally, with respect to the specific nature of international trade contracts, an additional deterrent to the use of local courts is the lack of intensive legal training in commercial law found among the judges of some countries, even the most

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116 Hunter, *supra* note 49.
industrialized ones. Clearly this training is indispensable to the handling of international commercial disputes that, as seen, can often be of great breadth and complexity. Consequently, international trade contracts such as large-scale sales, licensing agreements, and manufacturing or infrastructure contracts are increasingly entrusted to arbitrators who are more likely able to fulfill the contracting parties’ expectations of a highly technical, binding, and ultimately enforceable outcome.

(ii) International Investment Disputes

Although recourse to arbitration in the field of international investment is in absolute numbers less frequent than in the field of international trade, the relative involvement of the state in investment contracts and related arbitration proceedings is actually higher due to the more active and direct participation of the state in the management of foreign investments, especially in developing countries. International investment is usually divided in two categories: foreign direct investment (FDI) and portfolio investment. The latter category includes mostly credit provision arrangements—such as the purchase in a domestic company of securities or bonds—which only aim at granting the foreign actor a financial return, without any intent to own, control or manage the domestic firm. The category of foreign direct investment, on the other hand, is characterized by arrangements—such as purchases of privatized companies or infusions of new equity capital creating new firms—through which the investor acquires some ownership or control over the enterprise involved (to

117 However, this is not the case in many common law countries, where specialized commercial courts composed of judges who are promoted on merit can be found. Ibid.
118 Goldner, supra note 23. See also Bockstiegel, “Legal Rules”, supra note 23.
120 Ibid.
which extent this ownership or control extends often varies from one legal system to another).\textsuperscript{121}

The modern international investment mostly comes in the form of foreign direct investments, which physically manifest themselves in the host country through the actual location of manufacturing plants and other infrastructures abroad, as opposed to portfolio investments that consist simply of the transfer of capital.\textsuperscript{122} In the last decade there has been a dramatic increase in foreign direct investment that, while originating in the major industrialized countries, has been primarily directed towards developing countries whose participation on the inflow side steadily continues to rise.\textsuperscript{123} This is due to the more positive attitude towards foreign investment assumed in recent years by the developing countries, which had remained excluded from the previous two investment booms that took place from 1979-81 and 1987-90, the first one regarding oil producing countries and the second focusing in the developed world.\textsuperscript{124}

Since the 1980’s, developing countries have begun making concrete efforts to create a more hospitable environment for foreign investments. In order to achieve this result, these countries have progressively moved to dismantle all those barriers and disincentives that had traditionally precluded the flourishing of foreign investments.\textsuperscript{125} In fact, between the 1950’s and the 1970’s, most developing countries were host to investment regimes characterized by laws and regulations that did not facilitate foreign investment, such as provisions limiting the percentage of an enterprise that could be

\textsuperscript{121} Remi Bachand & Stephanie Rousseau, “International Investment and Human Rights: Political and Legal Issues” (Canada, June 11, 2003) background paper submitted for the Think Tank of the Board of Directors of Rights & Democracy, Investment in Developing Countries: Meeting the Human Rights Challenge.

\textsuperscript{122} Ibid.

\textsuperscript{123} UNCTAD Investment Report, 1998 in Bachand & Rousseau, supra note 121.

\textsuperscript{124} Ibid.

\textsuperscript{125} Trebilcock & Howse, supra note 119.
owned by foreigners, imposing restrictions on repatriation profits and setting export
targets or local sourcing requirements.\textsuperscript{126} Following the general contemporary trend
towards liberalization of investments, developing countries have removed most of these
restrictions and conditions and thus have succeeded in providing more investor-friendly
regimes.\textsuperscript{127} The state’s involvement in international investment contracts is particularly
significant in developing countries, which typically possess the natural resources but lack
the technical expertise and finance owned by developed countries to exploit their
products in more efficient ways. The governments of developing countries usually
enter into investment agreements with foreign private investors, who will profit from
projects undertaken in the host state while positively contributing to its economic
development. The state’s direct involvement is an expression of its permanent
sovereignty over the natural resources\textsuperscript{128} located within its boundaries, a sovereignty
that is rooted in the perception of these resources as the state’s natural property.

The intrinsic characteristics of investment agreements make international
arbitration particularly appropriate for settling prospective disputes.\textsuperscript{129} First of all, one
of the most common features of economic development agreements\textsuperscript{130} is their duration,

\begin{itemize}
  \item \textsuperscript{126} Carl Unegbu, “BITS and ICC: Portent of a New Wave?” (1999) 16 J. of Int’l Arb. 93.
  \item \textsuperscript{127} Among the factors that caused a substantial liberalization in international investment regimes, the most
significant ones are: the transition of former socialist states in Eastern Europe to a market economy
model; the wave of deregulation of important services sectors, which started in developing countries since
the late 1970s; the desire of developing countries to create a better investment environment to respond to
the decline in investment activity by multinational corporations, a decline attributable to the worsening of
the developing countries’ balance of payment and to the increasing of their national debts. *Ibid.*
  \item \textsuperscript{128} The expression “permanent sovereignty over natural resources” was first adopted by UN General
Assembly Resolutions 523 (VI) of January 1952 and 626 (VII) of December 1952. *Maniruzzaman, supra*
note 101.
  \item \textsuperscript{129} Markham Ball, “Structuring the Arbitration in Advance – The Arbitration Clause in an International
Development Agreement” in *Contemporary Problems, supra* note 21.
  \item \textsuperscript{130} Economic development agreements, often referred to as “state contracts”, include most common
investment agreements such as concessionary agreements and agreements for the exploitation of natural
resources, as well as modern types of contracts, such as joint venture, technology transfers and service
\end{itemize}
which can span over quite an extended period of time. This type of transaction typically implies a long-term contractual relationship that can go on for decades. During this time, the circumstances in which the contract is performed can dramatically vary. Parties to a long-term project are exposed to the risk of change of economic conditions, governments and political regimes, all of which can affect the finalization of the investment or the execution of contractual obligations. This risk is even greater if one considers that investment agreements, especially in developing countries, consist of an initial commitment of a large sum of money, whose first profits will be reaped for the first time only after a number of years.

Secondly, the asymmetry in relative positions so typical to all contracts between a state and a private party weighs all the more heavily in the context of investment disputes. The foreign investor is subject to the host state’s laws and regulations dealing with investments or economic activities and the foreign investor’s financial interests can be greatly harmed by changes in these legislations. Sometimes these changes are necessitated by public policy considerations and social or political pressure, while at other times they might be simply arbitrary or outright discriminatory. A typical source

132 Ball, supra note 129. Rawding, supra note 39.
133 Hirsh, supra note 50.
134 Private parties may protect themselves from the risk of modification of the law governing the contract by including “stabilization clauses” in the investment agreements. Through such clauses, the host state undertakes the obligation not to change the terms of the contract by legislative or administrative action, without the consent of the private party. The aim of these clauses is to prevent changes in the legislation of the host state in the areas of taxation, fiscal policy, expropriations and nationalizations that would adversely affect the contractual position of the private party. Therefore, the purpose of these clauses is to “freeze” the law applicable to the agreement at the date of signature of the contract. See Goldner, supra note 22. See Hirsh, supra note 50. See also Rawding, supra note 39. The validity of such clauses is the object of academic debate and is often contested because these clauses stand in conflict with the legislative freedom of the state party. See Toope, supra note 49 and Redfern & Hunter, supra note 23.
of concern for private investors, for instance, is the host state’s interference with the contractual relationship by means of increasing tax rates.\textsuperscript{136} Although a state cannot exercise its sovereign prerogatives and interfere with contractual terms in a way that constitutes an abuse of rights or that is contrary to the principle of good faith, the extent of such obligations remains difficult to define and rests on a case-by-case evaluation.\textsuperscript{137}

The unique features of international investment agreements, their scope and duration, as well as the special risks to which foreign private investors are exposed serve to increase the need for the arbitral resolution of investment disputes. Both parties to investment agreements “desire a neutral forum, one that is as free as possible from governmental pressure or national bias, and that is likely to operate with independence and objectivity for decades to come”.\textsuperscript{138} The state will naturally be reluctant to submit to the jurisdiction of another sovereign as to matters that involve its natural and economic resources, while the private party will not generally trust the host state’s courts, which may also refuse to be seized of a claim against the state when the claim concerns the state’s acta iure imperii. It is worth noting that the activities of the state connected with the utilization of its natural resources are generally considered as acta iure imperii.\textsuperscript{139}

The inherent suitability of international arbitration to settle investment disputes is confirmed by the great number of investment treaties that provide for it. Virtually all


\textsuperscript{138} Ball, supra note 129.

\textsuperscript{139} Georges R. Delaume, Law and Practice of Transnational Contracts, (New York: Oceana, 1988).
modern bilateral investment treaties (BITs)\(^{140}\) contain arbitration clauses that are binding on the host state.\(^{141}\) The model of investor-state arbitration is also a feature of modern multilateral agreements, such as the North American Free Trade Agreement (NAFTA).\(^{142}\) Chapter 11 of the NAFTA allows for the investor to bypass the national courts of a state party and to submit to binding arbitration\(^{143}\) a claim that it has incurred a loss or damage as a result of a breach of obligation on the part of the host state.\(^{144}\) Hence, for its ability to provide a stable and neutral forum before which private parties can directly bring their claims, arbitration has become the preferred method of resolution of investment disputes between host states and foreign private parties. Many


\(^{141}\) The purpose of Bilateral Investment Treaties (BITs) is to encourage foreign investments by providing a more stable legal framework within which the investment will operate. Many of these treaties are concluded between developed and developing countries, whose aim is to attract foreign investments that will contribute to their economic development. Typically, these treaties provide for guarantees of non-discrimination of investment, such as national treatment and most-favoured-nation provisions. Kenneth J. Vandevelde, “Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties” (1998) 36 Colum. J. Transnat’l L. 501. As of the end of the year 2001, more than 2000 BITs have been signed. UNCTAD, *World Investment Report 2002*, United Nations, New York, Geneva, 2002. Available online at <http://r0.unctad.org/wir/contents/wir02content.en.htm.>


\(^{143}\) Investors may choose to submit the claim to arbitration pursuant to one of three sets of rules: 1) the Convention on the Settlement of Investment Disputes (ICSID Convention), provided that both the host country and the investor’s home country are both parties to the Convention; 2) the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the investor, but not both, is a party to the Convention; 3) the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. NAFTA, *supra* note 142, art. 1120.1.

