THE *ORDRE PUBLIC* DIMENSIONS OF CONFIDENTIALITY AND TRANSPARENCY IN INTERNATIONAL ARBITRATION: EXAMINING CONFIDENTIALITY IN THE LIGHT OF GOVERNANCE REQUIREMENTS IN INTERNATIONAL INVESTMENT AND TRADE ARBITRATION*

*Florentino P. Feliciano***

I. CONFIDENTIALITY AS A PERSPECTIVE IN INTERNATIONAL ARBITRATION

Arbitration, often considered as an alternative to regular court proceedings, capitalizes on being a less public venue than the latter, thereby lending support to the general perception that confidentiality is important for the sustainability of arbitration across national borders. The concern for confidentiality was in fact not the main impetus for the establishment of arbitration as a valuable mode of settling disputes. Rather, recourse to cross-border arbitration was moved by the ability to disassociate oneself from a given domestic judicial system and the insistence on party autonomy in determining the rules of law that would govern the relationship between the disputing parties and the resolution of their dispute.

Modern arbitration finds its roots in the capitulation system prevalent in Egypt and other parts of the Ottoman Empire during the 18th century, where European residents in Egypt were exempt from the jurisdiction of the domestic judicial system and subject only to their own consular courts. This was frequently problematic in situations where a dispute involved an Egyptian subject to the domestic judicial system, and a foreigner exempt from the reach of the same system. This was sought to be remedied by the establishment in the late 1800s of Mixed Courts, which had jurisdiction in civil cases involving either Egyptians or foreigners or foreigners of different nationalities. The Mixed Courts had both foreign and Egyptian judges, who administered codes based on French law.[1]

---

* *Cite as* Florentino Feliciano, *The* Ordre Public *Dimensions of Confidentiality and Transparency in International Arbitration: Examining Confidentiality in the Light of Governance*

The factors that led to the rise and development of international arbitration as a preferred mode of contemporary dispute resolution are multiple and complex. One of these factors was the concern of Western multinational corporations over subjection to the jurisdiction of the courts of foreign sovereigns which would of course be applying the law of the foreign sovereign.[2] International arbitration offers the possibility of insulating the foreign corporation, to some degree, from the jurisdiction of the foreign sovereign in whose territory the corporation is operating, by offering an alternative to such jurisdiction.

Confidentiality is now assumed to be a common feature and advantage of international arbitration, and has basically existed for the comfort and convenience of one or both parties in an arbitral proceeding. It prevents the disclosure of allegations made by a party which may be distressing or even offensive to the other. It allows a party to make arguments in private which it may hesitate to make in a forum open to public access.

Requirements in International Investment and Trade Arbitration, 87 PHIL. L.J. 1 (page cited) (2012).

** Senior Associate Justice, Supreme Court of the Philippines (ret.). Former Member and Chairman, Appellate Body, World Trade Organization. Senior Counsel, SyCip Salazar Hernandez & Gatmaitan (Manila).

The extensive assistance rendered by May Ann R. Rosales, Nelson T. Antolin and Jose Florante M. Pamfilo, all of SyCip Salazar Hernandez & Gatmaitan, is gratefully acknowledged. I must also express my appreciation to Jane E. Yu and Rebecca E. Khan, both of the Office of the Solicitor General of the Philippines. These young professionals read this piece and made helpful comments.

This piece was also submitted to Prof. Junji Nakagawa, Professor of International Economic Law, Institute of Social Science, University of Tokyo, for inclusion in a forthcoming volume on Transparency. A small and earlier version of this essay was delivered at the second biennial meeting of the Asian Society of International Law – Tokyo Conference, 2009. Prof. Nakagawa has kindly agreed to my submitting this piece to the collection of centennial lectures by the College of Law, University of the Philippines.

[1] *See* Gabriel Wilner, *The Mixed Courts of Egypt: A Study on the Use of Natural Law and Equity* (1975), *available at* http://digitalcommons.law.uga.edu/fac_artchop/210/; *see also* http://www.britannica.com/EBchecked/topic/180382/Egypt/22385/From-the-French-to-the-British-occupation-1798-1882.

[2] One or both parties in an international arbitration case may have some hesitation in relying totally upon the domestic court system of the respondent state. *See* William Knull, III and Noah Rubins, *Betting the Farm on International Arbitration: Is it Time to Offer an Appeal?*, 2 AM. REV. OF INT'L. ARB. 4, 538 (2000).

The privacy of arbitral proceedings has facilitated and encouraged recourse to arbitration. Privacy means that only the parties, arbitrators, administrator, parties' counsel, and witnesses have right of access to the proceedings, documents, and awards rendered.[3] In this context, confidentiality pertains to the right to know of the existence of an arbitration proceeding, the place of arbitration, the identities of the parties, the subject matter and nature of the dispute, the identities of the arbitrators and their presumed expertise, criteria for resolution (applicable law or *ex aequo et bono*), and the orders and awards.. Furthermore, it means that testimony, documents, and witnesses, among others, are available only to the parties, arbitrators, and other persons designated by common consent of the parties.

Under the present setup of arbitral proceedings, arbitrators have a general duty to observe confidentiality,[4] while the duty of disputing parties to maintain confidentiality depends upon the existence of an express agreement, the arbitration tribunal, the applicable law and procedures, as well as the type of information at issue and the manner in which such information may be used.[5] The duty to observe confidentiality may likewise bind certain third parties, such as lay and expert witnesses, under specific contractual obligations.[6] This system of requiring and maintaining confidentiality is especially valuable for firms or States which place a high premium on business or government secrets and reputation.[7] The confidential nature of arbitral

---

[3] *See* Loukas Mistelis, "*Confidentiality and Third Party Participation: UPS v. Canada and Methanex Corp v. United States",* in INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW, CAMERON MAY 171 (Todd Weiler ed., 2005).

[4] International Center for Settlement of Invest Disputes (ICSID), Rules of Procedure for Arbitration Proceedings ("ICSID Arbitration Rules"), Rule 6, *available at* https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/63.htm.

[5] Cindy G. Buys, *The Tensions Between Confidentiality and Transparency in International Arbitration*, 14 AMERICAN REVIEW OF INTERNATIONAL ARBITRATION 121, 124 (2003).

[6] *Id.* at 123-24; Colin YC Ong, *Confidentiality of Arbitral Awards and the Advantage for Arbitral Institutions to Maintain a Repository of Awards*, 1 ASIAN INT'L ARBITRATION JOURNAL 2, 169 (2005).

[7] Hans Bagner, *The Confidentiality Conundrum in International Commercial Arbitration,* 12(1) ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN 18 (2001); Buys, *supra* note 6 at 123.

proceedings is likewise seen as a positive factor in the facilitation of settlement and in reducing tension between disputing parties.[8]

Actually, few countries, such as the United Kingdom, France, and the Philippines, recognize a general duty of confidentiality in international arbitration. Other countries such as the United States, Australia, and New Zealand reject the notion of a general duty of confidentiality, unless established by applicable law or the *lex arbitri* or by common consent of the parties.

Nevertheless, even where a general duty of confidentiality is recognized in a particular country, such duty is never absolute. In the Philippines, the applicable law allows for certain exceptions, *i.e.* arbitration proceedings[9]--including the records, evidence and the arbitral award--are considered confidential[10] and should not be published, except with the consent of the disputing parties or for the limited purpose of disclosing to the court of relevant documents in cases where resort to the court is allowed.[11]

Where a general duty of confidentiality is widely recognized, certain exceptions or limitations of such duty are also commonly recognized. Notwithstanding the mutual consent of the parties, confidentiality is limited where a legal norm or a regulatory requirement demands the disclosure of facts or evidence that would otherwise be regarded as covered by confidentiality. For instance, documents or other evidence tending to show criminal or illegal activity should be disclosed to law enforcement authorities. The requirements of *ordre public* clearly take precedence over confidentiality in this situation.

---

[8] Christina Knahr and August Reinisch, *Transparency versus Confidentiality in International Investment Arbitration – The* Biwater Gauff *Compromise*, THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 6, 109-110 (2007).

[9] Rep. Act. No. 9285, § 23, § 33 (2004). This law covers both domestic arbitration and international commercial arbitration proceedings.

[10] Note that "confidential information" covers the following: (1) oral or written communication made in a dispute resolution proceeding, including any memoranda, notes or work product of the neutral party or non-party participant; (2) oral or written statements made or which occur during mediation or for purposes of considering, conducting, participating, initiating, continuing or reconvening mediation or retaining a mediator; and (3) pleadings, motions, manifestations, witness statements, reports filed or submitted in an arbitration or for expert evaluation. *See* Rep. Act No. 9285, § 3(h).

[11] § 23. The court in which the action or the appeal is pending may even issue a protective order to prevent or prohibit disclosure of documents or information containing secret processes, developments, research and other information where it is shown that the applicant will be materially prejudiced by an authorized disclosure thereof.

Confidentiality is likewise limited where disclosure is essential in the "interests of justice," such as where injustice to a party in the same or in another case is sought to be prevented.

In national or international arbitration, disputes are resolved by applying one of two possible standards – (a) *ex aequo et bono*, which are generally difficult to reduce to specific and detailed statements and probably best kept concealed or confidential; or (b) a system of applicable law, either agreed upon by the parties or indicated by the conflicts rules of a relevant system of law. Confidentiality seems reasonably appropriate in case (a). However it may hinder the ascertainment of whether or not the applicable law agreed upon by the parties was indeed properly applied by the arbitrators in a particular case if insisted upon too strictly in case (b).

A point of considerable irony should not escape notice: confidentiality is of greater importance in international arbitration processes, while in domestic judicial or quasi-judicial dispute resolution processes, transparency and accessibility have significantly greater scope than confidentiality, at least in national communities characterized by republican and liberal constitutional structures. The Philippines, while a small and developing country, is a good example of the point we here seek to make.[12]

---

[12] Thus, the Constitution of the Philippines lays great stress on the right of the people to be informed on matters of public concern. Article III (7) of the 1987 Philippine Constitution provides that:

"(t)he right of the people to information on matters of public concern shall be recognized. Access to official records and to documents and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law."