\(^{144}\) NAFTA, *supra* note 142, art. 1116.
modern treaties refer to arbitration under the UNCITRAL\textsuperscript{145} or ICC rules,\textsuperscript{146} however, the majority of BITs contain a reference to arbitration under the ICSID rules.\textsuperscript{147}

(iii) ICSID

The International Centre for the Settlement of Investment Disputes (ICSID) was instituted by the Washington Convention of 18 March, 1965.\textsuperscript{148} Promoted by the World Bank, the Convention's main purpose was to promote international investment, and in particular to encourage foreign investment flows into developing countries in favour of their economic development.\textsuperscript{149} Therefore, the Washington Convention has established a system for settling disputes that not only grants adequate protection to foreign investors in foreign states, but also takes equally into account the interests of the investor and of the host state.\textsuperscript{150} One of the main advantages provided by the Center to the host state is the prohibition on the investor's home state to extend diplomatic protection to its national or to bring an international claim on its behalf.\textsuperscript{151}

The investors, on the other hand, are protected from possible attempts by the state to frustrate the arbitration process either by reneging on their commitment to

\textsuperscript{148} The Convention on the Settlement of Investment Disputes between States and Nationals of Other States was opened to signature on March 18, 1965 on behalf of all the States members of the International Bank for Reconstruction and Development. It came into force on October 14, 1966. Information available online at <http://www.worldbank.org/icsid> [Washington Convention].
\textsuperscript{149} Redfern & Hunter, supra note 23. Hirsh, supra note 50.
\textsuperscript{151} Washington Convention Art. 27(1), supra note 117.
submit to the jurisdiction of the Center or by raising claims of sovereign immunity. Article 25(1) of the Convention provides that “when the parties have given their consent, no party may withdraw its consent unilaterally”. Therefore, consent to ICSID arbitration constitutes on the part of the state an irrevocable waiver of immunity from jurisdiction.\textsuperscript{152} Furthermore, the Convention has established an effective framework for the recognition and enforcement of the Center’s awards. The Convention provides: (1) that the parties are bound by the award and that each party must abide by, and comply with, the terms of the award (Article 53); and (2) that every contracting state must recognize ICSID awards and enforce the pecuniary obligations imposed by them as if they were a final judgment of a court in the state where recognition and enforcement are sought (Article 54(1)).\textsuperscript{153}

The truly innovative feature of the Convention rests on the fact that there is no exception to the recognition and enforcement of the awards in contracting states.\textsuperscript{154} In fact, in equating the Center’s awards to national judgments the Convention goes even further than the New York Convention,\textsuperscript{155} since the binding character of the ICSID award cannot be challenged in the courts of the contracting states, not even on the grounds of public policy.\textsuperscript{156} The Convention is currently in force in 139 States.\textsuperscript{157}

\textsuperscript{152} Delaume, “Impact on Arbitration”, supra note 108.
\textsuperscript{153} It is worth noting that subsequent to recognition, issues of immunity from execution can still arise. In fact, the Convention provides at art. 55 that the procedures set forth for the recognition and enforcement of awards shall in no way “be construed as derogatory from the law in force in any Contracting State relating to immunity of that State or any foreign State from execution.” The way in which the execution will be carried out depends on the sovereign immunity rules in force at the place in which enforcement is sought.
\textsuperscript{154} Delaume, “Impact on Arbitration”, supra note 108.
\textsuperscript{155} Ibid. See also Rubino-Sammartano, “Arbitration Under the Washington Convention”, supra note 75.
\textsuperscript{156} Under the New York Convention, which significantly contributed to increase the effectiveness of foreign awards, recognition and enforcement of foreign awards can be denied upon limited grounds listed in art. V of the Convention. New York Convention, supra note 68.
including numerous developing countries, thus constituting the most far reaching and successful system of investment disputes resolution existing to this day.  

**D. Conclusions**

In the light of this overview of the main advantages of arbitration in the context of disputes between private and state parties, it is possible to conclude that while private parties will find the arbitral solution more effective than the judicial one, they will nevertheless remain exposed to original risks that are directly linked to the inequality of positions characterizing their relationship with the states. A state engaging in commercial relations with private parties acts not only as an economic, profit-oriented entity, but also as a sovereign state that is in charge of the interests of its citizens. Beyond its capacity as a contracting party, the state is also entrusted with the responsibility to safeguard the public interest. We shall now proceed to analyze whether a duty of confidentiality assumed by the state in its contract with a private party holds up when the information concerned may be of public interest.

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157 As of March 2003, 154 States had signed the Convention and 139 had obtained the Status of Contracting State by depositing their ratification. ICSID, List of Contracting States and other Signatories of the Convention are available online at <http://www.worldbank.org/icsid/constate/c-states-en.htm>.

158 Latin American countries (which have been traditionally wary of the system of international arbitration) such as Paraguay, El Salvador and Costa Rica have ratified the Convention.
Section II - Confidentiality

A. Conceptual and Judicial Framework

The principle of confidentiality\(^{159}\) has been widely assumed to be among the most characteristic and advantageous features of international arbitration, which stems directly from the agreement to arbitrate as its natural and self-evident consequence. For the longest time, the question of confidentiality in relation to arbitral proceedings and in relation to the information generated or disclosed therein was rarely raised, let alone debated. Most specialized works on arbitration have only summarily touched upon this issue mostly because it was often taken for granted. The main textbooks on arbitration have rarely devoted any of their pages to the specific matter of confidentiality and, in the cases in which they have, it was mostly to offer a superficial overview of the matter and general conclusions on the private nature of the institution.\(^{160}\)

The long-standing assumption that arbitration proceedings are governed by a general principle of confidentiality has not only rested on the lack of academic debate but also on the undisputed private character of arbitration. It has been commonly established that arbitration proceedings are held privately, and confidentiality has often been inferred from this characteristic. If arbitration is by definition a private process of

\(^{159}\) The notion of confidentiality refers to the parties' expectation of not having the persons who are present at the proceedings disclose the information generated throughout the proceedings or their outcome. The notion of confidentiality, although interconnected with the notion of privacy, must be kept separate from it. Privacy leads to the expectation that the arbitral proceedings are conducted in a private fashion allowing only for the presence of those who are personally involved in them. Most institutional arbitration rules explicitly provide for the private nature of arbitration proceedings and do not permit the attendance of outsiders, unless the parties agree otherwise. See, for instance, art. 21 (3) of the ICC rules of arbitration, art. 19(4) of the London Court International Arbitration rules and art. 20 (4) of the American Arbitration Association (AAA) International Arbitration Rules.

dispute resolution, it was thought, it must therefore and necessarily be confidential. While the arbitration rules of the major international and national institutions do specify that arbitration hearings are private and that third parties are normally excluded, they are similar to the vast majority of national laws on arbitration in that they either remain silent or do not always thoroughly address the issue of confidentiality. Nevertheless, even in the absence of any express provision, confidentiality was, until recently still regarded as an implied term of the agreement to arbitrate itself.

In England, a series of cases contributed to consolidate the notion that a duty of confidentiality, albeit subject to limited exceptions and qualifications, follows from, and is the product of, the privacy that typically informs the arbitral proceedings. Starting from the 1980’s and throughout the 1990’s, English courts have uniformly held the view that, even in the absence of an express provision or a contractually agreed upon obligation, an implied duty of confidentiality arises out of the private process of

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161 See supra, note 159.
162 For example, the ICC rules of arbitration do not provide for a general rule of confidentiality. The only provision relating to confidentiality is art. 20.7 that empowers the Arbitral tribunal “to take measures for protecting trade secrets and confidential information.” Other international institutions’ rules, such as the Commercial Arbitration and Mediation Center for the Americas (“CAMCA”) Mediation and Arbitration Rules (art. 36) and the ICSID arbitration rules (art. 6), only provide for an obligation of confidentiality on the part of the tribunal or arbitrators, and do not impose any express obligation on the parties or on the other participants to the arbitral proceedings. The most detailed provisions on confidentiality are included in the World Intellectual Property Organization (WIPO) Arbitration Rules. Chapter VII of the WIPO Rules thoroughly deals with confidentiality, regulating the various elements of the arbitral proceedings separately: the disclosure of the existence of arbitration, disclosures made during the arbitration, confidentiality of the award and confidentiality to be observed by the arbitrator and the Center.
163 English courts, while consistently supporting the notion of a general principle of confidentiality, specified that this implied and extensive obligation of confidentiality does remain subject to limited qualifications and exceptions, such as the consent of the party or leave of the court, and to the order of the court to disclose documents of a prior arbitration for the purpose of a subsequent action.
arbitration and it is so encompassing as to include all the material produced therein.\textsuperscript{165}

In \textit{Hassneh Insurance Co. of Israel v. Mew}\textsuperscript{166}, Colman J. noted that:

If it be correct that there is an implied term in every agreement to arbitrate that the hearing shall be held in private, the requirement of privacy must in principle extend to documents which are created for the purpose of that hearing. The most obvious example is a note or transcript of the evidence. The disclosure to a third party of such documents would be almost equivalent to opening the door of the arbitration room to that third party. Similarly, witness statements, being so closely related to the hearing, must be within the obligation of confidentiality. So also must outline submissions tendered to the arbitrator. If outline submissions, then so must pleadings be included.\textsuperscript{167}

This generally accepted assumption of confidentiality did not spark any significant controversy until when it became closely scrutinized and challenged following a number of cases in national jurisdictions that reached conclusions opposite to the prevailing view expressed by English courts.\textsuperscript{168} When confronted with the issue of confidentiality, some jurisdictions--such as the French and the English ones\textsuperscript{169}--have been inclined to imply broad obligations of non-disclosure and uphold them beyond the letter of the law or the contract.

However, some others--such as the Australian, Swedish and the American jurisdictions--displayed the completely opposite approach, denying any protection of confidentiality that is not explicitly provided for.\textsuperscript{170} The inconsistency of such

\begin{itemize}
\item \textsuperscript{165} For instance, in \textit{Dolling Baker v. Merrett}, the English Court of Appeal held that an implied duty of confidentiality attached to arbitral proceedings bears on each party and it applies to “documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award” as well as evidence given by any witness in the arbitration. \textit{Dolling Baker v. Merrett}, at 1213-1214, \textit{supra} note 164.
\item \textsuperscript{166} See \textit{Hassneh Insurance Co. of Israel v. Steuart J. Mew}, \textit{supra} note 164.
\item \textsuperscript{167} \textit{Ibid.} at 247.
\item \textsuperscript{170} See \textit{Aita v. Oljeh}, \textit{supra} note 169.
\end{itemize}
conflicting rulings has cast doubts on the existence of an implicit obligation of confidentiality attached to the arbitral proceedings. Pursuant to these decisions, which ranged from recognizing an absolute duty of confidentiality to denying it altogether when not resting on the express will of the parties, it became evident that “today, with respect to confidentiality, nothing should be taken for granted”.\textsuperscript{171} The once undisputed notion that a general rule of confidentiality was intrinsic to arbitration, having been repeatedly tested in national courts and denied on several occasions, is not certain anymore. Although a survey of these cases reveals that more courts have confirmed the principle of confidentiality of arbitration than denied it, its legal basis and range of application remain contentious, given the array of different exceptions to which the courts have pointed from time to time.\textsuperscript{172}

Moreover, in the light of these judicial developments it can be questioned whether the parties involved would actually find desirable a general rule of confidentiality that is as comprehensive as they suppose it to be. It appears doubtful that a blanket confidentiality obligation would be altogether beneficial to the parties, especially if a national court imposes on them an implied duty of confidentiality that they had not contracted for or, even further, commands a penalty or warrants avoidance of the entire agreement to arbitrate because of the breach of such duty.\textsuperscript{173}

\textsuperscript{171} Fortier, supra note 4.
\textsuperscript{172} Such as the interest of justice, the protection of a party’s legal right, a court order and the consent of the parties. These are the exceptions that could limit the range of a confidentiality obligation, as identified by the court in \textit{Ali Shipping v. Shipyard “Trogir”}. See supra note 164.
\textsuperscript{173} In the \textit{Bulbank} case, for instance, the Swedish court held that “confidentiality is a basic and fundamental rule in arbitration proceedings” and concluded that the arbitration agreement had been nullified by the disclosure on an interim award on behalf of one of the parties. \textit{A.I. Trade Finance Inc. v. Bulgarian Foreign Trade Bank Ltd. (Bulbank)}, supra note 168. Similarly, in \textit{Aita v. Ojeh}, the French Court of Appeal, asked to annul an award made in England, that the challenge itself and the annulment proceedings had violated the principle of confidentiality. Consequently, it ordered the challenging party to pay a penalty to the party which had won the arbitration, concluding that the action had “caused a
Of course, the parties who value confidentiality can achieve a greater certainty and predictability of results through express provisions included in their contracts. To safeguard their interest in confidentiality, they may always provide contractually for it, thus making their agreement the legal source of an obligation of confidentiality that they owe to each other. This contractual provision would then govern the arbitral proceedings and would be enforceable by the arbitrators and the courts. Alternatively, or cumulatively with an express agreement of confidentiality, they may refer in their contract to institutional rules and applicable law that explicitly protect it.

Nonetheless, it is worth underlining that independently of its basis, confidentiality will hardly be absolute. First of all, arbitration may assume a public dimension, since recourse to a national court is always a possibility at various stages of arbitration, whether for the enforcement of a provisional measure or the enforcement of the award itself when a party refuses to abide by it voluntarily. The efforts of the parties to preserve the confidentiality of the existence of arbitration or the documents relating to the arbitral proceedings could be inevitably frustrated whenever the assistance of an ordinary court is sought, consequently determining the fall of arbitration into the public domain.