The case law of the Supreme Court of the Philippines is to the effect that this provision of the Constitution is "self-executing" and that what may be provided by the legislature are reasonable conditions and limitations upon the access to be afforded, which access must be consistent with the declared State policy of "full public disclosure of transactions involving public interest." See, e.g. Legaspi v. Civil Service Commission, G.R. No. 72119 (1987) and Gonzales v. Narvasa, G.R. No. 140835 (2000).

Philippine Administrative law includes the following noteworthy statutory provisions: (i) Book VII (Administrative Procedure), Chapter 3, (Adjudication), Section 16(1) of the Revised Administrative Code of 1987 provides: "Every agency shall publish and make available for public inspection all decisions or final orders in the adjudication of contested cases." Further, Section 5(e) of Republic Act No. 6713, entitled "the Code of Conduct and Ethical Standards for Public Officials and Employees" (promulgated February

II. CONFIDENTIALITY UNDER INTERNATIONAL ARBITRATION RULES

United Nations Commission on International Trade Law ("UNCITRAL")

The 1976 Arbitration Rules of the UNCITRAL ("1976 Rules") seem to contain the most restrictive confidentiality provisions, where it is often impossible to gain access to documents, while awards and other arbitration-related documents are rarely made public.[13] For instance, Article 25(4) of the 1976 Rules provides that "hearings shall be held *in camera* unless the parties agree otherwise," while Article 32(5) provides that "[t]he award may be made public only with the consent of both parties."

However, the 1976 Rules were amended in 2010 ("2010 Rules") to meet changes in current arbitral practice by "enhancing the efficiency of arbitration." Notable is the amendment of Article 32(5) of the 1976 Rules, now Article 34(5) of the 2010 Rules, such that an award may now be made public not only upon the consent of all the parties, but also "where and to the extent disclosure is required of a party by legal duty, to protect and pursue a legal right or in relation to legal proceedings before a court or other competent authority."

Nevertheless, there is still nothing in the 2010 Rules relating to the publication of the minutes of meetings, the pleadings of disputing parties, and the orders of the arbitral tribunal. The absence of provisions here could imply that the matter of their publication is to be decided by the parties or to be determined by the discretion of the arbitral tribunal in a particular case.[14]

20, 1989) states: "All public documents must be made accessible to, and readily available for inspection by, the public within reasonable working hours."

At the same time, the Internal Rules of the Supreme Court of the Philippines promulgated on May 4, 2010, (A.M. No. 10-4-20-SC) prohibits the disclosure of: (a) the result of the raffle of cases to the individual members of the Supreme Court [Rule 7, Section 3] and the result; (b) the actions taken by the Court on each case included in the agenda of the Court's sessions [Rule 9(2) and (4); and (c) the deliberations of the members during the sessions of the Court on cases and matters before it [Rule 10(2)].

[13] Knahr and Reinisch, *supra* note 9 at 98.

[14] Some have noted in connection with the 1976 Rules that the UNCITRAL Model Law on Arbitration deliberately refrained from regulating the issue of confidentiality.

Furthermore, there is still no express mechanism under the UNCITRAL Arbitral Rules for third-party submissions, although it has been held that the broad discretion bestowed on tribunals to conduct the procedural aspects of the arbitration in Article 15(1) of the 1976 Rules (now Article 17(1) of the 2010 Rules) encompasses the power to admit *amicus curiae* briefs.[15]

International Centre for Settlement of Investment Disputes ("ICSID")

Under the ICSID regime, the Centre and the arbitrators are obliged to maintain confidentiality. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention") provides that the Centre should publish "excerpts of the legal reasoning" of the arbitral tribunals,[16] but it should not publish an arbitral award without the consent of the parties to the arbitration.[17] Reports of Conciliation Commissions, minutes, and other records of proceedings may likewise be

---

According to the UNCITRAL Model Law Working Group in paragraph 101 of the Report of the Secretary-General on possible features of a model law on international commercial arbitration (A/CN.9/207), "it may be doubted whether the Model Law should deal with the question whether an award may be published. Although it is controversial since there are good reasons for and against such publication, the decision may be left to the parties or the arbitration rules chosen by them."; *See* Knahr and Reinisch, *supra note* 9 at 99. Even in *S.D. Myers Inc. v. Canada*, the tribunal found that "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 that currently before this tribunal."; *See S.D. Myers Inc. v. Canada,* Procedural Order No. 16 of May 13, 2000, par. 8.