Secondly, regardless of the breadth of a confidentiality obligation expressly provided for in the contract or the agreement to arbitrate, one of the parties may bear an

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public debate of facts which should remain confidential", since it is “the very nature of arbitral proceedings that they ensure the highest degree of discretion in the resolution of private disputes”. Aita v. Ojjeh, supra note 169.


175 Alex C. Brown, “Presumption Meets Reality: an Exploration of the Confidentiality Obligation in International Arbitration” (2001) 16 Am. U. Int’l L. Rev. 969 (identifying some of the reasons why a duty of confidentiality of the fact of arbitration can not be completely unbounded).

inescapable obligation of disclosure, whether statutory or fiduciary, which would frustrate the effectiveness of any confidentiality rule. In some cases, the party might be bound by a statutory duty to inform third parties whose interests are directly affected by the incipient arbitration. Parties may find it necessary and unavoidable to disclose the existence of the arbitration, the names of the participants, the nature of the dispute and the financial consequences thereof. If a corporation undertakes arbitration, for instance, a number of bankers, insurers and stakeholders would need to be notified of the process on the basis of a fiduciary obligation because of the financial repercussions that the final outcome could produce. In other cases, practical commercial reasons or ethical duties justify the need of disclosure of the information; for example, the management of a company would be compelled to inform the director of the start of arbitration proceedings.177

Among the exceptions to which confidentiality may give way, one is peculiar to arbitration between a private party and a public actor. When a public actor is involved in arbitration, the boundaries of the notion of confidentiality may inevitably be restrained by a public interest exception, which national courts and international tribunals have elaborated in recent years. Even if the parties do not limit themselves to presume a general rule of confidentiality, but actually provide for it in their agreement, their interest in preserving the confidential character of the arbitral proceedings may be overcome by a duty of disclosure held by the public actor towards the public at large.

Therefore, in the context of mixed arbitration, confidentiality is subject to an additional challenge brought about by the presence of a public actor, whose legal

177 Brown, supra note 175 (identifying some of the reasons why a duty of confidentiality of the fact of arbitration can not be completely unbounded).
obligations and moral duties differ from the ones of the private party. "The presence of a state as a party to arbitral proceedings gives a particular colouration to the arbitral proceedings" and certainly has the potential to affect the scope and enforceability of a duty of confidentiality.

The challenges to confidentiality that arise in international arbitration between private and state parties have only recently begun to be articulated in judicial and arbitral fora. Nonetheless, these cases illuminate a generalized prevalence of public interest considerations over the parties’ desire to shield the arbitration from public scrutiny.

B. The Case Law

To fully understand the content of the public interest exception to confidentiality, it is appropriate to examine how and to what extent it has been delineated by national courts and international tribunals that have dealt with confidentiality of arbitration when either a state, a state-controlled enterprise or a public agency were involved. To this end, two decisions reached in Australian courts with respect to domestic arbitrations and four rendered in NAFTA arbitrations pursuant to Chapter 11 will be now analyzed.

1. The Australian Case Law

(i) *Esso/BHP v. Plowman*

The best known decision on the public interest exception to confidentiality is the one reached by the High Court of Australia in the case *Esso Australia Resources Ltd. v. Plowman.* In a controversial finding, the High Court denied that the nature of arbitration intrinsically calls for confidentiality and concluded that even if a duty of

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179 See *Esso supra*, note 168.
confidentiality did exist, it would remain subject to a public interest exception. The High Court judgment provoked a great uproar in academic circles and has been described “as flying in the face of widespread understanding elsewhere”. The conclusion reached in that case—that under Australian law an implied duty of confidentiality does not exist—shook the international arbitration community and sparked such interest that a special issue of the journal Arbitration International was devoted to the subject and a number of experts submitted their opinions for consideration.181

The Esso decision came out of two parallel arbitrations in the State of Victoria, which occurred between Esso and two public utilities over a price increase. The two governmental companies in question had entered into separate agreements with the Gas and Fuel Corporation of Victoria (GFC) and with the State Electricity Commission of Victoria (SEC) for the supply of natural gas. Each agreement contained a price review clause under which the price payable for the supplies was to be adjusted over the life of the agreement by taking into account changes relating to royalties and taxes attributable to the production or supply of natural gas.

The public suppliers sought to increase the price of the product as a result of a new tax, Resource Rent Tax, imposed on their profits by the Australian Government. Both GFC and SEC opposed the increase and, moreover, expected the price to be reduced, since the Government, while imposing the new tax, had simultaneously abolished the royalty which the companies had been bound to pay on the gas produced. The agreements provided that the companies had to support the calculation leading to the

180 Fortier, supra note 4.
increase by providing relevant details. The companies agreed only on condition that GFC and SEC signed a confidentiality agreement as to the information being shared. After GFC and SEC refused to comply with such a request, arbitral proceedings were commenced on the basis of another clause also included in the contract that referred the parties to arbitration in the event that they could not agree on the price change. The subject-matter of the dispute was of great interest to the public, since the price of gas and electricity was destined to rise if the companies succeeded in the arbitrations, thus affecting all consumers in Victoria.

The Victorian Minister for Energy and Minerals, who was the Minister ultimately responsible for the two public utilities, brought an action against the public utilities and Esso, seeking a declaration that all of the disclosed information during the course of the arbitrations was not subject to an obligation of confidentiality and could be inspected by the Minister in order to supervise the public utilities and the rates that they were charging for oil supplies.182 Esso and the other suppliers argued that the arbitrations and the documents produced therein were confidential, the information including proprietary and commercially sensitive material concerning profit margins, production costs and estimated gas reserves.183 The Minister had a broad statutory power to obtain information from SEC which “he requires either for Parliament or for himself”184 though this provision had been repealed by the time the case reached the High Court. The GFC statute, on the other hand, had never provided for such a power.185

183 Rogers & Miller, supra note 160.
184 See Esso, supra note 168 at 11 of the judgment of Mason C.J. The provision, Clause 4(2) of the “Business and Rules” component of the Sixth Schedule to the State Electricity Commission Act 1958 (Vic.) (No. 6377/1958), provided for the power of the Minister to obtain SEC’s minutes and papers.
185 See Gas and Fuel Corporation Act 1958 (Vic.).
The Minister's application was largely accepted both by the trial judge and on appeal. The lead decision at the High Court was written by Mason C.J. and was entirely supported by Dawson and McHugh JJ. A separate concurrent judgment was written by Brennan J. while the fifth judge, Toohey J., wrote in dissent. After acknowledging several expert opinions, the High Court of Australia concluded that the documents were not confidential. In his decision, which has become the subject of controversy, Mason C.J. addressed three main issues: 1) the existence of an implied duty of confidentiality in Australia; 2) the existence of disclosure obligations for public authorities; 3) and the standards for disclosure of information arising in an arbitration that is of legitimate public interest.

With respect to the first issue, Mason C.J. focused on the legal basis of a duty of confidentiality in arbitration. While noting that the parties who wish to secure the confidentiality of the documents prepared for or used in arbitration can contractually provide for it, he agreed with the findings of the Court of Appeal that a duty of confidence cannot be deduced from the privacy of the arbitral hearings, as generally supported by English courts. Furthermore, he held that in Australia, no general duty of confidentiality was implied in an agreement to arbitrate and found that confidentiality was implied in an agreement to arbitrate and found that confidentiality

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186 For the appeal-level decision, see Esso Australia Resources Ltd. v. Plowman (1994), 1 V.R. 1 (CA).
187 Interestingly, Toohey J. was the only judge on the High Court panel who did not see any need to address the role for a public interest exception to confidentiality in the case. In his judgment, he concludes at 26 that “Although it did not arise in this appeal, I agree with the Chief Justice that there is a ‘public interest’ exception to the principle of confidentiality. But it is unnecessary and inappropriate to discuss the boundaries of that exception.”
189 Chief Justice also specified that, in any case, a confidentiality obligation would never be boundless, because 1) it does not attach to witnesses, 2) the proceedings or the award can always come before an ordinary court, and 3) the party might have a fiduciary or statutory obligation to disclose the information relating to the arbitral proceedings. See Chief Justice decision at 33, supra note 168.
190 Ibid.
was not "an essential attribute of a private arbitration imposing an obligation on each party not to disclose the proceedings or documents provided in and for the purposes of the arbitration" nor "part of the inherent nature of the contract and of the relationship thereby established".\textsuperscript{191}

He then went on to address the issue of a public actor's duty to account to the public for the manner in which it performs its functions. He underlined that sometimes the public actor holds a positive duty to disclose information to the public. "There may be circumstances, in which third parties and the public have a legitimate interest in knowing what has transpired in an arbitration, which would give rise to a 'public interest' exception. The precise scope of this exception remains unclear".\textsuperscript{192}

The third aspect of Mason C.J.'s judgment deals with the nature of the information supposedly subject to the public interest exception and with the standards of disclosure thereof. Mason C.J. holds that information of legitimate public interest is that of "governmental" character. Without further clarification, he asserts that the information sought to be disclosed from the arbitration indeed qualifies as "governmental". On the basis of this assumption, he argues in favour of public disclosure, noting how "government secrets" differ from personal and commercial secrets. Because of this difference, "the judiciary must view the disclosure of governmental information 'through different spectacles'".\textsuperscript{193} In effect, this calls for a reversal of the ordinary onus of proof for disclosure and assuming, contrary to the norm,

\textsuperscript{191} Ibid.
\textsuperscript{197} Ibid. at 38.
\textsuperscript{199} Ibid. at 39.
that governmental information ought to be available to the public unless it can be proved that the public interest demands non-disclosure.\textsuperscript{194}

Recalling his decision in \textit{The Commonwealth of Australia v. John Fairfax \\& Sons Ltd.},\textsuperscript{195} he concludes that since the public sector calls for openness rather than secrecy, disclosure is necessary when the information relates to statutory authorities or public utilities. In the last part of his judgment, he finally wonders "why should the consumers and the public of Victoria be denied knowledge of what happens in these arbitrations, the outcome of which will affect, in all probability, the prices chargeable to consumers by public utilities?"\textsuperscript{196}

This third part of Mason C.J.'s reasons appears to be somewhat weak and open to criticism. First of all, his argument in favour of disclosure is entirely premised on the nature of the information at issue, which he assumes to be of governmental nature, yet he fails to justify the basis for this assumption. Following his reasoning, what appears to qualify the information revealed in the arbitration as governmental is the mere fact of communication from the suppliers to the public energy authorities. If communication to a public authority was the qualifying criterion, then all the information that legal and natural persons have a legal duty to supply to the state, would gain the status of governmental information even though the public does not have a legitimate interest in it.

Mason C.J.'s approach to the public interest exception suffers from a certain degree of vagueness, for it does not delineate the parameters or content of such

\textsuperscript{194} Ibid.
\textsuperscript{195} \textit{The Commonwealth of Australia v. John Fairfax \\& Sons Ltd} (1980), 147 C.L.R. 39 (HC). In this case, the issue of the publication of governmental secrets relating to defense and foreign policy had been considered.
\textsuperscript{196} See \textit{Esso, supra} note 168 at 40 of the reasons of Mason C.J.
exception to confidentiality, nor does it provide a well-reasoned basis for the conclusion that, in this case, the public interest demands full disclosure of information arising from the arbitrations. What appears certain is that, while none of the judgments define how information comes to be of public interest, they all recognize that there can be legitimate reasons to override a confidentiality rule governing the arbitral proceedings.