[15] Gary Born & Ethan Shenkman, *Confidentiality and Transparency in Commercial and Investor-State International Arbitration*, in THE FUTURE OF INVESTMENT ARBITRATION 5-42 (Rogers, Catherine A. and Alford, Roger P. eds., 2009), 30, citing Methanex Corporation v. United States, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae, January 15, 2001; United Parcel Services of America v. Government of Canada, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, October 17, 2001; Glamis Gold Ltd. v. United States, Decision on Application and Submission by Quechan Indian Nation, Sep. 16, 2005.

[16] ICSID ARBITRATION RULES, Rule 48(4). It must be noted that prior to the 2006 amendments to the ICSID Arbitral Rules, the ICSID was not obliged to do so.

[17] ICSID Convention, ch. IV, § 4, art. 48(5), *available at* http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf. This is reiterated in Rule 48(4) of the ICSID Arbitration Rules, *available at* http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

published with the consent of both parties,[18] while general information about the operation of the Centre, including registration of all requests for conciliation or arbitration, may be published unilaterally by the Secretary-General.[19] Further, Rule 6(2) of the ICSID Arbitration Rules requires arbitrators to sign a declaration obligating themselves to keep confidential all information they come to learn as a result of their participation in an arbitration proceeding. Deliberations of an arbitral tribunal are likewise kept private,[20] and only members of the arbitral tribunal are allowed to take part in such deliberations unless the arbitral tribunal decides otherwise.[21] The arbitral tribunal, after consultation with the Secretary-General, may allow persons other than the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the tribunal, to attend or observe all or part of the hearings.[22] After consultation with the parties, the arbitral tribunal may also allow third parties to submit *amicus curiae* briefs subject to certain conditions.[23]

It is not clear from the ICSID rules or regulations whether parties are allowed to disclose any documents to the public during or after the arbitral proceedings, but some tribunals have made pronouncements regarding this matter.[24] Some writers have noted the absence of any express prohibition

---

[18] ICSID Administrative and Financial Regulations, Regulation 22(2). *See* Giovanna a Beccara and others v. Argentine Republic, ICSID Case No. ARB/07/5, Procedural Order on Confidentiality (Jan. 27, 2010), ¶153.

[19] Regulation 22(1). In fact, these information are currently published on ICSID's website.

[20] ICSID ARBITRATION RULES, Rule 15(1).

[21] Rule 15(2)

[22] Rule 32(2). In such cases, the arbitral tribunal will have to establish procedures for the protection of proprietary or privileged information.

[23] Rule 37(2).

[24] *See* Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Provisional Measures, December 9, 1983. In this case, the Respondent requested provisional measures to prevent the Claimant from publishing a newspaper article containing statements that would be detrimental to the Respondent. However, the tribunal refused to grant such by arguing that the said article could not have harmed the Respondent nor could it have exacerbated the dispute. It may thus be said that Amco v. Indonesia supports the approach that parties are in principle free to publish documents or awards unless they have explicitly agreed on confidentiality. Still, the tribunal stated that there may be situations where the parties may have to refrain from making public certain information so as not to aggravate or exacerbate their dispute.

against parties publicly disclosing briefs and other submissions in the ICSID rules.[25]

London Court of International Arbitration ("LCIA")

The new Arbitration Rules of the London Court of International Arbitration ("LCIA Rules")[26] also contain various provisions relating to confidentiality. All meetings and hearings are held in private unless otherwise agreed by the parties or directed by the Arbitral Tribunal.[27] A more extensive clause on confidentiality is Article 30, which generally requires the parties to keep confidential all awards in their arbitration, together with all materials in the proceedings created for the purpose of the arbitration, and all other documents produced by another party in the proceedings not otherwise in the public domain – save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in *bona fide* legal proceedings before a State court or other judicial authority, and unless the parties expressly agree in writing to the contrary.[28]

The deliberations of the Arbitral Tribunal are likewise confidential, save and to the extent that disclosure of an arbitrator's refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal.[29] Finally, the LCIA Court does not publish any award or any part of it without the prior written consent of all parties and the Arbitral Tribunal.[30]

International Chamber of Commerce ("ICC")

Article 20(7) of the 1998 Rules of Arbitration of the International Chamber of Commerce ("ICC Rules") allows an arbitral tribunal to take measures for protecting trade secrets and confidential information, while Article 21(3) of the same Rules excludes from the proceedings all persons who are not involved therein, unless allowed by the arbitral tribunal and the parties. Further, Article 6 of the Statute of the ICC's International Court of Arbitration ("ICA") and Articles 1 and 3(2) of the ICA's Internal Rules emphasize the

---

[25] Born & Shenkman, *supra* note 16 at 29.

[26] Adopted to take effect for arbitrations commencing on or after Jan. 1, 1998.

[27] LCIA RULES, art. 19.4.

[28] LCIA RULES, art. 30.1.

[29] LCIA RULES, art. 30.2.