The overall conclusions that can be drawn from the Australian High Court decision is that even if a duty of confidentiality exists by virtue of the parties' contract it is not absolute, for it is always vulnerable to a public interest exception. Therefore, parties to mixed arbitration are not able to count on the public actor's contractual promise to preserve an agreed level of confidentiality, because that promise will be infringed whenever the interest of the public lies in the disclosure of the information revealed in the arbitral proceedings. The real dilemma then with respect to parties to mixed arbitration is not whether or not their presumption of an implied duty of confidentiality will be confirmed in reality, but whether a contract of confidentiality entered into with a public actor will hold up once the arbitration has begun and sensitive information is produced therein. As one commentator noted:

A new weapon has thus been placed in the hands of the Commonwealth, the states, state entities and public utilities as participants in arbitrations. Indeed the list of beneficiaries is not so easily confined. Any party to an arbitration is now enabled to run up the flag labelled 'public interest' and to claim the right (or to assert the duty) to communicate to the public at large confidential disclosures obtained as a result of the arbitral process and testimony which has been or is to be advanced in the arbitration by the publicizing party or his opponent.\footnote{Neil, supra note 181.}

Paradoxically, the \textit{Esso} decision seems to have identified an absolute presumption of non-confidentiality of any arbitration involving a state or a public authority, a
presumption that the parties are unlikely to avoid even by a carefully drafted confidentiality agreement. Finally, this decision generated a great deal of uncertainty, for having formulated a public interest exception to confidentiality, without having sought to determine its scope.

(ii) The Cockatoo Dockyard case

*Commonwealth of Australia v. Cockatoo Dockyard Pty. Ltd.* is a second important case from Australia on the duty of confidentiality in arbitration. The decision in the case was released only two and a half months after the decision in *Esso* and represents the first significant application of the principles therein formulated. The arbitration at issue was between the Commonwealth of Australia and Cockatoo Dockyard Pty. Ltd. ("Codock") and concerned environmental conditions on Cockatoo Island. Cockatoo Island, which is situated near Sidney, had been leased by Australia and used as a naval dockyard from 1857 to 1991. Since 1933 the island had been operated by Dockyard under a series of Lease and Trading Agreements until its decommissioning in 1991.

The arbitral proceedings arose as a result of allegations by the Commonwealth that at the end of the lease Codock had left the island contaminated with residues of certain industrial substances of sufficient quantity to qualify as a breach of the final Lease Agreement. During the arbitration, a journalist requested information concerning the toxic waste supposedly left on the Island, pursuant to the *Freedom of Information Act*

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198 Rogers & Miller, *supra* note 160.
200 Kirby P., who wrote the lead decision in *Cockatoo Dockyard*, notes that arguments in the case were heard on the day that the High Court of Australia released its decision in *Esso*. See *Ibid.* at 665.
Codock sought to obtain from the arbitrator directives securing the confidentiality of documents relevant to the arbitration. Australia opposed Codock’s application on the basis that restrictions on the disclosure of documents concerning Cockatoo Island would impair the free flow of information in society and impinge upon governmental powers.

The arbitrator issued several directions on the confidentiality issue. In his final decision, the arbitrator ordered that “neither party to the proceedings disclose or grant access to:

(a) any documents or other material prepared for the purposes of the arbitration;
(b) any documents or other material, whether prepared for the purposes of this arbitration or not, which reveal the contents of any document or other material which was prepared for the purposes of this arbitration;
(c) any documents or material produced for inspection on discovery by the other party or the purposes of these proceedings; or
(d) any documents or material filed in evidence in these proceedings”.

On application to the Supreme Court of New South Wales, Australia challenged the arbitrator’s directions by asserting that the arbitrator had exceeded his procedural powers as defined by section 14 of the Commercial Arbitration Act 1984, and had unreasonably purported to interfere in governmental rights and duties. The Supreme Court originally denied relief to Australia, a decision that Australia appealed and was overturned 2 to 1 by the Court of Appeal. The leading judgment of the majority was written by Kirby P. In brief, the majority found (1) that the Court has jurisdiction to intervene in an arbitration and review a procedural direction of an arbitrator, and (2)

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201 Freedom of Formation Act (Cth.) (No. 3, 1982).
202 See Cockatoo Dockyard, supra note 199 at 664.
203 See Ibid, at 669.
204 Commercial Arbitration Act (No. 160, 1984). Section 14 of the Act reads as follows: “Subject to this Act and to the arbitration agreement, the arbitrator or umpire may conduct proceedings under that agreement in such manner as the arbitrator or umpire thinks fit.”
where a government is a party to an arbitration, the arbitrator has no power to make procedural orders imposing an obligation of confidentiality on the government, so as to limit the government’s duty to account to the public or pursue the public interest. Although Kirby P.’s judgment revolves to a large extent around the proper interpretation of the New South Wales Commercial Arbitration Act, which governs domestic arbitration, it also concerns general principles of arbitration that have further implications at the international level.

While recognizing that the arbitrator is entitled to issue interlocutory directions concerning the conduct of the arbitration, Kirby P. concluded that the concerned directions were impermissibly broad, having touched upon various other interests which lie outside the legitimate scope of the arbitration. In support of his intervention, his Lordship stated that “the rule of law requires that the court ... will define and, where necessary and appropriate, declare the limits beyond which the purported powers in pursuit of private arbitration intrude into competition with other legitimate public and private rights and duties.” Kirby P. proceeded then to address the public interest exception and founded his decision to overturn the confidentiality rulings made by the arbitrator on the nature of the public interest in the subject-matter at issue. He says, “For all this court knows, it is both significant and urgent that the material should be made available, for the protection of public health and the restoration of the environment, both to [various governmental agencies] ... or even to the public generally”. Noting how it would be problematic to maintain a veil of confidentiality

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206 See Cockatoo Dockyard, supra note 199 at 676.
207 Ibid. at 680.
on documents having such a wide public interest and utility,\textsuperscript{208} he finds similarly to the judgment in the \textit{Esso} case that it is in the interest of the public to be informed about the substantive features of the issue involved in the arbitration. Consequently, he concludes as follows:

While private arbitration will often have the advantage of securing for parties a high level of confidentiality for their dealing, where one of those parties is a government, or an organ of government, neither the arbitral agreement nor the general procedural powers of the arbitrator will extend so far as to stamp on the government litigant a regime of confidentiality or secrecy which effectively destroys or limits the general governmental duty to pursue the public interest.\textsuperscript{209}

In the light of this finding, it appears that the \textit{Cockatoo Dockyard} decision is also largely in favour of public disclosure over confidentiality, even in the presence of an express provision requiring that confidentiality be maintained. Furthermore, the scope of the public interest exception to confidentiality resulting from this decision is, once again, an extremely broad one and not yet precisely defined. Kirby P. too, citing the comments of Brendan J. in \textit{Esso}, concludes that “public interest” is a category broad enough to include moral, political and even strongly held philosophical interests, “for example, one favouring freedom of the public to have access to materials and documents of legitimate interest to the public.”\textsuperscript{210}

\textbf{(iii) Conclusions on the Australian Case Law}

By not circumscribing the contours of the public interest exception, these two decisions leave the parties to mixed arbitration with the knowledge that even commercially sensitive information may be disclosed if the public has a legitimate interest in such disclosure, without defining the type of public interests which will likely

\textsuperscript{208} \textit{Ibid.}
\textsuperscript{209} Neil, \textit{supra} note 181.
\textsuperscript{210} Rogers & Miller, \textit{supra} note 160.
bring the public interest exception in operation. Possibly, the most careful approach to
the public interest exception is a case-by-case evaluation, as suggested by Brandon J. in
Esso. In his decision he attenuates the reach of Mason C.J.’s judgment that there exists
a public interest exception of indefinite scope. While recognizing that a public interest
exception could arise even if there is merely a moral, as opposed to legal, duty to
account to the public for the manner in which a public entity performs its function, he
specifies that the right to disclosure cannot be absolute.211 To this end, he states:

The duty to convey information to the public may not operate uniformly upon each
document or piece of information... Performance of the duty to the public is unlikely to
require the revelation of every document or piece of information. It may be possible to
respect the commercial sensitivity of information contained in particular documents
while discharging the duty to the public and, whether that is possible, the general
obligation of confidentiality must be respected.212

If the right of a public entity to disclose sensitive information obtained during
arbitration rests on the legitimate interest of the public, then that interest should be
ascertained in each case. A case-by-case consideration of the information in question
would ensure that an obligation of confidentiality is displaced only because the
information is actually of public concern, consequently striking a better balance
between the interests and rights of both the public and the participants to arbitration.

2. International Decisions: The NAFTA Cases

Until recently there has been relatively little consideration of the issue of
confidentiality in mixed arbitration by international tribunals,213 the only relevant

211 Ibid.
212 See Esso, supra note 168 at 9 of the reasons of Brennan J.
213 However, it is worth noting that certain confidentiality issues arose in the Iran – United States Claims
Tribunal Process. See Toope, supra note 49 at 270-271 and 323-324.
exception being the case of *Amco Asia Corp. et al. v. Republic of Indonesia.*\(^{214}\) However, in recent years, there have been a growing number of NAFTA Chapter 11 decisions specifically addressing confidentiality and the public interest.

(i) The *Metalclad* case

The first NAFTA Chapter 11 tribunal to consider the issue of confidentiality was in *Metalclad Corporation v. the United Mexican States.*\(^{216}\) The *Metalclad* case involved a claim brought by Metalclad Corp., a U.S. company in the waste management business, against Mexico. Metalclad alleged the breach of various provisions of Chapter 11 by the Mexican Government, which had undertaken actions that impaired Metalclad’s ability to use its waste treatment facility.\(^{217}\) Arbitration of the dispute was conducted under the ICSID Additional Facility Rules.

At the beginning of the proceedings, in September 1997, Mexico complained of a telephone communication made by Metalclad’s Chief Executive Officer, which was alleged to have been “intended to provide information to shareholders, investment analysts, and other members of the public who were interested in the Claimant’s activities.”\(^{218}\) Mexico requested the tribunal to issue a confidentiality order, pursuant to

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\(^{215}\) NAFTA, see *supra* note 142. NAFTA Chapter 11, see *supra* note 142.


\(^{217}\) In 1997, the Governor of San Luis Petrosi issued a decree that mandated that the land including the location upon which Metalclad had its waste treatment enterprise would become a permanent ecological reserve.

\(^{218}\) Margrete Stevens, “Confidentiality Revisited” (2000) 17(1) ICSID News 2, online: World Bank <http://www.worldbank.org/icsid/news/n-17-1-2.html> in which Stevens describes two ICSID cases relating to confidentiality, without naming them. Certainly, these unnamed cases are *Metalclad, supra* note 216 and *Loewen, infra* note 224.
Article 1134 of NAFTA and Article 28 of the ICSID Additional Facility Rules.\(^{219}\) Mexico also sought to obtain a declaration that breach of such order would permit it to request the tribunal to enforce sanctions against Metalclad.\(^{220}\) In its submissions, Mexico argued that a general principle of confidentiality is implied in arbitration. In October 1997, the tribunal, while denying Mexico's request for the provisional measures on the basis of the lack of the necessary conditions for interim relief, addressed the issue of whether parties to a NAFTA Chapter 11 arbitration were entitled to expect the confidentiality of the proceedings. Rejecting the notion of an implied rule of confidentiality, the tribunal stated:

Neither the NAFTA nor the ICSID (Additional Facility) Rules contain any express restriction on the freedom of the parties in...respect [of making publicly available information concerning the arbitration proceedings]. Though it is frequently said that one of the reasons for recourse to arbitration is to avoid publicity, unless the agreement between the parties incorporates such a limitation, each of them is still free to speak publicly of the arbitration.\(^{221}\)

Moreover, the Tribunal noted that, regardless of any expectations of confidentiality, under the security laws of the United States, where Metalclad is resident, a public company whose stock is traded on a public stock exchange is under a positive duty to provide to shareholders information that could affect share value.\(^{222}\) Nonetheless, the tribunal recommended that to ensure "the orderly unfolding of the arbitral process and ...the maintenance of working relations between the Parties," public discussion of the

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\(^{219}\) Art. 1134 of NAFTA, supra note 142, provides: "A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective...For the purposes of this paragraph, an order includes a recommendation." Art. 27 of the ICSID Arbitration (Additional Facility) Rules provides: "The Tribunal shall make the orders required for the conduct of the proceeding." See International Centre for the Settlement of Investment Disputes, "Schedule C: Arbitration (Additional Facility) Rules" in ICSID Additional Facility Rules, available online at <http://www.worldbank.org/icsid/ICSID_Addl_English.pdf>

\(^{220}\) Stevens, supra note 218.