[30] LCIA RULES, art. 30.3.

confidential nature of the work of the ICA, its Committees, and its Secretariat. For instance, the sessions of the ICA are open only to its members and to the Secretariat,[31] and all documents and correspondence submitted by the parties or the arbitrators may be destroyed unless a party or an arbitrator requests in writing for the return of such documents.[32] ICA members are likewise obliged to keep confidential any information concerning individual cases with which they have become acquainted in their capacity as such members.[33]

The ICC has, however, been unilaterally publishing redacted versions of arbitral awards in its various publications, where the names of the parties and other identifying data are removed. Nevertheless, if a party objects to such publication, then even a redacted version of an arbitral award would not be published.[34]

III. CONFIDENTIALITY V. TRANSPARENCY: THE TENSION DYNAMIC

The increasing level of recognition of the importance of good governance[35] has brought about more insistent calls for transparency, which in international arbitration generally takes the form of disclosure to third parties or of third-party participation in arbitral proceedings.[36] More and more writers and counsel challenge the idea that all aspects of international arbitration should always be confidential for arbitration to be valuable.[37] Some disputing parties may not value confidentiality as highly as others or may even decide to waive it entirely.[38]

---

[31] ICA INTERNAL RULES, art. 1(1), *available at* http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf.

[32] Art. 1(7).

[33] Art. 3(2). However, the ICA members may communicate specific information to their respective National Committees when requested by the ICA Chairman or Secretary General.

[34] Born & Shenkman, *supra* note 16 at 20.

[35] Mabel Egonu, *Investor-State Arbitration Under ICSID: A Case for Presumption Against Confidentiality?*, 24 J. INT'L. ARB. 487 (2007).

[36] Knahr and Reinisch, *supra* note 9 at 110.

[37] *See* Buys, *supra* note 6 at 121.

[38] Mistelis, *supra* note 4 at 171, citing *Andersen Consulting Business Unit Member Firms and Arthur Andersen Worldwide Societe Cooperative*, ICC Case No. 9797/CK/AER/ACS of Jul. 28, 2000. The parties in the much discussed cases *CME/Lauder v Czech Republic* also decided to have the awards widely published.

Confidentiality and transparency are both values in international arbitration. They are, however, competing values which need to be accommodated and adjusted one to the other in specific cases. A constant or fixed amount of both values in each and every case is probably not necessary. The line of actual contact and equilibrium between the two *desiderata* is a moving one, and its particular location and shape are functions of differing factors. Some of these factors include the kind of international arbitration proceeding involved as well as the nature of the subject matter of the dispute sought to be resolved, matters which we discuss below.

IV. CONFIDENTIALITY AND TRANSPARENCY IN INTERNATIONAL INVESTMENT ARBITRATION

The level of public interest in arbitration proceedings is normally higher in investment arbitration than in ordinary commercial arbitration, not only because States and enterprises providing public services are frequently parties in investment arbitration, but also because the subject matter of investment disputes usually involve governmental measures.[39] The tension between confidentiality and transparency is especially highlighted where substantial public interest underlies a certain arbitral proceeding, such as where what has been made confidential demonstrates some misconduct or where unlawful activity had been resorted to by public officers or by officials of foreign multinational corporations and sometimes by stockholders and other stakeholders in the domestic corporate partners or joint venturers of the foreign corporation. This is a concern more sharply at stake in international investment arbitration, where the parties' interest in maintaining privacy and confidentiality often clash resoundingly with the general public interest in knowledge of economic development activities and accountability of public officers of the host state and officials of foreign corporations and sometimes the officials and equity owners of the local partners or associates of the foreign corporation.[40]

Some writers[41] argue that there are instances where an agreement requiring confidentiality may be unenforceable due to public policy interests or

---

[39] *See* Knahr and Reinisch, *supra* note 9 at 113.

[40] Mistelis, *supra* note 4 at 170.

[41] Jack Coe, Jr., *Transparency in the Resolution of Investor-State Disputes – Adoption, Adaptation, and NAFTA Leadership,* 54 U. KAN. L. REV. 1339, 1361-62 (2006); Colin YC

mandatory law requirements, such as where the agreement requires a party to violate securities disclosure requirements or competition law provisions.[42] A party may publicize arbitral awards or perhaps even other aspects of arbitral proceedings where reasonably necessary to comply with a legal obligation.[43]

For instance, where, in the course of the arbitral proceeding, a party or any other entity may be found to have engaged or participated in corruption in any aspect of the obligation or contract that is the subject of the proceeding, may the other party disclose information relating to such finding to comply with a legal obligation, *i.e.* the duty to prosecute illegal activity as in the case of a State party?

Almost by definition, international dispute resolution through arbitration involves the relocation and re-adjustment of the line of contact and equilibrium between the interests of the claimant and the respondent. What factor or factors may rationally be taken into account in the course of such relocation and re-adjustment by the independent tribunal before which one or the other party seeks the enforcement of a putative duty of confidentiality or a confidentiality agreement, or of a claimed duty of disclosure of some information or production of some documents or other materials? We turn now to at least a general consideration of this complex issue.