\(^{221}\) Part of the order is reproduced in the Final Award. See Metalclad, supra note 216 at 13.

\(^{222}\) Ibid.
case should be limited to "a minimum". It is worth noting that, uncharacteristically, in this case it is the state rather than the private party that sought to enforce confidentiality.

(ii) The Loewen case

In the Loewen case, yet another NAFTA Chapter 11 tribunal rejected the notion of the existence of a general rule of confidentiality applicable to the arbitral proceedings convened under Chapter 11. The Loewen Group, Inc. ("Loewens"), a Canadian corporation, submitted to arbitration pursuant to Chapter 11, alleging the breach of several NAFTA provisions committed by the United States during a civil suit prosecuted against the claimant--Loewen--in Mississippi. In May 1999, the United States requested that all filings in the arbitration, including the minutes of the proceedings, be treated as available to the public. The claimant, while agreeing that the minutes and the filings could be made available after the case was concluded, opposed the respondent's request on the basis of two arguments. First, the claimant stated that both the ICSID Additional Facility Rules and NAFTA contain disclosure limitations, and secondly, that the parties were bound by a general obligation of confidentiality in regard to the proceedings. In September 1999, the tribunal rejected the United States' request by noting that art. 44(2) of the ICSID Additional Facility Rules provides

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223 Ibid.
224 The Loewen Group, Inc. and Raymond L. Loewen v. United States of America (Decision on Hearing of Respondent's Objection to Competence and Jurisdiction) (5 January, 2001), ICSID Case No. ARB(AF)/98/3 [Loewen], available online at <www.naftalaw.org>.
225 Loewen alleged that the United States had violated article 1102 (national treatment), article 1105 (minimum standard of treatment) and article 1110 (expropriation and compensation). See The Loewen Group, Inc. and Raymond L. Loewen v. United States of America, Notice of Claim (30 October, 1998), available online at <www.naftalaw.org>.
226 The substance of order was described in the decision referenced supra at note 230, at 24 - 26 and 28.
that minutes of proceedings are not to be published without the consent of the parties. Nonetheless, the tribunal did not accept the claimant's submission that the parties to arbitration were "under a general rule of confidentiality." In particular, the tribunal stated:

In an arbitration under NAFTA, it is not to be supposed that, in the absence of express provision, the Convention or the Rules and Regulations impose a general obligation on the parties, the effect of which would be to preclude a Government (or the other party) from discussing the case in public, thereby depriving the public of knowledge and information concerning government and public affairs.

However, the tribunal did endorse the same recommendation made in the Metalclad case that the parties limited public discussion of the case to "what is considered necessary." (iii) The Methanex case

The Methanex case is the first NAFTA Chapter 11 arbitration to thoroughly address confidentiality and the public interest exception and to deal with the aspect of amicus curiae submissions. In 1999, Methanex, a Canadian corporation, initiated NAFTA Chapter 11 proceedings against the United States (U.S.) pursuant to the UNCITRAL Rules over an order issued in 1999 by the California Governor to ban from California Gasoline, by December 2002, a methanol derivative produced by

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227 Art. 44(2) of the Arbitration (Additional Facility) Rules, see supra note 224, provides: "The minutes of the hearing shall be signed by the President of the Tribunal and the Secretary-General. These minutes alone shall be authentic. They shall not be published without the consent of the parties." The tribunal pointed out that this prohibition is primarily directed to the tribunal, but is understood in the Metalclad decision as being directed also to the parties.

228 See Loewen, supra note 224 at 26.

229 Ibid.

230 Ibid.


Methanex. In August 2000, a Canadian non-governmental organization, the International Institute for Sustainable Development ("IISD") petitioned the Methanex Tribunal for standing in the arbitration as *amicus curiae*. The same petition requesting *amicus curiae* status was made by a coalition of American environmentalist groups\(^{234}\) ("the Coalition") in October 2000. Both IISD and the Coalition sought the permission to 1) file written submissions to the Tribunal, 2) attend hearings, and 3) receive copies of all submissions and materials filed with the Tribunal by the Parties. The substance and breadth of the petitions brought about the question of admissibility of *amicus curiae* participation in Chapter 11 arbitration under the UNCITRAL Rules and the level of confidentiality in such arbitration.

Several written briefs were received by the Tribunal before it ruled on the issue: IISD filed two briefs in support of its petition; three sets of submissions were made by Methanex (in opposition); and two sets of submissions were filed by the U.S. (in support). Canada and Mexico also made submissions in response to the application for *amicus curiae* standing, the former in support of the petitions, the second against them.\(^{235}\)

*IISD and Methanex submissions:* In petitioning the tribunal, IISD first stressed the great public interest in the case and the critical impact that the tribunal’s decision

\(^{233}\) In particular, Methanex alleged violation of Articles 1105 (Minimum Standard of Treatment) and 1110 (Expropriation and Compensation) of NAFTA.

\(^{234}\) The environmentalist groups were Communities for a Better Environment, the Blue Water Network of Earth Island Institute, and the Center for International Environmental Law.

\(^{235}\) The Canadian and Mexican submissions did not address confidentiality. The Canadian submissions addressed the more general question of transparency in Chapter 11 arbitrations. See *Methanex, supra* note 231 (Submission of the Government of Canada) (10 November 2000). Mexico’s submissions argued that *amicus* participation would give interveners more rights in proceedings than non-disputing Parties to NAFTA themselves have. Mexico also opposed *amicus* participation arguing that the acceptance of the petition would set a precedent for other Chapter 11 proceedings in which Mexico might be involved, thereby risking the importation into those proceedings of an institution alien to Mexico’s legal tradition and not agreed to in NAFTA in any case. See *Methanex, supra* note 231 (Letter to the Arbitration Tribunal in the case *Methanex Corporation v. the United States of America*) (undated).
would have on environmental and other public welfare law-making in the NAFTA region.\textsuperscript{236} It then argued that the tribunal had jurisdiction to grant the permission sought by the petitioners under its general procedural power provided for by article 15\textsuperscript{237} of the UNCITRAL Arbitration Rules.\textsuperscript{238} Methanex, in its submissions opposing the petitions, contended that article 25(4)\textsuperscript{239} of the UNCITRAL Rules, which provides for the hearings to be held \textit{in camera}, carries also an implied duty to hold confidential all documents generated for the hearings.\textsuperscript{240} Methanex further noted that permitting \textit{amicus curiae} participation would violate the parties' agreement on confidentiality, which provided that the transcripts of hearings and submissions by the parties would be kept confidential, subject to disclosure to certain persons on a need to know basis.\textsuperscript{241}

IISD, in its response to the submissions of Methanex, contended that article 25(4) of the UNCITRAL Rules did not override the authority granted to the Tribunal by article 15 to conduct the arbitration in the manner that it deems appropriate.\textsuperscript{242} Moreover, the presence of \textit{amici} authorized by the Tribunal would not make

\begin{footnotes}
\footnotetext[236]{See \textit{Methanex}, supra 231 (Petition to the Arbitral Tribunal submitted by the International Institute for Sustainable Development) (25 August, 2000) at 3.2 and 3.3.}
\footnotetext[237]{See UNCITRAL Rules, Article 15(1) supra note 145: "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."}
\footnotetext[238]{See \textit{Methanex}, supra note 231 at 4.1.}
\footnotetext[239]{See UNCITRAL Rules, Article 25(4) supra note 145: "Hearings shall be held \textit{in camera} unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses."}
\footnotetext[240]{See \textit{Methanex} supra note 231 (Submissions of the Claimant Respecting Petition of the International Institute for Sustainable Development) (31 August, 2000) at 3-5. Methanex, in support of its argument, refers to the reasoning stated in the case \textit{Hassneh Insurance Co. of Isreal \textit{v.} Steuart J. Mew}, supra note 164.}
\footnotetext[241]{This agreement was formalized in a Confidentiality Order delivered to the Tribunal by joint submission on 23 August 2000. See \textit{Methanex}, supra note 231 at 6.}
\footnotetext[242]{\textit{Ibid.} (Petitioner's Response to the Submissions of the Claimant, Methanex Corp., in the Petition of the International Institute for Sustainable Development to the Arbitral Tribunal) (6 September 2000) at 3; See also (Petitioner's Final Submissions) (16 October, 2000) at 24.}
\end{footnotes}
proceedings any less in camera? With respect to the issue of confidentiality, IISD stated that "the UNCITRAL Rules do not impose confidentiality restrictions... [but] contemplate that such issues can be resolved by agreement between the parties, where appropriate, and with the approval of the Tribunal." However, IISD argued that, being the U.S. party to the arbitration, the arbitration would be subject to the U.S. Freedom of Information Act, which implies that "access to key materials, such as memorials and counter-memorials... [could] be obtained through an application" under the Act. Therefore, IISD submitted "the petitioner is requesting no more that it is entitled to under applicable U.S. legislation." Finally, IISD stressed that "there is no general principle of confidentiality that stands in the way of this Petition." In this respect, IISD relied upon the Metalclad decision that recognized that such a general principle is found in none of NAFTA, the ICSID (Additional Facility) Rules, the UNCITRAL Rules, nor in the draft Articles on Arbitration adopted by the International Law Commission. IISD also cited S.D. Myers v. Canada, which, like Metalclad, denied the existence of a general principle of confidentiality. The S.D. Myers tribunal recognized:

...whatever may be the position in private consensual arbitration between commercial parties, it has not been established that any general principle of confidentiality exists in an arbitration such as [this]...The main argument in favour of confidentiality is founded on a supposed implied term in the arbitration agreement. The present arbitration is

243 See Methanex, supra note 231 (Petitioner’s Final Submissions) (16 October, 2000) at 24.
244 See Methanex, supra note 231 at 5.
246 See Methanex, supra note 231 at 6.
247 Ibid.
248 See Methanex, supra note 231 at 25.
249 See Metalclad, supra note 216.
taking place pursuant to a provision in an international treaty, not pursuant to an arbitration agreement between the disputing parties.\textsuperscript{251}

\textbf{The United States Submissions:} The U.S., while supporting the \textit{amicus} participation in the arbitration, found it necessary to address the issue of confidentiality.\textsuperscript{252} Recognizing that the issue of whether or not the arbitration at issue “is deemed confidential is irrelevant to the issue of participation by \textit{amici},”\textsuperscript{253} it noted that the Methanex arbitration is “fundamentally different [in] nature than a typical international commercial dispute.”\textsuperscript{254} Relying on the \textit{Esso} decision, the U.S. noted how “arbitrations against a government-for that reason only-have a public interest component different from purely private arbitrations.”\textsuperscript{255} Furthermore, the U.S. stated that Chapter 11 cases such as this one are “even [different] from commercial arbitration involving a public entity, because they go beyond the breaches of commercial contracts and implicate core governmental functions.”\textsuperscript{256} Indeed, the U.S. argued that Articles 1126(10)\textsuperscript{257} and 1137(4)\textsuperscript{258} of NAFTA, together with Annex 1137.4 “demonstrate that the State Parties expected the substance of each Chapter Eleven disputes and most

\begin{itemize}
\item \textsuperscript{251} \textit{In a NAFTA Arbitration Under the UNCITRAL Arbitration Rules Between S.D. Myers, Inc. v. Canada} (Procedural Order No. 16) (13 May 2000) at 8, cited in \textit{supra} note 231 at 26; emphasis in original.
\item \textsuperscript{252} See Methanex, \textit{supra} note 231 (Statement of Respondent United States of America Regarding Petitions for \textit{Amicus Curiae} Status) (October 27, 2000) [U.S. Statement]; and (Statement of Respondent United States of America in Response to Canada’s and Mexico’s Submissions Concerning Petitions for \textit{Amicus Curiae} Status) (November 22, 2000)[Second U.S. Submissions].
\item \textsuperscript{253} See Second U.S. Submissions \textit{Ibid.} at 3.
\item \textsuperscript{254} See U.S. Statement, \textit{supra} note 252 at 4.
\item \textsuperscript{255} \textit{Ibid.}
\item \textsuperscript{256} See U.S. Statement, \textit{supra} note 252 at 5.
\item \textsuperscript{257} Article 1126(10) of NAFTA, \textit{supra} note 141, provides: “A disputing Party shall deliver to the [NAFTA] Secretariat, within 15 days of receipt by the dispute Party, a copy of: (a) a request for arbitration made under...the ICSID Convention; (b) a notice of arbitration made under...the ICSID Additional Facility Rules; (c) a notice of arbitration given under the UNCITRAL Arbitration Rules.”
\item \textsuperscript{258} Article 1137(4) stipulates that Annex 1137.4 applies to publication of an award. Annex 1137.4 states that where Canada or the United States is the disputing Party, either Canada or the United States, as appropriate, or a disputing investor that is a party to the arbitration may make an award public. Where Mexico is the disputing Party, the applicable arbitration rules apply to the publication of an award. See NAFTA, \textit{supra} note 142.
\end{itemize}
awards to be made available to the public."259 It then invited the tribunal to look to the
Esso case that recognized that privacy of the proceedings does not imply confidentiality
as an essential attribute of the arbitral proceedings.260 Finally, the U.S. stressed that the
confidentiality order does not prohibit the petitioners from receiving relevant documents
generated during the arbitration. Indeed, "it specifically envisage[d] that important
documents generated during the course of the arbitration will be releasable immediately
to the public and that the remainder would be releasable pursuant to lawful requests
under the U.S. Freedom of Information Act."261

**The tribunal's decision:** In its decision, the tribunal, after a detailed
consideration of its power under Article 15(1) of the UNCITRAL Rules, reached the
conclusion that it had jurisdiction to address the petitions for *amicus* standing.262 While
considering that it could be appropriate to allow *amicus* submissions from the
petitioners in the arbitration at issue, the tribunal nonetheless held that it was premature
to determine whether such submissions would actually be of assistance, and reserved
the right to make its final determination on the petitions at a later stage of the
proceedings.263 In fact, the tribunal stressed that before definitively deciding on this
matter, it intended to define with the disputing parties procedural limitations as to the
timing, form and content of the submissions.264 The tribunal also rejected the
petitioner’s request to receive all the materials generated within the arbitration, given
the existence of a confidentiality agreement between the parties settling the issue.265

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262 See Methanex, *supra* note 231 at 31 and 53.
Finally, the Tribunal found that since the parties were not in agreement on the issue of the petitioners' attendance at hearings, under Article 25(4) of the UNCITRAL Rules, the petitioners must be excluded.266

In January 2003, the petitioners presented a motion to the tribunal seeking for an order setting out the modalities for their participation as *amicus curiae* in the arbitral proceedings.267 Despite the petitioners' solicitation, the tribunal has not yet made a decision because the disputing parties have not reached an agreement on whether *amici* submissions should be limited to legal issues or extended to the factual ones as well.268

In its decision on the admissibility of *amicus curiae* submissions, the tribunal refused to make a determination on the existence and scope of an implied duty of confidentiality, given the existence of a confidentiality agreement between the parties.269 It nonetheless recognized the uncertainty surrounding the issue of confidentiality and concluded:

As to confidentiality, the Tribunal notes the conflicting legal materials [the *Bulbank*270, *Esso*271 and *Cockatoo Dockyard*272 decisions on one hand; the *Ali Shipping*273 case on the other] as to whether Article 25(4)...imposes upon the Disputing Parties a further duty of confidentiality (beyond privacy) in regard to the materials generated by the parties within the arbitration.274

In conclusion, it is not clear from the tribunal’s analysis if or how *amici* authorized to make submissions to the tribunal should access materials generated within

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266 *Ibid.* at 41-42.
267 See *Methanex, supra* note 231 (Joint Motion to the Tribunal Regarding the Petitions for *Amicus Curiae* Status) (January 31, 2003).
268 Methanex recently requested the tribunal to limit *amicus curiae* submissions to legal issues raised by the parties as opposed to factual issue. See *Methanex, supra* note 231 (Claimant Methanex Corporation's Request to Limit *Amicus Curiae* Submissions to Legal Issues Raised by the Parties) (15 April, 2003). Shortly thereafter, the U.S. responded to Methanex’s request, arguing that *amici* should be permitted to comment on factual issues, since their perspective on factual issues can be to the tribunal as valuable as the *amicus* perspective on the law. (Response of Respondent United States of America to Methanex’s Request To Limit *Amicus Curiae* Submissions To Legal Issues Raised By The Parties) (15 April, 2003).
269 See *Methanex, supra* note 231 at 46.
270 See *Bulbank, supra* note 168.
271 See *Esso, supra* note 168.
272 See *Cockatoo Dockyard, supra* note 199.
273 See *Ali Shipping, supra* note 164.
274 See *Methanex, supra* note 231 at 43.
the arbitration when the confidentiality agreement is defective or absent. The tribunal has dealt with the issue of confidentiality and disclosure on a procedural rather than substantive level, simply concluding that it had no power to dispose of the matter. Nonetheless, the tribunal still found it necessary to address substantive matters such as the public policy considerations stressed by the petitioners and it also displayed appreciation for the public interest in the disputed case. It ultimately found in favour of disclosure over secrecy by stating:

There is undoubtedly public interest in this arbitration... [It] arises from its subject-matter, as powerfully suggested by the Petitions. There is also the broader argument, as suggested by the Respondent and Canada: the Chapter 11 arbitration process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal’s willingness to receive amicus submissions might support the process... whereas a blanket refusal could possibly do harm.  

This decision, similarly to the others discussed above, is not completely satisfactory, since it simply confirms that the public interest can bear on the level of confidentiality characterizing an arbitration involving a state, but it is not conclusive on the modalities of such an influence.

(iv) The U.P.S. case

Another NAFTA Chapter 11 tribunal was recently confronted with the issue of third party participation and solved it in the affirmative. In January 2000, United Parcel Service of America Inc. (U.P.S.) initiated arbitration proceedings against Canada under the UNCITRAL Rules of Arbitration. In 2001, the Canadian Union of Postal Workers, a trade union, and the Council of Canadians, a non-governmental

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275 Ibid. at 49.
276 U.P.S. claims that Canada breached NAFTA Articles 1102 and 1202 (National Treatment), 1105 (Minimum Standard of Treatment), 1502(3)(a) and 1502(3)(d) (Monopolies and State Enterprises) and 1503 (State Enterprises). See United Parcel Service of America Inc. v. Government of Canada [U.P.S.] (Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae), (17 October 2001), available online at <www.naftalaw.com>
organization, (together, "the petitioners") petitioned the U.P.S. Tribunal for permission to participate in the arbitration as parties, or, in the alternative, as amici curiae. The petitioners also sought the right to make submissions concerning the place of arbitration and the scope of the Tribunal's jurisdiction; finally, they sought to receive copies of all of the Parties' documents.

In support of their application, the petitioners argued that they had a direct interest in the subject-matter of the arbitration, whose outcome could adversely affect them, as well as an interest in the broad public policy implications of the dispute. They further argued that their expertise on the issues raised by the claim would be of assistance to the tribunal and would provide it with a different perspective of the questions before it. The tribunal, in agreement with both Canada and U.P.S., recognized that it had no jurisdiction to grant party status to the petitioners and rejected their request to participate to the arbitration as parties.

As for the request to obtain amicus standing, the tribunal declared that it is within the scope of article 15(1) of the UNCITRAL Rules to receive submissions offered by third parties. Citing the decision in Methanex, the tribunal concluded that permitting amici submissions is "a matter of its power rather than of third party right." The tribunal noted:

[The] powers [conferred on the Tribunal by Article 15(1)] are to be used to facilitate the Tribunal's process of inquiry into, understanding of, and resolving, that very dispute which has been submitted to it in accordance with the consent of the disputing parties.
Consequently, the tribunal did not find it appropriate for the petitioners to make submissions on the place of arbitration or the jurisdiction of the tribunal.\textsuperscript{283}

Similarly to the \textit{Methanex} tribunal, the \textit{U.P.S.} tribunal held that third parties were prevented to attend oral hearings, because of the lack of an agreement between the parties as requested by article 25(4) of the UNCITRAL Rules.\textsuperscript{284} With respect to the “difficult question of the confidentiality of the pleadings and other documents generated in the course of the proceedings,” the tribunal concluded that the issue has not yet been settled by an agreement between the parties or an order.\textsuperscript{285} It nonetheless admitted:

\begin{quote}
While principles of transparency may support the release of some of the documentation, that is not a matter which can be the subject of a general ruling. Some documentation may be available in the public domain, through any agreement or confidentiality order that might be made, or otherwise lawfully.\textsuperscript{286}
\end{quote}

Ultimately, this decision does not offer much guidance on either the theoretical or practical side. First, it does not answer the question of what provisions would provide a basis for determining whether or not \textit{amici} should access documents generated during the hearings in the absence of an order or agreement between the parties. Secondly, and with respect to the actual scope and modality of \textit{amici} participation, the tribunal did not reach any specific conclusion\textsuperscript{287} but limited itself to stating that “the circumstances and the detail of the making of any amicus submissions” will be determined following consultation with the parties.\textsuperscript{288}

\begin{footnotesize}
\begin{enumerate}
\item Ibid. at 71.
\item Ibid. at 67.
\item Ibid. at 68.
\item Ibid.
\item It is worth noting that the tribunal has recently issued the first procedural directions on the modalities for the making of written submissions by \textit{amici}. See \textit{supra} note 276 (Procedural Directions for Amicus Submissions) (4 April 2003).
\item See \textit{U.P.S.}, \textit{supra} note 276 at 72.
\end{enumerate}
\end{footnotesize}
(v) Conclusions on the NAFTA Cases

By examining the NAFTA Chapter 11 decisions that addressed the issue of confidentiality and public interest, two points can be made. First, all tribunals confronted with the issue uniformly acknowledged the public dimension and broad public policy implications of investor-state arbitrations arising from a treaty base rather than from private contract. In doing so, the tribunals seemed to imply, more or less openly, that in this type of arbitrations there is no room for a presumption of confidentiality. Indeed, their approach may carry the potential to transform the public interest exception into a general rule.

Secondly, while all the decisions on amici participation were based on the powers conferred to the tribunals by the procedural rules governing the arbitrations, so far none of the tribunals has used these powers to issue guidelines and indicate selective criteria to which amici submissions should accord in order to be considered. Finally, it is worth noting that, while accepting the amicus briefs on the basis of their discretion, no tribunal has yet relied on them to reach their final findings.

Section III- Public Interest Exception

In light of the analysis of the case law from national jurisdictions and the NAFTA Chapter 11 tribunals, one sure proposition can at least be attempted: that a public interest exception to confidentiality can and does operate in the context of mixed arbitration. Nonetheless, the conditions necessary to invoke it and the extent to which it influences the degree of confidentiality informing the arbitral proceedings has yet to be refined. At present, given the inclination of both courts and arbitral tribunals to take into consideration the public dimension of disputes involving states while deciding on
matters of confidentiality, it appears safer for the concerned parties to assume the potential interest of the public in the arbitration rather than presume its confidential nature.

Paraphrasing two authors who a few years ago were addressing the status of a general duty of confidentiality in international commercial arbitration,\(^{289}\) it might be said that the public interest exception is an exception in *statu nascendi*. Certainly, future decisions will be integral to illuminate this exception’s range of application. To understand the way in which the presence of a public actor in international arbitration can motivate the determination that information formerly agreed or expected to be confidential instead falls into the public domain it is useful to consider some of the factors that may weigh on the future elaboration of the public interest exception. This final section will focus on examining both the factors that would favour the widening of the notion of public interest and those that would suggest a more restrictive interpretation thereof.

**A. Factors in Favour of Expanding the Public Interest Exception**

**1. The Increasing Expectation of Public Participation and Democratic Governance**

One of the most important factors that would tend to expand the notion of a public interest exception to confidentiality is the increased expectation of public participation in governance. The growing spread of democratic governments\(^{290}\) coupled

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\(^{289}\) "...a general duty of confidentiality cannot be said to exist *de lege lata* in international arbitration. At best, it is a duty in *statu nascendi.*” Paulsson & Rawding, *supra* note 169.