The first factor that almost projects itself is the kind of international arbitral proceeding in the context of which a right to receive certain information or a duty to keep certain information confidential is asserted. Is the arbitration proceeding one between two or more privately owned business companies, each asserting an individual or private commercial interest, or is it one between a private investor company and a respondent host state in whose territory an investment is claimed to have been made? If the parties to the arbitration case are both simply private business vehicles, there would seem little basis for presuming that duties in the nature of good governance *inter se* were established and that confidentiality was meant to be waived wholly or partially. Where one of the parties to the arbitration is a sovereign state with territory and a human population to secure and take care of by appropriate

---

Ong, *Confidentiality of Arbitral Awards and the Advantage for Arbitral Institutions to Maintain a Repository of Awards,* 1 ASIAN INT'L. ARB. J. 2, 174-175 (2005); J. Anthony Van Duzer, *Enhancing the Procedural Legitimacy of Investor-State Arbitration through Transparency and Amicus Curiae Participation*, 52 MCGILL L. J. 681, 685 (2007).

[42] Born & Shenkman, *supra* note 16 at 9.

[43] *Id.*, at 24.

measures, it seems clearly improper to assume that confidentiality duties override reasonable securing of those important sovereign and public law interests. Where a private claimant seeks to escape criminal liability by asserting confidentiality duties against a sovereign respondent who could not have known about illegalities deliberately and consistently concealed by the claimant, it is not casually to be supposed that an investor's right to confidentiality and privacy override the sovereign's duties, *qua* sovereign, to its own people.

V. CONFIDENTIALITY AND TRANSPARENCY IN INTERNATIONAL TRADE ARBITRATION

Although dispute settlement under the international trading system under the WTO is more often akin to litigation, the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") does provide for arbitration as an alternative means of dispute settlement.[44] Arbitration in the international trade context may be preferred in certain situations, such as where parties desire an expeditious yet binding solution to the dispute, to ensure stricter confidentiality, or where the dispute would not otherwise be directly enforceable under the DSU.[45]

The concept of confidentiality is likewise present in the WTO system, is recognized both in the arbitration and "litigation" aspects of dispute settlement, and is applicable in all stages of a dispute. Panel deliberations and Appellate Body proceedings are confidential, and opinions expressed in the Panel report by individual panelists are anonymous,[46] although parties in a

---

[44] DSU, art. 25, *available at* http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm.

[45] Jan Bohanes & Hunter Nottage, *Arbitration as an alternative to litigation in the WTO: Observations in the light of the 2005 Banana Tariff Arbitrations*, in Yasuhei Taniguchi, Alan Yanovich & Jan Bohanes, THE WTO IN THE TWENTY-FIRST CENTURY, 212-247, 227 (2007).

[46] DSU, arts. 14, 17(10) & 17(11). *See, generally*, Florentino Feliciano, Dispute *Settlement Under the Aegis of the World Trade Organization*, in ODYSSEY AND LEGACY: THE CHIEF JUSTICE ANDRES R. NARVASA CENTENNIAL LECTURE SERIES (Supreme Court of the Philippines and the U.P. College of Law: 1998) 179-203; Florentino Feliciano & Peter Van den Bossche, *The Dispute Settlement System of the World Trade Organization: Institutions, Process and Practice*, 75 PHIL L. J. 2 (2000).

number of recent cases have decided to open up the hearings of Panels and the Appellate Body to the public.[47]

Furthermore, a Panel is precluded from revealing confidential information obtained from any individual or body within the jurisdiction of a WTO member without formal authorization from the individual, body, or authorities of the WTO member providing such information.[48] Written submissions to a Panel or Appellate Body are confidential, but will be made available to the parties to the dispute.[49] Also, any information submitted by a WTO member to a Panel or Appellate Body that such WTO member has designated as confidential will be treated as confidential information.[50]

However, a party to a dispute may publicly disclose statements of its positions or provide non-confidential summary of information contained in its written submissions.[51] On the other hand, panelists, members of the Appellate Body, arbitrators, experts participating in the dispute settlement, or members of the Secretariat or Appellate Body support staff are required to maintain the confidentiality of dispute settlement deliberations and proceedings, as well as any information identified by a party as confidential.[52] They are likewise precluded from making any statements on such proceedings or the issues in dispute in which they are participating, until the panel or Appellate Body report has been de-restricted.[53]

---

[47] For instance the panel in *US – Zeroing (Japan)* (WT/DS322) and the Appellate Body in the *US – Continued Suspension* (WT/DS320) and *Canada – Continued Suspension* (WT/DS321) opened all hearings to the public.

[48] DSU, art. 13.

[49] Art. 18(2).

[50] *Id.* The panel in *EC – Export Subsidies on Sugar* has clarified this to mean that parties and other WTO members have the responsibility of ensuring that no member of their delegation will disclose to any person outside of the delegation any information designated as confidential.

[51] DSU, art. 18(2).

[52] RULES OF CONDUCT FOR THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES, WT/DSB/RC/1 (December 11, 1996), Clause VII(1) in relation to Clause IV(1); *available at* http://www.wto.org/english/tratop_e/dispu_e/rc_e.htm#top.

[53] *Id.*, Clause VII(2).