\(^{290}\) According to a survey conducted by Freedom House in 2000, 40.7% of the world’s peoples are living in “free societies”, 23.8% were "partly free" and 35.5% are “not free”. Stein, *supra* note 12.
with a progressive globalization of economy.\textsuperscript{291} has contributed to sensibly change the relationship between the state and its constituencies at both the national and the international level. In the past several decades, the long-standing primacy of the nation-state and the traditional notion of absolute sovereignty have been eroded by, firstly, the emergence of international organizations to which those nation-states have increasingly surrendered important elements of national authority\textsuperscript{292} and, secondly, the progressively significant proliferation and activism of NGOs—pressure groups that effectively act on behalf of the public interest.\textsuperscript{293}

Furthermore, advancements in technology and the consequent increase in the connectedness between peoples, as well as the generalized acceptance of democratic values, have all contributed to deepen the participation by individual citizens to political governance and to subsequently strengthen the role of private actors in the international policy arena—an arena that was once exclusively the domain of the states. Individuals have become increasingly recognized as subjects and participants of international law and have been accorded legal rights, especially under the international and regional human rights systems.\textsuperscript{294}

On the basis of widespread acceptance of the notion of democratic government, domestic constituents and transnational actors are progressively claiming their right to public participation in the institutions and organizations whose decisions will directly

\textsuperscript{291} Globalization, commonly defined as "denationalization of clusters of political, economic and social activities" undermines the ability of the sovereign state to control activities in its own territory, increasing the need of transnational regulatory coordination in order to solve global problems on an international level. Nowrot, \textit{supra} note 13.


\textsuperscript{293} Steve Charnovitz, "Two Centuries of Participation: NGOs and International Governance" (1997) 18 Mich. J. Int'l L. 183 (illustrating the increased role played by NGOs in international decision-making and judicial processes).

\textsuperscript{294} Stein, \textit{supra} note 12.
affect them. This notion of public participation is rooted in the international relations theory of liberalism, according to which "nations are not conceived of as autonomous, self-maximizing actors, nor are they the ultimate subjects of international law. Rather, private actors are the essential players in international society who, in seeking to promote their own interests, influence the national policies of States." Moving away from the state-centric theory of realism, which traditionally posited the preeminence of states in the international realm, this modern theory recognizes the increasingly important role played by individuals in the formation, shaping and maintenance of regimes and rules. Complementary to this concept of public participation are the standards of transparency and openness in those processes wherein participation is sought. Governments are now expected to be open to public scrutiny and to allow for the public to be informed about the activities in which they are engaging.

The expectation of public participation to governance certainly bore on both the Esso and Cockatoo Dockyard decisions from the Australian courts, but it is in the context of the NAFTA Chapter 11 arbitrations that it has been most fully acknowledged. The decision to permit third parties to participate to the arbitral proceedings by virtue of written submissions in the Methanex case has been directly

linked by that tribunal to an appreciation of the benefits that greater openness and transparency can confer to the NAFTA arbitration process.

2. NAFTA Chapter 11 Accusations of Lack of Transparency and Recent Developments

Although NAFTA arbitrations are peculiar in that they deal with a claim brought by a private party against a state pursuant to a trilateral treaty rather than an arbitration agreement, they still offer a clear indication of the growing recognition of a moral expectation of public participation nurtured in modern societies. The NAFTA tribunals’ decisions on confidentiality must also be contextualized in the ambit of the internal criticism repeatedly brought against the investor-state arbitration under Chapter 11.299 In recent years concerns have been raised in relation to the confidentiality and privacy of arbitral proceedings, features which are perceived as incompatible with the nature of disputes arbitrated under Chapter 11.

The arbitration process has often been accused of being unduly secretive and lacking in public participation,300 both characteristics that are considered as undesirable “given that such arbitration is being used to interpret public international law, in whose meaning many parties have a stake and that many of the interpretative issues before the tribunal relate to the relationship of investor rights to domestic public policies.”301 Some of the concerns surrounding the transparency of the arbitral process appear to be well-founded. The early stages of the Chapter 11 dispute mechanism offer limited public access and the only mandatory public notification or disclosure during the

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299 Eastman, supra note 10.
Chapter 11 claim process concerns the notice of arbitration, which officially begins the arbitration process.\(^{302}\)

Under article 1126(10), the claimant is required to notify the NAFTA Commission Secretariat of its desire to convene an arbitral panel. Article 1126(13) provides that the NAFTA Secretariat must publish this notice on a public register, a public register that can only be accessed by visiting the Secretariat Office. Nonetheless, NAFTA parties are not bound by any provision to publicly release the notice of intent to arbitrate, which may open an optional phase of consultations and negotiations.\(^{303}\) Although there is no legal restriction preventing the state claimed against to disseminate the notice of intent or the content of consultations, it is interesting to note that governments have generally been reluctant to do so.\(^{304}\) As a result of this attitude, it is not practically feasible to determine the exact number of notices of intent to arbitrate currently pending. Furthermore, only Canada and the United States have the right to disclose an award made against them without the consent of the investor, whereas when Mexico is party to the dispute the applicable arbitration rules\(^{305}\) will apply, which uniformly require the consent of both parties.\(^{306}\)

In response to public concerns regarding the lack of transparency that characterizes the arbitration process, the NAFTA parties have begun to undertake positive steps to facilitate public access and ensure greater openness of the

\(^{302}\) NAFTA art. 1120, see supra note 142.

\(^{303}\) Ibid., art. 118.


\(^{305}\) NAFTA Article 1137(4), see supra note 258.

proceedings. In July 2001, the Free Trade Commission adopted an Interpretative Note with respect to confidentiality duties of the Parties. The note, which is binding on arbitral panels, provides in part as follows:

Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to Chapter Eleven arbitration, and, subject to the application of Article 1137(4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal.

In application of the foregoing: ... the NAFTA Parties agree that nothing in the relevant arbitral rules imposes a general duty of confidentiality or precludes the Parties from providing public access to documents submitted to, or issued by, Chapter Eleven tribunals, apart from the limited specific exceptions set forth expressly in those rules.

Each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of:

- confidential business information;
- information that is privileged or otherwise protected from disclosure under the Party's domestic law; and
- information that the Party must withhold pursuant to the relevant arbitral rules, as applied.

Although the note does not address the openness of oral hearings or access to documents relating to the early stages of a NAFTA arbitration case, it clearly states the commitment of NAFTA parties to a more open and accountable process.

The tribunal's decisions allowing for amici participation in the Methanex and U.P.S. cases represent a cautious yet encouraging step towards making the arbitral process under Chapter 11 more transparent and publicly accountable. Even though it

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307 It is worth noting that both Canada and the United States have begun to make more information related to arbitration under Chapter 11 publicly available on their government websites. Canada's website of Department of Foreign Affairs and International Trade (<http://www.dfait-maeci.gc.ca/tna-nac/menu-en.asp>) and the US Department of State (<http://www.state.gov/s/l/c3439.htm>) website contain many of the documents filed in the cases to date, including transcripts of the hearings, parties' claims and responses as well as awards. Also, a wealth of information is available on various private web sites maintained by the investors, their counsel and others.

308 "Notes of Interpretation of Certain Chapter 11 Provisions", issued by the NAFTA Free Trade Commission on 31 July 2001, available online: Foreign Affairs and International Trade Canada <http://www.dfait-maeci.gc.ca/tna-nac/> When the Free Trade Commission established under NAFTA has interpreted a provision of NAFTA, the interpretation is binding on an arbitral tribunal (NAFTA Article 1131).
cannot be assumed that the conclusions reached by NAFTA tribunals will be shared by other arbitral tribunals convened pursuant to an arbitration agreement, they show the increasing influence that the pressing expectation of public participation can exercise towards reducing the overall level of confidentiality in mixed arbitration.

3. The Existence of Legal Rights to Public Participation

Beyond the moral expectation to public participation, it can also be argued that individuals carry a positive legal right to be actively involved in governance. The individual’s right to participate in government has been recognized by several multilateral instruments. These instruments guarantee the right to political participation at different levels, and set out standards to which signatories must conform in order to ensure this participation. One of the most important multilateral instruments in this sense is the *International Covenant on Civil and Political Rights*.\(^{309}\)

This Covenant, to which 147 states are party, represents the most widely subscribed treaty providing for participatory rights. Article 25 of the Covenant establishes that “Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives…”\(^{310}\) Since subsection b) of article 25 specifically addresses the right to genuine and periodic elections, subsection (a) can be read as referring to “additional means of influencing public policy.”\(^{311}\)

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\(^{310}\) *Ibid.*  
With respect to article 25, the Human Rights Committee of the United Nations has stated that the article “covers all aspects of public administration, and the formulation and implementation of policy at international, nation, regional and local levels.” This expansive interpretation of Article 25 is consistent with the drafters’ original intentions as expressed in the early version of the article, which read: “Every citizen shall have the right to take part in the government of the State.” Therefore, the existence at the international level of legal obligations made by the states to ensure the right to public participation seems to argue in favour of restraining the level of confidentiality in mixed arbitration and to confer legal grounds to a public interest exception thereof. The right to be informed of the activities in which a government is engaging might not just be founded in the moral expectation of public participation, but might also originate from the obligations assumed by the state in that regard.

B. Factors in Favour of Restricting the Public Interest Exception

1. Protection of Trade Secrets and Proprietary Commercial Information

A factor that would tend to limit the scope of application of the public interest exception is the desire to guarantee adequate protection for the trade secrets and proprietary information of private parties to arbitration. When intellectual property is involved, the need to protect this type of information represents a strong argument in favour of maintaining a higher level of confidentiality in arbitral proceedings during

which it is produced. If the information at issue is secret in nature, the grounds upon
which disclosure may be allowed tend to be sensibly reduced. The notion of secrecy is
not longer susceptible to different interpretations varying from a country to another due
to the entry into force of the Agreement on Trade-Related Aspects of Intellectual
Property Rights (TRIPs).314

Article 39 of the TRIPs thoroughly defines the concept of secret information and
provides protection so long as the information is “secret in the sense that it is not ... generally known among or readily accessible to persons within the circles that normally
deal with the kind of information in question;”315 has commercial value relating to its
secrecy;316 and “has been subject to reasonable steps under the circumstances ... to keep
it secret.”317 If all these conditions are met, owners of secret information “shall have the
possibility of preventing [the] information...from being disclosed...without their
consent...”318 Therefore, owners of trade secrets and other proprietary commercial
information are granted the possibility of preventing disclosure of their secret
information when they are dealing with a government that is a member of the World
Trade Organization (WTO). If a state that is not a party to the WTO seeks disclosure of
the private party’s intellectual property revealed in the arbitral proceedings, the matter
must then be settled according to the law applicable to the arbitration and the law
applicable to protection of trade secrets.319 Given the great number of states that are

314 Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994,
January 1995).
315 Ibid. at Art. 39(2)(a).
316 Ibid. at Art. 39(2)(b).
317 Ibid. at Art. 39(2)(c).
318 Ibid. at Art. 39(2).
parties to the WTO\textsuperscript{320} and have thus assumed the obligation to protect trade secrets, this remains a remote possibility.

However, the special consideration deserved by trade secrets and other intellectual property rights when involved in arbitration is confirmed by the detailed provisions devoted to the protection of their confidentiality by the World Intellectual Property Organization (WIPO) Arbitration Rules.\textsuperscript{321} The WIPO rules specifically define confidential information and set out the procedure for a party invoking confidentiality in which the arbitral tribunal may determine whether or not the information is to be classified as confidential.\textsuperscript{322} Chapter VII of the WIPO Rules thoroughly deals with confidentiality, regulating the various elements of the arbitral proceedings separately: the disclosure of the existence of arbitration, disclosures made during the arbitration, confidentiality of the award and confidentiality to be observed by the arbitrator and the Center.\textsuperscript{323} The WIPO rules also expressly specify on whom the duty to maintain confidentiality is imposed—namely, the parties (Articles 73-75), any

\textsuperscript{320} As of April 2003, 143 states Members of the WTO.
\textsuperscript{321} The World International Property Organization (WIPO) is an international organization dedicated to promote the use and protection of intellectual property. The WIPO Arbitration and Mediation Center was established in 1994. The WIPO Arbitration rules are available at \url{<http://arbiter.wipo.int/arbitration/rules/index.html>}.
\textsuperscript{322} \textit{Ibid.} Article 52. Article 52 (d) provides for the tribunal to designate, on request of the party and in special circumstances, a confidentiality advisor who will determine in lieu of the party whether the information is to be classified confidential and to whom it may be disclosed.
\textsuperscript{323} Art. 73 (disclosure of the existence of arbitration), the exceptions for the disclosure are: when is required by law; by a regulatory body; for satisfying an obligation of good faith or candor owed to a third party. The limitations are: disclosing no more than is legally required; furnishing details of the disclosure and reason for it. Art. 74 (disclosure made during arbitration), the exceptions are: consent of the party; order of a court. Art. 75 (disclosure of the award), the exceptions are: parties’ consent; action before a national court or other competent authority; legal requirement imposed on the party; protection of a party’s legal rights against a third party. Art. 76 (disclosure made by the Center and arbitrator), the exceptions are: disclosure necessary in connection with a court action relating to the award; required by law. \textit{Ibid.} For an analysis of the WIPO Rules of Confidentiality see Hans Smit, “Confidentiality: Article 73 to 76” (1998) 9 Am. Rev. Int’l Arb. 233. See also, Camille A. Laturno, “International Arbitration of the Creative: A Look at the World Intellectual Property Organization’s New Arbitration Rules” (1996) 9 Transnat’l Law. 357.
witnesses (Article 74(b)), and both the arbitrator and the Center (Article 76). Any party to mixed arbitration requested to release proprietary information may invoke high standards of disclosure similar to the ones provided for by the WIPO Rules to protect the information.

2. The Risk of Politicizing the Dispute

Probably the most compelling argument in favour of a restrictive view of the public interest exception is the need to preserve a non-politicized atmosphere for the resolution of a dispute between a state and a private party. Especially in the context of investment disputes, the main risk implicit in opening up the arbitration process and make it more available to public scrutiny is of politicizing the disputes and thereby defeating one of the primary purposes of investor-state arbitration. The rationale of the preference accorded by the majority of international investment treaties to investor-state arbitration rather than state-to-state arbitration historically rests heavily on the need to place the foreign investors and the host states on a more equal footing by removing investment disputes from “the political realm and put[ting] them more into the realm of commercial arbitration.”

Before the instrument of investor-state dispute resolution was adopted, since the investors lacked any standing under international law, investment disputes were matters resolved exclusively by the states. This practice was rooted in the “doctrine of espousal”. According to this doctrine, any injury to the investor or its property, if not remedied by the national courts of the host state, was considered an injury to the investor’s home state. The state of the injured investor was thus entitled to bring a

324 Price, “Safety Valve”, see supra 147.
claim against the host state, and if there was no forum in which the claim could be brought then the foreign sovereign could unilaterally take measures against the injuring state on the basis of a breach of international law. 326

The classical doctrine of espousal was reflected in early investment treaties, under which if private investors were subjected to measures inconsistent with the treaty obligations, the investors had to rely on their home government to process its claim. 327 The state was under no obligation to bring the claim on behalf of its national and the state’s decision on whether or not to initiate the investment dispute was not always based on the merits of the claim, but rather often contaminated by political considerations. Indeed, legitimate and meritorious claims could be downgraded or even ignored by home governments, whenever political calculations or the need to preserve the diplomatic relation with the host state were prevailing. 328

The rise of BITS, followed by the NAFTA, radically changed the regime for investor protection by introducing the concept of investor-state arbitration. By thus empowering the investors to directly seek redress of their claim without having to wait for their own state to espouse their claim, the investor’s home government can now distance itself from the dispute. 329 Consequently, the dispute can be resolved in a way that does not involve “the political organs of the two states” 330 and the investor’s claim

327 See Jones, supra note 325.
328 Charles N. Brower and Lee A. Steven, “NAFTA Chapter 11: Who Then Should Judge?: Developing the International Rule of Law under NAFTA Chapter 11” (2001) 2 Chi. J. Int’l L. 193. The author defines the process by which a government decides on the opportunity to bring an investor’s claim against the host state as “politically explosive”.
can “be decided on the merits and [is] not [to] be subsumed within a larger political or foreign relations dialogue between its government and the host government.”\textsuperscript{331}

Therefore, the level of confidentiality normally permeating the arbitral process appears to be consistent with the intent motivating the switch from a state-to-state to investor-state arbitration. The maintenance of confidentiality has the ability to shield the process from disruptive influences and to confine it to the actual dispute at issue and to its parties. By lowering the degree of confidentiality in mixed arbitration, the risk is that the integrity of the arbitral forum may be lost. Public attention may affect the parties’ attitudes, possibly compelling them to assume certain stands that are popular or politically advisable at the time. This legitimate concern suggests a restrictive interpretation of the public interest exception and should always be taken into consideration when deciding to what extent the level of confidentiality can be sacrificed.

C. Conclusions

This examination of the risks and benefits associated with greater openness and public access to mixed arbitration highlights the complexity of the evaluations that are needed to reconcile the conflicting values behind confidentiality on one side and transparency on the other side. Moreover, it confirms the undesirability of a generic notion of the public interest exception, an exception that must not be supported unconditionally and justified at any price. Courts and tribunals that will deal with the interplay of confidentiality and a public actor’s participation to arbitration face the delicate task of balancing different and competing values. A concerted comparison of

\textsuperscript{331} Price, “Some Observations”, \textit{supra} note 326.
the conflicting interests at stake will continue to be necessary in order to determine when and under what specific circumstances disclosure should be favoured over secrecy.
Conclusions

Conceptually, public interest and confidentiality are alternative values that tend to exclude each other. These notions remain at opposing ends of the spectrum of values involved in mixed arbitration, an opposition that reflects, and is the result of, the intrinsically diverse natures of the parties to mixed arbitration. This public interest/confidentiality dichotomy cannot simply be the object of theoretical inquiry, for it would be inappropriate to establish an a priori hierarchy by virtue of an abstract comparison between the two values. Their importance needs to be assessed and tested in practice in order to ascertain which value deserves to prevail over the other, and to what extent. To this end, and as a theoretical premise, it is useful to differentiate between arbitrations pursuant to NAFTA Chapter 11 and the ones that originate in a purely private agreement to arbitrate.

The former calls for separate attention and consideration in that the NAFTA arbitrations, like most investor-state arbitrations, are uniquely characterized by a mixture of commercial and non-commercial interests. Private and commercial interests intersect with public and regulatory interests because investment disputes typically concern a host state’s domestic regulations, which are challenged by an investor claiming that the regulatory action has been taken at the expense of its private interests. In order to pursue their goal of creating “a predictable commercial framework for business planning and investment,” the NAFTA parties needed an efficient and predictable means of dispute resolution that produced enforceable outcomes.

Although the NAFTA parties chose to submit Chapter 11 proceedings to the legal framework of international commercial arbitration, this choice did not necessarily
eliminate the existence of both commercial and non-commercial elements in the
disputes that were to be resolved through arbitration. It is precisely the non-commercial
dimension of these disputes that may establish the basis for a positive right to public
participation in this type of mixed arbitration. This right should be recognized not only
with respect to arbitrations occurring pursuant to a public law treaty, such as the
NAFTA, but also in the ones that arise from provisions in commercial contracts,
whenever they entail public policy ramifications. When the arbitration bears upon
matters of application and interpretation of public policy, the interest of the public in
being informed of the progress and outcome of the arbitration seems to legitimize a
restriction of the confidentiality originally envisaged by the parties.

Relying upon the *acta iure imperii* and *acta iure gestionis* distinction applied to
matters of sovereign immunity, it could be said that when the arbitration revolves
around acts of public authority it automatically becomes a matter of public concern, and
the same nature-of-activity test could then be applied to settle issues of confidentiality.
This could be a constructive approach to the process of identification of the conditions
that could trigger the public interest exception to confidentiality.

Whenever the nature of the state's activity involved in the arbitration is found to
be *iure imperii*, the public interest exception should become operational and the
confidentiality surrounding the arbitral proceedings should be reduced to accommodate
the legitimate interest of the public. In investment disputes, the investor's claim is
brought against the host state's *acta iure imperii*, a circumstance that should not
necessarily render the state party immune from whatever degree of confidentiality
contracted for, but that should neither be overlooked. To this end, the public interest
could be satisfied through, at least, allowing the interested third parties to participate to
the arbitral process by means of written submissions. In this way, the expectation of
public participation would be fulfilled without compromising the privacy of the arbitral
hearings. With respect to the material generated or produced during the arbitration, the
scope of its disclosure, if sought, should firstly rest on the agreement of the parties. In
the absence of such an agreement, the tribunal should always settle the matter in
consultation with the parties, possibly avoiding the dissemination of every piece of
information, but rather limiting it to that information that has been ascertained to be of
actual public interest.

It would certainly be desirable for the NAFTA Free Trade Commission to issue
another interpretative note to further qualify the prerequisites and modalities of public
participation in the form of amici submissions. Such a note would be beneficial for two
reasons. Firstly, it could provide future tribunals with greater guidance on the aspect of
accessibility of documents by amici that have been authorized to submit briefs to the
tribunal. After all, while all the tribunals that have dealt with this issue so far have
clearly stated that no duty of confidentiality is inherently attached to NAFTA
arbitrations, they have all denied access to materials and documents filed by the parties
regardless of the existence of an actual agreement to that effect. This contradiction
should be resolved since it is easily predictable that amici will continue to seek the right
to make submissions in conjunction with the right to access the parties' documents, by
claiming the importance of such access for the purpose of making their submissions
more effective and pertinent to the case. Therefore, it is imperative that it be
determined whether the denial of public access to the parties’ documents will rest on a contractual basis (the agreement of the parties) or the tribunal’s procedural powers.

The second reason why an interpretative note setting out guidelines for amici participation would be beneficial is its potential to protect future tribunals from possible accusations of their engagement in decisions that exceed their procedural powers. The tribunals were called on to adopt procedures that minimized the parties’ burden in meeting amici submissions and avoided disrupting the arbitration, and they all, in their final considerations, emphasized the importance of putting limits to these submissions. These limits might not be simply procedural, such as the length of the submissions, since these tribunals may also define, based on their discretion, other criteria that should be met in order to participate in the process, such as the source of financing of the NGO or what kind of specific contribution, factual or legal, it is expected to make to the dispute. The exercise of this discretion may attract criticism from time to time, and an official note confirming the tribunals’ powers in that sense would place them in a safer position to make those decisions that would provide the tribunals with beneficial assistance from third parties beyond that brought by the disputing parties.

As for all the types of mixed arbitrations that are different from those convened under NAFTA, a case-by-case evaluation of each situation would be preferable. A general public interest exception to confidentiality is every bit as undesirable as would be an absolute rule of confidentiality. Only a specific appreciation of all the circumstances surrounding a particular case would illuminate when the relative importance of making arbitration proceedings transparent is to prevail over the parties’ interest in keeping their proceedings secret. This kind of careful consideration would
also suggest what particular element of the arbitral process is of actual interest for the public and at what stage of the arbitration should disclosure be allowed.

The public interest is easily recognizable with respect to the final award once it has been rendered, but it could be determined that it is far less pressing for the public to know the minutes of the oral hearings, at least when the arbitration is still in progress. Nonetheless, even in the presence of a public interest, disclosure should not be unbounded, and proprietary commercial information that meets the requirements of article 39 of the TRIPs should always be protected. In all other cases, the information should be made available to the public only as long as it bears on aspects of public policy or public law since, having considered all the pertinent issues, it is only under these conditions that sacrificing the parties’ interests in confidentiality would appear to be justified.
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