Most WTO documents are made generally available, and all unrestricted WTO documents are made accessible online in the official WTO languages.[54]

Third parties having a substantial interest in a matter before a panel and which have notified the Dispute Settlement Body ("DSB") of such interest may also make written submissions to the panel.[55] Note, however, that the concept of a "third party" under the DSU pertains to WTO members who are not the parties to the dispute. Furthermore, third parties may not appeal a panel report, although they may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.[56]

Private counsel were previously not allowed to represent parties in trade disputes. Some attribute this reluctance to the WTO's roots in the General Agreement on Tariffs and Trade ("GATT"), which had a less formal means of settling disputes that was more of a diplomatic resolution of misunderstandings and less of an adjudication of legal issues.[57] The issue of retaining private counsel emerged with the formulation of the DSU during the Uruguay Round, which transformed the nature of dispute settlement in the trading system to a rule-based adjudication process. Many opposed the move, citing access to sensitive government documents that would be revealed in the course of proceedings that are closed to the public, and the absence of any suitable WTO rule regulating such private counsel especially for breaches of obligations of confidentiality. These concerns did not prevent the Appellate Body in *EC – Bananas*[58] from overruling the Panel and holding that there is "nothing in the [WTO Agreement], the DSU or the Working Procedures, nor in customary international law or the prevailing practice of international tribunals, which prevents a WTO member from determining the composition of its delegation in Appellate Body proceedings" and that "it is for a WTO

---

[54] Peter Van den Bossche, *NGO Involvement in the WTO: A Comparative Perspective*, 11 J. INT'L. ECON. L. 717, 739 (2008).

[55] DSU, art. 10.

[56] Art. 17(4).

[57] Priscilla McCalley, *The Dangers of Unregulated Counsel in the WTO,* GEORGETOWN JOURNAL OF LEGAL ETHICS (2005).

[58] *EC – Regime for the Importation, Sale and Distribution of Bananas,* WT/DS27/AB/R (1997).

member to decide who should represent it as members of its delegation in an oral hearing of the Appellate Body."[59]

The retention of private counsel is just one step towards greater transparency in the WTO. Another is the possibility for non-governmental organizations ("NGOs") to file *amicus curiae* submissions to both Panel and the Appellate Body.[60] This strategy has been vigorously opposed by developing countries, which frequently perceive NGOs to be representative of developed country interests owing to the belief that most NGOs are funded by developed countries – a view that has obviously not been subjected to careful research and analysis. Note that the body to which the *amicus curiae* briefs are submitted have the authority to determine the usefulness of such briefs, and thus their admissibility.

It should also be noted that the WTO website has included an NGO page containing information relevant to NGO participation in WTO activities and in sessions of the Ministerial Conference.[61] While attendance of NGOs in the formal plenary meetings of the Ministerial Conference is now well-established, NGO participation in these meetings has not yet been formalized.[62]

Still, the impetus for increasing transparency in the WTO is inevitable, given the continuing evolution of WTO dispute settlement into a rule-oriented system with an increasingly juridical nature. Some opine that the lack of internal transparency, *i.e.* non-party WTO members' access to information during and after a dispute, weaken the legal strength of developing and least developed country members which now constitute the vast majority of the WTO Members. On the other hand, the lack of external transparency, *i.e.* the extent that outsiders to the WTO system such as the academia, media, NGOs, individuals, and businesses or industries are able to observe dispute proceedings or access information relating to disputes, threaten the legitimacy

---

[59] *EC – Bananas*, ¶10.

[60] *US– Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (1998); *EC – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (2001).

[61] Van den Bossche, *supra* note 55 at 733.

[62] *Id.* at 727

of the WTO dispute settlement system as perceived by an increasingly vigilant international civil society.[63]

VI. SUMMARY OF TRANSPARENCY MECHANISMS IN INTERNATIONAL ARBITRATION

As has already been touched upon above, several transparency mechanisms exist in international arbitration. The orders and awards of arbitral tribunals may be published in certain circumstances. For instance, the consent of both parties is needed to publish orders and awards of the ICSID and the ICC, except for excerpts of such orders and awards.

Participation of non-disputing parties as *amicus curiae* is not as difficult as it once was, with the decision of the ICSID tribunals in *Aguas Argentinas*[64] and *Aguas Provinciales*,[65] as well as the recent amendments to the ICSID Arbitration Rules. On the other hand, the issue on the disclosure of decisions and pleadings to the public, specifically through publication, is not as easily sorted out, although the discussion by the ICSID tribunal in *Biwater Gauff v. Tanzania*[66] would perhaps pave the way for its more substantial resolution.

Third party members with substantial interests are also allowed to participate, with some limitations, in international dispute settlement proceedings in a manner analogous to a right to intervene. They are also allowed to file submissions to the WTO Panels and Appellate Body, but they

---

[63] Eliyahu Wolfe, *Shining Sunlight on Dispute Settlement: Strengthening the Multilateral Trading System Through Enhanced Transparency in the WTO Dispute Settlement System* (2009), *available at* http://works.bepress.com/eliyahu_wolfe/1/.

[64] *Aguas Argentinas S.A., et al. v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *amicus curiae*, May 19, 2005, *available at* <http://ita.law.uvic.ca/documents/AguasArgentinasVivendi-OrderAmicusCuriae.pdf>.

[65] *Aguas Provinciales de Santa Fe S.A., et al. v. Argentine Republic*, ICSID Case No. ARB/03/17, Order in Response to a Petition for Transparency and Participation as *amicus curiae*, March 17, 2006, *available at* <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC512_En&caseId=C18>.

[66] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, September 29, 2006, *available at* <http://ita.law.uvic.ca/documents/Biwater-PONo.3.pdf>.

cannot initiate appeals. They also have the right to receive copies of awards, and the right to bring private counsel in Panel hearings and Appellate Body proceedings. This is in contrast with the practice that prevailed during the early years of WTO dispute settlement, where member countries could only bring their internal government counsel to oral hearings in Geneva. Finally, third parties may file amicus briefs, but the Panels and the Appellate Body will determine whether or not to accept such briefs.

In the North American Free Trade Agreement ("NAFTA"), a non-disputant member has the right to receive copies of all submissions of the parties and of the orders and awards in a dispute. The United States and Canada have stated that they will post on their respective websites all their written submissions in Chapter 11 proceedings that they participate in. Mexico has likewise stated that it will follow the pertinent provisions in the Arbitration Rules governing the particular proceeding it may be participating in. Under a special mechanism, the Fair Trade Committee – where all members are represented – has the right to render written interpretations of provisions of the NAFTA, even while arbitration proceedings are ongoing.

VII. CLOSING REMARKS

In a quest to disassociate one from the rightful jurisdiction of domestic judicial authorities, confidentiality has risen as a value in international arbitration. It reinforces the notion of party autonomy, whereby parties are ideally given a choice of the applicable law to govern their relation. For instance, two private parties who are both Filipino citizens in the Philippines ideally have the choice of applying French or Spanish law to govern the conduct of their relation. Thus, when a dispute arises, French or Spanish law is applied in the facilitation of its resolution, and there is no way of making certain that the non-Philippine law was in fact applied correctly in their case as the proceedings are required to be confidential. Such a situation is untenable where the dispute involves a State party and the public interest at stake is substantial. If there is no way that the dispute is resolved in accordance with the ordinary law of comity or the ordinary norms of public conduct, or there is no way to gauge if these norms have actually been correctly enforced, it may very well be that the outcome of the dispute will be determined by who is more powerful, more influential, or wealthier because confidentiality shields the resolution of the dispute from the critical eye of the community.

It is thus clear that confidentiality and transparency are both values in international arbitration. It is equally clear they are also competing values which need to be accommodated and adjusted to the other in each specific case. It also seems clear that confidentiality tends to be a "wasting asset" and may be of declining utility.

For instance, an international commercial proceeding between two private persons or entities involving a construction dispute as to whether specifications of materials or equipment to be used or installed have been met will probably be regarded as appropriately accorded a higher or larger scope of confidentiality. The interests involved are more likely to be essentially private in character, not involving any important community-wide or public interests that need protection through transparency mechanisms, save perhaps the coherent development of the relevant provisions of the applicable law (i.e., the *lex causae* or the *lex contractus*).

On the other hand, an international investment arbitration between an investor and the host State presents a different context. In ICSID proceedings, a sovereign State is a disputing party. Thus, public funds may well have been spent and exercises of authority by public officials may well have been undertaken, and may need careful scrutiny to determine conformity with the applicable law. In this kind of international arbitration proceedings, the interests of the host State are intensely involved. Hence, the need for transparency practices – such as access to documents and other evidence of potential criminal acts or corrupt practices, and the ability to use such documents and evidence in separate proceedings brought by the host State or third parties – is clear and pressing. The scope of the universal exception to confidentiality of documents generated in the course of the proceedings will tend to expand, and disclosure and access to such documents for enforcement of local criminal and anti-corruption laws tend to become enormously important.

Further, in an international trade arbitration or in a Panel or Appellate Body proceeding of the WTO, the parties in dispute are two sovereign States. Both proceedings are regarded as confidential and private, but not in the absolute sense. There is material accommodation of the interests of transparency and the necessity of developing coherent and consistent case law in interpreting and applying the covered WTO agreements. Over the last decade, there has been appreciable movement toward greater transparency values, especially in the development of a coherent system of international

trade law that is enforceable within the WTO system. There is a trend towards a greater degree of judicialization – adjudication of disputes in accordance with law that is understood by every member state and applied and enforced in a consistent and rational manner.

There are many kinds of situations where disclosures of and open access to materials acquired or generated in the course of such proceeding significantly outweigh the convenience and economy of effort that confidentiality and privacy make possible. In principle, the demands of transparency are frequently more important and more insistent – from longer term perspectives – for both developed and developing countries, than the efficiencies and economies that confidentiality might otherwise afford.

-o0o-